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WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF SOUTHWESTERN CASES IN WHICH REHEARINGS
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SHELBY v. GRABBLE.

(Court of Appeals of Kentucky. Oct. 15, 1915.)

1. APPEAL AND ERROR ⇐1002—REVIEW—QUESTIONS OF FACT.

Where plaintiff and his witnesses testified to one state of facts, and defendant and his witnesses to another state of facts, a verdict for plaintiff was not flagrantly against the evidence, and the Court of Appeals could not substitute its judgment for that of the jury as to disputed questions of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ⇐1002.]

2. EVIDENCE ⇐155—ADMISSIBILITY—SIMILAR EVIDENCE OF ADVERSE PARTY.

Where, in an action on a note claimed to have been given for borrowed money, defendant denied signing the note and sought to show that plaintiff did not have the means with which to make the loan in question, and plaintiff testified that he had a sum of money in a bank, the testimony of the cashier of such bank that plaintiff had a large sum on deposit at or about the time the loan was made was competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 445-458, 2148; Dec. Dig. ⇐155.]

3. TRIAL ⇐76—RECEPTION OF EVIDENCE—OBJECTIONS—TIME FOR OBJECTIONS.

Where the cashier of a bank testified from a memorandum concerning plaintiff's deposit in the bank, if defendant desired to object to such evidence as secondary evidence and to have the books produced, he should have objected and excepted at the time, and it was too late to object after the cashier's testimony had been completed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 172, 183-190, 287; Dec. Dig. ⇐76.]

4. EVIDENCE ⇐368—DOCUMENTARY EVIDENCE—REQUIRING PRODUCTION.

Where the cashier of a bank testified without objection from a memorandum concerning a deposit in his bank, and the books of the bank were not in the town where the trial was taking place, but in a neighboring town, and to require their production would probably have necessitated a delay or postponement of the trial, it was not error after he had completed his testimony to refuse to order their production.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 444, 1540-1558; Dec. Dig. ⇐368.]

5. WITNESSES ⇐405—IMPEACHMENT—COMPETENCY OF IMPEACHING EVIDENCE.

Where, in an action on a note claimed to have been given for borrowed money, defendant denied signing the note and testified that plaintiff never at any time loaned him a single dol-

lar, a check drawn by plaintiff to defendant's order, which plaintiff testified was delivered by him to defendant and subsequently charged to his account in the bank and represented money which he had loaned to defendant, was competent to impeach defendant, though the amount covered by the check was not a part of the loan represented by the note.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1273, 1275; Dec. Dig. ⇐405.]

Appeal from Circuit Court, Ballard County.

Action by J. C. Grabble against A. M. Shelby. Judgment for plaintiff, and defendant appeals. Affirmed.

J. B. Wickliffe, of Wickliffe, and Eaton & Boyd, of Paducah, for appellant. Hendrick & Nichols, of Paducah, for appellee.

CLAY, C. This is a suit on a note for \$850, dated March 1, 1912, and payable, 12 months after date, to the order of J. C. Grabble, purporting to have been signed and executed by A. M. Shelby. Shelby interposed a plea of non est factum and want of consideration. Plaintiff, J. C. Grabble, recovered a verdict and judgment for \$837.50, with interest from the date of the note. Shelby appeals.

[1] It is first insisted that the verdict is flagrantly against the evidence. Plaintiff testified, in substance, that he and the defendant had had various business transactions. On October 14, 1911, he loaned the defendant \$350. In January, or February, 1912, he loaned the defendant \$185. Later on in the month of February he loaned the defendant \$235. The defendant was also indebted to him for certain fee bills. Finally he and the defendant made a settlement, whereby it was agreed that the amount due, including certain interest and fee bills, was \$850. Thereupon plaintiff drew up the note for \$850, and, on meeting the defendant, the latter signed the note in the presence of plaintiff and John Nichols. John Nichols testifies that he was present when the note was signed. It further appears from the evidence for plaintiff that he was a constable at the time and was also engaged in repairing machinery, from which he derived some income. On cross-examination, it was sought

to show that plaintiff did not have sufficient money to make the loan. Plaintiff stated that he had some money in bank. In this statement he was corroborated by Mr. Lovelace, the cashier of the bank at La Center. On the other hand, defendant testified that he never signed the note in question and that plaintiff never loaned him a dollar in his life. While there are a number of circumstances which tend to sustain the contention of plaintiff, there are also certain circumstances which tend to support the contention of the defendant. After all, it is a case where plaintiff and his witnesses testify to one state of facts, and defendant and his witnesses to another state of facts. That being true, it cannot be said that the verdict of the jury is flagrantly against the evidence, and we are not at liberty, therefore, to substitute our judgment for that of the jury, which is the tribunal fixed by law, in this character of cases, for settling disputed questions of fact.

[2-4] In testifying to the amount of money which plaintiff had in bank, Mr. Lovelace, the cashier of the bank at La Center, testified from a memorandum. Defendant interposed no objection to this testimony. After the witness had testified at considerable length on cross-examination and had concluded his testimony, the defendant objected to his testimony and asked that he be required to produce the books of the bank. The objection and motion to produce the books were overruled. Defendant claims that this was error. As the defendant sought, on cross-examination of plaintiff, to show that plaintiff did not have the means with which to make the loan in question, and as plaintiff stated that he had a sum of money in the bank at La Center, the evidence of the cashier of that bank that he had a large sum on deposit, at or about the time the loan was made, was certainly competent. If defendant desired to have the books showing plaintiff's account produced and to object to the cashier's evidence on the ground that it was secondary evidence, he should have objected and excepted at the time and asked for the production of the books. Where a witness testifies from memory, or a memorandum, and no objection, based on the character of the evidence, is made at the time, it is too late to object after his testimony has been completed; and where, as in this instance, the books are not in the town where the trial takes place, but in a neighboring town, it is not error, after the witness has completed his testimony without objection, to refuse to order the production of the books when this will probably necessitate a delay in or postponement of the trial.

[5] Another error relied on is the introduction by plaintiff of a check for \$40, drawn to the order of defendant, and which plaintiff says that he delivered to defendant, and

which plaintiff also testifies was charged to his account in bank and represented money which he had loaned to defendant. The objection to this testimony is based on the fact that the \$40 covered by the check was not a part of the loan represented by the note. Inasmuch, however, as defendant testified that plaintiff never at any time loaned him a single dollar, the evidence was competent for the purpose of impeachment and, being so limited by the admonition of the court, was properly admitted.

The instructions are not subject to complaint. They authorize a verdict for the plaintiff only in the event defendant executed and delivered the note and there was a valuable consideration therefor.

Judgment affirmed.

CARTER COAL CO. v. HILL.

(Court of Appeals of Kentucky. Oct. 14, 1915.)

1. MASTER AND SERVANT ⇨118—PROPPING ROOF OF MINES—STATUTORY PROVISIONS.

Ky. St. 1909, § 2739b, subsec. 7, which was in force in 1913, and which provided that every owner, lessee, or operator of a mine should provide and furnish the miners employed therein a sufficient number of caps and props to be used by the miners in securing the roof in their rooms, and at such other working places where by law or custom of those usually engaged in such employment it was the duty of such miners to keep the roof propped after the miner had selected and worked the same, did not apply where by custom or rule of the mine the duty of propping or timbering did not devolve upon the miner himself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. ⇨118.]

2. MASTER AND SERVANT ⇨278 — ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

In an action for injuries to one employed in defendant's mine, where the work of shooting or digging down the coal and loading it into cars was let by contract at a price per ton, evidence held to show that it was the duty of the mining company to prop the roof of the room neck where the injured person was working, but that, under the contract between it and the contractor whom plaintiff was assisting, the duty devolved upon the contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. ⇨278.]

3. MASTER AND SERVANT ⇨118—LIABILITY FOR INJURIES—DELEGATION OF DUTIES.

Where, under the custom of a coal mine in which the work of shooting or digging down the coal and loading it into cars was let out by contract at a given price per ton, it was the duty of the coal company not only to cross-timber but to set the props in a room neck where one assisting a contractor was working, the responsibility arising from this duty could not be evaded by a contract requiring the contractor to perform this work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. ⇨118.]

4. MASTER AND SERVANT ⇨190—LIABILITY FOR INJURIES—ASSURANCE OF SAFETY.

Where the duty of cross-timbering a mine in which the work of shooting or digging down the coal and loading it into cars was let out

by contract rested on the coal company, and it selected B. to perform this work, B. was a vice principal, and his assurance to one who was assisting a contractor that the roof of a room neck was safe was, in effect, an assurance by the coal company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. ¶ 190.]

5. MASTER AND SERVANT ¶ 157—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE—WARNING OF DANGER.

If B., instead of giving an assurance of safety, warned such employé that the room neck was dangerous a sufficient length of time before the accident to have enabled him by the exercise of ordinary care to stop work and avoid the peril, it was his duty to heed the warning of danger, and he could not recover for an injury caused by the dangerous condition of the roof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 303; Dec. Dig. ¶ 157.]

6. TRIAL ¶ 125—CONDUCT OF COUNSEL—IMPROPER ARGUMENT.

In an action for personal injuries against a coal company, plaintiff's counsel stated that the corporation's "hoarded thousands and millions" could not pay plaintiff for the wails and pains and agonies that he had suffered, and referred to the corporation as a wicked, soulless corporation that had no life and could not be hurt or feel, and as a lawless corporation that had left desolation, destruction, and maiming from one end of a creek to the other. Objections and motions to exclude these statements were overruled. *Held*, that this argument was so objectionable as to require a reversal, especially as counsel, in going outside of the record and bringing to the attention of the jury the amount of money which the corporation had and the number of accidents which had happened in its mine, could have had no purpose other than to inflame the minds and excite the passions of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 303-307; Dec. Dig. ¶ 125.]

7. APPEAL AND ERROR ¶ 688—REVIEW—MOTIONS FOR NEW TRIAL—AFFIDAVITS.

Under Civ. Code Prac. § 340, subsec. 2, authorizing a new trial for misconduct of the jury, the prevailing party, or his attorney, and section 343, providing that the grounds mentioned in such subsection, among others, must be sustained by affidavits showing their truth, affidavits as to improper argument which took place in the court's presence, about which there was no dispute, and to the happening of which the court certified in the bill of exceptions, were unnecessary; such affidavits only being required where the misconduct of counsel does not take place in the court's presence or is the subject of dispute, if it does so take place.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2894-2896; Dec. Dig. ¶ 688.]

Appeal from Circuit Court, Knox County.

Action by W. H. Hill against the Carter Coal Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

J. D. Black and Black, Black & Owens, all of Barbourville, for appellant. Brown & Nuckols, of Frankfort, and Golden & Lay, of Barbourville, for appellee.

CLAY, C. This is a personal injury case in which plaintiff, W. H. Hill, recovered of defendant, Carter Coal Company, a verdict

and judgment for \$15,000. The coal company appeals.

The facts are as follows: The company employed certain men to undercut coal by means of electrical cutting machines. After the coal is undercut it is the duty of other employes, called "loaders," to shoot or dig down the coal and load it into the cars. This character of work was let out by contract at so much per ton. One G. P. Brooks had the contract at the place where plaintiff was injured. In carrying out his contract Brooks was assisted by plaintiff, Will Gaylor, and W. F. Detherage. Plaintiff had had about 15 years' experience as a miner. Prior to the accident he had been working as a loader in another part of the mine. On the morning of the accident he was directed by Brooks to go to work in a room neck. This neck had not been carried a sufficient distance to be called a room. It was only 9 or 10 feet wide, and the work of mining had progressed only for a distance of about 20 feet. Soon after plaintiff went to work he was struck by a large piece of overhanging slate and severely injured. The roof of the neck at this point could have been protected by cross-timbers of jack posts, and it was the duty of the company to do this work. Brooks says that it was his duty to do all straight timbering; that is, set the jack posts. Pete Broyles, the timber man, who was also sued, says that it was his duty to do the cross-timbering, but not set the jack posts. Other witnesses say it was not part of plaintiff's duty either to cross-timber, set the jack posts, or take down the draw slate. Plaintiff also states that just before going into the room neck he was assured by Pete Broyles, the timber man, that the top of the room was sound. Plaintiff also claims that it was his custom to sound the roof when he went to work; that he did so on the occasion in question, and the roof appeared to be solid. Plaintiff admits, however, if he found the slate loose it was then his duty to report it to some one. For the defendant, the mine foreman, York, after stating it was his duty to look after the working places and see that they were safe, testified as follows:

"Q. Tell the jury whose duty it was to take down the draw slate. A. It was the contractor, the men employed loading the coal to take it out; or, if it come in large falls, we would send a man to help timber it up and pay them for taking it up."

Broyles, the timber man, testified that it was not his duty to look after the loose slate at the face of the coal in the men's working places. It was his duty to cross-timber, but this could not be done within 12 feet of the face of the coal. He further testified that the place where plaintiff was at work was too close to the face of the coal to permit of cross-timbering, and it was no part of his duty to set the jack posts, although he admits that he started to get a jack post for

the purpose of setting it up just shortly before the accident occurred. He further claims that just prior to the accident he warned plaintiff of the dangerous condition of the roof. Gaylor, who was working with plaintiff, and who had formerly been a contractor and assigned his contract to Brooks, said that, under his contract, the company was to do all cross-timbering, but he was to set the jack posts. Detherage, who was also working with plaintiff, testified that it was the duty of the man doing the contract to take down the loose slate; that the man engaged in loading coal is always supposed to take care of the loose slate. He further said it was the duty of the man who loaded the coal to set the jack posts. Brooks, the contractor, testified that it was not the duty of the company to timber at the place where the slate fell. It was his duty, under his contract, to have the draw slate taken down and to set the jack posts in the working places.

[1-3] The accident out of which this action arose occurred in the year 1913, and therefore prior to the amendments of 1914 to the mines and mining statute. Under the statute then in force, it was the duty of the mine owner, after the miners had selected and marked them, to furnish to the miners a sufficient number of caps and props to be used by the miners in securing the roof in their rooms, and at such other working places where by law or custom of those usually engaged in such employment it was the duty of the miners to keep the roof propped. Section 2739b, subsec. 7, Kentucky Statutes 1909. Manifestly, this statute is not applicable where, by custom or rule of the mine, the duty of propping or timbering does not devolve upon the miner himself. Defendant insists that the trial court erred in assuming in the instructions that it was the duty of the defendant to prop the roof, and therefore use ordinary care to make plaintiff's working place reasonably safe. Plaintiff's evidence shows that under the custom of the mine no duty of propping devolved upon him. Defendant insists that the evidence of York, Broyles, Gaylor, Detherage, and Brooks, above set forth, shows that it was the duty of the plaintiff and those working with him to do the propping. We have carefully considered the evidence referred to, and fail to find any ground for this contention. Brooks says it was his duty, under his contract, to set the jack posts, and a careful reading of the statements of York, Detherage, Gaylor, and Broyles shows that the word "loaders" was used with respect to the contractor, and not with respect to the men employed by him to do the work. On the whole, we think the evidence shows that it was the duty of the company to do the propping, but that under the contract between the company and Brooks this duty devolved upon Brooks. Manifestly, if, under the custom of the mine,

it was the duty of the company not only to cross-timber, but to set the props, the responsibility arising from this duty could not be evaded by a contract requiring the contractor to perform the work. If, upon another trial, it should be made to appear that the contractor's employes were themselves charged with the duty of propping or taking down the draw slate, then the question of whose duty it was to do such work under the particular circumstances of this case should be submitted to the jury. Of course, if it was the duty of the plaintiff and those working with him to do this work, and they failed to do so, and by reason thereof he was injured, there can be no recovery.

[4, 5] Objection is urged to an instruction authorizing a recovery based on an assurance of safety given by Broyles, the timber man. It is urged that Broyles was not in authority over plaintiff and had no right to bind his master by an assurance of safety. The evidence shows that the duty of cross-timbering the rooms devolved upon the company. Broyles was the agent selected by the company to perform this work. He was to do this work when the conditions required, and it must be presumed that he possessed superior knowledge of the danger, or lack of danger, growing out of the condition of the roof. As the duty of cross-timbering devolved upon the master, and as this duty was intrusted to Broyles, Broyles became a vice principal and took the place of the master, and his assurance of safety was, in effect, an assurance by the master. It follows that the trial court did not err in giving the instruction referred to. We conclude, however, that the rule should work both ways. Broyles not only says that he did not give plaintiff any assurance of safety, but distinctly told him that the roof was dangerous. If the plaintiff had the right, on the one hand, to rely on Broyles' assurance of safety, he should be required, on the other hand, to heed Broyles' warning of danger, and the jury should be told, in substance, to find for the defendant if Broyles, the timber man, warned plaintiff of the dangerous condition of the roof and of the danger of working thereunder a sufficient length of time before the accident to have enabled plaintiff, by the exercise of ordinary care, to stop work and avoid the peril.

[6] In his argument to the jury counsel for plaintiff used the following language:

"(1) You can take from this corporation its hoarded thousands and millions, and you can't pay this man for these wails and pains and agonies that he has suffered.

"(2) Go out and bring in a verdict here against this wicked, soulless corporation—this thing that's got no life, that you can't hurt and that can't feel.

"(3) Something must be done with this lawless corporation that's left a string of desolation and destruction and maiming from one end of Brush creek to the other, a sample of which you have here before you in Wiley Hill.

"(4) Ah, Marsee, how can you, with the hire-

ling soul that you have in you for this wicked corporation up there, how can you look this man in the face?"

Defendant objected to the foregoing statements, and moved the court to exclude them from the consideration of the jury. The objections and motion were overruled. The plaintiff's right to recover in this action depended on the company's negligence and his want of contributory negligence. The amount of money which the corporation had and the number of accidents which had happened in its mine were matters about which no evidence was given, or could, with propriety, have been given. Counsel, in going outside of the record and bringing such matters to the attention of the jury, could have had no purpose other than to inflame the minds and excite the passions of the jury. This is not a case of one act of impropriety followed by an admonition of the court to the jury not to consider the statement. It is a case where the limits of legitimate argument were transcended in a number of instances without rebuke or admonition from the court. Such violations of the propriety of debate have been condemned in a number of cases and reversals ordered. *Kentucky Wagon Mfg. Co. v. Duganica*, 113 S. W. 128; *L. & N. R. R. Co. v. Payne*, 138 Ky. 275, 127 S. W. 993, Ann. Cas. 1912A, 1291; *I. C. R. R. Co. v. Jolly*, 119 Ky. 452, 84 S. W. 330, 27 Ky. Law Rep. 118; *McHenry Coal Co. v. Sneddon*, 98 Ky. 687, 34 S. W. 228, 17 Ky. Law Rep. 1261; *L. & N. R. R. Co. v. Crow*, 107 S. W. 807, 32 Ky. Law Rep. 1146; *C. N. O. & T. P. Ry. Co. v. Martin*, 154 Ky. 349, 157 S. W. 710; *Owensboro Shovel & Tool Co. v. Moore*, 154 Ky. 431, 157 S. W. 1121; *Knights of Maccabees of the World v. Shields*, 162 Ky. 392, 172 S. W. 696. In none of these cases was the language more objectionable than that used by counsel in the present case. Indeed, if a reversal were not ordered in this case, it would be difficult to find a case requiring a new trial because of improper argument.

[7] But the point is made that the improper argument of counsel was not sustained by affidavits, as required by the Code. Section 340, subsec. 2, Civil Code, authorizes a new trial for misconduct of the jury, of the prevailing party, or of his attorney, Section 343 provides in part as follows:

"The grounds mentioned in section 340, subsections 2, 3 and 7, must be sustained by affidavits showing their truth; and may be controverted by affidavits."

In our opinion, this provision applies in those cases only where the misconduct of the counsel does not take place in the presence of the court, or, taking place in his presence, is the subject of dispute. It does not apply to improper argument taking place in the court's presence about which there is no dispute and to the happening of which the court certifies in the bill of exceptions. In the present case the improper argument is set

forth in the bill of exceptions and certified to by the court. This practice has always been regarded as sufficient. *Bannon v. Louisville Trust Co.*, Adm'r, 150 Ky. 405, 150 S. W. 510; *Southern Ry. in Kentucky v. Thacker's Adm'r*, 156 Ky. 486, 161 S. W. 236.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

DANIEL et al. v. DANIEL,*

(Court of Appeals of Kentucky. Oct. 13, 1915.)

1. PLEADING — 66 — COMPLAINT — INDEFINITENESS.

A complaint, alleging that defendant breached a contract with plaintiff by failing to account for plaintiff's share of money derived from the sale of certain timber in accordance with the contract, is not indefinite because it averred that the names of the purchasers were unknown to the plaintiff, since such names must necessarily be known to defendant, whose duty it is to disclose them.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. — 66.]

2. PLEADING — 193, 367 — GROUNDS OF DEMURRER — INDEFINITENESS — MOTION TO MAKE SPECIFIC.

Where a petition states a cause of action, a general demurrer will not lie because of indefiniteness in some respects in the statement of the facts; the remedy being by motion to make the statements of the petition more specific, under Civ. Code Prac. § 134.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 64, 425, 428-435, 437-443, 1178-1193; Dec. Dig. — 193, 367.]

3. TRIAL — 139 — PEREMPTORY INSTRUCTION — SUFFICIENCY OF EVIDENCE.

It is not error to refuse a peremptory instruction directing a verdict for defendant if there is any evidence to support the plaintiff's cause of action.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. — 139.]

4. JOINT ADVENTURES — 5 — SALES — ACTIONS ON CONTRACTS — INSTRUCTIONS.

In an action for an accounting of profits on the sale of timber which by agreement the parties were to buy and sell, and, after payment of advances to share the profits, it was not error to charge the jury that if they believed from the evidence that there was an agreement between the parties to buy timber for the purpose of resale, that timber was so bought, and sold by defendants at a profit, that under the contract plaintiff was to have half the profits less the money advanced by defendants for the original purchase, their finding should be for plaintiff for half the profits derived from any timber sold not exceeding the demand in the petition, but that if they believed that no timber so purchased was resold at a profit they should find for defendants.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 7; Dec. Dig. — 5.]

Appeal from Circuit Court, Perry County.

Action by C. B. Daniel against K. F. Daniel and another for breach of contract. From a judgment for plaintiff, defendants, appeal. Affirmed.

Wootton & Morgan, of Hazard, for appellants. Jno. B. Eversole and W. C. Eversole, both of Hazard, for appellee.

SETTLE, J. The appellee, C. B. Daniel, by petition filed in the Perry circuit court, sued to recover of the appellants, K. F. Daniel and Elizabeth Daniel, \$2,179.50 claimed as his half of alleged profits realized on a timber contract, it being alleged in the petition that in August, 1910, he made with them the contract in question, whereby he undertook to forthwith purchase for them certain standing timber on Willard and Forked Mouth creeks, in Perry county, appellants agreeing to furnish the money to pay for the timber, and that they would sell the timber and, after repaying themselves the money they had furnished appellee to purchase it and deducting the cost attending its sale, give and pay appellee one-half the profits realized therefor; that pursuant to such contract appellee purchased for appellants, with the money advanced by them for that purpose, 5,386 trees in the months of August, September, October, November, and December, 1910, at a cost of \$2,647, which timber appellants at once contracted to the Hamilton Realty Company at the price of \$7,034, by which sale, if appellants had permitted it to stand, they would have realized, after deducting the money they had advanced to pay for the timber and the cost of taking it up, a profit of \$4,359, one-half of which, \$2,179.50, appellee was entitled to and would have received; but that a controversy then arose between him and appellants over a division of the profits, his half of which they refused to pay, and, in order to avoid payment of which, appellants by a fraudulent collusion with the Hamilton Realty Company induced the latter to rescind the contract of sale appellants had made with it. It was further alleged in the petition that, shortly after their rescission of the contract with the Hamilton Realty Company, appellants sold the timber in question for as great a profit as would have been made out of the sale to that company, to other persons to appellee unknown. The prayer of the petition asked, in substance, that appellants be made to account to appellee for his half of the profits realized from such sales, and that he be given judgment against them therefor to the amount of \$2,179.50. Appellants, by answer, traversed the averments of the petition, but by a subsequent paragraph admitted that they had employed appellee to purchase for them a part of the timber in controversy, and alleged that for such services as he rendered under this employment they had agreed to pay, and had paid, him at the rate of \$1 per day. The affirmative matter of the answer was controverted of record, and upon the issues thus formed the case went to trial, resulting in a verdict in favor of appellee for \$600 damages. From the judgment entered upon that verdict, this appeal is prosecuted.

[1, 2] Appellants insist that the trial court erred in overruling their general demurrer to the petition, it being their contention that

the averments of the petition are not sufficiently specific to authorize a recovery. The contention is unsound. Considered as a whole, the petition in meaning and effect rests appellee's right of recovery upon the grounds: First. That he is entitled to judgment against appellants for one-half the profits that would have been realized from the alleged sale by them of all the timber to the Hamilton Realty Company, but for their fraud in inducing that company to rescind such sale in order to enable appellants to avoid the payment to appellee of his half of the profits, which constituted a violation of their contract with appellee and made them liable to him for damages equaling in amount half the profits of the sale to the Hamilton Realty Company. Second. That, if the court should find this ground of recovery untenable, the subsequent sales made of the timber by appellants to other parties at a profit, in any event, entitled appellee to his half of such profits. It is true the allegations of the petition as to the subsequent sales are indefinite, both as to the number and amounts, respectively, of such sales. The averment, however, that the names of the purchasers are unknown to appellee, threw upon appellants, as the names must necessarily be known to them, the duty of disclosing them; but as the petition was indefinite in failing to state that the number and amounts, respectively, of the subsequent sales were unknown to appellee, appellants should have entered a motion requiring the petition to be made more specific in the particulars mentioned. This they failed to do, hence they cannot complain that their demurrer to the petition was overruled. A general demurrer will lie when the petition fails to state a cause of action but will not lie where there is indefiniteness in some respects in the statement of the facts constituting the cause of action. In such case the remedy is a motion to make the statements of the petition more specific. Civil Code, § 134.

[3] It is a further contention of appellants that the trial court erred in refusing the peremptory instruction asked by them at the conclusion of the evidence. The refusal of a peremptory instruction directing a verdict for the defendant is not error, if there is any evidence to support the plaintiff's cause of action; hence in passing upon this contention consideration of the evidence will be necessary. In other words, it must be determined from the evidence: First, whether appellee made with appellants the contract alleged in the petition; second, whether profits were realized from sales of timber by the latter.

While there is a contrariety of proof as to this question, we think the weight of the evidence is to the effect that the contract was substantially made as claimed by appellee. Appellee is a son of appellants, and it appears from the evidence that the appellant

K. F. Daniel, who has had 30 years' experience in handling timber, was conducting his operations in that line in the name of his wife and coappellant, Elizabeth Daniel. Although the money used in the business was furnished by him, sales of timber and deeds therefor were in every instance made to the wife.

Appellee testified not only that the contract, as alleged in the petition, was made between himself and the appellants, but, in addition, that he purchased a large quantity of standing timber from one Tom Moore, by whom it had previously been purchased under a number of contracts taken in the name of D. Y. Coombs, appellants furnishing the money with which to pay for same; that from the sale of the timber thus purchased appellants were to retain from the proceeds the money which they had furnished to pay for the timber and the cost attending its sale, and the profits were to be divided equally between them and appellee. The evidence in behalf of appellee cannot be said to sustain the allegations of the petition as to the sale made by appellants of the timber to the Hamilton Realty Company, but does show the making by the latter of other sales of the timber, the prices realized therefor, and the profits to be divided between the parties.

The appellant K. F. Daniel in testifying contradicted appellee as to the character and terms of the contract, but admitted enough to show that he had employed him to purchase some of the timber in question and agreed to pay him for his services one-half the profits realized thereon. Indeed, a letter written by him to appellee, which appears in the record, contains these statements:

"When I told you you could have a interest in this timber, I didn't mean that you should have a interest in all the timber that I could buy. I meant to give you a share of the timber which was taken up and branded with the letter K, after Betsy Daniel got all of her purchase money back."

The above statements corroborate the appellee that there was a contract between him and appellants, whereby they were to buy some timber, sell it, and divide the profits, after repaying to the appellants the amount furnished in the purchase of the timber. It is patent, however, from the evidence, that, when the timber was sold, profits were larger than was anticipated by the parties to the contract, which, according to the testimony of appellee, so excited the avarice of the appellant K. F. Daniel, as to lead to his refusing a division with appellee of the profits at all. The evidence introduced by appellee, while not sufficient to sustain the averments of the petition as to the entire amount of profits claimed to have been realized for the timber purchased by him and sold by appellants under the contract, does fairly establish the following facts: That 449 trees purchased by appellee under the contract from

the Stacy land, 356 trees from the Baker land, and a considerable number from the Caldwell land, costing in the aggregate \$642.50, were sold by the appellants for \$1,991, which, after repaying to appellants the money they had furnished in the purchase of the timber, left a net profit of \$1,348.50, to one-half of which, \$674.25, appellee was entitled under his contract with appellants; but the verdict of the jury only allowed him \$600 of this sum.

It further appears from the evidence that timber other than that last above mentioned, which had been purchased by appellee under the contract, was also sold by appellants for a profit, none of which they were made to account for by the jury; but, as appellee has not taken a cross-appeal from the judgment, we are not concerned with the loss of profits he sustained upon the sale of that timber. From our consideration of the evidence we are unable to say that the verdict of the jury did the appellants any injustice.

[4] Appellants' complaint of the instructions cannot be sustained. But two instructions were given, both of which are substantially free of error. They in substance advised the jury that, if they believed from the evidence that appellee and appellants entered into an agreement with each other to buy timber for the purpose of a resale, and did buy timber for that purpose in Perry county, Ky., the deeds to which were made to the appellant Elizabeth Daniel, that such timber or a portion thereof was afterwards sold by appellants at a profit, and that under the agreement between the parties they were, after repaying the latter the money they advanced to purchase the timber, to divide the profits equally, that is, one-half to appellee and one-half to appellants, their finding should be for the appellee, in a sum equal to one-half of the profits derived from the resale of the timber, or any part thereof, not to exceed the amount claimed in the petition; but, upon the other hand, if they believed from the evidence that no timber purchased under the contract was resold at a profit, then the finding should be for the appellants.

The record discloses no prejudicial error in the admission or rejection of evidence.

Judgment affirmed.

EASTERN KENTUCKY HOME TELEPHONE CO. et al. v. HATCHER et al.

(Court of Appeals of Kentucky. Oct. 13, 1915.)

1. TELEGRAPHS AND TELEPHONES — 7 — GRANT OF FRANCHISE—VALIDITY.

Under Const. § 164, providing that franchises may be granted by municipalities only after due advertisement and to the highest and best bidder, and Ky. St. § 3636, providing that no franchise shall be granted by an ordinance passed on the day of its introduction nor with-

in five days thereafter, a franchise granted by an ordinance introduced and passed on April 2, 1906, was void, and was not validated by an ordinance introduced and passed on May 7, 1906, confirming the transfer of the franchise of April 2d, by the grantee of the council to an assignee, and also granting the franchise to the assignee; such two ordinances not being legally equivalent to a single ordinance passed in conformity with the act.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 5; Dec. Dig. 6-7.]

2. MUNICIPAL CORPORATIONS 680, 681 — GRANT OF FRANCHISE STATUTE—CONSTRUCTION.

The purpose of Ky. St. § 3636, regulating the granting of a franchise by municipalities, being to protect the public interests, its provisions must be carried out according to their unmistakable terms.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1459-1466; Dec. Dig. 680, 681.]

Appeal from Circuit Court, Pike County.

Action by James Hatcher and others against the Eastern Kentucky Home Telephone Company and another for an injunction, which was granted. On motion by defendant in Supreme Court to dissolve. Motion denied.

J. J. Moore, of Pikeville, for appellants. Stratton & Stephenson, of Pikeville, and J. P. Hobson & Son, of Frankfort, for appellees.

MILLER, C. J. James, John H., and Richard Hatcher, as plaintiffs, brought this action against the Eastern Kentucky Home Telephone Company (hereinafter called the company for brevity) and N. Starkey, the sole owner of said company, for a mandatory injunction requiring them to remove a guy pole and a guy wire running therefrom to a telephone pole planted on the main street of Pikeville, a city of the fifth class, and in front of plaintiffs' store, so as to greatly narrow the sidewalk and interfere with its proposed improvement to the curb line of the street. The circuit judge granted the injunction, and required the company to remove the telegraph pole, the guy pole, and the guy wire, for the double reason that the planting of the pole and iron guy rod in front of the entrance of the Hatcher building was an unreasonable interference with the use of their property, and the ordinance under which the telephone company operated was invalid. The company has applied to me for a dissolution of the injunction; and, on account of the importance of the questions involved, all the judges of the court heard the argument, and concur in the conclusions reached.

The essential facts bearing upon this controversy are, briefly, as follows: The plaintiffs own two lots facing on Front street and extending back to the Big Sandy river, upon which there is a business house. In making certain changes in connection with the removal of its exchange from Front street to a building on Grace avenue, the company set a telegraph pole near the curb of the street in front of the Hatcher store. It also placed

an iron guy rod between the pole and the store, and about six feet from the pole, and from this iron guy rod it ran a guy wire to the pole for the purpose of bracing it. As the distance from the Hatcher property line to the curb of the street is about twelve feet, the iron guy rod, being placed about midway of that distance, forms an obstruction to the outer six feet. The inner six feet of this front is now occupied by a brick sidewalk; but, since the property owners upon the adjoining square have located their sidewalks along the curb line, the Hatchers purposed to construct a new sidewalk along the curb line in front of their property, in order that the sidewalks in the neighborhood might be uniformly located along the curb line. From what has been above stated, however, it is apparent that the telegraph pole and the guy wire will effectually obstruct a sidewalk, if built along the curbstone; and this is the principal complaint in this action.

Two propositions were presented upon the argument: (1) That the ordinance under which the defendant is operating is invalid; and (2) if it is valid, the use the company has made of the sidewalk is an unreasonable one.

[1] Taking up the first question it appears that the franchise under which the telephone company is operated was bought by John F. Butler from the city of Pikeville under an ordinance passed April 2, 1906, and the rights thereby acquired were subsequently assigned by Butler to Starkey, the present owner and operator of the telephone company.

Section 3636 of the Kentucky Statutes provides as follows:

"No ordinance, and no resolution, granting any franchise for any purpose, shall be passed by the city council on the day of its introduction, nor within five days thereafter, nor at any other than a regular meeting," etc.

This section was passed pursuant to section 164 of the Constitution, which provides:

"No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

The ordinance creating the franchise under which the telephone company is operating was introduced into the city council of Pikeville on the 2d day of April, 1906, and was passed by the council on the same day. Acting under this ordinance, the court's commissioner sold the franchise therein granted to Butler, who thereafter assigned his bid to the Eastern Kentucky Home Telephone Company. Subsequently, on May 7, 1906, the city council of Pikeville passed an ordinance approving and confirming the sale of the franchise by the commissioner to Butler;

and, after reciting the assignment by Butler to the company, the ordinance of May 7th further provided as follows:

"Now, in pursuance to said transfer from said J. F. Butler to the Eastern Kentucky Home Telephone Co., be and it is hereby granted the right, privilege, authority, and franchise to erect, operate and maintain lines of telephone and telegraph including the necessary poles, fixtures and electrical conductors upon, along and over the public roads, streets and highways of the city of Pikeville, for a period of twenty years, as the business of the purchaser, successors and assigns may, from time to time, require."

The second clause of the ordinance above quoted, as well as the succeeding five clauses thereof, which relate to the details of the construction of the telephone system, the charges it shall be authorized to make, etc., are but repetitions and copies of similar clauses in the original ordinance of April 2, 1906. But this ordinance of May 7, 1906, was also passed by the city council on the same day of its introduction into that body.

It is contended by counsel for the plaintiffs that the original ordinance of April 2, 1906, is void, because it violated section 3636 of the Kentucky Statutes, *supra*, in that it was passed by the city council on the same day of its introduction, and did not lie over five days thereafter, as is required by the statute. The company attempts to avoid this criticism of the ordinance of April 2d by relying upon the ordinance of May 7, 1906, above referred to, which passed the council on that day, and granted the franchise to appellant pursuant to the ordinance theretofore introduced on April 2d; and in support of this contention the company relies upon *Cumberland Telephone & Telegraph Co. v. Hickman*, 129 Ky. 220, 111 S. W. 311, 33 Ky. Law Rep. 730. In other words, the company would treat the two ordinances as one ordinance which was introduced into the city council on April 2, 1906, and passed by that body on May 7, 1906.

We do not, however, understand that the case of *Cumberland Telephone & Telegraph Co. v. Hickman*, above relied on, justifies this procedure. In that case certain promoters asked that they be permitted to install a public telephone exchange within the municipality. Their proposition was submitted to an extra session of the council held on August 16, 1894, for the purpose of considering the proposition. The council determined to grant the franchise and directed its clerk to advertise a public sale of the franchise on September 3, 1894, which was the date of the next regular meeting of the council. Furthermore, at the meeting on August 16th there was introduced an ordinance setting forth the terms of the telephone franchise to be granted, and this ordinance was laid over until the next meeting, to be held on September 3d. The sale was made as advertised, and, the bid having been reported to the council for its action on September 3, 1894, it was accepted by the council, which

thereupon unanimously passed the ordinance which had theretofore been introduced on August 16th creating the franchise. While the ordinance accepting the bid of the purchaser of the franchise was passed on September 3d, the same day it was introduced, the initial ordinance creating the franchise was introduced on August 16th, and was adopted at the regular meeting held on September 3, 1894. It will thus be seen that the initial ordinance in the *Hickman Case* had laid over more than the necessary five days from its introduction into the city council, as is required by section 3636 of the statutes, *supra*.

In the case at bar, however, the ordinance creating the franchise was introduced into the city council on April 2, 1906, and was passed and approved at the same meeting. It did not lie over for five days after its introduction, as required by the statute *supra*, or for any period of time.

The ordinance of May 7, 1906, accepting the bid of Butler, evidently attempted to cure the defect connected with the passage of the ordinance of April 2, 1906, by attempting to regrant a franchise to the purchaser substantially identical in terms with the franchise theretofore granted by the ordinance of April 2, 1906; but this curative ordinance of May 7, 1906, is subject to the same criticism as to its passage that is made against the ordinance of April 2, 1906. They cannot be treated as one ordinance introduced on April 2d and finally passed on May 7th, because they are two separate and distinct ordinances, and, although they have several provisions which are substantially alike, they are not identical and do not purport to be the same ordinance.

In the *Hickman Case* the court held, in strict accordance with the terms of the statute, that the ordinance creating the franchise must lie over five days after its introduction into the city council. It also held that the ordinance or resolution accepting the bid and formally granting a franchise to the purchaser could be passed at the same meeting at which it was introduced into the council; in other words, the court there held that, while the statute required the ordinance creating the franchise to lie over five days after its introduction into the council before it was finally passed, the statute nevertheless permits the ordinance accepting the bid of the purchaser and formally granting the franchise to him to be passed at the session of its introduction.

But all this is quite different from the method followed in the case at bar, since the initial ordinance of April 2, 1906, creating the franchise did not lie over five days, and consequently was passed in violation of the express terms of the statute, which are mandatory. *East Tenn. Tel. Co. v. Anderson County Tel. Co.*, 57 S. W. 457, 22 Ky. Law Rep. 418; *Id.*, 115 Ky. 488, 74 S. W. 218, 24

Ky. Law Rep. 2358; *Maraman v. Ohio Val. Tel. Co.*, 76 S. W. 398, 25 Ky. Law Rep. 785; *McQuillin's Munic. Corp.* § 688.

[2] Franchises of this character are of great public interest, in which almost every citizen of the community is directly concerned. The purpose of the statute was to protect that interest, by giving every one an opportunity of knowing what is being done, and to be heard before the franchise is granted. This can only be done by carrying out the statute according to its unmistakable terms. The second invalid ordinance cannot serve to make valid the first invalid ordinance.

The ordinance under which the company obtained its franchise is invalid; and the company therefore had no right to plant its pole, guy rod, and guy wire in the streets of Pikeville.

The motion to dissolve the injunction is overruled.

PEAL et al. v. CAIRO NAT. BANK.

(Court of Appeals of Kentucky. Oct. 13, 1915.)

PRINCIPAL AND SURETY — 23—CONDITIONAL SURETYSHIP—NOTICE TO OBLIGEE.

Where a surety signs a note upon condition that others also sign with him, and delivers the note to a third person to deliver to the payee upon obtaining such other signatures, and the other signatures are not obtained, the surety is nevertheless bound if the payee has no notice of the condition, since the surety makes the person to whom he so delivers the note his agent for delivery to the payee, and the payee is not bound by any condition not known to him.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 45-54; Dec. Dig. § 23.]

Appeal from Circuit Court, Ballard County.

Action by the Cairo National Bank against J. S. Peal and another, as sureties on a note. From a judgment for plaintiff, defendants appeal. Affirmed.

Eaton & Boyd, of Paducah, for appellant Shelby. J. B. Wickliffe, of Wickliffe, for other appellants. W. A. Anderson, of Wickliffe, for appellee.

MILLER, C. J. On May 20, 1910, John Shded, as principal, with A. M. Shelby, J. S. Peal, and F. S. Saag, as his sureties, executed their note to the Ballard County Bank for \$1,200, due in 60 days thereafter. Four days thereafter the Ballard County Bank assigned the note to the Cairo National Bank, for value, and in the usual course of business. When the note matured on July 20, 1910, it was renewed for four months, by the same parties. When the renewal note matured on November 20, 1910, the Cairo National Bank sent it to the Ballard County Bank for collection or renewal.

Shded's store at Bandana, Ky., was destroyed by fire on October 21, 1910, and sub-

sequently he was adjudged a bankrupt. Shded's estate paid a dividend of 33½ per cent. upon its indebtedness, aggregating \$412.20, upon the note in question, leaving a balance of \$924.55. The note was not renewed promptly, because the parties were waiting to ascertain what dividend would be paid thereon by Shded's estate. In the meantime Saag, one of the sureties, had died, and the note was renewed on March 20, 1911, for the balance of \$924.55, with Shelby and Peal as his sureties. Upon the maturity of this last renewal note, the Cairo National Bank sued Peal and Shelby.

The defense of the sureties is that, when the first renewal note matured, and was renewed on March 20, 1911, the last time, they signed it with the understanding and agreement with Purdy, cashier of the Ballard County Bank, that the note was not to be accepted or delivered to the bank unless Saag, the other surety, should also sign the note, and that said note was delivered to the appellee in violation of the agreement.

At the close of all the evidence the court peremptorily instructed the jury to find for the plaintiff; and, from a judgment entered accordingly, Shelby and Peal prosecute this appeal.

It is well settled that a surety may sign a note conditionally, which may or may not release him from liability, according to the circumstances of the particular case. Where a surety signs a note or bond on condition that other sureties shall also sign before the note is to be binding upon him, he is nevertheless bound if the obligee accepts it without notice of the condition. The reason for the rule is that in cases of this character the surety makes the person to whom he delivers the note conditionally his own agent for the purpose of delivery, and any condition unknown to the payee will not affect him. The general rule in the last-named class of cases is stated in 32 Cyc. 45, as follows:

"Where sureties sign a bond on condition that others shall also sign it before delivery by their principal to the obligee, it has been held in some cases that they are not bound where no other signatures are procured, although the instrument provides that those who sign shall be liable notwithstanding such a condition. In other cases it has been held, and this seems to be the better rule, that where a surety signs an obligation upon the condition that others are also to sign it, he is bound, although the instrument is delivered in violation of the agreement, if the obligee accepts it without notice of the condition, either actual or constructive, or those signing it afterward waive such condition; but if the obligee has notice of the condition when he receives the instrument, he cannot hold the surety liable thereon."

See, also, note in 45 L. R. A. 321.

The last rule above announced prevails in Kentucky. *Smith v. Moberly*, 10 B. Mon. 266, 52 Am. Dec. 543; *Millett v. Parker*, 2 Metc. 608; *Bivins v. Helsley*, 4 Metc. 78; *Garvin v. Mobley*, 1 Bush, 48; *Jackson v. Cooper*,

19 Ky. Law Rep. 9, 39 S. W. 39; Strader v. Waggoner, 21 Ky. Law Rep. 967, 53 S. W. 663; Barber v. Ruggles, 27 Ky. Law Rep. 1077, 87 S. W. 785.

But the proof in this case fails to bring the appellants within the rule above announced. Peal merely says he did not agree that Saag's name should be left off the note; that he told Purdy he would not renew the note "without Mr. Saag, unless some one was put on the note that was good"; and that he did not consent to sign the note leaving Saag's name off unless they put some other solvent person on it. But he nowhere says Purdy agreed to any such arrangement, or that appellee knew of it; and he further says he knew that Saag was dead. Shelby's testimony is even less explicit, since he testified he never knew anything about Saag's name having been left off the note.

The proof wholly fails to establish any agreement that a new surety should sign in Saag's place, or that there was any agreement upon the part of Purdy that the note should not be delivered until a new surety was procured.

The peremptory instruction was clearly right, and the judgment is affirmed.

ELSWICK v. RATLIFF, Clerk, et al.

(Court of Appeals of Kentucky. Oct. 12, 1915.)

1. ELECTIONS \S 146—CANDIDATES—NOMINATIONS—WITHDRAWAL.

While the Primary Act (Ky. St. \S 1550 et seq.) requires candidates to state that, if nominated, they will accept the nomination, and not withdraw, yet, in view of the provision for the filling of vacancies occurring after any nomination by death or otherwise, a nominee may create a vacancy by withdrawal.

[Ed. Note.—For other cases, see Elections, Dec. Dig. \S 146.]

2. ELECTIONS \S 146—NOMINATION—RESIGNATION.

Where a nominee for circuit clerk notified the county clerk in writing that he resigned his nomination, and directed that his name be not printed on the official ballot, he cannot, after the resignation was accepted by the party authorities and another candidate selected, then withdraw his resignation and continue to be the nominee, though notice of the resignation was not formally given the party authorities.

[Ed. Note.—For other cases, see Elections, Dec. Dig. \S 146.]

Action by K. B. Elswick against J. E. Ratliff, Clerk, and others, in which an injunction was granted. Defendants moved to dissolve. Motion granted.

Hazelrigg & Hazelrigg, of Frankfort, and F. T. Hatcher, of Pikeville, for the motion. Willis Staton, of Pikeville, opposed.

TURNER, J. This is a motion before me to dissolve an injunction granted by the judge of the Pike circuit court enjoining the clerk of the Pike county court from placing the name of S. T. Isom upon the ballot at

the approaching November election as the Democratic nominee for circuit clerk of that county, and adjudging K. B. Elswick to be the Democratic nominee for that office, and directing the clerk of the county court to place his name upon the ballot as such.

At the primary election in August, 1915, K. B. Elswick was nominated for clerk of the Pike circuit court on the Democratic ticket without opposition, and his certificate of nomination was duly issued to him. Thereafter, and on September 11, 1915, in a writing duly acknowledged by him, he withdrew as the Democratic nominee, and directed the clerk of the Pike county court not to have his name placed on the official ballot at the November election; but on the following day he withdrew this paper and in some way regained possession of it from the clerk, and it does not appear from the record that the same was ever filed in the clerk's office. Thereafter, and on the 13th day of September, 1915, he again, by writing directed to the clerk of the Pike county court, duly acknowledged, withdrew as the nominee of the Democratic party and directed the clerk not to place his name on the official ballot. This writing appears to have been filed in the office on September 13, 1915. On that same day, at a meeting of the Democratic executive committee of Pike county, a subcommittee which had been appointed by the chairman of the committee made a report recommending that the said resignation of Elswick be accepted, and this report was unanimously adopted by the committee. Thereupon George W. Coleman was nominated by the committee to fill the vacancy caused by the resignation of Elswick, and a certificate of nomination issued to him. Thereafter, and on the 16th day of September, 1915, said Coleman, by writing duly acknowledged by him, resigned said nomination and directed the clerk not to print his name on the official ballot. On the 25th of September Elswick notified the clerk of the Pike county court in writing that he still claimed to be the Democratic nominee for circuit clerk, and undertook to withdraw and revoke his former resignation, and of this action the Democratic executive committee had notice. On the 5th of October, 1915, at another meeting of the county committee, S. T. Isom was nominated to fill the vacancy caused by the resignation of Coleman, and a certificate of nomination was duly issued to him.

This is an action by Elswick seeking a mandatory injunction against the clerk of the Pike county court requiring him to place his name on the ballot as the nominee of the Democratic party for circuit court clerk, and further seeking to enjoin Isom from claiming to be such nominee.

[1] The first contention of the plaintiff is that, as a candidate in the primary is required by statute to state that, if he is nominated

as the candidate of his party, he will accept such nomination and will not withdraw, he therefore cannot withdraw, and that nothing but his death between the primary and the general election will create a vacancy. But such is not the effect to be given to that statute; it was only for the purpose of requiring men who sought nominations to be in good faith at the time, and to sincerely represent his party as its candidate at the ensuing election. It was not contemplated by the statute that a change in a man's situation or conditions between August and November should deprive him of the right to decline to represent his party when change of conditions or circumstances in his opinion authorized it. It was not the purpose to absolutely bind him to be a candidate for an office which he did not want, or to fill an office which he had discovered did not suit him, or to act as the representative of his party when in his judgment it was not best for either. A man might be thought an ideal representative of his party in August, and by reason of unforeseen occurrences he might be thought a most unfortunate representative in November; or he might very much desire an office in August, when by reason of ill health, sickness in his family, or changed conditions of some kind, he might not want it later. The very provision in the Primary Act itself that when a vacancy occurs after any nomination, by death or otherwise, the governing authority of such party may provide for filling such vacancy and make such nomination, is conclusive that the Legislature had in mind that vacancies might occur in nominations from other causes than death.

[2] The only other question necessary to pass upon is whether Elswick, after having notified the county clerk in writing that he resigned his nomination, and directing that his name be not printed on the official ballot, and after this resignation, although not formally made to the party authorities, had come to their knowledge and they had accepted it and nominated another candidate, could then withdraw it and continue to be the nominee.

The case of *Saunders v. O'Bannon*, 87 S. W. 1105, 27 Ky. Law Rep. 1166, was where a trustee of a graded school district resigned to take effect at a future date, and his resignation was accepted by the board at the time it was made. Thereafter he undertook before the time his resignation was to take effect to withdraw the same, and this court, in holding that he did not have the power to withdraw it after its acceptance, said:

"It is also clear that appellee, O'Bannon, after the 27th of May, was not a legal trustee, for his resignation took effect on that day, which had been legally accented by the board, and after its acceptance he did not have the power to withdraw it, nor did his coappellee and himself have the power to appoint him as trustee. Their attempt to do so on the 26th of May was a nullity.

"In the case of *Mimmack v. United States*, 97 U. S. 426 [24 L. Ed. 1067] the court, in substance, said that when a resignation shall have been presented to the proper authority, and the same shall be accepted, whether formally or by the appointment of a successor, it is beyond recall; it cannot be withdrawn.

"In *Am. & Eng. Ency. of Law*, p. 424, it is said: 'A contingent or a prospective resignation, however, can be withdrawn at any time before it is accepted, and after it is accepted it seems that it may be withdrawn with the consent of the authority accepting, where no rights have intervened.'

In this case the resignation of Elswick was unconditional, and fully relinquished his right to the nomination, and was to take effect at once. 29 Cyc. 1404, thus states the rule:

"An unconditional resignation which has been transmitted to the authority entitled to receive it, and a resignation implied from the acceptance of an incompatible office, may not be withdrawn. But a resignation conditional in character or to take effect in the future may be withdrawn."

In 16 L. R. A. (N. S.) 1058, there is an instructive note dealing with this question which shows the decided weight of authority to be that an unconditional resignation, when transmitted to the proper authorities and accepted, cannot be withdrawn.

We are constrained to hold that Isom is the rightful Democratic nominee, and it follows that the injunction was wrongfully granted.

Judges CARROLL, HURT, and NUNN considered this motion with me and concur in this opinion.

DOBBS v. CRECELIUS et al.

(Court of Appeals of Kentucky. Oct. 12, 1915.)

1. ELECTIONS \S 156 — PRIMARY ELECTION — TIME FOR FILING CERTIFICATE OF NOMINATION — STATUTE.

Under Primary Election Law (Ky. St. 1915, \S 1550, subsec. 26) providing that after the state board of elections has canvassed the primary vote they shall issue to the successful candidate a certificate of nomination, which, not less than 30 days next before the day on which the general November election is held, shall be filed with the secretary of state, where the Republican nominee for the office of representative filed with the secretary of state his certification of nomination on October 4th, such certificate was not filed "not less than thirty days next before" November 2d, the day of the general election.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. \S 129; Dec. Dig. \S 156.]

2. ELECTIONS \S 156 — PRIMARY ELECTION — TIME FOR FILING CERTIFICATE OF NOMINATION — MANDATORY CHARACTER OF STATUTE.

Ky. St. 1915, \S 1550, subsec. 26, providing that after the state board of election commissioners have issued to the candidate of each political party receiving the highest number of votes a certificate of nomination, which certificate, not less than 30 days next before the day on which the general November election is held, shall be filed in the office of the secretary of state, is mandatory in character, and failure to comply therewith deprives the nominee of the

right to have his name printed on the official ballot.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 129; Dec. Dig. § 156.]

Action by S. C. Dobbs against C. F. Crecelius, Secretary of State, and W. C. Allen. Motion by the court to dissolve an injunction. Motion overruled.

O. B. Bertram, of Monticello, for plaintiff. James Garnett, Atty. Gen., for defendant.

TURNER, J. This is a motion made before me by the defendant C. F. Crecelius, secretary of state, to dissolve an injunction prohibiting him from certifying the name of W. C. Allen as Republican nominee in the Thirty-Sixth legislative district of this state, composed of the counties of Clinton and Wayne. In the primary election held on the 7th of August, 1915, S. C. Dobbs was nominated by the Democrats for representative in that district, and W. C. Allen by the Republicans, and they each received their certificates of nomination. On the 28th of September, 1915, Dobbs filed with the secretary of state his certificate of nomination; on the 4th day of October, 1915, Allen filed with the same official his certificate of nomination.

This is an action by Dobbs against the secretary of state and Allen seeking to enjoin the secretary of state from certifying to the county clerks of Clinton and Wayne counties the name of W. C. Allen as the Republican for that office, and thereby authorizing the said county clerks to have his name printed on the official ballots to be used at the election on November 2, 1915.

Only two questions are presented: (1) Did Allen file his certificate of nomination with the secretary of state within the time prescribed by law? and (2) Is the statute requiring the same to be filed not less than 30 days next before the day of the election mandatory, or is it merely directory, and has the secretary of state the right, after the expiration of the time prescribed by statute, to receive and file in his office a certificate of nomination?

[1] The primary election law (section 1550, Carroll's 1915 Edition Kentucky Statutes, subsec. 26), after fixing the day upon which the county election commissioners shall meet and canvass the returns, and after providing which returns shall be made to the county clerk and which returns shall be made to the secretary of state, then fixes the day upon which the state board of election commissioners shall meet at the Capitol and canvass the state returns, and further provides:

"And after they have completed the tabulation and canvass of the returns of said primary nominating election they shall immediately certify to the same, and they shall issue to that candidate of each political party receiving the highest number of votes for the office for which he was a candidate, a certificate of nomination, which certificate shall, not less than thirty days next before the day on which the general

November election is held, be filed in the office of the secretary of state."

By the very terms of this statute the election day cannot be counted as one of the 30 days; the language "not less than thirty days next before the day" of election necessarily excludes the day itself. To require a thing to be done 30 days before the day of election means that it must be done 30 days before that day begins. It has long been the rule in this state that, where the time is to be computed from the act done, then the day on which it is done is to be included as a part of the time; but if it is to be from or after the day itself, the day must be excluded. See *Newton v. Ogden*, 126 Ky. 101, 102 S. W. 885, 31 Ky. Law Rep. 549, and the authorities there cited. The question in that case was whether a local option election had been held "within thirty days next preceding or following" a regular election, and the court said:

"If the regular election in the meaning of the statute is to be considered as an act done, then the day upon which it was done must be included; on the contrary, if it is to be regarded as a day or date, and not an act, then it must be excluded."

Manifestly the statute in question here requires the filing of the certificate 30 days before the day of the election, and not merely 30 days before the election. Counting the 4th day of October, there were only 29 days between that and the 2d of November, and it is therefore apparent that Allen's certificate of nomination was not filed in time.

[2] The remaining question is whether the provision of the statute quoted is mandatory or only directory, and on this question there is little difficulty. In the case of *Brodie v. Hook*, 185 Ky. 87, 121 S. W. 979, a provision in the statute requiring that a candidate should file his certificate 15 days before the election was held to be mandatory, and that a candidate who had filed his certificate within 15 days of the election had no right to have his name printed on the official ballot. A similar statute was held to be mandatory in *Hollon v. Center*, 102 Ky. 119, 43 S. W. 174, 19 Ky. Law Rep. 1134.

In giving the reason for declaring such a provision mandatory, this court, in the case of *Brodie v. Hook*, supra, said:

"We are of the opinion that the General Assembly enacted this mandatory provision requiring the certificates and petitions of nomination to be filed not less than 15 days before the election, so as to give the clerk that much time to prepare and have the ballots printed and distributed among the polling places in the county before the day of the election, and without being annoyed by litigation by some one attempting to get some name on or off the ballots, and without being importuned by candidates and their friends for that purpose."

The same reasoning applies to the statute in this case. The secretary of state is required 20 days before the election to certify to the county clerks of the 120 counties in

the state the names of not only the nominees of all the parties for state offices, but to certify to them the names of the candidates for district offices in all districts larger than a county; and it is apparent that it was the legislative purpose to give to the secretary of state the time intervening between the time certificates of nomination are required to be filed with him and the time he is required to certify the same to the various county clerks in which to make accurate the correct certificates.

Naturally the court is reluctant to deprive one of the right to have his name printed upon the official ballot so that his fellow citizens, if they so desire, may vote for him; but, the provision of the statute quoted being mandatory, there is no escape from it.

The motion to dissolve the injunction is overruled.

Chief Justice MILLER, and Judges CARROLL, HANNAH, and NUNN sat with me in the hearing of this motion, and concur in this opinion.

HARRIS et al. v. HOPKINS et al.

(Court of Appeals of Kentucky. Oct. 12, 1915.)

1. GUARDIAN AND WARD ⇨90—SALE—INVALIDITY—REMEDY.

In an action by guardian for the sale of land to secure funds for the education of his minor wards, the petition did not state in the caption of the petition that he was acting as guardian, or allege that the sale was necessary for their "maintenance and education," but merely for the "education" of the wards. The judgment ordering sale of land did not specifically adjudge that it was necessary to educate and support the infant wards, and the guardian purchased at the sale. Held not to make the judgment and sale thereunder void, but were only errors in the proceedings rendering it voidable, and until remedied by appeal within one year after removal of disability, as provided by Civ. Code Prac. § 745, or by proceedings to vacate or modify it taken within such year under sections 391, 518, the sale was binding on all parties.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 349-355; Dec. Dig. ⇨90.]

2. GUARDIAN AND WARD ⇨107 — SALE OF WARD'S LAND—COLLATERAL ATTACK.

It is only in cases where there is an entire want of jurisdiction that a judgment and sale of a minor ward's land can be collaterally attacked.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 392, 393; Dec. Dig. ⇨107.]

3. GUARDIAN AND WARD ⇨105 — SALE OF WARD'S LAND—RIGHTS OF PURCHASER.

Under the express provision of Civ. Code Prac. § 391, the setting aside of a judgment for and a voidable sale of land of infant wards, does not affect the title of the guardian as purchaser, or of bona fide purchasers from him.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 383-389; Dec. Dig. ⇨105.]

Appeal from Circuit Court, Floyd County.

Action by F. A. Hopkins against George B. Harris and another, with counterclaim and

cross-petition against plaintiff and his vendees. Judgment for plaintiff and his vendees, and defendants appeal. Affirmed.

C. B. Wheeler, of Ashland, for appellants. F. A. Hopkins, J. C. Hopkins and James Goble, all of Prestonsburg, for appellees.

NUNN, J. While appellants were infants their land was sold by order of court in an action instituted by Joel C. Martin as their guardian. The purpose of the action was to secure funds for their education. All the parties were properly before the court, and the land was within the jurisdiction of the court. Martin, although plaintiff in the action and guardian for the infants, was purchaser at the decretal sale. The sale was confirmed and commissioner's deed made to him May 2, 1890. The action was brought under section 439 of the Civil Code, and the bond required in such cases was properly executed, approved, and recorded. Martin sold the land to Hopkins, and Hopkins subsequently sold portions to the other appellees.

In 1908 Hopkins brought this action against appellants, George B. Harris, who was then 27 years of age, and Noah Harris, who was 31 years of age, alleging that they were setting up claim to the land and casting a cloud upon his title, and sought a judgment quieting his title and enjoining the appellants from making further claim. The appellants filed answer, counterclaim, and cross-petition, whereby they set up title in themselves and made the vendees of Hopkins parties to the action. Hopkins and his vendees controverted the affirmative matters in the answer, and also claimed the land by adverse possession for a period of more than 15 years. The court adjudged that Hopkins and his vendees were the owners.

[1, 2] The real question presented is whether, in the action of Martin against the infants, the judgment and sale thereunder are void. If it was voidable merely, or if there was error only in the proceedings, the remedy for the infants was to appeal from the judgment within one year after removal of disability (Civil Code, § 745), or within that time take steps in the court rendering the judgment to have it vacated or modified (Civil Code, §§ 391, 518). Appellants insist that the judgment was void because Joel C. Martin did not state in the caption of his petition that he was acting as guardian; that the petition does not allege that the sale was necessary for "maintenance and education," but merely for the "education" of the wards; that the judgment ordered sale of the land, without specifically adjudging that it was necessary in order to educate and support the infants. They contend that the sale was void because their guardian was the purchaser, and that, if not void, he at least held it in trust for them.

None of the criticisms directed at the pro-

ceedings are sufficient to render the judgment void. At most the matters referred to are errors, and the remedy was by appeal or steps to vacate the judgment. Until the judgment be reversed on appeal, or modified or vacated by direct proceedings, it is binding on all the parties thereto. As said in *Dawson v. Litsey*, 10 Bush, 412, in considering a collateral attack upon a judgment rendered in proceedings where the parties and the subject-matter were within the jurisdiction of the court:

"Such errors are voidable only, and can be corrected alone by some direct proceeding furnishing grounds for vacating the judgment, as provided by the Code, or by an appeal; and it is only in cases where there is an entire want of jurisdiction that such judgments can be collaterally questioned."

See *Dorsey v. Kendall*, 8 Bush, 299; *Revill's Heirs v. Claxon's Heirs*, 12 Bush, 563; *Ogden v. Stevens*, 98 Ky. 566, 33 S. W. 932, 17 Ky. Law Rep. 1115; *Oliver v. Park*, 101 Ky. 1, 39 S. W. 423, 19 Ky. Law Rep. 179.

[3] Neither does the fact that the guardian was the purchaser void the sale. At most it was voidable at the option of the infants. When it appears that the sale was reported, and the bonds executed and approved, and the sale confirmed by the court, it stands as a valid sale until it is set aside or vacated after steps taken in the manner already referred to, and even then the title of Hopkins and his vendees would not be affected, unless it be made to appear that they were not bona fide purchasers. Civ. Code, § 391. As said in *Clements v. Ramsey*, 4 S. W. 313, 9 Ky. Law Rep. 174:

"The purchase was made by the guardian in his own right. Having been made by the guardian, the chancellor could have refused to confirm the sale. He saw proper to confirm it, and directed a deed made to him by the commissioner. That deed invested him with title, and where he sold to a third party, the latter held it against the infant and all others claiming under him. The sale was not void."

See *Morrison v. Garrett*, 22 S. W. 320, 15 Ky. Law Rep. 305; *Faucett v. Faucett*, 1 Bush, 511, 89 Am. Dec. 639.

It appearing that neither the judgment nor sale were void, and that no steps were taken to reverse, vacate, or modify them, we conclude that the lower court properly adjudged that the appellees were the owners of the land, and the judgment is therefore affirmed.

ARCHER et al. v. BOWLING et al.

(Court of Appeals of Kentucky. Oct. 12, 1915.)

1. DEATH —44—CIVIL ACTION—PARTIES—STATUTE.

Under Ky. St. § 4, providing that the widow and minor children, or either, or both, of a person killed by the careless or malicious use of firearms, etc., may have an action against the one committing the homicide, and may recover punitive damages, a suit by the widow alone was for the benefit of herself and her minor children, and she could not control the

action, so as to defeat a recovery by them, so that they were entitled to join as parties plaintiff in a suit brought by her alone.

[Ed. Note.—For other cases, see *Death*, Dec. Dig. —44.]

2. DEATH —81—CIVIL ACTION FOR DAMAGES—REMARriage OF WIDOW.

The fact that the widow had remarried during the pendency of the suit did not affect her right to recover or that of the minor children.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 35, 37-46, 48; Dec. Dig. —31.]

3. DEATH —91—CIVIL ACTION—DAMAGES.

In an action under Ky. St. § 4, for damages for the death of her husband from the malicious use of firearms, etc., the plaintiff's marriage pending the suit did not diminish the amount of damages that might have been recovered by her if she had remained unmarried, or affect the amount that she and her children, as joint plaintiffs, might recover.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 99-101; Dec. Dig. —91.]

4. DEATH —95—CIVIL ACTION—MEASURE OF DAMAGES.

Under Ky. St. § 6, relating to damages recovered in a civil action for the death of a person killed by the malicious use of firearms, etc., the measure of damages was such a sum as would reasonably compensate the widow and children of the deceased for the loss of his earning power, together with such punitive damages as the jury might award; the widow taking one half and the children the other half.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 108, 109, 111-115, 120; Dec. Dig. —95.]

5. LIMITATION OF ACTIONS —124—PARTIES—INTERVENTION.

Where a widow's action for damages for the wrongful death of her husband, brought under Ky. St. § 4, had been begun within a year from his death, an application of his infant children to come into the case as parties plaintiff was not barred by the one-year statute of limitations, though not made until after that time.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 541; Dec. Dig. —124.]

Appeal from Circuit Court, Whitley County.

Action by Mrs. Lewis Archer and others against Thomas Bowling and others. Judgment for defendants, and plaintiffs appeal. Reversed, with directions.

H. B. Brown, of Jellico, Tenn., and R. L. Pope and P. W. Hardin, both of Williamsburg, for appellants. H. L. Bryant, R. S. Rose, and Stephens & Steely, all of Williamsburg, for appellees.

CARROLL, J. On August 20, 1911, Lewis Archer was killed by Thomas Bowling. He left surviving him a widow and five infant children, and within the year his widow alone brought suit against Bowling and others implicated in the killing to recover damages for the death of her husband, under section 4 of the Kentucky Statutes. This section reads:

"The widow and minor child, or either or both of them, of a person killed by the careless, wanton or malicious use of firearms, or by any weapon popularly known as colts, brass knucks, or slung-shots, or other deadly weapon, or sand-

bag or any imitation or substitute therefor, not in self-defense, may have an action against the person who committed the killing, and all others aiding or promoting, or any one or more of them; and in such actions the jury may give vindictive damages."

In a trial of this suit there was a verdict in favor of the widow, but on the appeal of the defendants the judgment was reversed for reasons stated in the opinion in *Bowlin v. Archer*, 157 Ky. 540, 163 S. W. 477. The mandate from this court was filed in the lower court in February, 1914, and in May, 1914, the infant children of Lewis Archer offered a pleading asking to be made parties plaintiff in the suit. In this pleading they adopted the allegations of the petition and amended petition filed by their mother, and stated that since the first trial of the case, and pending the appeal, their mother had married, and they set up that they were proper parties plaintiff in the action, and should be permitted to prosecute it in their own behalf and for their own benefit, and they prayed to be made parties plaintiff and to be permitted to prosecute the action with her against the defendant.

[1] The trial court refused to permit this pleading to be filed, or to permit these infant children to be made parties plaintiff, and further adjudged that the widow was only entitled to damages "for whatever loss she sustained, if any, from the death of her first husband up until the date of her marriage with James Archer." From the judgment refusing to permit their pleading to be filed, and also from the judgment holding that the widow could only recover damages from the date of the death of her first husband until her second marriage, this appeal is prosecuted.

Martin v. Smith, 110 S. W. 413, 33 Ky. Law Rep. 582, was a case in which a suit under section 4 of the Statutes had been brought by the widow alone, and it appears from the opinion that the widow, after bringing the suit, moved the court to dismiss it. Pending this motion, the infant children of the widow and her deceased husband came into court and asked that they be made parties plaintiff and be permitted to prosecute the action in the name of their next friend. The court overruled the motion of the infant children to prosecute the action in the name of their next friend, and, granting the request of the widow, dismissed the action brought by her. From this ruling the infant children appealed. In the course of the opinion the court said:

"Under the statute, * * * the action may be brought by the widow and minor child, or children, jointly, or by the widow alone, or by the minor child or children alone, or, if there be neither widow, child, or children, by the personal representative of the intestate. * * * If the action be brought by the widow alone, the minor child or children, appearing by their guardian or next friend, have the right to be made parties plaintiff. The widow cannot control the action so as to defeat a recovery by the minor child or children. She may, of course,

dismiss it in so far as she is concerned, but the dismissal as to her will not be permitted to interfere with its prosecution by the child or children if they are parties to it; nor will it bar an action instituted by them within the proper time. The statute was designed to benefit the children as well as the widow; the recovery, if any, being for their joint benefit."

Adopting this construction of the statute, we are of the opinion that the court erred in refusing to permit the infant children to join as parties plaintiff in the suit with their mother. The suit, although brought by her alone, was for the benefit of herself and her infant children. All of them were severally and jointly interested in the recovery and entitled to the benefit thereof.

[2, 3] The fact that the widow married during the pendency of the suit, did not affect her right of recovery or that of the children. The case should be heard and disposed of without reference to her marriage, as the fact of her marriage did not have the effect of diminishing the amount that might have been recovered by her if she had remained unmarried, or affect the amount that she and her children, as joint plaintiffs, might be entitled to recover. *Georgia R. R. Co. v. Garr*, 57 Ga. 277, 24 Am. Rep. 492; *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548.

[4] In actions like this the distribution of the recovery is fixed by section 6 of the statute, providing in part:

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same. * * * The amount recovered, less funeral expenses and the cost of administration, and such costs about the recovery, including attorney fees as are not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order: * * * If the deceased leaves either a widow and children or a husband and children, then one-half to such widow or husband and the other one-half to the children of the deceased."

So that under this statute, in a case such as we have, the widow would be entitled to one-half of the amount recovered and the children to the other one-half; and the measure of damages is such a sum as will reasonably compensate the widow and children for the loss they sustained in the destruction of the power of the deceased to earn money, and, in addition thereto, the jury may, as provided in the Statutes, give vindictive damages.

[5] The question is raised by counsel for appellees that the right of the infant children to come into the case was barred by the one-year statute of limitation. This assertion, however, is not well founded. The action by the widow was brought within a year after the death of her husband, and the pleadings of the infant children asking that they be made parties plaintiff to the action did not change the nature of the suit brought

by her. The only purpose of the tendered pleading was to make new parties plaintiff to the action, and the court erred in not permitting the pleading to be filed.

Wherefore the judgment is reversed, with directions to proceed in conformity with this opinion.

ELAM et al. v. HICKMAN et al.

(Court of Appeals of Kentucky. Oct. 12, 1915.)

BOUNDARIES — §55 — EXCESS LAND — APPORTIONMENT.

The owner of two lots in a block of land in which there was a surplus of 18 inches conveyed the property separately by deeds which specified with accuracy the number of feet conveyed. In an action between the grantees it was insisted that the corner of one of them as fixed by the deed should be shifted in order that he might share in the surplus. *Held* that, as it did not appear that the owner intended to convey his share of the surplus, and as there was no proceeding by all the owners in the block to apportion it, the parties were bound by the descriptions in their deeds.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 278, 279; Dec. Dig. §55.]

Appeal from Circuit Court, Boyd County.

Action between Mathew Elam and others and A. H. Hickman and others. From a judgment for the latter, the former appeal. *Affirmed*.

O. M. Elam and John W. Woods, both of Ashland, for appellants. John T. Diederich and J. B. Wilhoit, both of Ashland, for appellees.

NUNN, J. This is a controversy over a boundary line between the city lots of Elam and Hickman. These lots make up part of a block in Ashland, between Twelfth street on the west and Thirteenth street on the east, and Central avenue to the south, and Railroad alley to the north. The block, as laid out by the Kentucky Iron & Coal Manufacturing Company in the year 1854, contains six lots, each fronting 50 feet on Central avenue. Deeds were made by that company to its vendees for all the lots having the dimensions named. It appears, however, that there is a surplus of 18 inches in the block between Twelfth and Thirteenth streets.

The division line in controversy relates to lots 55 and 56. These two lots are in the middle of the block. The parties got their title from a common vendor, John H. Maurer. The Elam deed was made October 3, 1903, and transferred title to lot No. 56, having 50 foot front, and also to the adjacent 5 feet of lot No. 55. Three days later Maurer conveyed to Hickman the remaining 45 feet of lot No. 55. The deed specified the beginning corner as in the line of Central avenue, and 155 feet east of the corner of Twelfth and Central avenue. Maurer inherited the two lots from his father, who had owned them since 1873. The question here is

whether, as between Elam and Hickman, the Hickman corner is the one named in his deed from Maurer, viz., 155 feet east of the Twelfth street corner, or whether a portion of the 18-inch block surplusage shall be apportioned between these two lot owners, and the corner in question be shifted further east, on Elam, in order that Hickman may share in it.

In effect, the judgment of the lower court was to establish the corner and boundary between Hickman and Elam as set forth in the deeds from Maurer, their common vendor. We are of the opinion that this judgment was proper.

The boundaries in the Maurer deeds are minutely set forth, and it is admitted that Elam and Hickman took the land so conveyed, dimensions and all. There is no allegation that Maurer owned or intended to convey any more than he did convey, or that by oversight or otherwise he failed in anything. This is not an action between all the owners to apportion the surplusage in the block, as neither they nor Maurer nor the original vendor have been made parties. If the original vendor has ever been divested of title to the alleged surplus, and it had been made to appear that the surplus actually belonged to the lot owners in common, it would not be proper in this action to arbitrarily shift any corners of the lots in question in either direction, in disregard of the rights or equities of the other lot owners.

In *Smith & Preston v. Prewit*, 2 A. K. Marshall, 185, where certain land was surveyed and patented with reference to one outside boundary, and granting 2,000 acres each to two patentees, but it subsequently developed that the boundary covered by these two patents was largely in excess of 4,000 acres, the court adjudged the surplus to be divided equally between them. This rule was followed in *Respass v. Farmers' Heirs*, 5 J. J. Marshall, 648.

But the situation here is more like that in the case of *Vance v. Gray*, 142 Ky. 267, 134 S. W. 181, where the court said:

"If we were back at the parting of the ways, and the original grantors were before us, and the conditions had not been changed, the case might possibly be worked out along the lines mapped out in the case of *Smith & Preston v. Prewit*, supra. But here, after the lapse of 40 years, during which time conditions have changed, the property passed into other hands, and improvements been made thereon, it will readily be seen that upon no just or equitable principle could the rule adopted in those cases be applied."

See, also, 5 Cyc. 973.

But Elam insists that the "record shows that the surplusage belonging to the two Maurer lots is there now unoccupied by anybody but Hickman." We do not understand that the record shows any surplus as belonging to the two Maurer lots, or that there has ever been an apportionment of it. It is true

that the testimony of the city engineer shows that in a number of other blocks laid out by the Kentucky Iron & Coal Manufacturing Company there was a surplus in varying amounts, and that this city engineer and his predecessors in office set stakes in this and other blocks at the corner of several lots, and in so setting stakes the block surplusage was taken into consideration. It appears that the purpose of this work of the engineers was for fixing cost of street improvements. But there is no proof that Hickman or any owners in this block assented to such apportionment or did anything that could operate as an estoppel.

We are of opinion that the judgment of the lower court should be affirmed; and it is so ordered.

CONSOLIDATED COAL CO. v. BALDRIDGE.

(Court of Appeals of Kentucky. Oct. 14, 1915.)

1. MASTER AND SERVANT ⇐199—INJURIES TO SERVANT—"FELLOW SERVANT."

A brakeman on a coal mine motor train, who, while making up the trip, gave directions to the motorman to go ahead or to back up, but who, when the trip was ready, would get aboard either on a car or the motor, while the motorman would take the trip to destination, the latter at all times having sole control of the trip, and in that regard being superior in authority to the brakeman, was not a fellow servant of the motorman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 491; Dec. Dig. ⇐199.]

For other definitions, see Words and Phrases, First and Second Series, Fellow Servant.]

2. MASTER AND SERVANT ⇐189—INJURIES TO SERVANT—NEGLIGENCE OF SUPERIOR SERVANT.

In Kentucky no recovery may be had from a master for an injury to a servant not causing death, resulting from the ordinary negligence of a servant superior to, and having immediate control of, or supervision over, the injured servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427-435, 437-448; Dec. Dig. ⇐189.]

3. APPEAL AND ERROR ⇐1066—HARMLESS ERROR—INSTRUCTIONS.

Under Civ. Code Prac. §§ 134, 338, 756, providing that the court must disregard trivial errors, not prejudicing the substantial rights of the party excepting, where, in an action by a brakeman on a mining car trip for injuries caused by the negligence of the motorman, who had immediate control of or supervision over the brakeman, the court erroneously authorized the jury to find for the plaintiff if the injury resulted from the "negligence" of the motorman, in violation of the rule that only gross negligence of a superior servant can subject the master to liability, but the evidence was such that if there was negligence at all it must have been gross negligence, verdict for plaintiff could stand, since the error was not prejudicial to the substantial rights of the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ⇐1066.]

Appeal from Circuit Court, Johnson County.

Action by Arlen Baldridge against the Consolidated Coal Company. Judgment for plaintiff, and defendant appeals. Affirmed.

O'Rear & Williams, of Frankfort, Allie W. Young, of Morehead, and Fogg & Kirk and H. S. Howes, all of Paintsville, for appellant. J. F. Bailey, of Paintsville, for appellee.

NUNN, J. Appellee was a brakeman on a coal mine motor train. The only other member of the crew was a motorman. While making an outbound trip the motor collided with an empty coal car which it had left on the main track when making the inbound trip. Appellee was lying flat on the motor, rather behind the motorman, and was painfully injured in the collision. He sued to recover on account of the gross negligence of the motorman in operating and driving the car, and on the trial the jury returned a verdict for \$370. Appellee's back and leg were bruised, but no bones were broken. He claims that he still suffers pain and inconvenience when his work requires hard use of his leg.

[1] Appellant asks for a reversal because, as it says, the brakeman and motorman were fellow servants, and therefore the court erred in refusing to give an instruction on that proposition. From the evidence we understand that in making up the trips or trains it was the duty of the brakeman to couple or uncouple the cars and give to the motorman proper signals to "go ahead" or "back up." When the trip was ready the brakeman would get aboard, either on the car or the motor, as he might feel the situation required, and the motorman would then take the train to destination. It is true, while making up the trip, the motorman responded to the brakeman's signals, but from the evidence it is clear that at all other times the motorman had sole charge and control of the train, and in that regard was superior in authority to the brakeman. Although these employes were, in the manner described, associated together in the same work, yet from the evidence they were not in the same grade of employment. The relative duties of these employes was not unlike that of the ordinary railroad engineer and brakeman, and it has been often held that an engineer and brakeman are not fellow servants, although employed on the same train. *Howard v. C. & O. R. R. Co.*, 90 S. W. 950, 28 Ky. Law Rep. 891; *L. & N. R. R. Co. v. Moore*, 83 Ky. 684.

[2] Appellant insists that the court erred in giving instructions to the jury which allowed the appellee to recover for the mere negligence of a superior servant engaged in the same work. The rule in Kentucky is that no recovery may be had from a master for an injury to the servant, not causing death, resulting from the ordinary negligence of a servant superior to and having immediate control of or supervision over the servant. *L. & N. R. R. Co. v. Brown*, 127 Ky. 732, 106 S. W. 795, 32 Ky. Law Rep. 552, 13 L. R. A. (N. S.) 1135; *I. C. R. R. Co. v. Coleman*, 59

S. W. 13, 22 Ky. Law Rep. 878; I. C. R. R. Co. v. Mayes, 142 Ky. 382, 134 S. W. 436.

[3] The court by the first and second instructions defined ordinary and gross negligence. Then by the third instruction authorized a finding for plaintiff if they believed the injury resulted from the "negligence" of the motorman. By another instruction they were authorized to find punitive damages for the plaintiff if they believed the motorman was guilty of "gross negligence" as defined by instruction No. 2. The instruction authorizing recovery for mere negligence was error, for the plaintiff was not entitled to recover at all unless there was gross negligence on the part of the motorman. But the moderate verdict persuades us to believe that the appellant was not prejudiced thereby. The jury found that the motorman was negligent. If there was negligence at all, it was gross negligence, and, under the facts in the case, the jury could not have reached one conclusion without arriving at the other. This motor on its inbound trip left the empty car at a switch on the main track for Hardin Dale, a miner, to shift it into his room. The motor went about 100 feet further in order to complete the trip and then started back. There is no dispute that the motor could have been stopped in 15 feet. Hardin Dale, who was attempting to switch the empty into his room, had a light on his cap, and could see the on-coming motor plainly, as the track was straight. He called to the motorman and told him not to bring the motor down until he could switch the car; and when the motor got within 20 or 30 feet of the empty, Dale heard the motorman say, "I will learn him to get the car in the clear." The appellee says he was lying face down and rather behind the motorman, and did not see the empty car ahead, or know that it had not been shifted into the room, but he heard the motorman say—

"something about that he would learn him to stay out of the way, or get out of the way, and he swore at the time he said it."

Clark Walker was in 20 feet of the empty, and stepped off the track to let the motor pass. He heard Hardin Dale call to the motorman, but did not understand what he said. The motorman said the mine was foggy, and he did not see the empty ahead of him until within about 8 feet of it. He says that no one signaled or called to him, and that he did not intend the collision, nor did he speak any such words as those attributed to him by Hardin Dale and the appellee. This being the proof, if the jury believed the motorman, they necessarily believed he was not guilty of any negligence. If they believed the other witnesses, there was but one conclusion, and that was that the accident was the result of his gross negligence. To justify a reversal the error complained of must affect the substantial rights of the appellant, and that it does so affect them must as clearly

appear as the error itself. Civil Code, §§ 134, 338, 756.

Although there was technical error in the instructions, it is manifest that the jury tried the case upon the real issue. Their finding against appellant established the fact of gross negligence, for all the proof was addressed to the question as to whether the motorman wantonly and recklessly ran the motor into the empty car. In view of this state of the record, we do not believe that the error was prejudicial, and therefore feel we would not be justified in remanding the case for another trial.

The judgment is therefore affirmed.

WEBER v. KNEPFLE.*

(Court of Appeals of Kentucky. Oct. 15, 1915.)

MUNICIPAL CORPORATIONS \S 289 — BETTERMENT ASSESSMENT—VALIDITY—STATUTE.

Ky. St. \S 3505, provides that the cost of reconstructing public ways and of making footway crossings shall be borne exclusively by cities of the fourth class. Section 3566 provides that the cost of making sidewalks, including curbing and guttering, whether by original construction or reconstruction, shall be apportioned to abutting property owners in such city. An ordinance of the city of the fourth class directed a reconstruction of the carriageway of the street, not providing for the construction of a sidewalk, but for curbing and guttering, and further providing that the reconstruction of the carriageway should be done at the city's cost, but that the cost of curbing and guttering should be assessed against abutting owners. In suit to enforce assessment warrants against a property owner, defendant contended that, since there was no provision in the ordinance for the construction of sidewalks, the reconstruction of the curbing and guttering was part of the reconstruction of the carriageway, and the cost thereof was payable by the city, so that the warrants were invalid. *Held*, that such assessments were valid, since the fact that in a single ordinance the council provided for the reconstruction of carriageway and curbing did not make the latter work part of the former.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 762, 765; Dec. Dig. \S 289.]

Appeal from Circuit Court, Campbell County.

Action by Edward J. Knepfle against Henry Weber. Judgment for plaintiff, and defendant appeals. Affirmed.

Nelson & Gallagher, of Newport, for appellant. Courtland T. Baker, of Newport, for appellee.

TURNER, J. Appellee, a contractor, brought this action against appellant to subject certain property owned by him on Fairfield avenue, Bellevue, Ky., a city of the fourth class, to the payment of certain street assessment warrants issued for the reconstruction of curbing and guttering in front of appellant's property. The ordinance under which the work was done directed a recon-

struction of the carriageway of the street and of the curbing and guttering, but no sidewalk is provided for. It further provides that the reconstruction work of the carriageway shall be done at the cost of the city, but that the cost of the curbing and guttering shall be assessed against the owners of the abutting property.

Section 3565, Kentucky Statutes, being a part of the charter of cities of the fourth class, provides:

"The cost of reconstructing public ways, streets or alleys, or repairing of the same, and the cost of making footway crossings, shall be borne exclusively by the city."

And section 3566 of the same charter provides:

"The cost of making sidewalks, including curbing and guttering, whether by original construction or by reconstruction, shall be apportioned to the front foot as owned by the parties respectively fronting said improvements, except that each corner lot shall have its sidewalk intersection included in its frontage."

Under these two sections as construed together, it is the contention of appellant that inasmuch as a reconstruction of the carriageway must, under the terms of the charter, be paid for by the city, and under the ordinance providing for the improvement the reconstruction of the curbing and guttering was only incidental to the reconstruction of the carriageway, the whole improvement shall be paid for by the city. In other words, that the reconstruction of the curbing and guttering is a part of the reconstruction of the carriageway under the ordinance, and is therefore, under the terms of the charter, payable by the city and not the property holders.

He relies upon the cases of the City of Louisville v. Tyler, 111 Ky. 588, 64 S. W. 415, 65 S. W. 125, 23 Ky. Law Rep. 827, 1609, and Gocke v. Staebler, 141 Ky. 66, 132 S. W. 167, as sustaining this view. Each of those cases involved an interpretation of the charter of cities of the first class somewhat similar to the provisions of the charter herein involved; but there was, in addition to these provisions, a further amendatory provision in first-class charters that in original construction of streets, lanes, and alleys, the cost of the curbing shall constitute a part of the cost of the street and not of the sidewalk. In the Tyler Case the question primarily was whether the improvement was original or reconstruction, and the court did hold that the cost of the curbing in that case should be paid for by the city whether it was original or reconstruction. But this court, in the case of City of Louisville v. Stoll, 159 Ky. 138, 166 S. W. 811, overruled the Tyler Case, and necessarily the reference to the Tyler Case in Gocke v. Staebler, 141 Ky. 66, 132 S. W. 167, was overruled.

The ordinance in the case at bar distinctly separated the carriageway improvement

and the curbing and guttering improvement, and provided that the one should be paid for by the city and the other by the property holders, as seems to have been unmistakably contemplated by the provisions of the charter quoted. The mere fact that in a single ordinance the council provided for the reconstruction of the carriageway and for the reconstruction of the curbing and guttering does not make the latter a part of the former. It must be given the same effect as if the two improvements had been provided for in separate and distinct ordinances.

The contention that the improvement of the carriageway was of an unusual character and not for ordinary purposes, and that the cost thereof must therefore be borne exclusively by the city, can have no bearing upon the liability of the appellant's property for the payment of the curbing and guttering improvement; for the ordinance properly required that the reconstruction of the carriageway should be paid for by the city, and separates the curbing and guttering improvement from the improvement of the carriageway.

Under the charter appellant's property was liable for the curbing and guttering improvement, and the court properly so adjudged.

Judgment affirmed.

COMMONWEALTH, for Use of CORBETT, v. FILIATREAU.

(Court of Appeals of Kentucky. Oct. 12, 1915.)

1. APPEAL AND ERROR \Leftrightarrow 1099—FORMER APPEAL—CONCLUSIVENESS.

In an action in equity against the father of the judgment debtor to subject mules, etc., alleged to have been fraudulently turned over to defendant to evade payment of the judgment, the language of the court on a former appeal, following the testimony of defendant to the effect that one Jack had died before the action was begun and that two were then remaining at the son's, was not conclusive as to the number of jacks which the son then had.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. \Leftrightarrow 1099.]

2. APPEAL AND ERROR \Leftrightarrow 179—PRESENTATION OF QUESTIONS.

In such action, a commissioner's report that defendant was chargeable with a jack which he had failed to surrender, valued at \$300, and the defendant's exception thereto, sufficiently raised the issue as to the number of jacks sold by the judgment debtor to the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1137-1140; Dec. Dig. \Leftrightarrow 179.]

3. FRAUDULENT CONVEYANCES \Leftrightarrow 295—SUIT TO SET ASIDE—EVIDENCE.

Evidence in an action in equity for the use of a judgment creditor against the father of the judgment debtor, to reach several jacks belonging to the judgment debtor and fraudulently turned over to the defendant, held insufficient to show that two of the jacks had died before the commencement of the action.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 867-875; Dec. Dig. \Leftrightarrow 295.]

4. FRAUDULENT CONVEYANCES — 271 — ACTION TO REACH PROPERTY — BURDEN OF PROOF.

In such action, the burden of showing that one of the two jacks turned over to defendant had died before the commencement of the action was on the defendant.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 796-798, 821; Dec. Dig. § 271.]

Appeal from Circuit Court, Marion County.

Action in equity by the Commonwealth of Kentucky, for the use and benefit of Elizabeth Corbett, against William Filiatreau. Judgment for defendant, and plaintiff appeals. Reversed, and cause remanded, with instructions.

See, also, 161 Ky. 434, 170 S. W. 1182.

H. W. Rives, of Lebanon, for the Commonwealth. Ben Spalding, of Lebanon, for appellee.

MILLER, C. J. This action in equity was instituted on November 11, 1912, by the commonwealth, for the use and benefit of Elizabeth Corbett, to enforce the payment of a judgment which she obtained against her brother-in-law, R. O. ("Dick") Filiatreau. The appellee, William Filiatreau, who is the father of R. O. Filiatreau, was made a defendant for the purpose of subjecting two mules, three jacks, and two jennets belonging to R. O. Filiatreau, which, it was alleged, he had fraudulently turned over to his father to evade the payment of Elizabeth Corbett's judgment. On the original hearing, the circuit court gave judgment in favor of William Filiatreau; but that judgment was reversed upon a former appeal to this court, and the action was remanded, with instructions to subject the attached property to the payment of appellant's debt. 161 Ky. 434, 170 S. W. 1182. In the former opinion, the court used this language:

"The jennets were taken to the father. Two of the jacks are yet remaining at Dick's. These animals had been reared by Dick Filiatreau, being the progeny of a jennet which his father had once given him; and how it was that William Filiatreau came to have an interest in them, amounting to the whole of their value, except \$200, is left to conjecture. One of these jacks appeared to have died prior to the institution of this suit, and the record does not clearly establish the value of the two remaining jacks and the two jennets; but the value of these two jacks and two jennets should be ascertained, and William Filiatreau must either account therefor or surrender the animals for sale herein in satisfaction of the judgment sought to be enforced."

Upon the return of the case to the circuit court, William Filiatreau surrendered all the property above specified, with the exception of one jack colt, which he said had died before this action was instituted. The commissioner's report, however, charged William Filiatreau with the jack, which he had failed to surrender, and fixed its value at \$300; but upon exception to the report, and oral evidence heard by the court, the excep-

tion was sustained, and William Filiatreau exonerated, the court being of opinion that the jack in question had died before this suit was instituted. The plaintiff again appeals.

The only issues upon this appeal relate to the fact of the death of one of the jack colts, and whether it occurred before or after November 11, 1912.

[1] 1. Appellant insists that the language above quoted from the former opinion conclusively charged William Filiatreau with the jack in question, or its value, and that he will not now be permitted to show that the jack was dead at the time the suit was filed. This is, in effect, a plea of *res judicata*. The statement in the opinion that one jack had died prior to the institution of this action, and that two jacks were then remaining at Dick's, is fully justified by the testimony of William Filiatreau upon the first trial. But, in his behalf, it is now insisted that he was mistaken in saying that two jacks were then living, and that he should be allowed to show the true state of facts—that only one jack was living at the time the suit was instituted.

We do not think the language in the former opinion should be treated as conclusive of a question which was not made an issue upon the first trial. The issue litigated and decided upon the former appeal was one of fraud, or no fraud, upon the part of R. O. Filiatreau in selling or turning over his stock to his father. No issue was made as to the number of jacks R. O. Filiatreau then had, and the circuit court entered no judgment subjecting any of the property to the payment of appellant's debt. The language of the opinion incidentally followed the testimony of William Filiatreau as to the property he had received from his son.

[2] The issue as to the number of jacks sold by R. O. Filiatreau to his father was first made by the commissioner's report and the exception filed to the report. The report, and the exception thereto, made the issues as to the fact and the date of the colt's death for the first time. While the issues might have been made by pleadings, the report and exception sufficiently raised those questions. *Dewhurst v. Shepherd's Ex'r*, 102 Ky. 240, 43 S. W. 253, 19 Ky. Law Rep. 1260.

[3, 4] 2. Upon the return of the case it was competent for William Filiatreau to show the true situation with reference to this property. But we are further of opinion he has failed to show satisfactorily that two of the jacks had died before the institution of this action. As above stated, William Filiatreau testified upon the first trial that two of the jacks were then at his son's farm. William Filiatreau did not, however, testify upon the return of the case, when this issue was made for the first time. The testimony upon the issue now before us is quite meager and unsatisfactory. As heretofore stated, this action was filed on November 11, 1912. The

following four witnesses testified orally before the court:

Felix Murphy said that about August or September, 1912, he dragged a dead jack out of R. O. Filiatreau's barn, but knew nothing about him, or anything about the other jacks on the place. James McCullom, a neighbor, testified that he saw a dead jack on R. O. Filiatreau's farm in the latter part of the summer of 1912, and from appearances he would say the jack was over two years old, and was of a sorrel, red color, with some gray hairs mixed through it. He further said he saw two jack colts on R. O. Filiatreau's farm, either in the spring of that year or of the year before. Alex. Higdon, another farmer, who lived four miles distant, testified that in the latter part of the summer of 1912 he saw a dead jack on R. O. Filiatreau's place, which appeared to be two or three years old. Mrs. R. O. Filiatreau testified that her husband had three jacks, an old one and two colts; that the old one died in the spring or summer of 1912; that one of the colts died, and the other one was surrendered and sold to pay plaintiff's judgment. She nowhere undertakes to give the time when the colt died.

Of the witnesses that testified before the commissioner, Rad Murphy said the older jack died, but he did not remember when he died; and, in answer to the question if one of the younger jacks on hand there in the summer of 1912 did not die that year, he answered:

"I helped to drag out one—drag one out of the stable about that time, I reckon."

Upon cross-examination, Rad Murphy said that his brother Felix lived with R. O. Filiatreau in 1910, and that the big jack died while Felix lived with R. O. Filiatreau. Thomas Corbett, a brother-in-law of R. O. Filiatreau, said he had no idea what the three year old jack was worth at the time this suit was instituted against William Filiatreau, thereby stating by inference, at least, that the older jack was then alive. R. O. Filiatreau testified that he sold his father only the two jack colts; that the big or older jack had died a year or two years before this litigation began, thereby contradicting all the other witnesses who said he died in the summer or fall of 1912; and that one of the colts died, although he does not give the date of his death.

Under this testimony it will be seen that the two colts were turned over to William Filiatreau by his son, R. O. Filiatreau, and that one of them died; but it has not been shown that he died before the institution of this action, on November 11, 1912. The burden was upon William Filiatreau to show that fact; and this he failed to do. On the contrary, upon the first trial of the case he said, without equivocation, that two of the jacks were then "at Dick's." This important statement of his deposition has never been

retracted, explained, or corrected in any way.

Under this proof we think the circuit judge erred in finding that one of the jack colts had died before the institution of this action, and that he should have charged William Filiatreau with \$300, the value of the colt as fixed by the commissioner.

Judgment reversed, and cause remanded, with instructions to the chancellor to enter a judgment as above indicated.

GRAY et al. v. GILLIAM et al.

(Court of Appeals of Kentucky. Oct. 14, 1915.)

1. MORTGAGES \S 309—RELEASE—RECORD OF NEW MORTGAGE.

Where a mortgage given to release another mortgage on other property recited that the first mortgage would be released as soon as the second one was accepted and recorded, the act of recording the mortgage ipso facto released the lien of the previous mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 864, 870, 889, 900, 902-905, 907-912; Dec. Dig. \S 309.]

2. MORTGAGES \S 73 — RENEWAL — ACCEPTANCE.

Where a mortgagor agreed to take a new mortgage in order to release the property, and it was stipulated that the second mortgage should not be effective until the interest on the first mortgage had been paid or arrangement satisfactory to the mortgagee had been made, a recordation by the mortgagee of the new mortgage without payment of interest constituted an acceptance thereof.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 170, 171; Dec. Dig. \S 73.]

3. MORTGAGES \S 283—ASSUMPTION OF PAYMENT—LIABILITY.

A vendee of real estate who assumes payment of the mortgage debt thereon is liable as principal therefor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 756-758; Dec. Dig. \S 283.]

Appeal from Circuit Court, Knox County.

Suit by J. A. Gilliam and others against J. T. Gray and others to foreclose a mortgage. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. D. Tuggle and J. B. Campbell, both of Barbourville, for appellants. J. M. Robison, of Barbourville, for appellees.

CARROLL, J. This case may be briefly disposed of. Previous to September, 1908, Gray was indebted to Gilliam in the sum of \$2,000, secured by a mortgage on what was known as the "tunnel property." Desiring to have this mortgage released, Gray proposed to execute a mortgage on other property, which proposition was accepted by Gilliam, and thereupon, on September 4, 1908, Gray and his wife executed to Gilliam a mortgage for \$2,000 on certain real estate described in the mortgage. The mortgage stipulated that:

"Before this contract of mortgage is to take effect, first party is to pay the accrued interest on the mortgage as it now stands on the tunnel property or to make such arrangement about

said interest as will be satisfactory to second party. It is further agreed by the parties hereto that as soon as this mortgage is accepted and placed on record that the first mortgage given to secure this debt will be fully released, and the mining property at the tunnel embraced by said mortgage will be freed from the same."

On October 2, 1908, this mortgage was duly recorded in the proper office. In 1912 the assignee of Gilliam brought suit to enforce this mortgage lien, and Gray sought to defeat a recovery upon the ground that Gilliam had never released the mortgage on the tunnel property or accepted the new mortgage, and therefore there was no consideration for its execution. Some claim is made that, in consequence of the failure of Gilliam to release the mortgage on the tunnel property, Gray was damaged in connection with a trade he had with the Charlton-Jellico Coal Company, but there is no evidence to support this contention.

[1] The new mortgage itself recited that as soon as it was accepted and placed on record the mortgage on the tunnel property would stand released. By placing this mortgage on record Gilliam accepted it in lieu of the mortgage on the tunnel property, and his act in thus accepting it of itself released the lien secured by the other mortgage.

[2] It is further said that the new mortgage provided that it should not take effect until Gray paid the interest on the first mortgage debt or made satisfactory arrangements concerning the same, and, as Gray did not pay this interest, the new mortgage did not take effect. But when Gilliam accepted this new mortgage and put it on record, he signified his willingness that it should take effect without the payment of the interest, and this act on his part was an acceptance of the new mortgage. In addition to this, in August, 1909, Gray conveyed the land covered by the new mortgage to his wife, and as a part of the consideration for this conveyance it was stipulated that Mrs. Gray should pay the mortgage debt to Gilliam. Again, in 1910, Gilliam, in his bankruptcy proceedings, fully recognized the existence and validity of this new mortgage.

[3] It is also relied on as error that personal judgment was given against Mrs. Gray, but there is no merit in this contention. Mrs. Gray assumed payment of this mortgage debt, and was liable as principal for its payment.

The judgment is affirmed.

TURNER v. NEWBERRY.

(Court of Appeals of Kentucky. Oct. 14, 1915.)

1. MORTGAGES — 37 — PAROL EVIDENCE — DEED AS MORTGAGE.

Parol evidence is admissible to impeach the consideration of a deed absolute on its face and to show that it was, in fact, intended as a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 97-107; Dec. Dig. — 37.]

2. MORTGAGES — 37 — ABSOLUTE DEED — PAROL EVIDENCE.

Where a debtor conveyed land, the deed for which recited the consideration, parol evidence that the land was sold on an oral trust that the vendee pay his debt and account for the balance, but that the vendee failed to account for the proceeds, was admissible in a suit for such proceeds, since the recited consideration of a conveyance may be impeached by oral testimony, although fraud or mistake be not alleged.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 97-107; Dec. Dig. — 37.]

Appeal from Circuit Court, Perry County.

Suit by W. H. Turner against William Newberry. Judgment for defendant, and plaintiff appeals. Reversed.

Napier & Turner and Miller & Wheeler, all of Hazard, for appellant. Wootton & Morgan, of Hazard, for appellee.

HANNAH, J. W. H. Turner sued William Newberry in the Perry circuit court to recover a sum of money claimed to be due in virtue of a certain oral trust. Upon a trial of the action, the court directed a verdict for the defendant, and the plaintiff appeals.

The Winchester Bank had sued Turner in the Perry circuit court, and it obtained a judgment in that action against Turner and against Newberry as Turner's surety on a bond executed therein for the sum of \$498.83. Turner was also indebted to one R. F. Fields in the sum of \$174.74, which was a lien upon a tract of land owned by Turner in Perry county, containing 95.54 acres.

According to the testimony of the plaintiff, which, for the purpose of this opinion, is taken as true, the trial court having directed a verdict for the defendant, Turner was unable to discharge the claim of the Winchester Bank, and Newberry asked him if he was going to permit him (Newberry) to suffer by reason of his having signed the bond mentioned, whereupon Turner said he would sell his land and pay off the claim of the bank and of Fields. At that time Turner had an offer of \$8 per acre for his land, but did not want to accept that price. Newberry then said that he was going to sell some land of his adjoining Turner's, and that he could sell the two tracts together for \$10 per acre or more; that, if Turner would convey to him the 95.54 acres then owned by Turner, he would put it in with his own land in the sale, and would pay over to Turner the excess of the sum so realized after discharging the debts due the Winchester Bank and R. F. Fields. Turner then proposed that a written contract to this effect be entered into, but Newberry said that the parties to whom he proposed to sell the land would not be willing to take it if they should learn that Turner was beneficially interested, as they were angry at him because he would not take their offer of \$8 per acre. Thereupon Turner and wife ex-

ecuted to Newberry a deed in the usual form, reciting that:

It was made "for and in consideration of the sum of \$673.57, \$498.83 of which is this day paid by second party to the Winchester Bank in satisfaction of a judgment rendered in favor of said bank in an action in the Perry circuit court wherein the Winchester Bank was plaintiff and W. H. Turner and others were defendants, and \$174.74 of same was this day paid by the party of the second part to R. F. Fields in satisfaction of a judgment lien he holds against the lands herein conveyed, which judgment lien was adjudged to said Fields in the above-named action, all of which is declared to be an essential and moving consideration, the receipt of all of which is hereby acknowledged, and on consideration of its full payment of said sum as above stated, the parties of the first part do hereby grant, bargain, sell, and convey," etc.

This deed was executed April 20, 1909, and on June 6, 1910, Newberry sold his land and the land so conveyed to him by Turner for a sum amounting to about \$11 per acre; and, Newberry having failed to account for any excess so realized over the \$673.57 paid by him to the Winchester Bank and to Fields, Turner brought this action to recover this difference.

We are informed by the brief of counsel for appellant (appellee has filed no brief) that the trial court sustained defendant's motion for a directed verdict upon the theory that, as there was no plea of fraud or mistake in the execution of the deed, a consideration other than that expressed in the deed could not be shown.

[1] It is well-settled in this state that parol evidence is admissible to impeach the consideration of a deed absolute on its face and to show that it was, in fact, intended by the parties as a mortgage or security for indebtedness. *Vaughn v. Smith*, 148 Ky. 531, 146 S. W. 1094; *Leibel v. Tandy*, 146 Ky. 101, 141 S. W. 1183; *McKibben v. Diltz*, 138 Ky. 684, 128 S. W. 1062, 137 Am. St. Rep. 408; *Brown v. Spradlin*, 136 Ky. 703, 125 S. W. 150; *Hobbs v. Rowland*, 136 Ky. 197, 123 S. W. 1185, overruling *Munford v. Green*, 103 Ky. 140, 44 S. W. 419, 19 Ky. Law Rep. 1791. See, also, 27 Cyc. 1021.

[2] The recited consideration of a conveyance may be impeached without allegation of fraud or mistake, and that, too, by parol testimony. Ky. St. § 470, subsec. 7; *Stamper v. Cornett*, 121 S. W. 623; Ky. St. § 472.

Of course, in the instant case, it was not shown that the conveyance from Turner to Newberry was, in fact, intended to be a mortgage. It was not intended that the land should be held by Newberry as security, but that he should sell it and pay to Turner whatever the sale realized over and above the amounts which Newberry had paid for Turner. The transaction was an oral trust.

In *Woolfolk v. Earle*, 40 S. W. 247, 19 Ky. Law Rep. 343, a daughter conveyed to her stepfather a tract of land for the recited consideration of \$1. There was a parol agreement at the time that he was to sell the

land so conveyed to him and pay the proceeds over to his wife, the daughter's mother. In a suit to enforce this trust, the court held parol testimony admissible to show that such was the inducement for the execution of the deed, and to establish the trust by showing the real consideration for the conveyance.

In *Spencer v. Richmond*, 46 App. Div. 481, 61 N. Y. Supp. 397, it was likewise held that parol evidence was competent to show that a deed absolute on its face was, in fact, to secure an indebtedness, and that there was also the further parol agreement that the lands thereby conveyed were to be sold, and the balance over and above such indebtedness owing to the grantee should be returned to the grantor.

In Texas, where, as in this state, there is no statute adopting the seventh section of the English statute of frauds, or any equivalent declaration, it is held that a parol express trust is raised where a grantor executes a conveyance of land, absolute on its face, under a parol agreement by the grantee to sell the land and account to the grantor. *Diffie v. Thompson* (Tex. Civ. App.) 90 S. W. 193; *Clark v. Haney*, 62 Tex. 514, 50 Am. Rep. 536.

And even in those states where the seventh section of the original statute of frauds is in force it is held, where a creditor of the grantor takes a conveyance of land under a parol agreement to sell the same and account for the proceeds in excess of grantor's debt, that notwithstanding the original invalidity of such parol agreement, when the land has, in fact, been sold, the proceeds are impressed with a trust in favor of the grantor which may be enforced. *Bechtel v. Ammon*, 199 Pa. 81, 48 Atl. 873.

The trial court therefore erred in directing a verdict for the defendant.

The judgment is reversed.

McWILLIAMS v. KENTUCKY HEATING CO. et al.

(Court of Appeals of Kentucky. Oct. 5, 1915.)

1. GAS — 18 — INJURIES FROM GAS — NEGLIGENCE.

Where plaintiff was injured when the spikes in the rear wheels of the steam roller which he operated under the direction of county officials pierced a gas main, resulting in an explosion which severely burned him when the gas came in contact with the fire box of the roller, the fact that the county officials had knowledge that the gas main was dangerously near the surface of the road, and nevertheless ordered plaintiff to operate his roller so that the accident might result, will not excuse the gas company for negligently laying its main too near the surface, since the negligence of one party does not excuse a third party from liability, also guilty of negligence, if the injury complained of would not have happened except for his negligence.

[Ed. Note.—For other cases, see Gas, Dec. Dig. — 18.]

2. GAS ⚡17 — GAS COMPANIES — RIGHTS IN STREETS — "ORDINARY CARE."

Where a contract between a turnpike company and a gas company, granting the latter the right to lay pipes in the turnpike, provided that the gas company should keep the pipes in proper condition, and so as not to interfere with ordinary travel, such condition of the contract meant that the gas company undertook to exercise ordinary care to keep and maintain its mains so as to have the road from day to day in such condition that it would be reasonably safe, considering the usage and travel which it might be reasonably anticipated it would be subjected to from day to day; "ordinary care" to maintain a place or thing in safe condition under such a state of facts being a variable and not a stationary degree of care.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 14; Dec. Dig. ⚡17.]

For other definitions, see Words and Phrases, First and Second Series, Ordinary Care.]

3. GAS ⚡18 — GAS COMPANIES — RIGHTS IN STREETS — DUTY OF CARE.

Where a gas company occupies a public street with its main, whether such street be owned by a turnpike company or be a public highway, such gas company, whether under contract with the turnpike company or its implied obligation to the public, is under duty to maintain its main in such manner as to have the road reasonably safe from day to day, considering the usage to which it may reasonably be subjected.

[Ed. Note.—For other cases, see Gas, Dec. Dig. ⚡18.]

4. GAS ⚡16 — GAS COMPANIES — RIGHTS IN STREETS — DUTY OF CARE — CONTRACT WITH TURNPIKE COMPANY.

A turnpike company, giving a gas company the right to use a road to lay its mains, cannot, by contract with such company, authorize it to exercise a less degree of care than is consistent with the right of the public to use the road with reasonable safety.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 13; Dec. Dig. ⚡16.]

5. GAS ⚡18 — INJURIES — NEGLIGENCE — PROXIMATE CAUSE.

To render a gas company liable for an explosion of gas from a broken main, the injury must have been the natural and probable consequence of the negligent act; a consequence that, in the light of attending circumstances, an ordinarily prudent man might have anticipated.

[Ed. Note.—For other cases, see Gas, Dec. Dig. ⚡18.]

6. GAS ⚡20 — INJURIES — NEGLIGENCE — QUESTION FOR JURY.

In an action against a gas company for injuries received by plaintiff operator of a steam roller for a county in road repairing, when the spikes of the machine's rear wheels pierced a gas main resulting in an explosion, the question of the gas company's negligence held for the jury under all the evidence.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 16, 17; Dec. Dig. ⚡20.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Joseph P. McWilliams against the Kentucky Heating Company and others. From a judgment directing verdict for defendants, plaintiff appeals. Reversed for new trial.

Edwards, Ogden & Peak, P. F. Sullivan, and L. J. Mackey, all of Louisville, for appellant. Fred Forcht and Matt O'Doherty, both of Louisville, for appellees.

CARROLL, J. This appeal is prosecuted by the appellant from the judgment of the lower court, directing the jury to return a verdict in favor of the appellees in a suit he had brought against them to recover damages for personal injuries. The appellant, at the time he sustained the injuries complained of, was employed by Jefferson county as the engineer of a steam roller in the reconstruction and maintenance of a county road of Jefferson county known as the Eighteenth Street road. The steam roller being operated by appellant weighed about 26,000 pounds. It was so constructed that there was one small roller or wheel in front and two large rollers or wheels in the rear. These large rollers or wheels in the rear had each 24 holes in their surface. These holes were for the purpose of inserting steel spikes about four inches long, which spikes could be placed in the holes and taken out at the pleasure of the person in charge of the machine. When it was desired, in the reconstruction of a macadam road, to tear up the roadbed, these spikes were placed in the wheels, and as the machine was run over the road they loosened up the surface of the macadam somewhat in the manner that it might be loosened by a pick, plow, or harrow. When it was desired to roll the surface of the road the spikes were taken out of the wheels, and the machine run over the road, thereby making it compact and solid. At the place where the appellant was injured the road was 40 feet wide. Sixteen feet of this 40 feet was a macadam road, and about 24 feet of it was what is known as a summer or dirt road, and at the time of the accident the county authorities were engaged in the reconstruction or repair of the macadam on this road, and in this work had been using the steam roller. In the course of the work the appellant was directed by the county officer in charge to run the roller in the summer or dirt road several hundred feet, to a point where it would be needed for use on the macadam road, so that it would not disturb the macadam road between the place it was standing when the order was given and the place to which he was ordered to remove it. While running the roller down this dirt road as he was directed to do, the spikes in one of the wheels punched holes in an iron gas pipe that had been placed in this summer or dirt road, and when these holes were so made, the escaping gas came in contact with the fire in the engine, causing an immediate explosion and the envelopment of the engine in flames. When the explosion occurred and the flames surrounded the engine, the appellant, who was operating it, was severely burned and injured, and to recover damages for the injuries so sustained, he brought this suit.

It is further shown by the record that in 1890 the appellees obtained from the Valley

Turnpike & Gravel Road Company, a private corporation that then owned and operated this road as a toll road, a right of way over the road for the purpose of conveying natural gas from gas fields in Meade county, Ky., to Louisville, Ky. This right of way was evidenced by a written contract between the turnpike company and the appellee, in which it was provided, among other things, that the gas company—

"agrees and binds itself to keep the line of a pipe ditch in proper condition, well filled until thoroughly settled so as not to interfere with ordinary travel, and any metal or other material necessary to maintain said line in good condition must be furnished by said second party."

Pursuant to this contract the gas company laid an 8-inch wrought iron pipe, $\frac{5}{16}$ of an inch thick, from its gas fields in Meade county over and along the road to Louisville. This pipe was laid in a ditch made in the dirt road about 9 feet from the edge of the macadam, and covered over with dirt, the pipe being laid, in many places, at an average depth of about 1 or 2 feet below the surface of the earth, at other places nearer to the surface. It is further shown that at the time and place of the accident the dirt or earth which covered this gas pipe had worn or washed away, or the mains had been originally placed near the surface, so that the top of the gas main was only an inch or two below the surface of the roadbed. It is further shown that about 1901 the county of Jefferson purchased this turnpike road from the turnpike company and converted it into what is known as a free turnpike, and it was thereafter operated and maintained by the county. The evidence further shows that steam rollers of the type, size, weight, and equipment of the one being operated by appellant had been used in the repair of the roads of the county for about 12 years before the accident, and at that time the county had nine of them in use. It should also be noted that the county officials in charge of the roadwork knew the mains were in the dirt road although appellant did not.

The foregoing statement of fact fairly represents the evidence offered by appellant, but which was not considered sufficient by the trial court to take the case to the jury.

In support of the ruling of the lower court, it is argued by counsel for appellees that the law did not impose on them the duty of maintaining gas pipes so far below the surface, or sufficiently strong or sound to prevent the same being punctured by the spikes in the wheels of a machine of the character operated by appellant, and further, that the proximate cause of the gas escaping was the independent, intervening act of the appellant in operating the roller with the spikes in the wheels over the dirt road, an act which could not have been reasonably anticipated by appellees. The further argument is made that the officials of Jefferson county knew that the gas main

was in the road, and should have notified appellant, if he did not know of its existence, and this knowledge on the part of these officials relieved appellees from liability.

[1] Disposing first of the argument that the knowledge of the county officials that the gas main was in the road transferred to the county liability for the accident. The evidence shows that the appellant had no knowledge whatever of the fact that this gas main was in the road, although it does appear that the county officials in charge of the construction of the road at this point knew that this main was in the road; they did not, however, know it was so close to the surface as that it would be punctured by the spikes in the roller. But the knowledge of the county officials, or whether they did or did not know of the closeness of the main to the surface of the road, is not a material factor in the disposition of this case. The appellant is not to be dismissed because the county officials were guilty of some want of care, nor are the appellees to be relieved from liability even if it should be assumed that the negligence of the county officials was a contributing cause in producing the accident that caused the injury. We think it is a well-settled rule in the law of negligence that the negligence of one party does not excuse from liability a third party, also guilty of negligence, if the injury complained of would not have happened except for his negligence. So that, if we should assume that the county authorities were negligent, and that their negligence, concurring with that of the appellees, produced the injury, the right of action created in the appellant against the appellees on account of their negligence is not, in any manner, impaired or diminished by the negligence of the county officials if they were guilty of any. In *Shearman and Redfield on Negligence* (5th Ed.) vol. 1, § 81, the well-known rule on this subject is thus stated:

"The mere fact that another person concurs or co-operates in producing the injury, or contributes thereto, in any degree, whether large or small, is of no importance. If the injuries caused by the concurrent acts of two persons are plainly separable, so that the damage caused by each can be distinguished, each would be liable for the damage which he caused; but if this is not the case, all the persons who contribute to the injury by their negligence are liable, jointly or severally, for the whole damage. It is immaterial how many others have been in fault, if the defendant's act was an efficient cause of the injury." *Sydnor v. Arnold*, 122 Ky. 557, 92 S. W. 289; *City of Louisville v. Hart's Adm'r*, 143 Ky. 171, 136 S. W. 212, 35 L. R. A. (N. S.) 207; *City of Louisville v. Arrowsmith*, 145 Ky. 498, 140 S. W. 1022; *City of Louisville v. Bridwell*, 150 Ky. 589, 150 S. W. 672.

We may therefore leave entirely out of view any supposed negligence or want of care on the part of the county officials. The issue whether they were negligent or not has no place in this case. If the appellees were guilty of actionable negligence, the appel-

lant has the right to maintain this action against them without regard to any negligence on the part of the county officials that may have contributed to the injuries complained of. Having this view of this feature of the case, we will now proceed to inquire into the sufficiency of the other arguments advanced by counsel for appellees in support of the contention that the ruling of the trial judge was proper.

[2] The contract obligated the appellees to keep their line of pipes in proper condition, and in such a way as not to interfere with ordinary travel on the road. The meaning of this condition, as we construe it, is that the appellees undertook to exercise ordinary care to continually keep and maintain the gas mains in such manner as to have the road, from day to day, in such condition as that it would be reasonably safe, considering the usage and travel which it might be reasonably foreseen or anticipated it would be subjected to from day to day. Ordinary care to maintain a place or thing in safe condition, under a state of facts such as we have, is a variable and not a stationary degree of care. It changes as the conditions under which it is to be exercised change, and keeps pace with these conditions, so that the place or thing under all conditions that it may reasonably be foreseen or anticipated will arise will be in a reasonably safe condition.

[3, 4] It cannot be maintained that public service or other corporations may occupy public roads, under a contract or otherwise, and be held to a less degree of care than we have laid down. A private corporation having the right to own and control a public road, as did the turnpike company, which gave to appellees the right to use the road for the purpose of laying their gas mains, cannot let a contract for the use of part of the road and agree that the other party may exercise a less degree of care than would be consistent with the right of the public to use the road with reasonable safety, nor can it contract that the use of the road may be such as to place it in condition that it would not be reasonably safe for public travel.

[5, 6] But it is insisted that the exercise of ordinary care on the part of the appellees in maintaining the gas main in such condition as to leave the road in reasonably safe condition for public travel did not impose the duty of anticipating or guarding against the danger that might follow from the use of the road by the character of machine being operated by appellant at the time of his injury. It is doubtless true that the machine being used was of unusual size and weight, and that the spikes in the wheels added largely to the danger of its use, if, as in the case we have, they came in contact with the gas main. It is also likely that this type or character of machine was not in use in Jefferson county, or elsewhere in the state when these pipes were laid 25

or more years ago. But the evidence is that this type of machine, equipped in the manner that it was when appellant was injured, had been in use on the roads of Jefferson county for some 12 years for the purposes for which it was being used at the time of the injury. So that this type of machine was not then either new or novel, but on the contrary were a part of the usual equipment in use in the improvement of the highways of Jefferson county. In view, therefore, of these conditions, it cannot be said as a matter of law that the cause that produced the accident was of such unusual and extraordinary character as that, in the exercise of the care required, the appellees could not have anticipated that this accident and resulting injury would happen. The duty appellees were under to exercise ordinary care to maintain the gas mains in reasonably safe condition for public travel does not mean that they were only required to take notice of the kind and type of vehicles and machinery in use when the pipe was laid, or that they could rest content with conditions then existing without giving any heed to the progress in every department of road working and the changes and improvements constantly being made in all classes of road, as well as other machinery.

It may also be conceded that the main, when first laid, was placed in such condition as to leave the road safe for the uses and travel to which the road was, at that time, subjected. But the care demanded of appellees did not end when the main was laid. They were under a duty to exercise ordinary care to keep and maintain the main in such condition as that the road would be in reasonably safe condition, considering the uses and travel to which it might reasonably be anticipated it would be subjected in the future, and to take notice of the future use and travel and exercise such care as might be necessary to maintain the mains in reasonably safe conditions to meet its requirements. The duty imposed upon the appellees to exercise ordinary care in the maintenance of these gas mains imposed upon them the duty of exercising ordinary care at all times, while the mains were in the public road, to guard against injury through any reasonable and proper use of the road, in view of the condition to which its use under modern methods might be subjected. *Coulter v. Township*, 164 Pa. 543, 30 Atl. 490; *Clulow v. McClelland*, 151 Pa. 583, 25 Atl. 147, 17 L. R. A. 650; *Yordy v. Marshall County*, 80 Iowa, 405, 45 N. W. 1042; *Gregory v. Adams*, 14 Gray (Mass.) 242; *Kovarik v. Saline County*, 86 Neb. 440, 125 N. W. 1082, 27 L. R. A. (N. S.) 832, 136 Am. St. Rep. 704; *Board of Commissioners v. Coffman*, 60 Ohio St. 527, 54 N. E. 1054, 48 L. R. A. 455.

In laying down these rules we do not mean to hold that it was the duty of the appellees, in maintaining the gas mains, to provide against extraordinary or unusual conditions,

or to anticipate and guard against accidents arising from extraordinary or unusual causes that could not reasonably have been anticipated to exist at the time the injury complained of occurred. But they were under a duty to take notice of the uses to which the roads in Jefferson county were put, to take notice of the new methods and machinery employed by the county in the reconstruction and repair of its roads, and to maintain the gas main in such condition as that they would be reasonably safe for uses such as they were subjected to by the new methods and new machinery in use by the county.

It should further be kept in mind that ordinary care is to be measured by conditions as they arise. What would be ordinary care under one state of facts might be gross negligence under another state of facts. What would be ordinary care under some conditions and circumstances would be no care under other conditions and circumstances. Or, as said by Thompson on Negligence, vol. 1, § 25:

"The care, caution, and diligence required by the law is always measured by the circumstances of the particular case, and the rule of admeasurement is, the greater the hazard, the greater the care required."

In the application of this sound principle to the facts of this case, it seems very clear that the exercise of ordinary care required that appellees should exercise a degree of care commensurate with the dangerous agency they were transporting in the public road, and not only guard against danger from the use of the road by ordinary vehicles, but by such vehicles and machinery as it might reasonably be anticipated the county would use in the repair and reconstruction of its roads, and this could easily have been done by putting the mains deeper below the surface.

There is some suggestion by counsel that it was negligence to operate this machine on the dirt road, but there is no substance in this contention. The county had the right to use all parts of the road, and to operate this machine in any part of it that suited its convenience.

The argument is also made that the negligence, if any, of the appellees in maintaining the gas mains so close to the surface of the road was not the proximate cause of the accident. It is said that the proximate cause of the gas escaping was the independent, intervening act of the appellant in operating the roller, with the spikes in the wheels, over the dirt road. It is generally true, in cases like this, that to constitute proximate cause creating liability for negligence, the injury must have been the natural and probable consequences of the negligent act, or, in other words, the consequence that in the light of attending circumstances an ordinarily prudent man might have anticipated. *Logan v. C., N. O. & T. P. Ry. Co.*, 139 Ky. 202, 129 S. W. 575; *Sydnor v. Arnold*, 122 Ky. 557, 92

S. W. 289. But, as we have endeavored to point out, it cannot be said as a matter of law that appellees, in the exercise of the care required, could not have foreseen and anticipated that this accident might have happened. We think it was a question for a jury to say, under all the surrounding circumstances developed in the evidence, whether the appellees in the exercise of ordinary care could have known that their gas main was within an inch or so of the surface of the road in many places, and should have anticipated or foreseen the use to which the road where this gas main was laid might be subjected by the type of machinery the county was using in the repair of its roads and the danger that might arise therefrom, considering the nearness of the gas mains to the surface of the road.

The case of *American District Telegraph Co. v. Oldham*, 148 Ky. 320, 146 S. W. 764, Ann. Cas. 1913E, 376, is strongly relied on by counsel for appellees as fully supporting the lower court in ruling that the appellant failed to make out a case; but we find such substantial difference between the facts in that case and the facts in the case we have that a principle of law that might be entirely sound when applied to that case would have no pertinency when applied to this one. In the *American District Telegraph Co. Case* it appears that Oldham, a fireman in the employ of the city of Louisville, responded with his company to an alarm of fire. When they reached the fire they wrapped the hose around a guy post used by the telegraph company for the purpose of running a wire from it to a telegraph pole. The guy post, which happened to be rotten, was broken off and pulled down by the strain put on it in operating the hose, and when it fell struck Oldham. In holding that the telegraph company was not liable, we said:

"It was incumbent upon the telegraph company to maintain its poles in a reasonably safe condition for the purposes for which it was intended, and to keep it in such condition to withstand such strain as might reasonably be anticipated from the travel on the street. * * * But the company was under no obligation to maintain a pole in such condition that a fireman might safely wrap a hose around it, and if the strain of the hose caused the pole to fall, this use of the pole for a purpose for which it was not intended was the proximate cause of the injury."

It will thus be seen that the decision in that case was put distinctly upon the ground that the pole was being used in a manner entirely foreign to the purpose for which it was erected. The telegraph company, in the exercise of the highest degree of care, could not have anticipated that a fire hose would be wrapped around the pole, thereby subjecting it to a strain more than it could stand.

In the case we have the gas mains were in the public road, near the surface, and at a place where it was expected and intended that vehicles would go. We think the case should have gone to the jury, and that the

court erred in ruling as a matter of law that the appellant failed to make out a case for a jury. Wherefore the judgment is reversed for a new trial, in conformity with this opinion.

CITIZENS' TRUST & GUARANTY CO. v. FARMERS' BANK OF ESTILL COUNTY.

(Court of Appeals of Kentucky. Oct. 15, 1915.)

1. EVIDENCE ⚡397 — PAROL EVIDENCE AFFECTING WRITINGS.

Where the parties to a contract have deliberately put their engagement into writing expressed to import a legal obligation, with no uncertainty as to its object or extent, all previous negotiations and agreements with reference to the subject-matter are presumed to have been merged in the writing, and, in the absence of fraud or mistake, parol or extrinsic evidence is not admissible to vary, modify, or contradict the terms of the written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756-1765; Dec. Dig. ⚡397.]

2. EVIDENCE ⚡397 — PAROL EVIDENCE AFFECTING WRITINGS—WRITTEN CONTRACT—CONSTITUTION.

A written contract which will merge prior negotiations and agreements and render inadmissible parol evidence varying its terms need not be in any particular form, or be contained in one paper, or signed by both parties, provided it constitutes an efficacious contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756-1765; Dec. Dig. ⚡397.]

3. MONEY RECEIVED ⚡18 — AUTHORITY TO ADVANCE FUNDS — SUFFICIENCY OF EVIDENCE.

In an action against an alleged joint borrower of funds for money had and received, evidence held to show that defendant's only obligation was that in return for a loan to its subcontractor it would turn over and pay to plaintiff all estimates furnished by the United States government, or money received thereon, for river work.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 70-72; Dec. Dig. ⚡18.]

4. BANKS AND BANKING ⚡134—LIEN OF BANK ON DEPOSITS.

Where a bank advanced a subcontractor for government work funds to meet pay rolls, it had the legal right to appropriate from a deposit in such bank by the contractor to the subcontractor's account an amount sufficient to cover the advance for pay rolls or to compel payment from the deposit.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. ⚡134.]

5. UNITED STATES ⚡74—CONTRACTS—SURETY'S RIGHT TO COMPLETE WORK—EFFECT.

Where a government contractor defaulted on the work, which was undertaken by his surety, such surety had the right to protect itself against threatened loss by assuming the contract and subletting it, without subjecting itself to primary liability for a debt of such subcontractor contracted by it to secure funds to meet pay rolls of the first contractor, although the surety's liability on the contract would have compelled it to liquidate such pay rolls.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 57; Dec. Dig. ⚡74.]

Appeal from Circuit Court, Lee County.

Action by the Farmers' Bank of Estill County against the Citizens' Trust & Guaranty Company. Judgment for plaintiff, and

defendant appeals. Reversed, and cause remanded for new trial.

Burnam & Burnam, of Richmond, and G. W. Gourley, of Beattyville, for appellant. Hazelrigg & Hazelrigg, of Frankfort, and Sutton & Hurst, of Beattyville, for appellee.

SETTLE, J. This is an appeal from a judgment entered upon a verdict for \$5,000, with interest from October 22, 1912, recovered by the appellee, Farmers' Bank of Estill County, against the appellant, Citizens' Trust & Guaranty Company, in the Lee circuit court. The action in which the judgment was rendered grew out of the following state of facts:

One W. S. Garrettson, who had entered into a contract with the United States government to construct lock No. 13 on the Kentucky river, executed a bond to the government for the faithful performance of the contract, upon which the appellant, Citizens' Trust & Guaranty Company, a corporation having its chief office at Parkersburg, W. Va., became his surety. After undertaking the work required of him by his contract, Garrettson failed to comply with its terms, and abandoned the work on lock No. 13. Being liable upon Garrettson's bond, it devolved upon appellant to complete the work of construction or pay to the government the liability incurred by it on the bond. Under a contract with the government similar in terms to that of Garrettson it undertook the former course. It thereupon sublet this contract to Gahren, Dodge & Maltby, a corporation of the state of New York, to complete the work of construction which had previously been undertaken and abandoned by Garrettson; the Gahren, Dodge & Maltby company being at that time engaged, under a contract with the government, in the construction of a lock and dam in the Kentucky river, known as No. 14, at or near Heidelberg, Ky. The contract between appellant and the Gahren, Dodge & Maltby company is contained in two writings, dated, respectively, September 17, 1912, and October 8, 1912, the first being as follows:

"This agreement made this 17th day of September, 1912, by and between Citizens' Trust & Guaranty Company of West Virginia, a corporation, of the one part, and Gahren, Dodge & Maltby, a corporation, of the state of New York, of the other part, witnesseth: That Gahren, Dodge & Maltby agrees to take over and complete the W. F. Garrettson contract at dam No. 13, Kentucky river, Kentucky, in all respects acceptable to the government of the United States, and to expedite the work and carry it on to the best possible advantage, upon the following terms and conditions: Gahren, Dodge & Maltby will at once put a plant worth \$5,000 upon the site, and will put such an organization and force of men there as will insure the prompt and speedy prosecution of the work, night and day, if necessary. They will pay the unpaid pay rolls which will be due from the 20th to the 25th of September, and will charge as their compensation ten per cent. (10%) of

the estimates now due and unpaid, and hereafter to become due; this ten per cent. (10%) to be paid as and when these estimates are collected. The certified pay rolls and bills for supplies and materials necessary to carry on the work will be paid out of each estimate as it becomes due, and Gahren, Dodge & Maltby agree and guarantee that they will not remove any of their plant from the site of the work without the consent of Citizens' Trust & Guaranty Company of West Virginia. Citizens' Trust & Guaranty Company of West Virginia agrees to sublet the work to Gahren, Dodge & Maltby upon the foregoing terms and conditions, and it is further understood that if the total cost of completion by Gahren, Dodge & Maltby be less than \$55,000, then one-half of the difference between that cost and \$55,000 shall be paid to Gahren, Dodge & Maltby in addition to the ten per cent. heretofore mentioned.

"This agreement is based upon the approval of the chief of engineers of the War Department of the United States government, and also upon the annulment of the contract of Garrettson, and the assumption of the same by Citizens' Trust & Guaranty Company of West Virginia, as surety for W. F. Garrettson. It is understood and agreed by the parties hereto that Gahren, Dodge & Maltby shall take care of and pay the pay roll on this work until such time as the estimates received from the government exceed the pay rolls paid.

"In witness whereof Citizens' Trust & Guaranty Company of West Virginia has caused this instrument to be signed in its behalf by R. J. A. Boreman, its first vice president, and its corporate seal to be affixed and attested, by J. H. Knapp, its secretary, this 17th day of September, 1912, and Gahren, Dodge & Maltby have caused its corporate name to be hereunto signed by J. W. Butler, its vice president, this 17th day of September, 1912. Executed in quadruplicate. [Signed] Citizens' Trust & Guaranty Company of West Virginia, by R. J. A. Boreman, First Vice President. Attest: J. H. Knapp, Secretary. [Signed] Gahren, Dodge & Maltby, by J. W. Butler, Vice President."

The second writing, of October 8, 1912, is as follows:

"A-19574. This agreement made this 8th day of October, 1912, by and between Citizens' Trust & Guaranty Company of West Virginia, a corporation, of the first part, and Gahren, Dodge & Maltby, a corporation, of the state of New York, of the second part, witnesseth: That the agreement heretofore entered into by and between the parties hereto, dated the 17th day of September, 1912, for the completion of the W. F. Garrettson contract at dam No. 13, Kentucky river, Kentucky, is intended to and does embrace and include the work and materials embraced and included in a contract dated the 7th day of October, 1912, entered into between Citizens' Trust & Guaranty Company of West Virginia, as contractor, and Major L. H. Rand, Corps of Engineers, U. S. A., contracting officer in behalf of United States government, a copy of which contract and the specifications, therein referred to as amended, is attached hereto.

"This supplemental agreement, with the copy of the contract and specifications above mentioned, to be attached to the agreement between the parties hereto, dated September 17, 1912, for the purpose of more clearly defining and explaining the various things intended to be included in and covered by the agreement of September 17, 1912.

"In witness whereof the parties have caused their corporate names to be signed hereto and their corporate seals to be affixed and attested by their proper officers thereunto duly authorized this 8th day of October, 1912. This supplemental agreement is executed in duplicate, one copy to be retained by each party. Citizens' Trust & Guaranty Company of West Virginia, by G. W. Peterkin, President. Attest: J. H.

Knapp, Secretary. Gahren, Dodge & Maltby, by J. W. Butler, Vice President."

At the time Gahren, Dodge & Maltby undertook the work there was an unsettled pay roll due the men who had been employed by Garrettson on the work. This pay roll was for the month of August and until about the 17th of September. Gahren, Dodge & Maltby, under their contract with appellant, retained in their employ the men who had worked for Garrettson, and to whom the money due on this pay roll was going. It will be observed from the foregoing writings that Gahren, Dodge & Maltby agreed that they would furnish not only the cash necessary for paying off Garrettson's unpaid pay-roll for August and September, 1912, but also all future pay rolls during the progress of the work of construction; and, in addition, that they would furnish the necessary labor and material and perform the work of completing the construction of the lock and dam. For the repayment of the sums advanced by Gahren, Dodge & Maltby to discharge the Garrettson and future pay rolls, as well as the cost of material, the above writings provide that appellant should turn over to them all amounts received from the government on the Garrettson estimates for August and September, 1912, and all subsequent estimates, and, in addition, that they should receive 10 per cent. of the amount of each of these estimates as a bonus; and, further, that if the actual cost to Gahren, Dodge & Maltby for the material and work required should be less than the government paid, they would make that much more profit over and above the 10 per cent. they would receive as stated; that is if the total cost was less than \$55,000, then one-half of the difference between such total cost and \$55,000 would be paid to Gahren, Dodge & Maltby as a bonus.

After beginning and continuing the work of construction required of them by the contract evidenced by the two writings referred to from October 8 until about December 31, 1912, Gahren, Dodge & Maltby violated the contract by refusing to proceed further with the work, and removed from the place of work their plant and equipment, which compelled appellant to assume and complete the work of construction. By reason of Gahren, Dodge & Maltby's abandoning their contract and repudiating their obligations, no settlement was ever had with them by appellant.

On the 22d day of October, 1912, and within two weeks after Gahren, Dodge & Maltby, under their contract with appellant, began work on lock No. 13, the company applied, through its vice president, Butler, to James A. Wallace, cashier of the appellee, Farmers' Bank of Estill County, for a loan of \$5,000 to pay the Garrettson pay roll for August and a part of September, 1912. Wallace refused to make the loan to Gahren, Dodge & Maltby, but, upon being told by Butler that he was acting for appellant, Wallace claim-

ed to have told him appellant was considered good, and if it would say let him have the money he would make the loan; and, following a conversation over the long-distance telephone between Butler and Wallace, on the one part and Knapp, appellant's secretary and treasurer, on the other, Butler was furnished the \$5,000 by Wallace. The proceeds of the loan were not, however, placed to the credit of Gahren, Dodge & Maltby on the books of the bank until after Wallace had received a telegram and letter from Knapp transmitted and mailed October 22, 1912. The loan not having been repaid by Gahren, Dodge & Maltby, or by appellant, suit was brought against them for the amount thereof by the appellee bank April 24, 1913. The petition, after setting out the corporate status of the appellant and Gahren, Dodge & Maltby, contains these averments:

"The plaintiff says that on the 22d day of October, 1912, at the special instance and request of both of the defendants, the plaintiff loaned to them the sum of \$5,000, which amount they each and both jointly and severally agreed to pay to plaintiff one day after date with 6 per cent. interest from date until paid, and plaintiff says that said indebtedness is just and due, and that no part thereof has ever been paid, and that no interest thereon has ever been paid, although same has frequently been demanded."

By the prayer of the petition judgment was asked against each of the defendants for \$5,000, with 6 per cent. interest from October 22, 1912, until paid, and for the plaintiff's costs. Although appellee claims to have taken a note for the amount of the loan, it will be observed that the petition does not declare upon the note. The appellant filed its separate answer, specifically denying each of the above allegations of the petition and praying that the petition as to it be dismissed, and for its costs. The result of the trial has already been stated.

The single question presented for decision by the record before us is: Was the \$5,000 obtained of appellee by J. W. Butler for Gahren, Dodge & Maltby a loan for which appellant became liable? It is not claimed by appellee that appellant is liable to it as surety for Gahren, Dodge & Maltby, but that its liability for the debt sued on is that of a joint obligor; the other obligor being Gahren, Dodge & Maltby. If the evidence found in the record fails to sustain this contention of the appellee, the contention of appellant that its motion for a peremptory instruction should have been sustained must prevail. In order to correctly determine the matter at issue it will be necessary to consider what was said and done at the time of the transaction in question. The testimony of appellee's cashier, Wallace, as to what then occurred is as follows:

"Mr. Butler came in to get this loan to pay up the Garrettsan pay roll, and I would not let him have the money, and he told me he was acting for the Citizens' Trust & Guaranty Company of West Virginia, and I told him they were considered good, and if they would say

let him have it I would let him have the money. So he got them over the phone and talked to them at some length, and then he [Butler] told them to repeat the conversation to me. I took the phone and I asked him if that was Mr. Knapp, and he said it was, and I asked Mr. Butler if that was his voice, and he said it was, so I was not acquainted with this gentleman, but Butler said that was his voice, so I told Mr. Knapp that Mr. Butler asked the loan for them to pay off the Garrettsan pay roll, and he told me to let him have the money. I asked him to confirm that by letter or wire, and he did both. Mr. Butler signed up the papers at that time, and after I got the letter and telegram I placed it to their [Gahren, Dodge & Maltby's] credit. Q. And by whom and on what account was that money drawn out of your bank? A. That was to pay laborers and things of that kind; that was supposed to be the Garrettsan pay roll."

Butler, who was introduced in behalf of appellee, testified as follows:

"Mr. Wallace said he would loan it to the trust company, but not to us. I said, 'We must have the money right away; if we don't get it there will be a riot;' and he suggested calling up the Citizens' Trust & Guaranty Company, and Mr. Knapp answered the phone, and I asked him what we were going to do about paying off the men. I said, 'Mr. Wallace has agreed to loan \$5,000 to pay them off.' Mr. Knapp said, 'Get it for yourself.' I said, 'They won't loan it to us; they will loan it to you;' and he said, 'All right; get it.' I said, 'Is it all right for me to sign a paper?' He said, 'Yes.' I said, 'You repeat that to Mr. Wallace;' so I got off the phone and let Mr. Wallace get on."

Although Wallace's testimony is in most respects corroborated by that of Butler, it will be observed that neither of them said Knapp gave any assurance that appellant would repay the loan or guarantee its payment. Wallace's testimony goes no farther than to say that, when he informed Knapp Butler asked a loan to pay the Garrettsan pay roll, Knapp said to let him have it, following which he asked Knapp to confirm that by telegram or letter, which he promised to do and did, both by telegram and letter. The substance of Butler's testimony is that when he told Knapp Wallace would not let Gahren, Dodge & Maltby have the desired loan, but would make it to appellant, Knapp said, "All right; get it," and that when he asked Knapp if it would be right for him to sign a paper the latter said, "Yes." Wallace does not claim to have heard this statement made by Knapp to Butler, or to have been told by Knapp that it would be right for Butler to sign a paper. It will also be observed that Butler does not claim to have asked Knapp if it would be right for him to sign appellant's or Knapp's name to a paper. The inquiry on this point was limited to whether it would be right for Butler to sign a paper, without indicating the character of the paper.

J. H. Knapp, appellant's secretary and treasurer, being introduced in its behalf, in substance, gave the following testimony:

"Mr. Butler called me over the long-distance telephone and said that he was in Irvine, Ky., that he had arranged with the Farmers' Bank there to borrow \$5,000 of money to pay the pay rolls and other charges on the 13 work, but

that the bank would not let him have the money unless he would agree to send to the bank the money from the government when we got it, and I told him that we would be willing to do that. * * * I talked to Mr. Wallace over the telephone and reiterated to him the same statement, that we would send to the bank—Butler had told us to send to the bank, and we would do it—this government money whenever it was received and after it was received. Mr. Wallace did not ask me over the telephone to guarantee the payment of the note, or anything of that sort."

Knapp claimed he had never heard of Wallace's bank prior to that time, and further said:

"Mr. Wallace did not say anything to me about money being borrowed for the guaranty company, and I said nothing to him about it, and I did not ask him to let Gahren, Dodge & Maltby have the money."

Knapp also testified that it was agreed in the conversation between him and Wallace what he said with respect to the loan should be confirmed by a telegram or letter, both of which were on that day, October 22, 1912, sent to Wallace, and it is admitted by Wallace that the telegram was received by him that day, and the letter on October 24th, two days later. It is patent, therefore, that whatever assurance was made or obligation assumed by appellant in the conversation in question was contained in the telegram and letter, and further patent that the subsequent action taken by Wallace in making the loan was based upon the contents of the telegram and letter, for he emphatically states, and more than once repeats the statement, that the \$5,000 loaned was not placed to the credit of Gahren, Dodge & Maltby until October 24th, and after the telegram and letter had both been received. If the assurance given or undertaking assumed by appellant as expressed in the telegram and letter had differed in any material respect from the understanding between the parties arrived at over the telephone, the conclusion is inevitable that Wallace, as the representative of the appellee bank and a good business man, would have held up the loan and had a further communication with Knapp. It is the contention of appellant that the only agreement made by Knapp with Wallace and Butler over the telephone was that appellant would turn over or pay to the appellee bank the estimates on dam 13 when received from the government, or the money received upon such estimates from the government, to reimburse it for funds it advanced Gahren, Dodge & Maltby for settlement of pay rolls on dam 13, and the telegram and letter referred to fully sustain this contention.

The telegram is in the following words and figures:

"Parkersburg, W. Va., Oct. 22, 1912.

"Farmers' Bank, Irvine, Ky. Will pay to you estimates on dam thirteen when received from government for reimbursing funds advanced Gahren, Dodge & Maltby for pay roll on dam thirteen.

"Citizens' Trust & Guaranty Co."

The letter is as follows:

"Citizens' Trust & Guaranty Company of West Virginia.

"Parkersburg, W. Va., Oct. 22, 1912.

"Farmers' Bank, Irvine, Ky.—Gentlemen: Referring to work on dam No. 13, Kentucky river, which is being completed by this company under contract with the United States government, the said contract being made by reason of this company's liability as surety upon the bond of W. F. Garrettson, a former contractor, and which work we have subcontracted to Gahren, Dodge & Maltby, our understanding is with the latter concern that they are to advance certain funds to meet the pay roll, which sums are to be covered by estimates received by us from the government. We are requested by telephone today to wire you agreeing to turn these estimates over to you till reimbursed for sums advanced Gahren, Dodge & Maltby for purposes of meeting these pay rolls, and we assume, therefore, that they have made arrangements with you for advancing them the necessary cash. Pursuant to this telephonic request, we have just wired you as follows:

"Will pay to you estimates on dam thirteen, when received from government for reimbursing funds advanced Gahren, Dodge & Maltby for pay roll on dam thirteen.

"Citizens' Trust & Guaranty Co. [of W. Va.]—which wire we now confirm.

"Yours truly, W. G. Peterkin, President."

[1, 2] The above telegram and letter were introduced in evidence by appellee and read and identified by Wallace in giving his testimony. They therefore constitute a part of appellee's evidence. They were without objection accepted by appellee as confirmatory of the agreement made with appellant through Knapp over the telephone, and were retained by it as evidence of the agreement of the parties. This being true, their relation to this case is the same as would be sustained by a paper written and signed by the parties to evidence an oral agreement previously made, and which, in the absence of a claim of fraud or mistake on its execution, must be accepted as containing the whole agreement or contract made by the parties. It is a well-known rule of law that, where the parties to a contract have deliberately put their engagements into writing, so expressed as to import a legal obligation, without any uncertainty as to the object or extent of their engagement, all previous negotiations and agreements with reference to the subject-matter are presumed to have been merged in the writing, and with respect to such contract it is a well-known rule of law that, in the absence of fraud or mistake, parol or extrinsic evidence is not admissible to vary, add to, modify, or contradict the terms or provisions of the contract as put in writing. But, as said in 17 Cyc. 599:

"It is, of course, necessary to the application of the rule just stated that there shall be a complete written contract between the parties, the writing being of such a nature as to show that it was intended to evidence their agreement with reference to the subject-matter, and having the element of mutuality necessary to constitute a complete contract, but it is not necessary that the contract shall be in any particular form or that it shall be all contained in one paper, or signed by both parties; and a writing evidence-

ing the whole of an agreement between the parties which has been delivered, accepted, and under which business has been transacted cannot be varied by parol, even though it is not signed. Nor does the fact that a contract originally rested in parol and was reduced to writing only after being partly performed preclude the application to the writing of the rule excluding parol evidence to vary or contradict the writing, for the parol agreement is merged in the written one." *Nat. Mutual Benefit Ass'n v. Heckman*, 86 Ky. 254, 5 S. W. 565, 9 Ky. Law Rep. 525; *Vansant v. Runyon*, 44 S. W. 949, 19 Ky. Law Rep. 1981; *Gaither v. Dougherty*, 38 S. W. 2, 18 Ky. Law Rep. 709; *Farmer v. Gregory*, 78 Ky. 475; *Voss v. Schebeck*, 76 S. W. 21, 25 Ky. Law Rep. 481.

Neither the telegram nor letter contains any intimation of an agreement or undertaking on the part of appellant to assume the payment to appellee of the \$5,000 loaned by it to Gahren, Dodge & Maltby; nor does either contain any statement or admission of an understanding on the part of appellant that the loan of the \$5,000 had been made to it. On the contrary, the contents of both clearly indicate a mere understanding on the part of appellant that the loan of the \$5,000 was made by appellee to Gahren, Dodge & Maltby, and that appellant was only asked to turn over to appellee, in behalf of Gahren, Dodge & Maltby, the estimates furnished by the government from time to time upon the work done on dam 13, or the money received on such estimates, that they might be applied to the payment of the loan of \$5,000 made Gahren, Dodge & Maltby by appellee, until discharged.

It will further be observed that neither the telegram nor letter manifests any agreement or understanding on the part of appellant or Knapp that appellant was to execute or become a party to a note or other writing to be taken by appellee for the loan; nor does either contain any authority to Butler to execute such a paper or sign appellant's name thereto. In this connection it should be remarked that the understanding of appellant, expressed in the telegram and letter, which Knapp testified is the only agreement made by him with Wallace and Butler over the telephone, is in accordance with the contract it made with Gahren, Dodge & Maltby, a provision of which required it to turn over to Gahren, Dodge & Maltby, to reimburse them for moneys they were to advance on the pay rolls and for supplies, not only the government estimates, or moneys received thereon, in arrears on the work done on dam 13 by Garrettson, but also such estimates or moneys as appellant might receive for the work of Gahren, Dodge & Maltby; and, as we shall presently see, there is no contrariety of evidence as to the fact that appellant has fully complied with the above provision of its contract with Gahren, Dodge & Maltby. The note Wallace claims to have taken from Butler October 22, 1912, is as follows:

"\$5,000.00 Irvine, Ky., Oct. 22, 1912.

"One day from date we promise to pay to the order of Farmers' Bank of Estill County, Ir-

vine, Ky., five thousand dollars, negotiable and payable at Farmers' Bank of Estill County, Irvine, Ky., value received, with interest at the rate of 8 per centum per annum after maturity until paid. Indorsers waived demand, protest, notice of protest, and all legal diligence to enforce collection. As per agreement of this date hereto attached, this money advanced is for Aug. and part of Sept. pay roll of W. F. Garrettson at lock 13 Ky. and other small bills, as per telephone with Mr. Knapp.

"Citizens' Trust & Guaranty Co.,
"Of Parkersburg, West Va.
"Gahren, Dodge & Maltby, Agent,
"J. W. Butler, V. P."

For some reason not explained by Wallace or Butler, the former also caused the latter to execute to him the following additional writing:

"Irvine, Ky., Oct. 22/12.

"This is to certify that I have borrowed from the Farmers' Bank of Estill Co. (\$5,000.00) five thousand dollars for the Citizens' Trust & Guaranty Company of Parkersburg, West Virginia, to pay W. F. Garrettsons pay roll for Aug. and part Sept. and other small bills as per conversation over telephone with Trust Co. and this day confirmed by wire to said bank.

"Citizens' Trust & Guaranty Co.
"Gahren, Dodge & Maltby, Agents,
"By J. W. Butler, V. P."

If the execution of the note was unauthorized by appellant, the execution of the above writing by Butler was also unauthorized. As neither Wallace nor Butler claims that their conversation with Knapp over the telephone, or any memorandum thereof, was at the time or subsequently put in writing, the statement in the note that it was executed "as per agreement of this day, hereto attached," must either refer to the independent writing given by Butler or the telegram that day received by Wallace from Knapp. In any event, the agreement expressed by the telegram and in the letter from appellant of the same date must be regarded as the one made between Knapp, Wallace, and Butler over the telephone, for both were sent at Wallace's request to confirm what had been agreed on by telephone, and were without objection received and accepted by both Wallace and Butler as confirmatory of the telephone agreement.

As to the signing of appellant's name by Butler to the note and writing, Knapp testifies that Butler in so doing acted without authority. Butler alone claims that it was authorized by Knapp, but, as Knapp's testimony as to the agreement made by telephone is corroborated, and that of Butler as well as Wallace contradicted, by the contents of the telegram and letter, we are constrained to accept the denial of Knapp that he had authorized the signing of appellant's name to the note. Moreover, it appears from other evidence in the record, which is uncontradicted, that Knapp himself was without authority to sign appellant's name to the note; such authority, under its corporate powers and by-laws, being vested in its president and vice president, and not in its secretary or treasurer, both of which positions Knapp

holds. As Knapp was without authority to sign appellant's name, he was without power to confer such authority upon Butler; so in no event can it be said that the note in question imposes upon appellant any obligation to pay it. Doubtless appellee's recognition of the want of authority in Butler to sign appellant's name to the note led to its suing the latter as "for money had and received," instead of upon the note.

[3] It is patent, therefore, that appellee's own evidence, furnished by the telegram from Knapp, appellant's secretary and treasurer, and the letter from Peterkin, its president, which appellee's cashier and Butler accepted as confirmatory of and manifesting the agreement made by means of the conversation between them and Knapp over the telephone, conclusively shows that the only obligation or undertaking assumed by appellant was that it would turn over and pay to appellee all estimates furnished by the United States government or money it received thereon for work on dam 13 to reimburse appellee for funds advanced Gahren, Dodge & Maltby for pay rolls on dam 13. This understanding applied, of course, to the estimates on the pay rolls of Garrettson then in arrears and all future estimates or moneys on the work of Gahren, Dodge & Maltby. After accepting without objection the telegram and letter intended to confirm the contract made with appellant by telephone, and thus manifesting its approval of the terms thereof as set forth in both, appellee is bound thereby, and will not be permitted to contradict or modify its meaning. Appellee's approval of the contents of the telegram and letter is free of doubt, because shown by its refusal to deposit to the credit of Gahren, Dodge & Maltby the amount loaned, before the letter of appellant's president was received, which did not reach its hands until October 24, 1912.

[4] Appellant's compliance with the agreement made with appellee by telephone and expressed in its telegram and letter to it is equally free from doubt. There is no contrariety of evidence as to the fact that it paid to appellee for Gahren, Dodge & Maltby every estimate and all moneys it received from the government for work on dam 13. Appellant did not pay appellee the money on estimates for the work of August and part of September, 1912, done by Garrettson on dam 13, for those estimates and the money thereon have never been furnished or paid by the government and are yet withheld for future adjustment. But, independent of the Garrettson estimates, appellant paid to appellee for Gahren, Dodge & Maltby, from October 12, 1912, down to the time Gahren, Dodge & Maltby threw up their contract and abandoned work on dam 13, on estimates from the government, about \$11,000; and, as the sums thus paid were placed to the

credit of Gahren, Dodge & Maltby in the appellee bank, and under the latter's agreement with appellant and Gahren, Dodge & Maltby were all liable for the debt of \$5,000 due it from Gahren, Dodge & Maltby, it had the legal right to appropriate therefrom an amount sufficient to pay the debt, or to compel its payment from these deposits by that company, and, if it did not do so, it was not the fault of appellant.

[5] It is not material to this controversy that appellant's liability as surety on the original contract made by Garrettson with the United States government would, in the absence of the subcontract it made with Gahren, Dodge & Maltby, have compelled it to liquidate the pay rolls, liability for which was assumed by the latter. It had the right to protect itself against such threatened loss by making the contract with Gahren, Dodge & Maltby, without subjecting itself to liability to such debts of that company as it made with appellee. Not being primarily liable to appellee for the loan it made Gahren, Dodge & Maltby, its mere willingness, with the consent of Gahren, Dodge & Maltby, to aid the former in securing its debt against the latter by paying to it the moneys received on government estimates, which its contract with Gahren, Dodge & Maltby had required it to pay them, made appellant liable to appellee for nothing more than the amount of the estimates received by it from the government, and this liability it has fully discharged. On the other hand, if any loss has been sustained by appellee, it has resulted from its own negligence in failing to appropriate to the payment of the debt sued on enough of the moneys paid it for Gahren, Dodge & Maltby by appellant to accomplish that end.

As there is no evidence in the record to sustain the right of recovery attempted to be enforced by appellee, the peremptory instruction directing a verdict for the appellant, as asked by the latter, should have been granted by the trial court. This conclusion renders consideration of the instructions given by the court unnecessary. For the reasons indicated, the judgment is reversed, and the cause remanded, with directions to the circuit court to grant appellant a new trial, and for further proceedings consistent with the opinion.

MARSHALL v. HOLLINGSWORTH.

(Court of Appeals of Kentucky. Oct. 14, 1915.)

1. GUARANTY \Leftrightarrow 91—CONTRACT—SUFFICIENCY OF EVIDENCE.

In an action against a guarantor of notes, evidence held insufficient to support the defense that defendant's guaranty was written above his indorsement in blank without his knowledge or consent.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 104; Dec. Dig. \Leftrightarrow 91.]

2. GUARANTY ~~67~~—DISCHARGE OF GUARANTOR—NOTICE OF DEFAULT.

Under Ky. St. § 3720b, providing that, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged, the holder's failure, upon dishonor of a note, to give notice thereof to its negotiator, who had indorsed and guaranteed it, did not discharge such guarantor, since his unconditional and absolute guaranty fixed him with liability immediately upon default of the principal debtor.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 77; Dec. Dig. ~~67~~.]

3. GUARANTY ~~91~~—LIABILITY OF GUARANTOR—EXTENSION OF TIME OF PAYMENT—SUFFICIENCY OF EVIDENCE.

In an action against the guarantor of a note, evidence held insufficient to sustain the allegations of defendant's answer that at maturity the plaintiff agreed with the maker for an extension of time of payment of one year.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 104; Dec. Dig. ~~91~~.]

4. GUARANTY ~~57~~—DISCHARGE OF GUARANTOR—EXTENSION OF TIME FOR PAYMENT.

The extension of time for payment which, when extended by the holder of a note to the maker, will discharge the guarantor thereof, must be based on a binding agreement, founded on consideration, and for a definite time; mere indulgence by the holder to the maker or even a naked promise to extend the time of payment will not operate as the guarantor's discharge.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 68; Dec. Dig. ~~57~~.]

Appeal from Circuit Court, Lyon County.

Action by J. W. Hollingsworth against E. D. Marshall. Judgment for plaintiff, and defendant appeals. Affirmed.

N. W. Utley, of Eddyville, and Berry & Grassham, of Paducah, for appellant. John O. Gates, of Princeton, for appellee.

HANNAH, J. On December 22, 1910, E. D. Marshall sold and conveyed to Shirley Tisdale a tract of land in Lyon county. The consideration was \$4,940.62, of which \$500 was paid in cash upon the execution of the conveyance, and the remainder was evidenced by interest-bearing notes secured by lien retained on the land so conveyed, as follows: \$500 due January 1, 1912; \$985.15 due January 1, 1913, and a like amount due January 1, 1914; \$985.16 due January 1, 1915, and a like amount due January 1, 1916. The deed contained a stipulation that default in the payment of the first note or in the payment of the interest on any of the notes should precipitate the whole indebtedness and render it due and payable forthwith. On March 24, 1911, Marshall sold the notes mentioned to J. W. Hollingsworth, of Princeton, in Caldwell county.

Shirley Tisdale died in June, 1912, without having paid the \$500 note due January 1st of that year or either of the others. The administrator of his estate instituted a suit to settle the estate. Hollingsworth was made a defendant, and he filed the notes and asserted his lien on the land mentioned. Upon

decretal sale the land brought \$1,324.97, less than the principal and interest of the notes; and Hollingsworth thereupon brought this action against Marshall to recover the balance due on the notes, basing his right so to recover upon the ground that Marshall executed by indorsement upon the notes at the time of the transfer thereof to him an unconditional guaranty thereof. The plaintiff having succeeded in the trial court, the defendant appeals.

1. The notes mentioned each bear this indorsement:

"For value received, I hereby transfer and assign the within note to J. W. Hollingsworth, and guarantee the payment of same. March 24, 1911. [Signed] E. D. Marshall."

[1] Appellant's first defense was that he merely indorsed the notes in blank at the time he sold them to Hollingsworth, and that the guaranty was written above his signature thereafter, without his knowledge or consent, and he so testified; but the overwhelming weight of the evidence on this issue is to the contrary. It is shown that appellee, Hollingsworth, lived in Caldwell county, while the land sold by appellant was in Lyon county; that appellee knew nothing about the land upon which the notes were a lien, or its value. Under these circumstances, it is quite improbable that the notes were purchased by him without a guaranty. But, in addition to that, it is shown that the transfer of the notes was effected in the Farmers' National Bank at Princeton, of which Hollingsworth was vice president, and that the words of the guaranty were written upon the notes by the cashier of the bank before the name of Marshall was indorsed thereon; and this testimony is supported by that of the cashier and other attachés of the bank then present. The appellant is therefore liable as unconditional guarantor of the notes sold and transferred by him to appellee.

[2] 2. But he contends that, as no notice of dishonor of the \$500 note due January 1, 1912, was given to him, he was thereby released from liability on that note in virtue of the provisions of section 89 of the Negotiable Instruments Law (Kentucky Statutes, § 3720b), which is as follows:

"When a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged."

If appellant had been a mere indorser of the note in question, this contention would prevail; but he was not alone an indorser; he was also a guarantor, and, as such, his guaranty being unconditional and absolute, he was fixed with liability immediately upon default of the principal debtor, and failure upon the part of the creditor to give notice to the guarantor of such default did not operate as a discharge. *Levi v. Mendell*, 1 Duv. 77.

[3, 4] 3. Section 120 of the Negotiable Instruments Laws provides that a person secondarily liable on the instrument is discharged (subsection 6) by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved in the original instrument. A guarantor is secondarily liable. Section 191, Negotiable Instruments Law. And as further defense appellant pleaded that when the \$500 note matured, on January 1, 1912, appellee agreed with Tisdale that, if he would pay the interest accrued and place improvements upon the land to that extent, an extension of time of payment of that note for one year would be granted; that this agreement was made without appellant's knowledge or assent; that appellee thereby waived the right to declare a precipitation of the whole indebtedness, and, in effect, extended the time of payment of all the notes, and thus released appellant from liability thereon. Whether such an extension of time would have released the guarantor from liability on any note other than the \$500 one is a question we find it unnecessary to discuss; for appellant by his proof failed to sustain the allegations of his answer. Such extension of time was sought to be proven by the testimony of a brother of Shirley Tisdale in regard to certain statements made to him by appellee. His testimony on this subject was as follows:

"Q. Did you ever have any talk with Mr. Hollingsworth about these notes that Shirley Tisdale died owing him; if so, when? A. Well, I don't know; the day of the sale—I don't remember what day it was—the day the place here was sold, we talked a little about the business here in Eddyville. He told me that my brother had paid the interest on the notes, but had not paid any of the principal; that he came to him and told him he could pay the interest on the notes, but couldn't pay the principal and have money to do what he wanted to do on the farm; that he would like to use the money on the place, what he had left, and that he told him it would be all right; and that he did pay him the interest. * * * I think that was all that was said about the notes, anyway. Q. Did he say how much money your brother told him that he could pay or that he wanted to use in improving the land? A. Didn't specify the amount, that I remember of, at all that he wanted to use. Q. Did he tell you that he consented that your brother might do this? A. Yes; said to pay him the interest and he extended the time."

This conversation is denied by Hollingsworth; but, conceding that it was had, there is no showing of such an extension as would operate to release the guarantor.

"The extension of the time of payment given by the creditor to the principal is an alteration of a very material part of the contract, and unless consented to by the surety (or guarantor), such extension or valid agreement for extension for a definite time will operate to discharge him from liability for such payment." Elliott on Contracts, § 3968.

But the extension must be based on a binding agreement, founded upon consideration, and for a definite time. 20 Cyc. 1472; 32 Cyc. 202. Mere indulgence by a creditor to the debtor, or even a promise by the creditor to extend the time of payment of the debt, will not operate to discharge the surety or guarantor; a contract valid and complete in all its essentials is requisite. Barber v. Ruggles, 87 S. W. 785, 27 Ky. Law Rep. 1077. It must be for a definite time and based on a valid consideration. Davless County Bank & Trust Company v. Wright, 129 Ky. 21, 110 S. W. 361, 33 Ky. Law Rep. 457, 17 L. R. A. (N. S.) 1122.

Viewed in the light of these rules, the evidence for appellant fails to sustain his plea of discharge from liability in virtue of the alleged extension of time.

Judgment affirmed.

HODGE TOBACCO CO. v. SEXTON et al. (Court of Appeals of Kentucky. Oct. 15, 1915.)

1. PLEADING \S 180—REPLY—SCOPE OF.

Under Civ. Code Prac. § 98, subsecs. 1, 2, 3, and 4, declaring that a reply may contain a traverse, a statement of facts avoiding a defense, a counterclaim, or a cross-petition, a reply cannot, where another has intervened as a defendant, set up against such person a cause of action which was not contained in the petition, and in cases of an attempt to do so it should be stricken.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 358-384; Dec. Dig. \S 180.]

2. APPEAL AND ERROR \S 171—CHANGE OF THEORY ON APPEAL.

Where the intervening defendant, after overruling of its demurrer, filed a rejoinder to the reply which set up a wholly new cause of action against it, the case on appeal will be disposed of on the theory that the reply took the place of an amended petition; for, where the case is disposed of below on one theory, the theory cannot be changed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. \S 171.]

3. PLEADING \S 196, 355 — DEMURRER — SCOPE OF.

Where a cause of action is attempted to be set up by reply instead of amended petition, the defect can be reached by motion to strike and not demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 453-455, 1102-1110; Dec. Dig. \S 196, 355.]

4. PRINCIPAL AND AGENT \S 145 — UNDISCLOSED AGENCY—LIABILITY OF PRINCIPAL.

Persons giving credit to the agent of an undisclosed principal may recover from the principal moneys furnished the agent for the business of his agency, an undisclosed principal being bound by the acts of his agent to the same extent as a disclosed principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 499, 513-520; Dec. Dig. \S 145.]

5. PRINCIPAL AND AGENT \S 25—ESTOPPEL TO DENY AGENCY.

As an estoppel is raised only where the owner of property or of a right knowingly makes misrepresentations or acts in such a manner that another not knowing the facts is misled

to his prejudice, the undisclosed principal of an agent who borrowed money inducing plaintiffs to become his surety is not estopped to deny liability; it appearing that he did not know of the transaction and did no act influencing plaintiffs.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 42-45; Dec. Dig. ¶25.]

For other definitions, see Words and Phrases, First and Second Series, Estoppel.]

6. PRINCIPAL AND AGENT ¶23—ACTIONS—EVIDENCE.

Where sureties who were compelled to pay the debt of an agent sought to hold the agent's undisclosed principal, evidence held insufficient to show the agent's authority to borrow, or in fact his agency, at the time of negotiating the loan.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. ¶23.]

7. SUBROGATION ¶1—CREDITORS OF AGENT—PRIVITY.

Where a principal was indebted to an agent, sureties of the agent who had been compelled to pay his debt cannot be substituted to the agent's rights against the principal unless they proceed by way of attachment or proper action.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 1, 2; Dec. Dig. ¶1.]

Appeal from Circuit Court, Lyon County.

Action by W. A. Sexton and others against W. D. Whaley, in which the Hodge Tobacco Company intervened. From a judgment for plaintiffs, the intervening defendant appeals. Reversed and remanded, with directions.

Wheeler & Hughes, of Paducah, for appellant. Utley & Utley, of Eddyville, for appellees.

HURT, J. The appellees, who were the plaintiffs below, by their petition alleged that W. D. Whaley had procured a loan from the Citizens' Bank of Kuttawa, in the sum of \$250, and executed his note therefor, with the appellees as his sureties, and the note becoming due, and Whaley failing to pay it, they were compelled to and did satisfy the note, and sought a judgment against Whaley for the amount of the note with interest. They also alleged grounds for an attachment and obtained an attachment, which was levied upon a parcel of tobacco as the property of Whaley, to secure the payment of the judgment that they might recover. Whaley was the only defendant named in the petition, or against whom a recovery was sought. He filed an answer, in which he admitted all the allegations of the petition. The appellant, Hodge Tobacco Company, filed a petition to be made a party, in which it alleged that it was the owner of the tobacco, which had been attached, and was the owner of it at the time the attachment was levied upon it, and that it had been purchased for it by Whaley, as its agent, and sought a dismissal of the attachment. By an order, the Hodge Tobacco Company was made a party defendant to the suit. The appellees filed a reply, in which they admitted the tobacco was the property of the Hodge Tobacco Company, and

was its property when the attachment was levied. They also alleged, in another paragraph, that the agency of Whaley for the tobacco company was a secret agency, or was not known and understood by the public at the time of the execution of the note by Whaley and they as his sureties, to the Citizens' Bank; that the tobacco company concealed the agency and allowed Whaley to do so; that they never knew of the agency until the filing of the petition by the tobacco company to be made a party to the suit; that, at the time they became the sureties, they believed that Whaley was intending to do a business upon his own account, and was borrowing the money to be put into the business in his own interest and right; and that the tobacco company was now estopped, by reason of said facts, from asserting ownership to the tobacco. By another paragraph, they alleged that the appellant, through its agent, Whaley, had borrowed the money as an undisclosed principal for the purpose of using it in its business of buying tobacco, and that it was so used, and that Whaley's acts in borrowing the money were within the scope or apparent scope of his agency, and prayed a judgment against the Hodge Tobacco Company and Whaley for the amount of the note, and asked that the attachment be sustained. The appellant filed a general demurrer to the reply, and also demurred to each paragraph of it, all of which were overruled, and to which it saved exceptions. It then filed a rejoinder, traversing the allegations of the reply, and the case, coming on for trial before the court and a jury, resulted in a verdict of the jury and judgment of the court against Whaley and the appellant for the sum of \$225, and the costs of the action. The appellant filed grounds for a new trial, which being overruled, it excepted and now appeals to this court.

The appellant also moved the court to discharge the attachment upon the face of the papers of the case. Upon the trial at the conclusion of the testimony for the appellees, and also at the conclusion of all the testimony in the case, the appellant moved the court to peremptorily instruct the jury to find a verdict for it, but these motions were both overruled, and to which the appellant excepted.

[1-3] It is insisted by the appellant that the judgment against it ought to be reversed, because the court erred in not sustaining its demurrer to the reply and the different paragraphs of it, and because the court erred in overruling its motion for a direct verdict, and its failure to sustain its motion to discharge the attachment.

The only party of whom a recovery was sought, or against whom a cause of action was stated in the petition, was W. D. Whaley. The cause of action there relied upon was the implied promise of Whaley to pay

the amount of the note which they had, as sureties, been obliged to pay for him. The appellant was not mentioned in any way in the petition and no recovery sought of it in the petition. The only cause of action attempted to be stated against the appellant was in the reply of the appellees, and it was only therein that a recovery was sought against it. By the provisions of section 98, subsecs. 1, 2, 3, and 4, of the Civil Code, it is very evident that, under the state of case and the recovery here sought, a plaintiff cannot maintain a cause of action and seek a recovery of one made a defendant by stating a cause of action and seeking a recovery from such person in a reply. According to the provisions of the Civil Code, the plaintiff must necessarily seek a recovery in his petition, or by an amended petition. The appellant, if it did not desire to contest upon the merits the cause of action stated against it in the reply, should have resorted to a motion to strike out such part of the reply as undertook to maintain a cause of action and a recovery against it, instead of undertaking to reach that question by a demurrer. The appellant, however, failed to make any motion to strike out from the reply, but filed a rejoinder, after its demurrer was overruled, in which it made an issue with the plaintiffs upon the cause of action stated against it. In the case of *Ruffner v. Ridley*, 81 Ky. 165, this court held that, where a reply is treated by the lower court and parties as an amended petition, it will be so treated by this court.

[4] Persons giving credit to an agent, who has an undisclosed principal, may maintain an action against the principal for the moneys furnished, upon his discovery, and an undisclosed principal is bound by the acts of his agent within the scope of his agency, to the same extent as a disclosed principal, and if it was true, as alleged in the reply, that the appellant, as the principal, borrowed the money which Whaley received upon the note executed to the bank, as the agent of appellant, and that the transaction was for appellant, and the money to be put into its business and it was so used, it seems that the appellees stated a cause of action entitling them to recover of the appellant, and for that reason its demurrer, upon the ground that no cause of action was stated against it, was not well taken. For the same reason, the demurrer to the third paragraph of the reply was properly overruled.

[5] The demurrer to the second paragraph of the reply, wherein it was attempted to plead an estoppel against appellant claiming to be the owner of the tobacco, should have been sustained. No fact is alleged showing that appellant ever knew of the fact of the appellees becoming surety of Whaley, neither is any fact or circumstance alleged, which would show that there was ever any duty imposed upon the appellant to give information of the agency to the appellees.

An "estoppel" means where one is the owner of property or has a right, but is precluded from claiming the property or to assert the right on account of some representation or act of his in regard to the property or right, which has induced another, not knowing the facts, to act to his prejudice. An element that is essential to make an equitable estoppel is that the person who is invoking it must have been influenced by or relied upon the representations or conduct of the person sought to be estopped, and was thereby induced to do something to his prejudice. *Taylor v. Jenkins*, 65 S. W. 601, 23 Ky. Law Rep. 1574; *Smither v. McGinnis*, 35 S. W. 630, 18 Ky. Law Rep. 134; *Wilson v. Scott*, 11 Ky. Law Rep. 370. It is also essential that the one to be estopped must have had knowledge of the facts, and the one relying upon the estoppel must have been ignorant of the truth, and was led into doing something that he would not have done but for the silence of the one sought to be estopped. *Newell v. Dunnegan*, 1 Ky. Law Rep. 354; *Milby v. Akridge*, 59 S. W. 18, 22 Ky. Law Rep. 867; *Watson v. Prather*, 65 S. W. 439. There is no allegation that the tobacco, which was attached, was in Whaley's possession when appellees became his sureties, or paid the note, or that the tobacco was ever in the possession of Whaley, or that he was claiming or pretending that it was his own at the time. Neither is there any allegation that appellant ever pretended, by word or act, that the tobacco was owned by Whaley. Hence there was no act nor silence on the part of appellant, which induced appellees to act to their prejudice in becoming the sureties of Whaley. The mere fact that a creditor believes that property is owned by his debtor and causes an attachment to be levied upon it does not estop the real owner from asserting title to it, unless the owner has, by his acts or silence, when he ought to speak, induced or caused the creditor to do some act to his prejudice in regard to it.

[6] The question left to be determined is whether there was any evidence which conduced to show that the appellant borrowed the money in controversy, through its agent, Whaley, or that Whaley was the agent of appellant, with authority to borrow money for it, and did borrow this money for appellant. If there was any evidence to support this averment, then the case should have been submitted to the jury, otherwise it should not have been. The statements of the witnesses as to what Whaley said about being the agent of appellant were not competent evidence against appellant to prove such agency, and should have been excluded. It should be stated that the three appellees each testified that they had no knowledge, at the time they became the sureties of Whaley, that he was an agent of the appellant, and that they looked to him and his business

to satisfy the note, and not to the appellant or any one else. The proof shows, without contradiction, that on the 10th day of December, 1913, Whaley entered into a contract with the appellant, by which he sold to the appellant an unlimited quantity of tobacco of certain dimensions and at certain prices. There was no provision in this contract that Whaley should buy tobacco at all. During the life of this contract he could not be considered the agent of appellant in any sense. On the 11th day of December, the day following the making of the contract between him and the appellant, he executed the note and obtained the money in controversy, and the appellees became his sureties upon the note. Whaley was introduced as a witness for appellees, and is the only person who could possibly know, so far as the evidence discloses, what he did with the proceeds of the note, and he stated that at the time he executed the note he was not an agent of appellant, but was preparing to open up and conduct a business of his own, in buying tobacco and delivering it to appellant, under the contract that he had with it, and that he used the entire proceeds of that note in expenses incurred by him while operating under that contract. After that time, 10, 15, 20, or 30 days, he did enter into an arrangement with appellant, by which he became the agent of appellant in buying tobacco and shipping to it.

[7] It seems that Whaley and appellant have a controversy about whether the appellant should pay him for certain expenses incurred by him in conducting the agency he had for it, in addition to the commissions paid him for his services; but, if his testimony can be believed, no part of the proceeds of the note, upon which appellees were his sureties, was invested in any of those expenses paid by him after he became the agent of appellant, and there is not a particle of testimony disclosed by the record to the contrary. There is no contradiction in the proof that Whaley was not the agent of appellant when he borrowed the money and appellees became his sureties, and, of course, the appellant could not be held as borrowing this money through Whaley, as its agent, when in fact and truth Whaley was not its agent. The only cause of action which appellees could have would be one against Whaley, to recover from him the money paid for him by them, as his sureties, or, if Whaley was the agent of appellant at the time and had authority to borrow money for it, appellant would then be the principal, although undisclosed at the time, and appellees could maintain their action against it; but there is a total failure of proof to show, either that Whaley was the agent of appellant at the time he incurred the obligation, or that he had any authority of any kind to borrow money for appellant, and there is, likewise,

an entire failure of proof to show that the money was invested in the business of appellant, but, instead thereof, the proof conduces to show the contrary, altogether. If Whaley, by an arrangement thereafter with appellant, by which he became its agent, incurred expenses which he would be entitled to recover against it, the appellees, because of his indebtedness to them, could not be substituted to his rights against appellant, in the absence of any privity between him and appellees. The only way in which appellees could reach what appellant might owe Whaley would be by means of a garnishment of appellant in a proper action for that purpose, and the recovery would have to be upon the basis of what appellant owed Whaley, and not upon the basis of appellant being their debtor.

The court should therefore have sustained the motion for a direct verdict by the jury.

It being admitted in the pleadings that appellant owned the tobacco, and no sufficient grounds shown to estop it from claiming it, the court should have discharged the attachment levied upon it as the property of Whaley.

The judgment appealed from is therefore reversed as to the Hodge Tobacco Company, and the cause remanded for proceedings consistent with this opinion.

AVERY BUILDING ASS'N v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 14, 1915.)

1. BUILDING AND LOAN ASSOCIATIONS — 4 — FORMATION—CHANGE OF NAME.

Where an existing corporation, to comply with Ky. St. § 856, providing that the words "Building Association" must form a part of the name of every building and loan association, added to its name, Home and Savings Fund Company, the words "Building Association," under the circumstances the amendment of the name did not create a new corporation, as it did not change in any material manner the name or the powers or privileges conferred on the original corporation by the act creating it.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 4; Dec. Dig. — 4.]

2. BUILDING AND LOAN ASSOCIATIONS — 3 — FORMATION—INCREASE OF STOCK AND INDEBTEDNESS.

Where the articles of incorporation of a building association by amendment in successive years increased the capital stock and authorized the association to increase its indebtedness above the amount designated in its original charter, such amendments did not render the association a new corporation, to subject all of its capital stock to the payment of an organization tax.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 3; Dec. Dig. — 3.]

3. BUILDING AND LOAN ASSOCIATIONS — 3 — FORMATION—EXTENSION OF FRANCHISE AND CHANGE OF NAME.

The Home and Savings Fund Company was organized in 1888, prior to the enactment

of Ky. St. § 4225, providing that every corporation which may be incorporated by or under the laws of the state, having a capital stock divided into shares, shall pay an organization tax. After the enactment of the statute the stock of the company was increased at intervals, and upon such increases the statutory tax was paid. Ultimately the charter was amended, increasing the capital stock from \$10,000,000 to \$15,000,000, prolonging the corporate existence, about to expire, for 99 years, and changing the corporate name (which had been changed once before merely to comply with the statute, that all "building associations" have such words in their title) from the Home and Savings Fund Company Building Association to the Avery Building Association. Claiming that a new corporation came into existence by virtue of such charter amendment, the state sued to recover the organization tax on the original capitalization of the company, which had never been paid. *Held*, that while so much of the last amendment of the charter as merely increased the capital stock should not be regarded as the creation of a new corporation within the meaning of the statute subjecting such corporations to the payment of an organization tax, the radical change made in the name of the association and the extension of its life was the creation of a new corporation, subjecting the original capital to the payment of the tax.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 8; Dec. Dig. ¶3.]

Appeal from Circuit Court, Franklin County.

Action in the name of the Commonwealth by its revenue agent against the Avery Building Association to compel the payment of an organization tax and recover the penalty for delinquency. Judgment for plaintiff, and defendant appeals. Affirmed.

William Krieger and Thos. A. Barker, both of Louisville, for appellant. John C. Duffy, of Hopkinsville, O'Rear & Williams and J. P. Hobson & Son, all of Frankfort, for the Commonwealth.

CARROLL, J. In 1888, before the adoption of the present Constitution of the state and the laws enacted pursuant thereto, a corporation styled the "Home and Savings Fund Company," with a capital stock of \$5,000,000 and a provision for its existence for 25 years, was organized under the general corporation laws of the state, or by special act of the Legislature—it is not material which. In 1891 the present Constitution went into effect, and in 1893 the Legislature of the state enacted what is now section 4225 of the Kentucky Statutes, providing that:

"Every corporation which may be incorporated by or under the laws of this state, having a capital stock divided into shares, shall pay into the state treasury one-tenth of one per centum upon the amount of capital stock which such corporation is authorized to have, and a like tax upon any subsequent increase thereof. Such tax shall be due and payable on the incorporation of the company and on the increase of the capital stock thereof, and no such corporation shall have or exercise any corporate powers until the tax shall have been paid, and upon payment it shall file a statement thereof with the secretary of state."

In 1897 the Home and Savings Fund Company amended its articles of incorporation by changing its name to the Home and Savings Fund Company Building Association and accepting the provisions of the Constitution. In June, 1906, another amendment was adopted, authorizing the association to increase its indebtedness from \$10,000 to \$25,000 and increasing its capital stock from \$5,000,000 to \$6,000,000. In February, 1907, another amendment was adopted, increasing the capital stock from \$6,000,000 to \$7,000,000. In December, 1907, the articles of incorporation were again amended by increasing the capital stock from \$7,000,000 to \$10,000,000. In 1912 yet another amendment was adopted, increasing the capital stock from \$10,000,000 to \$15,000,000, prolonging the corporate existence for a period of 99 years, and also changing the corporate name from the Home and Savings Fund Company Building Association to the Avery Building Association. The Association paid the organization tax on each increase of its capital stock made by the amendments, but did not pay any organization tax on the original capital stock, as there was no law in force at the time of its creation exacting an organization tax. In 1914 this suit was brought in the name of the commonwealth by a revenue agent, for the purpose of requiring the association to pay the organization tax on its original capital stock of \$5,000,000 and a penalty thereon, as provided by statute, of 20 per cent., amounting to \$1,000. The lower court ruled that the association must pay the organization tax of \$5,000 on its original capital stock and a penalty of \$1,000, and this judgment we are asked to reverse.

The theory of the commonwealth is that the various amendments adopted by the association, and especially the amendment of 1912, had the effect of creating a new corporation, and therefore the present corporation, known as the Avery Building Association, although it has a capital stock of \$15,000,000, has paid the organization tax on only \$10,000,000 of this capital stock, and therefore it should be required to pay the organization tax on the other \$5,000,000, as was held by the lower court. The defense of the Association is that the several charter amendments did not have the effect of creating a new corporation, as they only increased the capital stock, changed the name, and conferred some additional powers on the original corporation; and so the corporation has paid all the organization tax for which it is liable. The association further pleads and relies on the 5-year statute of limitation as a bar to a recovery of any organization tax, in the event it should be held that the effect of the amendments was to create a new corporation that would be subject to the organization tax if action to recover it had been taken in seasonable time.

We have had before us several cases dealing with this question. In *Senn v. Levy*, 111 Ky. 318, 63 S. W. 776, 23 Ky. Law Rep. 1331, a creditor of the German-American Title Company brought suit to enforce the payment of the double liability of stockholders to creditors under section 547 of the Kentucky Statutes. The facts were these: The German-American Real Estate & Investment Company was incorporated under the General Statutes, before the enactment of section 547 of the statutes and at a time when there was no double liability on stockholders. In 1894, and in the manner provided by the Kentucky Statutes for the amendment of articles of incorporation, the charter of this corporation was amended. The amendment changed the name from the German-American Real Estate & Investment Company to the German-American Title Company, increased the number of directors and also the shares of stock each must hold to qualify him as a director, and further authorized the president to appoint an executive committee with such powers as the by-laws might give. In holding that the amendment created a new corporation and subjected the stockholders to the double liability statute in force when the amendment was adopted, the court said:

"It held itself out to the public, under its new name, as having amended its charter under the act of 1893, as there was no other law under which they could have amended but the act of April, 1893, and that law imposed the double liability sought to be enforced here. The old law had been absolutely repealed. The change made by the amendment was a radical one. A corporation exists only in its corporate name, and a change of name was an abandonment, not only of the corporate name, but of the corporation itself. The old creature was destroyed and a new one sprang into existence, clothed with all the new powers and charged with all the new responsibilities imposed by the statutes which gave it birth. When the stockholders of the old corporation accepted certificates of stock in the new concern, they assented to, and acquiesced in, the amendment, and were thenceforth bound for all the liabilities of the new concern imposed upon it by law. Necessarily the liabilities and burdens are coexistent with the benefits. And there is no difference in principle between a reorganization and an amendment which accomplishes the same purpose."

Com. v. Licking Valley Building Association, 118 Ky. 791, 82 S. W. 435, 26 Ky. Law Rep. 730, was a suit by the commonwealth to recover an organization tax. The defense was that the association had been incorporated under the general laws of the state previous to the adoption of the present Constitution and the laws regulating corporations now found in the Kentucky Statutes, and hence it was not liable for the payment of this tax. It appears that by the original articles the capital stock of the association was \$1,000,000, divided into 2,000 shares of the par value of \$500 each. The period of its corporate existence was fixed at 25 years, which expired in May, 1911. In April, 1911, amended articles of incorporation were filed, extending the life of the corporation for 25

years and making some other changes in its corporate affairs. In holding it liable for the tax, the court said:

"The amended articles of incorporation did more than conform to the new statute. They created a new corporation. The old corporation would have expired on May 19, 1911. The new corporation runs for 25 years from April 19, 1897, and may then be renewed for a like term from time to time. The highest amount of indebtedness which the old corporation could incur was \$25,000. The new company can issue a capital stock of one million dollars and may incur an indebtedness of 20 per cent. of its paid-up capital. It also enjoys all the rights, privileges, and powers conferred by the new statute upon building associations organized under it. We had this question before us in *Senn v. Levy*, 111 Ky. 318, 63 S. W. 776, 23 Ky. Law Rep. 1331, and, according to the principles laid down in that case, the old corporation was destroyed and a new one, with new powers and new responsibilities, came into existence. The reasoning of that case is conclusive of the question."

In *Bruner v. Louisville Packing Co.*, 144 Ky. 471, 139 S. W. 764, the commonwealth sought to collect from the packing company an organization tax on amended articles of incorporation filed by it in 1910. The company was created in 1906, with a capital stock of \$750,000 upon which it paid the organization tax at the time of its creation. The amended articles merely reduced the capital stock from \$750,000 to \$350,000, and changed the name of the corporation from Louisville Packing Company to New Louisville Packing Company. In the course of the opinion the court said:

"It may be that, where there has been a change in the name of the corporation, accompanied by a substantial change in the scope, rights, and powers of the corporation, the amended articles of incorporation have the effect of creating a new corporation. *Com. v. Licking Valley Building Ass'n*, 118 Ky. 791 [82 S. W. 435, 26 Ky. Law Rep. 730]. No such case is here presented. No new rights or powers were conferred by the amended articles. The change in the name itself was slight. It was authorized and made in the manner pointed out by the statute. No new corporation was created. It is simply a case where the old corporation is continued under a slightly changed name, for exactly the same length of time, and with precisely the same rights and powers as were provided in the original articles of incorporation. Being the same corporation and having paid the tax once, and there being nothing in the statute requiring that it be paid the second time, it follows that the judgment of the lower court was proper."

In *Ohio Valley Tie Co. v. Bruner*, 148 Ky. 358, 146 S. W. 749, the question before the court was whether a corporation which had once paid this tax must pay it again when it proceeds to extend its corporate existence by amendment. The court answered this question in the negative, saying:

"If the corporation, however, should, by amendment, substantially change its scope, rights, and powers, there might be a consequent right to exact the organization tax; but that question is not here for decision. The ground of its collection in such a state of case would rest upon the determination of whether the change were so substantial or material as to create in fact a new corporation. For the sake of clearness it is to be borne in mind that this

decision applies to corporations which have once paid the tax. Should a corporation, organized under chapter 56 of the General Statutes, although already in possession of a corporate existence, seek the benefits flowing from the general corporation laws of the Kentucky Statutes by organizing or amending under them, it would need to pay its organization tax once. This was expressly held in *Com. v. Licking Valley Building Ass'n*, 118 Ky. 791 [82 S. W. 435, 26 Ky. Law Rep. 730]. But it would need to pay the tax only once, just as those created under the present general corporation law need to pay only once."

In *Com. v. Southern Pacific Co.*, 164 Ky. 818, 176 S. W. 375, the question before the court was whether certain amendments, subsequent to the enactment of section 4225, to the charters of the corporations, which had been created prior to the present Constitution, so changed the nature and character of these corporations as to make them, in effect, new corporations, subject to the payment of the organization tax on the original capital stock, and the court said they did not.

These cases are the only ones dealing with the matter now before us, and the precise question we have was not directly involved in any of them, although these cases furnish material aid in determining the question here presented.

[1] It will be observed that the original name of this association was the Home and Savings Fund Company, and that in 1897 it changed its name by amendment to that of the Home and Savings Fund Company Building Association. This amendment merely added the words "Building Association" to the title, and it may be conceded that these additional words were merely added to comply with section 856 of the Kentucky Statutes, providing that the words "Building Association" must form a part of the name of every building and loan association. Under these circumstances, we do not think this amendment had the effect of creating a new corporation, as it did not change, in any material manner, the name or the powers or privileges conferred on the original corporation by the act creating it.

[2] The amendments of 1906 and 1907 merely increased the capital stock, and authorized the association to increase its indebtedness above the sum designated in its original charter; and we are inclined to think that these amendments did not have the effect of so changing the powers or privileges of the association as to make it a new corporation in the sense that all of its capital stock would be subject to the payment of the organization tax.

[3] But in 1912 another amendment to the charter was adopted, increasing the capital stock from \$10,000,000 to \$15,000,000, prolonging the corporate existence, which was then about to expire, for a period of 99 years, and changing the corporate name from the Home and Savings Fund Company Building Association to the Avery Building Association.

So much of this last amendment as merely increased the capital stock should not be regarded as the creation of a new corporation within the meaning of the statute subjecting new corporations to the payment of an organization tax; but the radical change made in the name of the association, as well as the extension of its life, must, we think, be treated as the creation of a new corporation, subject to the payment of this tax.

It was held in *Senn v. Levy*, supra, that changing the name of the company from the German-American Real Estate Investment Company to the German-American Title Company was such a radical change as to create, in fact, a new corporation subject to the laws in force when the amendment was adopted.

In the Licking Valley Building Association Case the association extended by amendment to its charter its life, which was about to expire, and conferred upon the association some powers that it did not enjoy under the old charter; and this amendment was held to create a new corporation.

In the Louisville Packing Company Case the corporation was created in 1906 and paid an organization tax on its capital stock. After this it reduced its capital stock and changed its name from Louisville Packing Company to New Louisville Packing Company. But the court said this was not the creation of a new corporation, and did not subject the corporation to the payment of an organization tax on the new and reduced capital stock authorized by the amendment. It is insisted that this opinion, in effect, overruled *Senn v. Levy*. We do not so construe it. In holding that the slight change in the name did not have the effect of creating a new corporation, the court was largely influenced by the fact that this corporation had paid an organization tax once on all of its capital stock. This was really the controlling point in the decision, and this point was reiterated in the Ohio Valley Tie Company Case.

In the case we have we find that a corporation known as the Home and Savings Fund Company or as the Home and Savings Fund Company Building Association—it is not material which—was created, with a capital stock of \$5,000,000, before the statute authorizing the collection of an organization tax was enacted. We find that by various amendments to its charter this original corporation has been converted into a corporation styled the Avery Building Association, with an authorized capital stock of \$15,000,000. On \$10,000,000 of this capital stock it has paid this organization tax, but on \$5,000,000 of it, it has not. So that we have now a new corporation with a capital stock of \$15,000,000 upon \$5,000,000 of which the organization tax has never been paid.

It will thus be seen that there is a mark-

ed difference between this case and the Louisville Packing Company Case and the Ohio Valley Tle Company Case, as in each of those cases the corporation had paid the organization tax on the full amount of its authorized capital stock in existence at the time it was sought to again subject the stock to the payment of another organization tax. In the Southern Pacific Company Case the names of the corporations were not changed, the amendments merely conferring upon them larger and other powers than were authorized by the original articles of incorporation. But these powers were in the line of the powers conferred by the original charter, and did not, as the court held, make any material or radical change in the nature of the business the corporations were authorized by their original charters to carry on.

This case, we think, falls distinctly within the rule announced in *Senn v. Levy*; and, adhering to the doctrine announced in that case, we see no escape from the conclusion that this corporation is liable for the organization tax on \$5,000,000 of its capital stock. If it should not be required to pay this, it would necessarily follow that a corporation organized under the old statute could, in fact, become a new corporation, with new powers and privileges, and yet be exempt from the payment of the organization tax to which all other new corporations are subjected. It was manifestly the purpose of the new legislation to put all corporations as nearly as might be on the same footing so far as the general laws of the state were concerned, and if this corporation is not subject to the statute imposing an organization tax, it would be difficult to so amend the charter of an old corporation as to bring it under the influence of this statute.

The defense that the right of the commonwealth to enforce the collection of this tax is barred by the 5-year statute of limitation must be held unavailing, as this suit was brought within 5 years from 1912, when the amendment was adopted that made this corporation subject to the organization tax. We do not, however, decide, as it is not necessary so to do, that the 5-year statute would bar the collection of the tax if the amendment that converted the old into a new corporation had been adopted more than 5 years before the organization tax was sought to be collected. In short, we merely mention this question of limitation in passing.

The judgment is affirmed.

CONSOLIDATION COAL CO. v. VANOVER.

(Court of Appeals of Kentucky. Oct 13, 1915.)

1. APPEAL AND ERROR 641 — MOTION TO DISMISS—RECORD.

Failure of plaintiff to file a schedule in the lower court, and of the clerk below to certify that the entire record had been copied

and transmitted, will not require dismissal, where the clerk copied, at the instance of the plaintiff, the entire record in the case, and certified that the transmitted record, together with the stenographer's transcript of the evidence, signed by the judge, and indorsed by the clerk, was a true and correct copy of the case as it appeared of record in his office.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2789, 2790; Dec. Dig. 641.]

2. TRIAL 11—EQUITY CASE—TRANSFER TO COMMON-LAW DOCKET.

Under Civ. Code Prac. § 6, providing that actions of which courts of chancery had exclusive jurisdiction before the last day of August, 1851, must be equitable, and Civ. Code Prac. § 12, providing for the transfer of issues of fact in equity cases to the ordinary docket for trial upon motion of the parties, it was error to transfer an action seeking an injunction against threatened trespass for the lack of adequate remedy at law, which involved an issue of fact regarding a boundary, to the common-law docket, with directions to the jury to return a general verdict, since, the sole relief asked being by way of injunction, the action is purely equitable, though depending on an issue of fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 30; Dec. Dig. 11; Action, Cent. Dig. § 312.]

3. EQUITY 377—ISSUE OF FACT TO JURY.

In such case the proper practice is to order an issue out of chancery submitting only the question of fact to the jury.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 788-793; Dec. Dig. 377.]

4. EQUITY 381—ISSUE OF FACT TO JURY—WRIGHT OF VERDICT.

Where, in a purely equitable action, an issue of fact is submitted to a jury, the chancellor may disregard the verdict and enter judgment upon his own view of the weight of the evidence, as the verdict is merely advisory, and not entitled to the weight of the verdict of a jury in a common-law action.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 813-817; Dec. Dig. 381.]

5. APPEAL AND ERROR 301—PRESENTATION OF GROUND OF REVIEW—MOTION FOR NEW TRIAL — NECESSITY — TRANSFER TO LAW DOCKET.

It is no objection to the consideration on appeal of the error of the court below in transferring the case to the common-law docket that such error was not made a ground for new trial, since such error occurred before the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. 301.]

6. WITNESSES 345—IMPEACHMENT—ARREST ON CRIMINAL CHARGE.

Under Civ. Code Prac. § 597, providing that a witness may be impeached by contradiction, by evidence of statements conflicting with his testimony, and by evidence of his bad general reputation, but not by evidence of particular wrongful acts, except that his conviction of felony may be shown by his examination or the record of the judgment, evidence that a witness had been arrested on a charge of false swearing was inadmissible, in the absence of any attempt to show a conviction.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1126-1128; Dec. Dig. 345.]

Appeal from Circuit Court, Letcher County.

Action by the Consolidation Coal Company against Sam Vanover. Judgment dismissing

plaintiff's petition, and plaintiff appeals. Reversed and remanded.

Hager & Stewart, of Ashland, Jesse Morgan and B. P. Wootton, both of Hazard, and L. E. Harvie, of Whitesburg, for appellant. Roscoe Vanover, of Pikeville, and David Hays, of Whitesburg, for appellee.

CLAY, C. Alleging that it was the owner and in the actual possession of a certain tract of land on Elkhorn creek, in Letcher county, and that the defendant, Sam Vanover, threatened to enter on said land, tear down the dwelling house thereon, and commit other acts of trespass, plaintiff, the Consolidation Coal Company, brought this action against the defendant to enjoin him from trespassing on said land. The defendant pleaded, in substance, that he was the owner of a particularly described part of the land in question, and denied that he was threatening to tear down the dwelling house or commit any acts of trespass on any portion of the land claimed by plaintiff, except that which he himself owned. Over the objection of the plaintiff, the case was transferred to the common-law docket. A trial before a jury resulted in a verdict and judgment for the defendant. Plaintiff appeals.

[1] We are met at the outset by a motion of the defendant to dismiss the appeal, because plaintiff failed to file a schedule in the lower court, and the clerk of that court failed to certify that the entire record had been copied and transmitted to this court. In reply to this contention, it is sufficient to say that the clerk below copied, at the instance and direction of the plaintiff, the entire record in the case, and his certificate shows that the transmitted record, together with the stenographer's transcript of the evidence, signed by the judge, and indorsed by the clerk, is a true and correct copy of the case as it appears of record in his office. The motion to dismiss the appeal is therefore overruled.

The description of the tract in the deed under which plaintiff holds is, in part, as follows:

"Beginning at an oak tree on line of Jane Vanover's at ford of creek above Jane Vanover's residence."

There are two oak trees near the ford of the creek; the plaintiff claiming one as the beginning corner, and the defendant the other. On the decision of this issue of fact depended plaintiff's right to relief. The court did not direct an issue out of chancery for the purpose of trying this issue of fact, but transferred the case to the common-law docket and directed the jury to find either for the plaintiff or the defendant on the whole case. Upon the jury returning a verdict for the defendant, the court entered a judgment dismissing plaintiff's petition.

[2] The principal question presented by the appeal is the propriety of the court's ac-

tion in transferring the case to the common-law docket. Section 6 of the Civil Code provides:

"Unless otherwise provided by this Code or other statute: 1. Actions of which courts of chancery had jurisdiction before the 1st day of August, 1851, may be equitable; and actions of which such jurisdiction was exclusive must be equitable. 2. All other actions must be ordinary.

Section 12 of the Civil Code provides:

"In an equitable action, properly commenced as such, either party may, by motion, have the case transferred to the ordinary docket for the trial of any issue concerning which he is entitled to a jury trial; but either party may require every equitable issue to be disposed of before such transfer."

This is not an action for damages or mere trespass to try title. It is not an action where other than injunctive relief was asked, and the injunctive relief was merely ancillary to the main relief. It is a case where the only relief asked was an injunction restraining the defendant from committing certain threatened acts of trespass on the property in question. This relief was asked on the ground that the defendant was insolvent and plaintiff had no other adequate remedy at law. Where relief by way of injunction is the sole and only relief asked, such an action was purely equitable before the 1st day of August, 1851, and courts of chancery alone had jurisdiction. The action being purely an equitable one, though depending on an issue of fact, it was error on the part of the chancellor to transfer the case itself to the common-law docket, with directions to the jury to return a general verdict. The proper practice in such a case is to order an issue out of chancery and submit only the question of fact to the determination of the jury.

[3, 4] In a case like this of a purely equitable character, the verdict of the jury is merely advisory, and is not entitled to the weight of the verdict of a jury in a common-law action. In the latter case, the verdict can only be set aside when flagrantly against the evidence; whereas, in a case like this, the chancellor may disregard the verdict and enter judgment in conformity with his view of the weight of the evidence. *Bannon v. Patrick Bannon Sewer Pipe Co.*, 136 Ky. 556, 119 S. W. 1170, 124 S. W. 843.

[5] There is no merit in the contention that the error of the court in transferring the case to the common-law docket cannot be considered, because it was not made a ground for a new trial. Being an error that occurred before the trial, it was not a part of the trial, and it was not, therefore, necessary to make it a ground for a new trial. It stands on the same plane as any other error occurring before the trial commenced.

[6] Over the objection of plaintiff, defendant was permitted, on the cross-examination of plaintiff's witness, Newt Fannin, to show that Fannin had been arrested on a warrant charging him with false swearing and taken

to Pikeville on a certain day. Section 597 of the Civil Code is as follows:

"A witness may be impeached by the party against whom he is produced, by contradictory evidence, by showing that he has made statements different from his present testimony, or by evidence that his general reputation for untruthfulness or immorality renders him unworthy of belief; but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or record of a judgment, that he has been convicted of felony."

There was no attempt to show, either by the witness himself or by the record of a judgment, that the witness had been convicted of false swearing. By the express provisions of the Code, and by the uniform decisions of this court, it is not proper to impeach a witness by evidence of, or inquiry as to, particular acts or crimes, nor is it proper to ask him whether or not he has been indicted or arrested for a particular offense. The only proper method of inquiry in regard to every offense is to ask him whether or not he has been convicted of a felony. *Ashcraft v. Com.*, 60 S. W. 931, 22 Ky. Law. Rep. 1542; *Powers v. Com.*, 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. Law. Rep. 1807, 23 Ky. Law. Rep. 146, 53 L. R. A. 245; *Howard v. Com.*, 110 Ky. 356, 61 S. W. 756, 22 Ky. Law. Rep. 1845; *Com. v. Welch*, 111 Ky. 530, 63 S. W. 984; *Welsh v. Com.*, 60 S. W. 185, 948, 1118, 63 S. W. 984, 64 S. W. 262, 23 Ky. Law. Rep. 151; *Parker v. Com.*, 51 S. W. 573, 21 Ky. Law. Rep. 406; *Wilson v. Com.*, 64 S. W. 457, 23 Ky. Law. Rep. 1044; *Mitchell v. Com.*, 64 S. W. 751, 23 Ky. Law. Rep. 1084; *Pennington v. Com.*, 51 S. W. 818, 21 Ky. Law. Rep. 542; *Leslie v. Com.*, 42 S. W. 1095, 19 Ky. Law. Rep. 1201; *Baker v. Com.*, 106 Ky. 212, 50 S. W. 54, 20 Ky. Law. Rep. 1778; *Britton v. Com.*, 123 Ky. 411, 96 S. W. 556, 29 Ky. Law. Rep. 857; *Hayden v. Com.*, 140 Ky. 634, 131 S. W. 521.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

WILLIAMSON v. MORRIS.

(Court of Appeals of Kentucky. Oct. 15, 1915.)

1. FRAUDULENT CONVEYANCES — 299 — ACTIONS—EVIDENCE—SUFFICIENCY.

Evidence held to show that a conveyance by a husband of his land to his wife was in fraud of creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 876-890; Dec. Dig. —299.]

2. FRAUDULENT CONVEYANCES — 208—WHAT ARE—STATUTES.

Under Ky. St. 1915, § 1906, declaring that every gift, conveyance, or transfer of land made with intent to delay, hinder, or defraud creditors shall be void, a conveyance made with intent to hinder subsequent creditors is void and may be set aside.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 631, 633; Dec. Dig. —208.]

3. FRAUDULENT CONVEYANCES — 241 — ACTIONS TO SET ASIDE—CONDITIONS PRECEDENT.

Under Ky. St. 1915, § 1907a, declaring that it shall be lawful for any person aggrieved, when realty has been fraudulently conveyed, to file in a court having jurisdiction a petition against the parties to such transfer, and when done a *lis pendens* shall be created on the property so described while the suit shall progress and be determined as other suits in equity, it is unnecessary that execution against the debtor who transferred the property be returned unsatisfied, or that an attachment be attempted.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 694, 696-726; Dec. Dig. —241.]

Appeal from Circuit Court, Pike County.

Suit by Matilda Morris against Tilden Williamson, who counterclaimed. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

J. S. Cline, of Pikeville, for appellant. J. J. Moore and R. H. Cooper, both of Pikeville, for appellee.

TURNER, J. In August, 1900, W. T. Charles and wife conveyed to K. B. Morris and Matilda Morris, his wife, jointly, a tract of land in Pike county, and they continued to be the owners thereof until September, 1909, when K. B. Morris conveyed his interest in the land to his wife, the appellee, Matilda Morris. Prior to that time, however, and in 1907, K. B. Morris sold to appellant, Tilden Williamson, 11 walnut trees on the tract of land and received the money therefor. After the conveyance of September, 1909, to his wife, and in about 1910 or 1911, K. B. Morris cut and sold the 11 walnut trees sold to Williamson in 1907 and received the money therefor. About the 1st of January, 1913, appellant, Williamson, instituted an action in the Pike quarterly court against K. B. Morris for the value of the trees so appropriated by him, and on or about the 22d of January, 1913, recovered in that court a judgment against him on that account for \$75 and his costs. An execution thereon was issued from the quarterly court and returned no property found, whereupon appellant secured a transcript, filed the same in the office of the circuit clerk, and had issued therefrom another execution, which was levied on the land as the property of K. B. Morris. A sale was had of the Morris land under this execution, and appellant became the purchaser at the amount of his debt, interest, and cost, which was less than two-thirds of the appraised value. While the deed of September, 1909, from K. B. Morris to his wife is shown by the evidence to have been executed by him and delivered to her at the time it bears date, it was not lodged for record or recorded until the 21st day of January, 1913, a short time after the institution of the suit by Williamson against K. B. Morris, and only one day before he recovered a judgment in that action. This is an equitable action by

Matilda Morris against Williamson and the sheriff to cancel and set aside the execution sale and to enjoin the sheriff from making Williamson a deed thereunder, and to quiet her title to the land as against any claim of Williamson. Williamson made his answer in the action a counterclaim against the plaintiff, and prayed that the deed of 1909 from K. B. Morris to his wife be declared fraudulent, and that said land be subjected to the payment of his debt. The lower court in its judgment set aside the execution sale and quieted the title of the plaintiff against any claim of Williamson by reason thereof, and Williamson has appealed.

[1, 2] It is unnecessary to determine, for the purposes of this case, whether Williamson was, at the time of the conveyance in September, 1909, from K. B. Morris to his wife, an existing creditor of Morris, although he at the time owned the 11 walnut trees which were standing on the land, but which were not actually appropriated by Morris until after the conveyance; for a conveyance actually fraudulent is void as to subsequent purchasers for value just as it is as to pre-existing creditors.

Every fact and circumstance in the record shows that there was a fraudulent intent upon the part of Morris when he made the conveyance to his wife to defraud his creditors; he was at the time only 44 years of age and a reasonably active man; no reason is shown why he should suddenly have conveyed his property to his wife, except that he had made some timber contracts which he feared would get him in trouble, and the evidence of at least two or three witnesses shows that he had in mind the design to defeat future obligations which he feared would come upon him by reason of the existing timber contracts. The deed to his wife recites a consideration of \$5 and love and affection, and there is no pretense that she paid anything more than this for the land. The evidence is that since that conveyance he has continued to manage and control the farm just as he did before, and that they have actually received since that time something like \$5,000 from the sale of timber off of this land, a large part of which was paid to K. B. Morris himself. While K. B. Morris may not have had it in his mind at the time

of the conveyance in September, 1909, to his wife to defraud appellant by appropriating his timber, yet it is apparent from the evidence that he at that time had it in mind and made the conveyance with a fraudulent design to avoid the payment of obligations which he feared would come upon him under existing contracts. Section 1906, Carroll's 1915 Ed. Ky. St. provides:

"Every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to delay, hinder or defraud creditors, purchasers or other persons, and every bond, or other evidence of debt given, action commenced, or judgment suffered, with like intent, shall be void, as against such creditors, purchasers and other persons."

[3] This act has been held to apply where the conveyance has been made with a fraudulent design to defraud subsequent purchasers and creditors, as well as pre-existing creditors. Section 1907a of the same statute provides:

"That hereafter in this commonwealth it shall be lawful for any party who may be aggrieved thereby, when any real property has been fraudulently conveyed, transferred or mortgaged, to file, in a court having jurisdiction of the subject-matter, a petition in equity against the parties to such fraudulent transfer or conveyance or mortgage, or their representatives or heirs, alleging therein the facts showing their right of action and alleging such fraud, or the facts constituting it, and describing such property, and when done a lis pendens shall be created upon the property so described, and said suit shall progress and be determined as other suits in equity, and as though it had been brought on a return of nulla bona, as has heretofore been required."

Prior to the enactment of this last statute in 1896, it was held that a return of "no property" or an attachment was necessary before a creditor might subject real estate to his demand, but under its provisions he may now acquire a lis pendens in the manner there indicated.

Under the circumstances of this case the wife will be deemed to have been a privy to the fraudulent intent of her husband and will be bound thereby.

It is apparent that appellant acquired a lien on the one-half undivided interest of K. B. Morris in the land, which he was entitled to have enforced under his counterclaim.

The judgment is reversed, with directions to enter a judgment as herein indicated.

LOUISVILLE & N. R. CO. v. STOKES'
ADM'X.

(Court of Appeals of Kentucky. Oct. 12, 1915.)

CARRIERS \Leftrightarrow 347—INJURY TO PASSENGER—
NEGLIGENCE—QUESTION FOR JURY.

In an action against a railroad for death of a passenger killed while attempting to leave a train in motion, evidence on the point of defendant's negligence after its servants had discovered decedent's position of peril held insufficient to take the case to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350–1386, 1388–1397, 1402; Dec. Dig. \Leftrightarrow 347.]

Appeal from Circuit Court, Hopkins County.

Action by James D. Stokes' administratrix against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Laffoon & Waddill, of Madisonville, and Benjamin D. Warfield, of Louisville, for appellant. Gordon & Gordon & Cox, of Madisonville, V. Y. Moore, of Marion, and Fox & Powell, of Madisonville, for appellee.

CLAY, C. On January 18, 1913, James D. Stokes was struck and killed by a train owned and operated by the Louisville & Nashville Railroad Company. In this action by his administratrix to recover damages for his death there was a verdict and judgment in favor of the plaintiff for \$5,000. The railroad company appeals.

It is not insisted that the defendant owed the decedent the duty of using ordinary care to discover his peril, or that his peril could have been discovered sooner than it was by the exercise of ordinary care. The only ground on which the case was submitted to the jury was the failure of the defendant, its agents and servants, to use ordinary care to avoid injuring the decedent after his peril was discovered. Defendant insists that the trial court erred in refusing it a peremptory instruction. The question turns on whether or not there was sufficient evidence to take the case to the jury.

The accident occurred at 6:20 p. m. at the Madisonville station. A concrete platform extends along the entire front of the station building. The platform is 11½ inches higher than the track, and is 23 inches from the edge of the innermost rail. The train which struck decedent consisted of an engine and tender, baggage car, combination car, ladies' coach, and another car known as a "miners' rescue car." The coaches were about 60 feet in length. The train started for the purpose of setting out the "miners' rescue car." The decedent was standing on the steps of the ladies' coach, the second coach from the rear. While the train was going at the rate of about 5 or 6 miles an hour, he stepped off with his "left foot back-

ward." He fell with his head towards the north, and rolled from the concrete into the place between it and the rail. The record is silent as to the nature of his wounds. He lived but a short time.

Plaintiff relies on the following evidence: The two rear coaches and the space between them measured 125 feet. Plaintiff was not struck by the front trucks of the ladies' coach, but fell around them on the concrete and rolled towards the train. Riordan, the engineer, says that he had his hand on the throttle or brake valve when he received a signal by the bell cord and stopped the train within about 10 or 12 feet. Jones, the porter, said that he presumed the signal from the conductor went immediately to the engineer; that the train could have been stopped by service application of the air brakes in about 10 feet. Bohon, another witness, stated that the signal by means of the whistle cord was transmitted instantaneously, and that the engineer, after receiving the signal, ought to stop the train in about 8 or 10 feet. Canstler, who had had some experience in the railroading, said that the time necessary to transmit the signal by means of the bell cord was so short he did not know how to express it. It further appears that the conductor was just mounting the steps of the combination coach when the decedent fell and he saw decedent fall.

J. T. Smith testifies as follows:

"Q. Describe to the jury what happened to him after he fell in that position. A. The train passed on over him, and when the springs would pass over him they would sorter catch in his coat and sorter jump him up, and he would fall back, and when the last coach went over him that doubled him up. Q. When the springs or the parts of the car that extended towards the concrete would pass over him, it would brush his coat? A. Brush his coat up a little. Q. And when the hind end of the last coach passed over him it doubled him up? A. Yes, sir. Q. Mash-ed him over? A. Yes, sir; doubled him over."

Yateman Cox, appellant's flagman, testifies as follows:

"Q. Where were you at the time of this occurrence? Tell the jury what you heard and saw concerning that matter. A. I was on the rear platform of the train. Q. Let this represent the train. (Attorney places some books on the floor to represent the train.) A. I was standing on the rear end of the platform taking down my markers, when I first noticed the accident. The car bumped like it had run over a stick or broken rail. I was leaning back taking my markers down to change from this car to this one on account of switching this car off by the ice plant. When I heard the noise I was in such a position I could not look—like this (indicating)—and I had to turn around, and when I turned around I noticed a man lying on the track. Q. You did not see Mr. Stokes falling? A. No, sir. Q. The first you knew of his falling the rear wheel of the mine rescue car ran over some substance? A. Yes, sir."

Cox further testified that the train stopped in about 8 feet after he heard the signal.

For the defendant the conductor testifies that he was on the station platform when

decedent fell. It took him eight or ten seconds to get from the platform to the platform of the car. It took an interval of from one to two seconds between the pull of the cord to give the signal properly. He gave the signal as soon as he could.

There is evidence pro and con as to whether or not decedent was intoxicated.

From the above facts the following argument is made by plaintiff: The evidence shows that decedent was not injured until struck by the rear trucks of the last car. These trucks were 117 feet from the place where decedent fell. The train was going about 5 miles an hour, or $7\frac{1}{2}$ feet per second. An interval of $15\frac{21}{22}$ seconds elapsed between the time decedent's peril was discovered and his injuries were inflicted. In view of the evidence to the effect that it would require but a second or two for the conductor to reach the platform, another second or two to pull the bell cord, and another second or two for the engineer to stop the train, it is claimed that the evidence shows the conductor was guilty of negligence in not sooner transmitting the stop signal. The difficulty with this argument is that it grows out of the assumption that the evidence of Smith and Cox was sufficient to show that the decedent was injured by the rear trucks of the train, and that men in an emergency think and act almost instantaneously. Cox's evidence merely tends to show that the decedent was struck by the trucks of the last car. It does not tend to show that he had not been previously struck by that car or the one preceding. Smith says that when the springs would pass over decedent "they would sorter catch in his coat and sorter jump him up, and he would fall back, and when the last coach went over him that doubled him up." In reply to the suggestive question, "When the springs or the parts of the car that extended towards the concrete would pass over him it would brush his coat?" he said, "Brush his coat up a little." It is manifest that this evidence does not possess the quality of proof. It is not sufficient to induce conviction. It by no means follows that, because the parts of the train "jumped him up" or "brushed his coat up a little," the contact of the train with decedent's body was not sufficient to injure him. Here the decedent fell on the concrete. He rolled in between the concrete and the track. Being a man, it was practically impossible to place

him between the rail and the concrete so that his body would not come in contact with some part of the car. All that the witness Smith says may be true, and yet the decedent may have been seriously injured by parts of the car other than the rear trucks of the last car. Unfortunately, too, men do not think and act in an emergency with the same dispatch with which others, in their calmer moments and who are free from the excitement of the occasion, think they should have acted. It necessarily took some time for the decedent to fall to the concrete and roll under the train. It took some time for the conductor to realize and appreciate the peril in which he was thus placed. It took some time for him to decide on what was best to be done. It took further time for him to mount the steps and reach the bell cord. It took further time for him to give the proper signal to the engineer. It took further time for the engineer to think and act. It took further time for the train to stop after the engineer had acted. It seems to us, therefore, that the statements of the witnesses that a particular thing could have been done instantaneously, or another thing in a second or two, or that the train could have been stopped in from 8 to 10 feet, are mere speculations, based on what might have possibly happened if all the participants were apprised before hand what would take place, and the verdict of the jury, founded on such statements, is mere guesswork. Neither courts nor juries are authorized to indulge in speculation or guesswork as to the cause of accidents. To authorize a recovery there must be some tangible evidence from which it may be fairly inferred that the defendant was guilty of negligence, and that such negligence was the proximate cause of the injury. If the injury may as reasonably be attributed to a cause that will excuse the defendant as to a cause that will subject him to liability, then the well-settled rule is that a recovery cannot be had. *Stuart v. N. C. & St. L. Ry.*, 146 Ky. 127, 142 S. W. 232; *Weidekamp v. L. & N. R. Co.*, 159 Ky. 674, 167 S. W. 882; *Osborne's Adm'r v. C. & N. O. & T. P. Ry.*, 158 Ky. 176, 164 S. W. 818; *L. & N. R. Co. v. Stayton's Adm'r*, 163 Ky. 760, 174 S. W. 1104.

In our opinion, the trial court should have directed a verdict in favor of the defendant.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

LIVERPOOL & LONDON & GLOBE INS.
CO. v. WRIGHT et al.

(Court of Appeals of Kentucky. Oct. 13, 1915.)

1. JUDGMENT \Leftrightarrow 559—RES JUDICATA—CRIMINAL JUDGMENT.

In plaintiffs' suit on a fire policy, defendants pleaded that the fire was willfully set by one of the plaintiffs. Judgment for the plaintiffs was reversed, but subsequently one of them was convicted of having set fire to the building. Defendants on the second trial sought to amend the answers to show the conviction as *res judicata*. *Held*, that the motion was properly denied, because defendants were not entitled to rely upon a judgment to which they were not parties, and upon which estoppel was not mutual, as a bar, and, since defendants would not be estopped by acquittal, the plaintiff could not be estopped by conviction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1077, 1078; Dec. Dig. \Leftrightarrow 559.]

2. WITNESSES \Leftrightarrow 345—IMPEACHMENT—CONVICTION OF FELONY.

Conviction of plaintiff for having fired a building may be offered in evidence in an action on an insurance policy on the building to impeach his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1126-1128; Dec. Dig. \Leftrightarrow 345.]

3. NEW TRIAL \Leftrightarrow 100—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Where a defendant knew of evidence which might have been given and failed to produce the witness solely because he said he would not testify because it would tend to incriminate himself, he is not entitled to a new trial on the ground of newly discovered evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 183, 201-204, 208, 209; Dec. Dig. \Leftrightarrow 100.]

4. EVIDENCE \Leftrightarrow 577—EVIDENCE AT FORMER TRIAL—FOUNDATION FOR ADMISSION.

It is error to permit the reading of the transcript of material evidence given at a former trial, when there is nothing to show that the witness whose testimony is read cannot be produced.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2406; Dec. Dig. \Leftrightarrow 577.]

5. WITNESSES \Leftrightarrow 379—IMPEACHMENT—CONTRADICTORY STATEMENTS—RULINGS—RECEPTION OF EVIDENCE.

Questions asked a witness as to statements he was alleged to have made out of court in conflict with his testimony were improperly excluded, since the other party was entitled to impeach his credibility by that method.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. \Leftrightarrow 379.]

6. NEW TRIAL \Leftrightarrow 29—GROUNDS—MISCONDUCT OF COUNSEL—STATEMENTS OUTSIDE RECORD.

Statements of counsel which are not supported by the record and are palpably intended to improperly influence the jury are prejudicial, and verdict thereafter rendered in his client's favor should be set aside.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 43, 44; Dec. Dig. \Leftrightarrow 29.]

7. NEW TRIAL \Leftrightarrow 49—GROUNDS—MISCONDUCT OF JURY—COMMUNICATION WITH JURY—TREATING JURY.

The jury in a civil action was placed in the custody of an officer. During the trial he and the jurymen procured whisky from the attorney of one of the parties. Members of the jury also talked in private with the same attorney. *Held* that, whether the jury was actually

influenced or not, its conduct was improper, and a verdict in favor of such attorney's client should be set aside.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 97-99; Dec. Dig. \Leftrightarrow 49.]

Appeal from Circuit Court, Graves County.

Action by B. W. Wright and another against the Liverpool & London & Globe Insurance Company, consolidated with actions by the same plaintiffs against the Old Colony Fire Insurance Company, against the Citizens' Fire Insurance Company, and against the People's National Fire Insurance Company. Judgment was for plaintiffs, and defendants moved for a new trial, which was denied, and they appeal. Reversed.

M. B. Hollfield and Bunk Gardner, both of Mayfield, and Leslie Hindman, of Clinton, for appellants. W. J. Webb and Robbins & Thomas, all of Mayfield, and Sea & Via, of Clinton, for appellees.

HURT, J. The appellees, B. W. Wright and V. E. Allen, were partners, and engaged in the business of buying, prizing, and selling tobacco, in Mayfield, Ky., under the firm name and style of B. W. Wright, and, as such, occupied for the purposes of their business a barn, which was the property of G. R. Allen and W. A. Usher. The appellants, Liverpool & London & Globe Insurance Company, Old Colony Fire Insurance Company, Citizens' Fire Insurance Company, and People's National Fire Insurance Company, each issued to the firm of B. W. Wright a policy of insurance upon the tobacco in the barn, insuring it against destruction or damage by fire. The owners of the barn also carried insurance against damage from fire upon the barn, but in what companies it does not appear. The barn and the greater part of its contents were consumed by fire, and thereafter, the appellants having declined to pay the losses on account of the destruction of and damages by fire to the tobacco, the appellees filed a suit against each of them to recover the damages which were insured against by reason of the policies. A separate suit was filed against each of the appellants, and answers and other pleadings were filed in each of the cases until the issues were made. Each of the answers presented substantially the same defense against a recovery. The defense relied upon was the allegation that the appellees had willfully set fire to the barn and the stock of tobacco which was contained in it and caused the barn and tobacco to be burned, for the fraudulent purpose of collecting the insurance carried upon the tobacco. This defense was controverted by reply in each case. Thereafter the four suits were consolidated and tried at the same time and before the same jury. The trial resulted in a disagreement of the jury and a continuance of the case. At a subsequent trial the jury returned a verdict against the appellants for a portion of the

amount of the insurance, and the court rendered a judgment accordingly, but upon an appeal to this court the judgment was reversed, and the consolidated cases remanded for further proceedings.

Thereafter each of the appellants tendered and offered to file an amended answer, in which it was alleged that since the pendency of the litigation an indictment had been returned against the appellee B. W. Wright in which he was charged with the crime of willfully and unlawfully setting fire to and causing to be burned the tobacco house or warehouse in which the tobacco of the appellees was stored, and that there was insurance upon the house, being the crime denounced by section 1169, Kentucky Statutes, and that he had been put upon trial upon the indictment, and convicted and sentenced to a term in the penitentiary, that he had appealed from the judgment of conviction to this court, and the judgment was affirmed, and that the contents of the barn, on account of the destruction of which by fire the appellees were maintaining the suits, were consumed by and in the same fire which destroyed the barn, and for the setting of which the appellee Wright had been tried and convicted, and pleaded the judgment of the commonwealth of Kentucky against B. W. Wright as a complete bar to recovery by appellees in these consolidated suits. The appellees objected to the filing of these amended answers, and the court sustained their objections and refused to allow them to be filed, to which the appellants each saved an exception.

Thereafter another trial was had before the court and a jury, and at this trial a large number of witnesses were introduced and evidence heard upon the issues made as to the amount and value of the tobacco which was burned and damaged, and as to whether or not the barn was set fire to by the appellees and the contents caused to be burned by them or either of them. The trial resulted in a verdict by the jury in favor of the appellees, and upon this verdict the court rendered a judgment in favor of appellees against the Citizens' Fire Insurance Company for \$1,000, the Old Colony Insurance Company for \$1,000, the People's National Fire Insurance Company for \$1,000, and the Liverpool & London & Globe Insurance Company for \$2,000. The appellants filed grounds and moved the court to grant them a new trial, which was refused, and to which they excepted, and they have now appealed to this court.

A reversal of the judgment is sought upon the following grounds:

First. Because of misconduct of appellees' attorneys in the argument of the case before the jury.

Second. Because of the misconduct of the attorneys for the appellees in their efforts to wrongfully influence the jury in its decision upon the issues of the case.

Third. Because of error of the court in

permitting the appellees to read as evidence to the jury the transcript of the evidence given by Goldie Ford upon a former trial.

Fourth. Because of errors made by the court in its rulings upon the admission and rejection of evidence offered upon the trial.

Fifth. Because the court erred in not permitting the appellants to file their amended answers, in which they relied for a defense upon the judgment which adjudged B. W. Wright to be guilty of setting fire to and burning the barn and tobacco.

Sixth. Because of the misconduct of the jury.

Seventh. Because the verdict was flagrantly against the evidence, indicating that the jury was actuated by passion or prejudice.

Eighth. Because of newly discovered evidence.

Ninth. Because the jury, after being ordered to be kept together in the custody of the sheriff, were permitted to separate.

[1] The contention of the appellants that the court erred to their prejudice in overruling their motion to file the amended answers, in the fifth ground for a new trial will be first considered, because, if the judgment therein pleaded and relied upon as a bar to appellees' recovery constituted such bar, it completely disposes of the case, and no further questions need be considered. It will be borne in mind that the original answers presented the defense that the appellees had willfully burned the barn and its contents, and there is no doubt that such is a good and sufficient defense, if supported by the necessary evidence, to the cause of action stated by appellees in their petitions. It may also be conceded that, if one of the parties willfully burned the barn and its contents, they could not as partners recover upon the policies of insurance. The conviction of the crime denounced by section 1169, Kentucky Statutes, based upon the charge in the indictment that B. W. Wright and others associated with him willfully and unlawfully conspired together to do so, and in furtherance of such conspiracy set fire to and burned the barn, was had in an action by the commonwealth of Kentucky against B. W. Wright, and in which neither the appellants nor the other partner, Allen, were parties, either of record or otherwise. The proceeding by the state was for the purpose of redressing a wrong which Wright had committed against it. If the trial of Wright upon the indictment had resulted in an acquittal, could he and Allen then have offered the judgment of acquittal as a bar to the defense of appellants that appellees had themselves burned the barn and its contents? A mere statement of the proposition is its answer. The appellants could not be bound by the judgment pronouncing Wright not guilty of the crime charged in the indictment, because they were not parties to the action and had no control of the proceedings. Can one of

whom a recovery in damages is sought for an alleged assault or battery plead a judgment of acquittal upon an indictment based upon the same facts, in bar of the plaintiffs recovery? Or could one seeking the recovery of damages for an assault and battery plead a judgment of conviction of the defendant upon an indictment based upon the same facts, in bar of defendant's plea of son assault demesne, or a plea traversing the assault and battery? In the first instance, such judgment could not be pleaded, because the plaintiff was not a party to the action in which the judgment was rendered, and, in the second instance, it should not be allowed, because the plaintiff was not in any wise prejudiced, nor any right of his determined by the judgment, nor would he have been prejudiced, if the judgment had been one of acquittal, and not a conviction. To hold that the judgment of conviction against B. W. Wright was a bar to appellees' cause of action in the case at bar would have been to estop the appellees to assert their cause of action. The rule is that estoppels must be mutual. *Bridges v. McAllister*, 106 Ky. 791, 51 S. W. 603, 21 Ky. Law Rep. 428, 45 L. R. A. 800, 90 Am. St. Rep. 267; *Chiles v. Conley*, 2 Dana, 21.

In 23 Cyc. 1238, the doctrine is thus stated:

"It is a rule that estoppels must be mutual; and therefore a party will not be concluded against his contention by a former judgment unless he could have used it for a protection or as the foundation of a claim, had the judgment been the other way; and, conversely, no person can claim the benefit of a judgment as an estoppel upon his adversary unless he would have been prejudiced by a contrary decision of the case."

In 23 Cyc. 1237, it is said:

"To constitute a judgment an estoppel there must be an identity of persons as well as the subject-matter; that is, it is necessary that the parties as between whom the judgment is claimed to be an estoppel must have been parties to the action in which it was rendered, in the same capacities and in the same antagonistic relation, or else they must be in privity with the parties in such former action."

In *American & English Encyclopedia of Law*, vol. 24, p. 778, the following rule is stated:

"The rule is commonly laid down that, in order to render a matter *res judicata*, there must be a concurrence of four conditions, viz.: (1) Identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; (4) identity of the quality in the persons for or against whom the claim is made."

In the volume *supra* it is said:

"A judgment in a criminal prosecution constitutes no bar or estoppel in a civil action based upon the same facts or transactions, and conversely of a judgment in a civil action sought to be given in evidence in a criminal prosecution. * * * As between civil and penal actions, a judgment in one is, of course, no bar or estoppel to the prosecution of the other, if the parties are not the same, identity of parties being a fundamental requisite of *res judicata*, but, where there is a mutuality of parties, it has generally been held otherwise," etc.

In this jurisdiction it has, however, been held that, although the parties were the same and the actions based upon the same set of facts and circumstances, a judgment of acquittal in an action penal in its character was not a bar to a civil action. *Ellison, etc., v. City of Louisville*, 31 S. W. 723, 17 Ky. Law Rep. 593. The court rested its decision upon the fact that a different weight of testimony was required for a conviction in the penal case from that required for a recovery in the civil case.

If Wright had been acquitted, instead of convicted, of his guilt of the indictment against him, he could not have used the judgment as a bar to appellants' defense that he burned the barn and its contents, because appellants were not parties to the action in which he was convicted, and hence could not be prejudiced thereby, and the judgment lacked mutuality as an estoppel, and, further, the parties to the action at bar were not the same as in the case in which Wright was convicted.

The rules above announced are founded upon many reasons which are not necessary to be enumerated here, but suffice it to say that they have been so long established that they cannot now be called in question.

In the case of *Cooper v. Commonwealth*, 106 Ky. 909, 51 S. W. 789, 59 S. W. 524, 21 Ky. Law Rep. 546, 45 L. R. A. 216, 90 Am. St. Rep. 275, relied upon by counsel for appellants, the parties were the same and occupying the same antagonistic relation to each other as in the case wherein the judgment was held to be a bar to a proceeding in the case *supra*, and the cause of action was the same in each case. The same was true of the case of *Petit v. Commonwealth*, 57 S. W. 14, 22 Ky. Law Rep. 262, and hence neither of those decisions can have any application to the case at bar.

As to the case of *Waddle v. Wilson*, 164 Ky. 228, 175 S. W. 382, counsel overlook the fact that this was a suit against a policeman for damages for alleged false imprisonment, and that in an action of this character, or one for malicious prosecution, on account of the nature of the actions, a rule peculiar to such actions applies to the efficacy of the judgment which terminates the proceedings which follow the alleged false imprisonment or malicious prosecution. In actions of this character it is necessary to show the termination of the proceedings complained of. If an action for malicious prosecution, the complainant must show that the prosecution of which he complained terminated favorably to him, or that his conviction was procured by perjury or corrupt practices, and in an action for false imprisonment the same rule applies. *Duerr v. Ky. & Ind. Bridge & R. R. Co.*, 132 Ky. 228, 116 S. W. 325; *Spring v. Besore*, 12 B. Mon. 551; *Hegan Mantel Co. v. Alford*, 114 S. W. 290. In the two kinds of actions mentioned the complainant must

show that the prosecution against him or the arrest were made by an officer without a warrant and were without probable cause. The existence of probable cause is a sufficient defense in either action. If the prosecution complained of or the arrest complained of terminated in the acquittal of the party of the crime or offense for which he was prosecuted or on account of which he was arrested, he can use the judgment in his favor as evidence that there was no probable cause for his prosecution or arrest, and if convicted of the crime for which he was prosecuted or arrested, the judgment is conclusive evidence of the existence of probable cause for his prosecution or arrest, unless in his petition he alleges and sustains by proof that his conviction was obtained by fraud, corruption, or perjured evidence. In the case of Waddle et al. v. Wilson, supra, the defendant by amended petition pleaded the conviction of the plaintiff of the offense for which he was arrested, and the lower court sustained a demurrer to the answer, and this court held that the amended answer presented a good defense. The case at bar was an action upon a contract between the appellees and appellants.

[2] The court was not in error in overruling the motion to file the amended answers. Neither can the judgment of conviction of appellee Wright of the crime of burning the barn be used in evidence, except that appellants may prove the fact of his being convicted of a felony for the purpose of impeaching his testimony as a witness in the lawful way and under the proper admonition of the court. Without rectifying any of the facts in evidence, it cannot be held that the verdict of the jury was flagrantly or palpably against the weight of the evidence, or that there is not sufficient evidence to support the verdict.

[3] The contention that appellants should have a reversal of the judgment because of newly discovered evidence is not tenable. The affidavits on file show that the appellants had actual knowledge of the evidence which would be given by the proposed witness Gordon before the trial, and no reason is given for a failure to introduce him at the trial, except his claim that he would not testify because his statements would tend to incriminate him of the crime of assisting in burning the barn. His statements, as detailed in his affidavit, would not be evidence of his own guilt, and there was no reason for the failure to offer him as a witness upon the trial.

[4] The court erred in permitting appellees to read the transcript of the evidence of Goldie Ford, given upon a former trial of the case. The appellants objected to the reading of it, upon the ground that no effort had been made to secure her presence as a witness or her testimony at the trial, and the affidavit required by section 4643, Kentucky Statutes, was not offered or filed. The statute ex-

plicitly provides that such testimony can be used only "where the testimony of such * * * witnesses cannot be procured, which fact must be made to appear satisfactorily to the court by the affidavit of the party desiring to use the same, or his attorney." There is no showing or attempted showing made that the testimony of this witness could not have been obtained by deposition or other way provided by law, and no excuse is made for the failure. No affidavit of any one was filed. The statements read to the jury as the evidence of this witness were material, and the permitting it to be read was prejudicial error. So. Ry. Co. in Ky. v. Owen, 164 Ky. 571, 176 S. W. 25.

[5] During the trial below, and while appellee B. W. Wright, who was offered as a witness for appellees, was testifying upon cross-examination, he was asked the following questions, which were objected to by appellees, and the objections sustained, and he was not allowed to answer the questions:

(1) "Is it not a fact that you had a fight with G. R. Allen, the father of V. E. Allen, in the presence of R. F. Wright?"

(2) "Is it not a fact that during that fight you told said G. R. Allen that you and Vic [appellee V. E. Allen] are as guilty of burning that barn as I am, and if I have to go to the penitentiary you will have to go, too?"

(3) "I will ask you, while you were in jail, if Mr. Bob Wright ever came to see you in the interest of G. R. Allen and asked you not to tell on them?"

(4) "If you didn't reply to that question of Bob Wright by saying that they are just as guilty of burning that barn as I am?"

(5) "Is it not a fact that, while you were in jail after you had been convicted of burning the barn in which this tobacco was stored and sentenced to the penitentiary for said crime, you stated to Bob Wright that there were others just as guilty as you were?"

It is avowed that, if the appellee B. W. Wright had been permitted to answer, he would have answered "Yes" to each of the questions, and the court's refusal to allow him to answer is complained of as prejudicial error.

The first question relates to a matter not relevant to the issues in the case, and any answer which might have been made thereto was properly excluded. An answer to the third question was also properly excluded, because G. R. Allen was not a party to the suit, and the question does not indicate what or who it was that G. R. Allen wanted protected, and the appellees could not be affected by his statements. From an affirmative answer to the second, fourth, and fifth questions it might be inferred that Wright himself was guilty of burning the barn, although the admission that he used the language there inquired about would not be an unequivocal admission of guilt. The issue was whether or not the appellees, or either of them, burned the barn, and, Wright having testified that he did not do so, an affirmative answer to those questions would, without explanation, have been contradictory to the

statements made in his direct examination, and the appellants were entitled to have his answers thereto for the purpose of affecting his credibility, or, if he denied that he used the language, to contradict him by proving that he did make such declarations. Wright being a party to the suit, the appellants were entitled to prove the declarations inquired about, if he made such, as evidence in chief, not as evidence conducing to prove that any other persons were guilty of burning the barn, but that Wright had done so, himself.

[6] Another ground for a reversal insisted upon is the misconduct of the attorneys for appellees in making their arguments to the jury. The bill of exceptions shows that, while one of the appellees' attorneys was addressing the jury, he said:

"After this red-headed woman (Mrs. Lillie Riley Pearson) testified, and after I went to my hotel, I saw her prancing up and down in their office (pointing to the table where attorneys for defendant sat) with her handkerchief to her eyes."

The witness Lillie Riley Pearson had testified upon the trial that she was at the house of Lee Perkins shortly before the burning of the tobacco, and that B. W. Wright came there, and he and Perkins discussed the decline in the price of tobacco, and Wright requested Perkins to assist him in the burning of his barn so that he could collect the insurance. There was nothing in the record to support the statement of Via. It was testimony given by him to the jury after the conclusion of the legal evidence in the case, without being under oath as a witness, and when there was no opportunity for a cross-examination. It could have no meaning, except to impeach the testimony of the witness, by impressing upon the jurors that she was acting under some character of duress imposed upon her by the attorneys for appellants or some one else. Although the statement was objected to, the court ignored the objection, and failed to admonish either the attorney or the jury in regard to it.

Another of appellees' attorneys, in addressing the jury, said:

"That fellow Peel (speaking of J. J. Peel, assistant fire marshal) has bought and by intimidation procured these witnesses for the defendant (speaking of Lee Perkins, Lillie Riley Pearson, and William Gambel)."

There was nothing in the record to support this declaration. If the jury was impressed by it and believed it, it could have no other result than to cause the jury to discard the testimony of the witnesses referred to in making its verdict, and to discredit the witnesses for the appellant generally. The statement by the attorney was objected to at the time, but the court ignored the objection. When attorneys, in the argument of a case before a jury, make statements declaring things to be facts which the record does not support, either directly or inferentially, and which are calculated to improperly influence the jury in its finding, there is nothing to be

done except to set aside the verdict in their favor, and to impose the burden of another trial upon their clients. The statements of the counsel for appellees above set out were calculated to improperly influence the jury, and were prejudicial. *Owensboro Shovel & Tool Co. v. Moore*, 154 Ky. 431, 157 S. W. 1121.

[7] The second and sixth grounds upon which a reversal is sought we will consider together, as both relate to the misconduct of the jury and some of the counsel of appellees with relation to the jury. These grounds are supported by affidavits, and no counter affidavits are filed which contradict any of the statements made. The court placed the jury who heard this case in the custody of an officer. It seems that there are no provisions of the Civil Code which confer authority upon the court to place a jury in a civil case in the custody of an officer and to require the jury to remain together until after the case has finally been submitted to it, but in *Smith's Adm'x v. Middlesboro Electric Co.*, 164 Ky. 46, 174 S. W. 773, it was said that, if the court has the inherent right to require the jurymen in a civil case to remain together during the trial of the case and before its final submission, it must be considered to be a matter within the sound discretion of the court and in furtherance of justice, and it must be left in such cases to the sound discretion of the trial court to determine whether any violation of its order in reference to the jurors remaining together is prejudicial to the substantial rights of the parties. There does not seem to have been any substantial violation of the court's order to remain together on the part of the jury, but the officer having the jury in charge seems to have left the presence of the jury, at least upon one occasion, when he went to the room of appellees' attorney J. D. Via to procure whisky for the jury, and on another occasion to get a drink for himself. The uncontradicted statements in the affidavits show that frequently while the jury were hearing the case, and during recesses when it would be at the hotel where it was kept and where Mr. Via, one of the attorneys for the appellees, boarded, that Via was frequently seen to call a jurymen from the others to a distance of 10 or 15 feet, and there engage in a conversation with the juror, which could not be heard by the affiants; that G. R. Allen, the father of appellee V. E. Allen, and another who was an attorney for appellee in the case, were from time to time during the trial seen mixing freely and conversing with the different jurors; that Mr. Via took an officer in charge of the jury to his room and gave him a drink of whisky; that on one occasion, in the lobby of the hotel, two of the jurymen requested Mr. Via to give them whisky, and requested the officer to allow them to go with Via to his room to get whisky; that afterward, at the

request of several jurymen, the officer in charge went to Via's room and bore to him the request of the jurymen to send them whisky; that Via said that he did not have the whisky then, but would have it later, and showed him a drawer in which he would find it, and in a few minutes the officer returned to Via's room and found in the drawer a quart bottle which was filled a little over one-half with whisky, and which he took to the jury, and the jurymen drank it upon that night before retiring and on the next morning. The mere fact that jurymen have used intoxicating liquor during a trial, but not to such an extent as to be under its influence while hearing the testimony or considering of the verdict, has never been held a sufficient ground upon which to set aside the verdict of the jury. *Gordon v. L., St. L. & G. Ry. Co.*, 29 S. W. 321, 16 Ky. Law Rep. 713; *Smith's Adm'x v. Middlesboro Electric Co.*, 164 Ky. 46, 174 S. W. 773; *Perry v. Bailey*, 12 Kan. 539. Whether any improper influences were brought to bear upon the jury, or whether by the actions and conduct detailed in the affidavits anything improper or wrong occurred or was intended, cannot be known either on the part of the jurymen or Mr. Via, but the facts and circumstances, none of which are denied or explained, indicate a purpose and attempt to practice upon the jury for the benefit of appellees' cause.

In 29 Cyc. 803, it is said:

"It is generally ground for a new trial that members of a jury were entertained or treated during the trial by the successful party, or by his attorneys or agents, and especially that a

juror or jurors were furnished with intoxicating liquors by or on account of such party. It need not be shown that the offending person understood the impropriety of his act, or that any juror was actually influenced thereby."

Here an attorney for the appellees, whom we must presume had knowledge of the fact that the jury were put in charge of an officer and directed to remain together for the purpose of preventing improper influences reaching them, invites the officer to leave the presence of the jury and go with him to his room, upon one occasion at least, and then engages in plucking different members of the jury away from their fellows and engages them in conversations which cannot be heard by persons 10 or 15 feet away, and in treating them with whisky, although at their solicitation.

In *Cottle v. Cottle*, 6 Greenl. (Me.) 140, 19 Am. Dec. 200, the court said:

"It is insisted that the juror was not, in fact, influenced, and that justice has been done between the parties. It may be so; but it may be useful to the party to learn that a good cause may be injured, but cannot be promoted, by conduct of this sort, and to the public generally, to know that it will be tolerated in no case whatever."

The affidavit of J. R. Johnson, one of the jurors, is not considered by us. *Steel's Heirs v. Logan*, 3 A. K. Marsh. 397; *Allard v. Smith*, 2 Metc. 297; *Lucas v. Cannon*, 13 Bush, 650; *Doran v. Shaw*, 3 T. B. Mon. 415.

For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

SLOTHOWER v. CLARK. (No. 11410.)

(Kansas City Court of Appeals. Missouri. Feb. 1, 1915. Rehearing Denied Feb. 27, 1915. Writ of Certiorari Denied by Supreme Court May 3, 1915.)

1. MASTER AND SERVANT ⇨302—INJURIES TO THIRD PERSON—SCOPE OF EMPLOYMENT.

Where defendant, after being driven to church by his chauffeur, directed the chauffeur to go to a building west from the church and get his son and then return to the church to take defendant home, but instead the chauffeur went east to collect a debt owing to him, and in returning the machine injured plaintiff, defendant could not escape liability on the ground that the chauffeur was not within the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225-1229; Dec. Dig. ⇨302.]

2. MASTER AND SERVANT ⇨305—INJURIES TO THIRD PERSON—SCOPE OF EMPLOYMENT.

Mere orders to the servant will not absolve the master from liability for the servant's acts, the question being whether the servant was engaged in performing services for the master at the time of the injury, which is determined by the behavior, though contrary to orders.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1223, 1224; Dec. Dig. ⇨305.]

3. MASTER AND SERVANT ⇨301—INJURIES TO THIRD PERSON—LIABILITY OF MASTER.

Where defendant's chauffeur let another person whom he had invited to ride with him take the wheel, he remaining on the seat beside him, such other person's acts were the acts of the servant for which the defendant was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210-1216; Dec. Dig. ⇨301.]

Appeal from Circuit Court, Jackson County; T. J. Seehorn, Judge.

Action by Lewis Slothower against Edgar W. Clark. From a judgment for plaintiff, defendant appeals. Affirmed.

Hadley, Cooper & Neel, of Kansas City, for appellant. Sebree, Conrad & Wendorff, of Kansas City, for respondent.

ELLISON, P. J. Plaintiff's action is for personal injury received in a collision between a hearse on which he was riding and defendant's automobile. The judgment in the trial court was for plaintiff.

It appears that defendant had a chauffeur in his employ who drove the machine for him. That on Sunday morning the chauffeur drove him and his wife to church near Tenth and Harrison streets, Kansas City, Mo., arriving there at 11 o'clock. Before going into the church defendant directed the chauffeur to go to the "Commerce Building," about nine blocks west from the church, and get his son, then return back by the church and wait to take them home. Instead of performing these services directly, the chauffeur went a distance of six blocks east and five blocks south of the church to collect a debt owing to him by a man named Sweeny. In doing this he was practically going in an

opposite direction from the Commerce Building. He collected what was due him, and invited Sweeny in the machine to ride on the seat beside him, and started for the Commerce Building, where he was to get defendant's son. Sweeny asked the chauffeur to let him drive the machine, and the chauffeur did so by exchanging seats and letting him take charge of the steering wheel. On the way the machine collided with a hearse at Fourteenth and Paseo streets, whereby plaintiff was injured.

There was ample evidence to take the case to the jury on the question of negligence on the part of the driver of defendant's machine in colliding with the hearse, unless it be that the driver, at the time of the collision, was Sweeny, and that defendant would not be liable for his conduct, a phase of the case we will refer to again.

[1, 2] We will therefore pass to the important question whether the chauffeur was engaged in the line of his employment in defendant's service at the time the injury was inflicted upon plaintiff. First, we have testimony in defendant's behalf that the chauffeur had orders from him to run the machine carefully, and not to allow any one else to operate it. We will assume this to be a fact, but state the law that mere orders to the servant will not absolve the master from liability for the servant's acts. If it did, it would be a simple process for employers to rid themselves of all responsibility for the conduct of their agents. The question is not what orders did the master give as to his conduct but whether the servant was engaged in performing service for him at the time of the injury, and this is determined, not by his orders for behavior, but by the behavior itself, even though contrary to orders. *Whimster v. Holmes*, 177 Mo. App. 130, 134, 135, 164 S. W. 236. In that case the chauffeur, by authority of the owner, had taken an automobile to a public garage to be inspected, and was returning home to put up the machine when he discovered he had lost the keys to the machine and his master's private garage, and, thinking he may have left them at the public garage, turned back to go there and search for them. On his way, he injured a pedestrian, and we held he was prosecuting his employment in his master's service. We refer to that case for the reasons and authorities supporting our present conclusion that defendant's chauffeur was in the course of his employment, as defendant's servant, when he collided with plaintiff. His particular service was to go after defendant's son and bring him by the church, there to await defendants coming from the church and then to take them home. In going after the son he went out of his way to perform a service for himself in collecting a debt. In the *Whimster Case*, at page 138 of 177 Mo. App., at page 239 of

164 S. W., we quoted the following from *Ritchie v. Waller*, 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 181, 38 Am. St. Rep. 361:

"In cases of deviation the authorities are clearly to the effect that a mere departure by the servant from the strict course of his duty, even for a purpose of his own, will not, in and of itself, be such a departure from the master's business as to relieve him of responsibility. And if the servant in going extra viam is really engaged in the execution of his master's business within the scope of his employment, it is immaterial that he joined with this some private business or purpose of his own. Thus in *Patten v. Rea*, 2 Common Bench (N. S.) 605, the servant started out on business of the master, and also to see a doctor on his own account. While on his way to see the doctor he negligently drove against a horse and killed it, and the master was held responsible."

There is this apt statement in an English case quoted with approval in *Garretzen v. Duenkel*, 50 Mo. loc. cit. 108, 11 Am. Rep. 405:

"When a servant *quits sight* of the object for which he is employed, and, *without having in view* his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him." (Italics ours.)

If we insert the word "business" in place of "malice," we connect the statement directly with the present question. Now in this case, the chauffeur had not "quit sight" of defendant's business and, "without having in view" his orders, gone off on business of his own. He had defendant's directions in mind all the while and was executing them, only going a roundabout way to do so. Certainly, when he was on his return, on his way to the Commerce Building, as he was at the time of the collision, he had his orders in view and was performing them. He was in the very act of going after defendant's son. If he was not in defendant's service then, it has not been suggested how close he should have gotten to the Commerce Building before he would have been considered in such service.

[3] But it is insisted that at the time of the collision Sweeny was running the machine, the chauffeur, as we have seen, having permitted him to take charge of the steering wheel, he sitting beside him. At the trial the parties seemed to consider it was necessary to show that at the time of the collision the chauffeur was driving. In view of the evidence we think that is a matter of no

consequence or importance. When the chauffeur let Sweeny take the wheel, he remaining on the seat beside him, Sweeny's acts, practically speaking, were his, and his act in turning the wheel over to Sweeny was the act of defendant, for it was done in the defendant's service and while carrying out the chauffeur's employment. It was not the act of a servant abandoning his master's service and turning it over to another. In *James v. Muehlebach*, 84 Mo. App. 512, 518, we said that:

"If a servant in charge of his master's carriage should take a stranger with him into the driver's seat, hand him the reins and tell him to drive at a run, and an injury happen in consequence of the speed, the master must answer for the damage, for the negligence was that of his servant. But not so if the servant had quit the carriage and substituted the stranger in charge, generally, in his stead, without the knowledge of the master. For if an injury happen, it is not the act of the servant for whom only is the master liable. In *Booth v. Mister*, 7 Carr. & P. 86, a servant in charge of his master's cart gave over the reins to one in the cart with him, an injury happening in consequence of the negligent driving, the master was made to respond. Lord Abinger said, 'As the defendant's servant was in the cart, I think that the reins being held by another man makes no difference. It was the same as if the servant had held them himself.'"

That statement of the law is supported by *Hollidge v. Duncan*, 199 Mass. 121, 85 N. E. 186, 17 L. R. A. (N. S.) 982; *Thyssen v. Ice Co.*, 134 Iowa, 749, 112 N. W. 177, 13 L. R. A. (N. S.) 572; *Campbell v. Trimble*, 75 Tex. 270, 272, 12 S. W. 863; *Wellman v. Miner*, 19 Misc. Rep. 644, 44 N. Y. Supp. 417; *Bamberg v. International Ry.*, 53 Misc. Rep. 403, 103 N. Y. Supp. 297; *Kilroy v. D. & H. C. Co.*, 121 N. Y. 22, 24 N. E. 192; *Bk. of Cal. v. W. U. Telegraph Co.*, 52 Cal. 280, 290.

What we have said disposes of the question as to the propriety of the court's actions on the instructions refused for defendant. We think there was no error in the instance of the court's ruling on objections to the evidence; nor was there any error on the part of the court in remarks objected to as being a comment on the evidence. Nor do we think, in view of the evidence, that the verdict for \$2,500 was excessive.

We have not discovered any error justifying our interference, and hence we affirm the judgment. All concur.

HOLLIS et al. v. MYERS et al. (No. 6981.)
 (Court of Civil Appeals of Texas. Galveston.
 June 27, 1915. Rehearing Denied
 Oct. 14, 1915.)

1. PUBLIC LANDS §178—SALE BY AWARD.
 Public land awarded to a purchaser in accordance with the statute is the subject of sale.
 [Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 579-582; Dec. Dig. §178.]

2. PUBLIC LANDS §178 — CONVEYANCES — RIGHTS OF GRANTEE.

While, if a purchaser of public land from an original settler who has not completed his payments to the state and obtained a patent desires to have himself substituted for the original purchaser in order that he may carry out the contract with the state and have the patent issued to him, he must file his transfer in the General Land Office, his failure to do this in no way affects his title as against the original purchaser, and if such original purchaser completes the contract with the state and obtains the patent, the legal title thus obtained inures to the benefit of his vendee.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 579-582; Dec. Dig. §178.]

3. PUBLIC LANDS §178 — CONVEYANCES — RIGHTS OF GRANTEE.

Where an original settler on public land who had not completed his payments and obtained a patent conveyed to one who failed to file his conveyance in the General Land Office and obtain a patent, and thereafter conveyed to another party, who bought with full knowledge of the first conveyance, such subsequent grantee obtained no higher right by procuring the issuance of a patent to him than the original settler would have obtained had he obtained a patent after the first conveyance by him.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 579-582; Dec. Dig. §178.]

Appeal from District Court, Newton County; A. E. Davis, Judge.

Trespass to try title by R. C. Myers and others against W. D. Hollis and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Powell & Huffman, of Jasper, for appellants. Garland Smith, of Jasper, and John B. Warren, of Houston, for appellees.

PLEASANTS, C. J. This is an action of trespass to try title brought by R. C. Myers, R. C. Conn, J. S. Walker, and C. Byrnes against W. D. Hollis and H. M. Bivins. Pleas in abatement were sustained to the causes of action asserted by all of the plaintiffs except the plaintiff Myers, and as to him defendants pleaded not guilty, and that they were innocent purchasers for value without notice of plaintiff's claim. The cause was submitted to a jury in the court below upon special issues, and upon a return of the verdict judgment was rendered thereon in favor of plaintiff for the land claimed by him and against the defendants Hollis and Bivins and the sureties upon a replevy bond filed by defendants for the sum of \$800, the rental value of the property as found by the jury for the time

it was held by defendants under said replevy bond.

The facts disclosed by the record are as follows: The land in controversy is a part of the north one-half of section No. 6, Houston & Texas Central Railway Company, survey in Newton county. On October 14, 1901, the north one-half of said section No. 6, containing 320 acres, was awarded by the Commissioner of the General Land Office to E. H. Bivins as an actual settler. Bivins made his payment and executed his obligation to the state in accordance with the terms of his purchase as fixed by the statute. He completed his terms of occupancy, and on October 3, 1905, filed in the General Land Office proof of his occupancy as required by the statute. On December 22, 1904, after his three years' occupancy had been completed, he and his wife by general warranty deed conveyed 20 acres of the land to W. B. Brown for a cash consideration of \$175. Other conveyances by deeds of general warranty were subsequently made by Bivins and wife of different portions of the land to several different parties. Appellee Myers, by deeds from the vendees of Bivins and wife, acquired the title of said vendees. The deeds from Bivins and wife and the deeds to appellee were all promptly recorded in the deed records of Newton county, and appellee took possession of the land and made valuable improvements thereon. None of these deeds, however, were filed in the General Land Office, and no steps were taken by appellee, or any of the vendees of Bivins and wife, under whom appellee holds, to have themselves substituted for the original purchaser, nor to obtain a patent to the land. All of these sales were made and deed recorded, and appellee was in possession of the land prior to February 19, 1912, on which date E. H. Bivins, the original awardee of the land from the state, conveyed to his father, H. M. Bivins, the west half of the northwest one-fourth of section No. 6, thereby conveying 80 acres of the said section, which includes the land in controversy, the consideration recited in the said deed being \$100 and other valuable considerations. This deed was filed for record in Newton county and afterwards filed in the General Land Office and a patent was issued by the state to H. M. Bivins, assignee of E. H. Bivins, for the said 80 acres of land, the date of the issuance of the patent being the 27th day of February, 1913. On the 17th day of March, 1913, H. M. Bivins, the father of E. H. Bivins, conveyed 20 acres of the said 80 acres to W. D. Hollis, one of the appellants, reciting a consideration of \$500. The deed described the property conveyed as being one-half interest in the north one-half of an 80-acre tract of land, known as the west one-half of the northwest one-fourth of section No. 6, and further recited that:

"The interest that is intended to be conveyed by the said H. M. Bivins is what is known as the R. C. Myers Co. oil or artesian wells that is now on the above described property and it is the intent of this conveyance to convey only 20 acres of land."

Neither of the appellants, H. M. Bivins nor W. D. Hollis, testified in this case; nor was any proof offered upon the part of the appellants of the payment of the purchase money recited in the deed from E. H. Bivins to his father, H. M. Bivins, or in the deed from H. M. Bivins to the appellant W. D. Hollis. Nor was there any denial upon the part of appellants H. M. Bivins and W. D. Hollis of their knowledge that the land in controversy was in actual possession of the appellee R. C. Myers; nor did they deny that they knew that the deeds that he was holding under were on record in Newton county, Tex.

The appellee proved his title direct from E. H. Bivins, and the fact that his deeds were all recorded and general warranty deeds, and that he was in actual possession of the property in controversy, operating it and using it as a natatorium at the time that E. H. Bivins attempted to convey the land to his father, H. M. Bivins, and that the appellants knew these facts. The proof further showed that the appellants took forcible possession of the appellee's property, or his natatorium, just prior to the filing of this suit, and that upon the filing of this suit appellee sued out a writ of sequestration and sequestered the property, and the appellants replevied and since the replevy have been in the possession of the property.

Appellants present various assignments of error which it is unnecessary to set out or discuss in detail.

The main proposition advanced under the assignments and relied on by appellants for a reversal of the judgment is that because appellee and his vendors failed to file their deeds in the General Land Office and have themselves substituted for the original purchaser, they acquired no right or title in the land which can be asserted against H. M. Bivins, who after his purchase from E. H. Bivins had himself substituted for the original purchaser, paid the amount due the state, and obtained a patent for the land, nor against Hollis, the vendee of H. M. Bivins, notwithstanding both Bivins and Hollis, at the time of their respective purchases, had actual knowledge of appellee's possession and claim to the land.

[1, 2] There is no merit in this proposition. The title acquired by a purchaser to whom an award of public land has been made in accordance with the provisions of the statute will support an action of trespass to try title, and it goes without saying that land so held is the subject of sale. If the purchaser of such land from the original settler who has not completed his payments to the state and obtained a patent

desires to have himself substituted for the original purchaser in order that he may carry out the contract with the state and have the patent issued to him, he is required by the statute to file his transfer in the General Land Office, but his failure to do this in no way affects his title to the land as against the original purchaser, and if the latter completes the contract with the state and obtains the patent, the legal title thus obtained by him inures to the benefit of his vendee. If E. H. Bivins, after completing his term of occupancy, had paid the balance due the state on this land and obtained the patent therefor, he would have acquired no title to any portion of the land which he had previously conveyed, and the legal title evidenced by the patent would have vested in those to whom he had sold the land.

[3] Appellants, who bought with full knowledge of appellee's title, obtained no higher right by the issuance of the patent to H. M. Bivins than E. H. Bivins would have obtained had the patent been issued to him. The books are full of cases in which possession of the title of an awardee of school lands, who had not completed his payments to the state and obtained patent therefor, have maintained an action of trespass and recovered on such title. In the case of *Smith v. Coble*, 39 Tex. Civ. App. 243, 87 S. W. 170, it is expressly held that the title of such a purchaser is not affected by his failure to file his deed in the General Land Office. It seems to us that this is so obviously true that citation of authorities is unnecessary.

All of the assignments presented in appellants' brief have been considered, and none of them, in our opinion, can be sustained. We think that upon the undisputed evidence no other verdict and judgment could have been properly rendered. It follows that the judgment should be affirmed, and it has been so ordered.

Affirmed.

LINDSAY v. VOGELSANG et al. (No. 6980.)
(Court of Civil Appeals of Texas. Galveston.
June 18, 1915. Rehearing Denied Oct
7, 1915.)

1. VENDOR AND PURCHASER \S 334—REMEDY OF PURCHASER—MISTAKE — RECOVERY OF PAYMENTS.

Interest paid on the excess of purchase-money notes, due to a mistake in acreage, was recoverable.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. \S 959-980; Dec. Dig. \S 334.]

2. LIMITATION OF ACTIONS \S 37—STATUTE APPLICABLE—MISTAKE—ACTION TO RECOVER.

An action to recover the amount of interest paid to defendants on notes through mistake of the parties as to the amount due which defendants had refused to repay, all of which was paid or delivered to defendants within two

years before the commencement of suit, was not barred by the two-year statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 182-186, 477; Dec. Dig. ¶37.]

Appeal from Matagorda County Court; R. R. Lewis, Judge.

Action by D. A. Lindsay against N. M. Vogelsang and another. Judgment for defendants, and plaintiff appeals. Reversed, and judgment rendered for plaintiff.

Linn & Austin, of Bay City, for appellant.

LANE, J. This suit was originally brought by appellant Lindsay against appellees Vogelsang and Harty, in the justice's court of precinct No. 1, Matagorda county, on the 4th day of May, 1914, to recover two sums of money aggregating \$123.48, paid by plaintiff to defendants by the mutual mistake of all parties, and which sum of money was not in fact due by plaintiff to defendants. These two sums, \$61.74 each, were paid by plaintiffs to defendant on the 6th day of November, 1912, and the 6th day of November, 1913, respectively. Appellant D. A. Lindsay recovered judgment in said justice court for the full amount sued for, and appellees Vogelsang and Harty appealed from this judgment to the county court of said Matagorda county. In the county court appellees pleaded: First, the statute of limitations of two years, in bar of appellant's right to recover; and, second, that appellant for a valuable consideration had settled the matters in controversy, and therefore was estopped to recover in this action. The case was tried de novo in the county court before the court without a jury, and judgment was there rendered for the appellees Vogelsang and Harty. From this judgment Lindsay has appealed to this court.

At the request of appellant Lindsay, the trial court prepared and filed his findings of fact and conclusions of law. There is no statement of facts with the record, and we must therefore resort to the fact findings of the trial court to ascertain the facts shown at the trial.

The trial court finds that appellees Vogelsang and Harty on the 6th day of November, 1911, sold to appellant Lindsay and one J. W. May by general warranty deed a tract of land supposed by all the parties to the transaction to contain 198.92 acres, at \$40 per acre, and that in part payment therefor Lindsay and May executed ten promissory notes upon which interest was to be paid annually thereafter on the 6th day of November of each year until all notes were paid; that after Lindsay and May had paid two installments of interest, to wit, on the 6th day of November, 1912, and the 6th

day of November, 1913, it was discovered by all the parties that the land sold contained only 176.14 acres, 22.05 acres short of the number of acres conveyed, and that by reason of this shortage in acreage Lindsay and May had executed and delivered their notes to appellees for \$882 in excess of what they owed appellees; that, by reason of this mutual mistake on the part of all the parties to the transaction, Lindsay and May had paid interest on said \$882 in the sum of \$123.48, the amount sued for; that after this shortage in acreage was discovered, and after said interest had been paid, appellees credited Lindsay and May's notes, which were still unpaid, with \$882, but refused to refund the interest paid on the same for the two years from November 6, 1911, to November 6, 1913; that May transferred all interest he had in the matter in controversy to Lindsay; that Lindsay brought this suit on May 4, 1914.

Upon the foregoing fact findings the trial court filed his conclusions of law as follows:

"I conclude as a matter of law that the plaintiff's cause of action for the sum of \$123.48 paid as interest upon the notes executed on November 6, 1911, as purchase money for the land conveyed to him on said date by the defendants by their deed of said date, is barred by the statute of limitation of two years, which is pleaded in this action; and that the two-year statute, rather than the four-year statute, applies to the claim sued on; and that judgment be rendered for the defendants against plaintiff under said statute of limitation."

It is seen from the foregoing conclusion of law found by the trial court that he based the judgment rendered solely upon the erroneous conclusion that the facts found showed that the cause of action pleaded by appellant was barred by the statute of limitation of two years.

[1, 2] Without speculating as to the theory upon which the trial court reached such conclusion, we find that appellant's cause of action was for the recovery of \$123.48 paid to and received by appellees through mutual mistake of both parties and which appellees refuse to repay to appellant; that no part of same was paid or delivered to appellees for a term of more than two years prior to the institution of appellant's suit on May 4, 1914, and therefore the court erred in rendering judgment for appellees and in not rendering judgment for appellant for the amount sued for. Wherefore the judgment of the court below is reversed, and judgment is here rendered for appellant for \$123.48, together with 6 per cent. interest per annum on \$61.74 from the 6th day of November, 1912, and 6 per cent. interest per annum on the remaining \$61.74 from the 6th day of November, 1913, until said judgment is paid.

Reversed and rendered.

DAVIS v. PAYNE. (No. 800.)

(Court of Civil Appeals of Texas. Amarillo.
June 5, 1915. Rehearing Denied
Oct. 9, 1915.)

1. SCHOOLS AND SCHOOL DISTRICTS \S 106—ANNEXATION—TAXATION—CONSTITUTIONAL PROVISIONS.

Const. art. 7, \S 3, authorizes an ad valorem tax on property within a school district at a certain rate provided that two-thirds of its qualified voters shall vote such tax. The whole territory of a common school district, which had previously voted a special school tax of 20 cents on each \$100, was annexed, by Acts 29th Leg. c. 124, \S 148, to an independent school district subsequently organized within its territory and which had previously voted a special school tax of 50 cents on \$100. *Held*, that the merger did not destroy the special tax previously voted by the common school district, and that the new district might collect the 20-cent tax applicable to land situated in the common school district before the merger.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. \S 149, 248-252; Dec. Dig. \S 106.]

2. STATUTES \S 212—CONSTRUCTION—PRESUMPTION AGAINST ABSURDITY.

The presumption against absurd consequences of legislation is no more than the presumption that the legislators are gifted with ordinary common sense, and applies only where there is room for construction by reason of the obscurity or ambiguity of a law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 289; Dec. Dig. \S 212.]

3. STATUTES \S 181—CONSTRUCTION—INCONVENIENCE.

The argument of inconvenience results where the language of the law is not clear, either express or implied, and extends to Constitutions and statutes.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 259, 263; Dec. Dig. \S 181.]

4. SCHOOLS AND SCHOOL DISTRICTS \S 106—TAXATION—INJUNCTION—PARTIES.

In a suit by the owner of lands liable to a special school tax of 20 cents, voted by a common school district after its annexation to an independent school district subsequently organized within the same territory, to enjoin the collection of a 50-cent tax voted by independent district previous to annexation, the independent school district itself was a necessary party.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. \S 149, 248-252; Dec. Dig. \S 106.]

Appeal from District Court, Montague County; C. F. Spencer, Judge.

Action for injunction by A. M. Davis against H. H. Payne, ex officio assessor and collector of St. Jo, Texas. Judgment for plaintiff in part and for defendant in part, and plaintiff appeals. Affirmed.

A. L. Scott, of St. Jo, and W. W. Alcorn, of Montague, for appellant. T. H. Yarbrough, of St. Jo, and W. W. Cook, of Montague, for appellee.

HENDRICKS, J. On the 7th day of April, A. D. 1891, the city of St. Jo, Montague county, Tex., became an independent school district, by an election held for that purpose. Thereafter, on the 14th day of June, A. D.

1910, the qualified voters of the independent school district voted a special tax, not to exceed 50 cents on the \$100 valuation of all property situated within said district.

At the time of the formation of the St. Jo independent school district, there was situated, adjoining and around the independent school district, a common school district, No. 6, of Montague county, Tex.; and some time prior to the 1st day of April, 1912, certain qualified voters of said common school district, residing within that territory, presented to the board of trustees of the St. Jo independent school district a petition, soliciting the annexation of the territory embraced within the bounds of the common school district to the said independent school district. This petition, upon the date mentioned, by ordinance of the city council of the city of St. Jo, was adopted, and the limits of the St. Jo independent school district were, by virtue of chapter 124, \S 148, Acts of the 29th Legislature, extended so as to comprehend the territory of the common school district within the bounds of the independent school district for school purposes only.

Prior to the merger, and the annexation to the independent school district, the common school district had voted, and there was existent, a special school tax of 20 cents on the \$100 valuation; and subsequent to said merger there had been no special election for the creation of any other special school tax than those previously mentioned—the 50 cents special tax previously voted by the independent school district as it was originally constituted, and the special tax of 20 cents on the \$100 valuation previously voted by the common school district, as originally constituted.

The appellant, A. M. Davis, is the owner of 140 acres of land, situated within the added territory, annexed to the independent school district, and for the purpose of preventing the collection of the 50 cents special school tax, originally voted by the old independent school district, he applied to the district judge for an injunction, which upon hearing was partially granted and partially refused, the trial judge denying the injunction as to 20 cents on the \$100 valuation but granting the same as to 30 cents; and the appellant contends that, after the addition of the territory in the common school district to the independent district, there could be no collection of any tax whatever upon the property in the additional territory unless a new election was held and a special school tax was voted by a majority of the qualified tax paying voters of the whole district, voting at an election to be held for that purpose, by virtue of section 3, art. 7, of the Constitution adopted September 24, 1909.

It is clear that an independent school district, which has previously voted a tax for school purposes, cannot, by a subsequent ex-

tension of its limits, including additional territory, acquire the right to levy and collect such tax on the property in the annexed territory without another election by the qualified voters of the whole district, as merged, to determine the tax. The Supreme Court, in the case of *Crabb v. Celeste Independent School District*, 105 Tex. 195, 146 S. W. 528, 39 L. R. A. (N. S.) 601, Ann. Cas. 1915B, 1146, announced the doctrine following the holding of the Court of Civil Appeals of the Fifth District, in the case *Eagle Lake v. Lakeside Sugar Refining Co.*, 144 S. W. 709, construing section 3, art. 7, of the state Constitution, before the amendment of 1909, which, however, as applicable to the particular question, is practically the same, except that the old article provided that the special tax should be voted by two-thirds of the qualified property tax paying voters of the district, instead of a majority of such voters, as required by the amendment. The Supreme Court applied the familiar rule that where a power is expressly given by the Constitution, and the mode of its exercise expressly prescribed, such method of the exercise of the power is exclusive; but does the principle of the cases cited apply to the status of case presented here?

[1-3] The trial judge evidently attempted to enforce 20 cents of the 50-cent levy, upon the theory that such an amount is a legal tax upon the property in the added territory, with the change of agency under the law, for the purpose of collecting the same; and that said tax having been legally voted may be enforced by the new agents of the annexed territory until a new election is held for the collection of a new special tax for school purposes. Appellant's argument is, if we properly interpret the same, that the common school district (the territory of which was added to the independent school district) having been disorganized, on account of all the property in that district being merged in the other district, the special tax, previously voted by the common school district, was destroyed as a result of the annexation.

Upon this record, we presume that the 20 cents special tax previously voted in the common school district for school purposes was, when voted, a constitutional tax. If this tax could be enforced by the new agency created by the taxpayers of the common school district (the board of school trustees of the independent school district), and if the 50-cent levy, attempted to be enforced by the independent school district, could be said to legally include the 20-cent tax, legally existent, then the action of the district court is correct. The logic of appellant's position is, if the whole territory of an adjoining district becomes annexed to an independent district, properly and legally under the statute, the result of this annexation is to make the previous tax in each district before merger

absolutely void. We do not so construe the law. Unless the express prescription of the law, or the clear negation of the same, or the necessary implication, by construction, is such, we do not think it was the intention of the lawmakers to produce a result amounting to a total destruction of the taxes for one year, or until another election, where the annexation is such that another could not be voted and collected to meet the necessities of the school for that particular year.

"The presumption against absurd consequences of legislation is * * * no more than the presumption that the legislators are gifted with ordinary good sense. It is applicable, like all other presumptions, * * * only where there is room for construction by reason of the obscurity or ambiguity of the law." *Black on Interpretation of Laws*, § 46, p. 130.

The argument of inconvenient results, where the language of the law is not clear, either express or implied, has always been a principle of construction, both as to Constitutions and statutes.

In the case of *Rockwall County v. Roberts County*, 103 Tex. 407, 128 S. W. 369, it is disclosed that Roberts county, prior to December 30, 1888, was unorganized and attached to Wheeler county for judicial purposes. Roberts county organized, detaching itself from Wheeler, on the date mentioned, and before any action of the commissioners' court of the new county (Roberts) or by its officers, with reference to assessment and taxation of property in that county, a contract for jail and courthouse was made, and the district court and Court of Civil Appeals held that the issue of bonds for Roberts county for the purposes stated was not wholly valid, "unless the valuation was assessed in the county which is sought to be taxed by the issue of the bonds," and that said bonds could not be based upon the assessed valuation made by Wheeler county of the property situated in Roberts county, when Roberts was attached to Wheeler, on the theory, we presume, that the assessment by Wheeler of the land in Roberts became nugatory when the latter was organized. The Supreme Court, however, held it could be used, and, while the analogy between the two cases is rather remote, there is some application we think of that case to this.

In the *Crabb Case*, and the *Eagle Lake Case*, *supra*, the independent school districts were attempting to apply a tax to the added territory which had never been voted by the whole district. Though it may be said that the independent district in this instance was attempting to do the same thing, the district judge restricted its acts to an amount, and to a tax, which had legality when voted, as against the constitutional contention here presented, and was legally applicable to the land in that district, unless annexation destroys it; and we are inclined to think that, in case of a merger of two whole districts, a special tax previously voted as a legal tax,

by the voters of each district, could be collected by the agents of the whole district after annexation. The logical consequences of appellant's doctrine is that the independent school district could not collect the 50-cent special tax upon property solely situated in that district, which we believe does not ensue. If the agency of the independent district could collect the 50-cent tax as against the land in that district, as originally constituted, why could not the same agency collect the 20-cent tax applicable to land situated in the common school district as originally existent? We do not see any special inhibition by the Constitution of such a procedure, and the inconvenient and harsh results, ensuing to the community, and the maintenance of the public schools, are such as to induce that construction.

[4] Appellant, in his application for the particular injunction, did not make the independent school district a party to his suit; he only sued the ex officio and city assessor and collector, for the purposes of determining the validity of the tax. The independent school district of itself is a necessary party to this suit, and, that being so, any judgment in this proceeding could not be properly operative against it. *Vance v. Miller*, 170 S. W. 838; *Renshaw v. Arnett*, 158 S. W. 1197; *Voss v. School District*, 18 Kan. 471.

Upon the whole, we think this judgment should be affirmed.

Affirmed.

FT. WORTH & D. C. RY. CO. v. ALLEN.
(No. 736.)

(Court of Civil Appeals of Texas. Amarillo.
July 3, 1915. Rehearing Denied
Oct. 9, 1915.)

1. CARRIERS — 304 — PERSONS ASSISTING PASSENGERS — DUTY OF CARRIER — HOLDING TRAIN.

One entering a train, with the knowledge of the railroad company, to render necessary assistance to passengers in the interest of the company, does so by implied invitation, and the company must hold the train for a time reasonably sufficient to allow such person to render such assistance and leave the train.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1104, 1110-1114, 1124, 1242; Dec. Dig. — 304.]

2. CARRIERS — 304 — PERSONS ASSISTING PASSENGERS — KNOWLEDGE OF CARRIER.

A carrier who has no knowledge that one is entering its train to assist passengers only, and with the intention of thereupon alighting, may assume that such person boards the train as a passenger, and may start the train after giving him a reasonable time to get aboard.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1104, 1110-1114, 1124, 1242; Dec. Dig. — 304.]

3. CARRIERS — 304 — PERSONS ASSISTING PASSENGERS — STATEMENT TO BRAKEMAN — EFFECT.

Where one entering a train to assist his two daughters to a seat answered the brakeman's question as to destination by saying, "They are going to H.," the brakeman was not charged with knowledge that such person enter-

ed only to assist the others, and was intending to leave the train.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1104, 1110-1114, 1124, 1242; Dec. Dig. — 304.]

4. CARRIERS — 316 — PASSENGERS — INJURIES — CUSTOM — EFFECT.

Where a custom exists for a railroad company to allow persons to enter its trains to assist passengers, and to hold trains a reasonable time for that purpose, plaintiff who entered a train for that purpose and was injured by jumping from the train, which started before he could get off, need not show knowledge by the company that he entered the train to assist passengers only, since the custom supplies such notice.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1261, 1262, 1283, 1285-1294; Dec. Dig. — 316.]

5. CARRIERS — 304 — PERSONS ASSISTING PASSENGERS — CUSTOM — NEGLIGENCE.

Where it appeared, in an action for injuries received in alighting from a moving train, that plaintiff entered the train at a station to assist his daughters to a seat with the intention of thereupon leaving the train, but without knowledge of such intention on the part of the defendant company; that the company had no custom of holding its trains at such point to allow such assistance to passengers, but stopped only long enough for passengers to get on and off without regard to time—there was no negligence in failing to hold the train a reasonable time to allow plaintiff to perform the service and leave the train in safety.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1104, 1110-1114, 1124, 1242; Dec. Dig. — 304.]

6. CARRIERS — 336 — PERSON ALIGHTING FROM MOVING TRAIN — STATEMENT BY BRAKEMAN — EFFECT.

Where plaintiff left the train, which he had entered only to assist passengers to get on board, as it was getting under way and while descending the steps of the coach told the brakeman that he was going to alight, the reply of the brakeman to "jump with the train" was no invitation or command by the company constituting the inducing cause to plaintiff to alight, as the direction was merely in the nature of information or advice.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1357-1362; Dec. Dig. — 336.]

7. CARRIERS — 304 — PERSON ALIGHTING FROM MOVING TRAIN — DUTY OF CARRIER.

The plaintiff having started down the coach steps without hesitation declaring his intention to alight and without asking that the train be stopped at a time when the train was getting under way, it was neither the company's duty to stop the train, nor to prevent his alighting until the train could be stopped; its only duty being to use ordinary care in permitting him to leave the train.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1104, 1110-1114, 1124, 1242; Dec. Dig. — 304.]

8. CARRIERS — 336 — PERSON ALIGHTING FROM MOVING TRAIN — ACT OF BRAKEMAN — EFFECT.

The fact that the brakeman gave plaintiff room on the car steps to pass was not an invitation to plaintiff to jump from the train.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1357-1362; Dec. Dig. — 336.]

Appeal from District Court, Donley County; Jas. N. Browning, Judge.

Action by T. H. Allen against the Ft. Worth & Denver City Railway Company, to

recover damages sustained while alighting from a car. From a judgment for plaintiff, defendant appeals. Reversed.

Thompson & Barwise, of Ft. Worth (G. W. Wharton, of Ft. Worth, of counsel), and H. B. White, of Clarendon, for appellant. A. T. Cole, of Clarendon, and Odell, Turner & Powell, of Ft. Worth, for appellee.

HUFF, C. J. T. H. Allen, appellee, sued appellant for damages received by breaking his leg at Clarendon, a station of appellant on its line of road. It is alleged that appellee's two daughters and his granddaughter were desirous of boarding appellant's train at the station above named; that they had considerable baggage, and that for the purpose of assisting them, he boarded the train with them, carrying the luggage, and when they reached the seat intended for occupancy, the train began to move, and he sought to leave the train, and then he alleges the facts up to his fall. The negligence alleged is: (1) That it was the custom, and usual, to stop the train at the station five minutes, but on this occasion it only stopped two minutes and not longer than one minute after the employes permitted the passengers to enter; and it was negligent to start without remaining its customary time and without giving appellee an opportunity to seat the parties mentioned and to leave the car in safety. (2) It was negligent, when its servants learned that he desired to leave the train, in not bringing it to a standstill. (3) And for its servants to invite appellee to alight therefrom and tell him to jump with the train as it moved.

The trial court submitted two grounds of negligence:

(1) If appellant "negligently failed to cause said train to remain standing a reasonable length of time for plaintiff to accomplish his purpose and to disembark safely from the same, and you further believe from the evidence that the said servants and employes of defendant caused the said train to start before the same had stood a reasonable and sufficient time for plaintiff to safely alight therefrom in the exercise of ordinary care and diligence on his part, etc.; (2) or if you believe from the evidence that defendant's brakeman, by word or act, made it reasonably to appear to plaintiff that he was invited to leave the train at the time he did, and acting under such invitation," etc.

We find no allegation that appellee notified the servants of appellant that it was his purpose to assist his daughters to a seat and then disembark, and that he only boarded the car for that purpose, and that it was his intention to leave the train upon performing the service at the time he entered the car, or before he did so. The only allegation of notice given was after the train had started and just before he left the train, when it is alleged, as set out in ground (2) of negligence, when the servants learned he desired to leave the train, and in not bringing the train to a full stop. It will be observed this ground of alleged negligence was not submitted by the trial court.

The facts show that on the 21st of May, 1911, the appellee, with a married daughter and her little girl, and another daughter about 14 or 15 years old, went to the depot of appellant, for the purpose of taking the train to visit another daughter of appellee near Hedley, on defendant's line of road. They had one ordinary suit case and a folding baby buggy, which the married daughter was taking with her to present as a present to her sister living at Hedley. Appellee accompanied his daughters to the train for the purpose of putting them on the train. It is shown by the testimony that there were but few passengers who left the train or got on the train that morning; but as soon as the passengers getting off at that point had alighted, the appellee and his daughters boarded the train. He stated:

"My recollection is the coach we went on was attached to the smoker, up next to the front—that is my recollection. I did not notice how many there were. I got on where the passengers generally were getting on and off and where the others got on; that is the only place I noticed them getting on and off. * * * When the train stopped, as I said a while ago, we got to the train or depot just about the time the train slowed up, and I spoke to my daughter and said—well we walked up there and stopped and stood there until the passengers got off, and there was probably one in ahead of us, but as soon as we could get to the step we went on the train. * * * We walked right on down the aisle to the back end of the coach, I think right on the back end, where we found a vacant seat and stopped, and just about the time we got there I felt the train move, and I said to my daughter, 'I have got to get off.' I set the grip down and turned and walked back to the entrance. * * * I walked back to the platform and back on the platform of the car, and there was a brakeman standing on the lower step of the car, and I asked him if the train was going to stop at the coal chute, and he said 'No' and I said, 'I want to get off,' and I think that is the words I used as he walked up the steps and I walked down to the lower step and jumped off. He walked up and I down. I never heard anything else said at all, except just as I got on the lower step to get off I heard him—I suppose it was him—some one in the car said, 'Jump with the train.' * * * When I told the brakeman I wanted to get off he never said anything at all that I heard, except what I have told you. That is all that was said. I just asked him the question if he was going to stop at the coal chute, and he said, 'No,' and I said, 'I have got to get off.' Of course I had gone on there with the calculation of getting off and done that. I had went up there with the calculation of seating them and getting off. I do not think there was anything else said at all; nothing until I got on the step there. There was no one else on the platform at the time I stepped down the steps, except the brakeman, that I saw. The voice that said, 'Jump with the train,' came from about where the brakeman stood. * * * I just stepped down on the lower step and jumped off. When I jumped off I lit on my feet, and I fell. This leg gave way and I kind o' tumbled on that side and caught on my hand and tried to get up, and my leg gave way and I did not try any more."

On cross-examination he testified:

"I told my daughters as we got to the depot that I would not take the time to get the tickets; that they could pay on the train. We heard the train whistle of course before it came

in, but we got there just about the time it came in. * * * My recollection is that my daughters were in ahead of me, but now I would not be positive about that matter. We all were right together there, and I think they went in first. They were just going down to my daughter's to stay a few days on a visit. The brakeman was at the steps when we got there, and I think his name is Mr. Burnside. I don't think my daughters said anything about where they were going. I don't think it is a fact that Mr. Burnside asked me then where they were going and that I, or my daughters said, 'Hedley.' I would not be positive about that. I do not think that is true. I did not tell him where we were going. I don't remember saying a word about that. * * * It seems that he just swung on there. He was right on the lower step, I asked him if the train would stop at the coal chute, and he said it would not, and I said, 'I have got to get off.' I think those were the words I used, and he never said a word. * * * He told me to jump with the train just about the time I hit the bottom step. You might say that I was just turning loose at the time he told me to jump with the train. * * * In jumping from the train my recollection is that I went out pretty near straight from it. I may have gone a little at an angle, but my memory is that I went mighty nearly straight. If jumping with the train means jumping the way it is going, I did not jump with the train. You might say I was in a hurry to get off. I did not want to go further. I wanted off as soon as I could get off. It is a fact that I was in a hurry to get off and from the time I came out and got on the vestibule and saw the brakeman there was no pause, but I kept on going. * * * I did not ask the brakeman to stop the train for me."

The brakeman, Burnside, testified that he saw appellee and his daughters getting on the train at the time above mentioned.

"I first saw him at the station at Clarendon on the ground near the footstool at the front end of the rear coach. What we call the rear coach is the last coach day passengers ride in, ahead of the diner and two sleepers. Plaintiff came to the train to get on. I helped his folks on the train, and asked them where they were going, and they said, 'Hedley.' I suppose it was him and his two daughters. I took it to be his two daughters. I knew one was his daughter, and the other I did not know whether it was or not. The one that I knew was named Mrs. Robertson. The ladies got on the train first; there was one little child with them. I suppose we had been there some three or four minutes; that is as near as I can guess at that. There were not a great many passengers that got off the train at Clarendon at that time. When I asked Mr. Allen where he was going he was just getting up in the vestibule, and he said he was going to Hedley, and he went into the car with his folks. He said nothing else to me at that time. * * * The next time I saw Mr. Allen was after the train started and had gone a couple, or probably three car, lengths. He came out into the vestibule and said he was going to get off. He came out and said that, and I told him not to get off, that he might hurt himself, and to go to the conductor and he would let him off. He asked me if we would stop at the coal chute, and I told him that I did not know whether we would or not. He said, 'I am going to get off,' and he dropped off. During that conversation he was going down the steps. * * * Plaintiff just went down the steps and took the hand-rail with his right hand and stepped off backwards."

On cross-examination he stated:

"The only reason I remember Mr. Allen and what was said is because I asked Mr. Allen

where he was going, and he said he was going to Hedley, and he said they were going to Hedley. I do not know whether he said 'we' or 'they.' I do not exactly know what he said about it. If I remember right Mr. Allen was in his shirt sleeves; it was Sunday. I did not know he was going to get off the train."

The facts show that Mr. Allen did not board the train with the expectation of going to Hedley or as a passenger, but only for the purpose of assisting his daughters. The jury returned a verdict in favor of the appellee for \$5,000, and upon which judgment was rendered. The appellant requested the court to instruct a verdict for the appellant, which was refused. The action of the court in this particular is the ground for several assignments of error, which will now be noticed in order.

[1, 2] There is no evidence that we are able to find in the record that the appellee went into the train in conformity with the practice or custom at that station, approved or acquiesced in by the railroad; that is, to render necessary assistance to a passenger in the interests of the railway, and therefore an implied invitation. If one so enters, we understand the rule to be that under such circumstances a party so entering has the right to render the necessary assistance and to leave the car. A railroad so permitting him to enter with knowledge of his purpose is presumed to agree that he may execute it, and is bound to hold the train a reasonable time therefor. The duty is dependent upon the knowledge by the carrier of his purpose or by those in charge of the train. Without such knowledge, they may reasonably conclude that the entry was made for the purpose of becoming a passenger, and that the carrier may cause the train to be moved after giving time reasonably sufficient for him to get aboard.

[3] In this case the appellee does not testify or claim that he gave the brakeman, or any of the train crew, notice that he was entering to assist those in his charge. The only pretense of any verbal notice is the testimony of the brakeman on cross-examination, in which he stated that appellee answered his inquiry as to where they were going that "we," or "they, are going to Hedley." He could not remember positively whether appellee said "we" or "they." As stated above, appellee does not pretend to have given any sort of notice of his purpose in entering the car. We can see nothing in the manner in which appellee and his daughters boarded the car that would charge the train crew with knowledge that the appellee was entering to assist those accompanying him, and that he intended to leave the car upon performing that assistance. If it shall be conceded that the jury found appellee stated, "They are going to Hedley," and in doing so he referred to his daughters, this does not still charge the brakeman with knowledge that appellee was not then entering as a passenger, and that he was entering

as an assistant to his daughters, or that he intended to leave so soon as this service was performed. There being no such notice at the time of entrance, there was no duty resting upon appellant to hold the train a reasonable time to permit appellee to leave the car. *Oxsher v. Railway Co.*, 29 Tex. Civ. App. 420, 67 S. W. 551; *Railway Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 38 S. W. 401; *Railway Co. v. Guess*, 154 S. W. 1060; *Dillingham v. Pierce*, 31 S. W. 203; *Railway Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905; *Railway Co. v. Hutchinson*, 132 S. W. 509.

[4] There is no allegation in the petition that at the time of boarding the train by appellee the train crew then knew his purpose in entering the car, or that they had notice that he would leave; neither do we find any allegation that it was a long-continued custom of the railway at that point to permit parties accompanying a passenger to enter and render assistance and a reasonable time given in which to leave the car; and we find no evidence of such a custom. If appellee entered without notice of his purpose, there was no duty resting on appellant to hold the train a reasonable length of time to permit him to get off. If there was no custom alleged or proven in regard to assistants to passengers to enter the car during the usual and customary stop at the station, then no duty is shown on appellant to appellee to stop the train at the station the usual and customary time. If appellee had alleged and proven the custom in such particular, and if his proof had shown that the train was not stopped at the station the usual time, his right of recovery should have been submitted without proof of notice of his purpose; the custom would have supplied the notice. *Railway Co. v. Hutchinson*, 132 S. W. 509; *Railway Co. v. Abbott*, 170 S. W. 117.

[5] We find no evidence that the train schedule stop at Clarendon was five minutes to permit passengers to alight and others to board the train. The testimony of the conductor and brakeman is to the effect the time for arrival of the train at Clarendon was 8:37 a. m., and that there was no leaving time, but its departure was controlled by the business to be transacted at the time. A stop was made long enough for passengers to get on and off and to change the mail and express without regard to the number of minutes or seconds. This was the rule and custom at that station. So far as we are able to find, this testimony is undisputed. There appears to have been but few passengers to get on or off at that point on that day. Under these facts and the pleadings, the court should not have submitted the issue of negligence in failing to cause the train to remain standing a reasonable length of time to allow appellee to perform the service and leave the train in safety. The

allegation and facts proven showed no such duty owing appellee.

[8-8] The issue whether appellee was directed or invited to leave the train, and whether appellant was negligent in so doing, is also presented by appellant's special requested charge for an instructed verdict. The appellee entered the car upon his own volition, and under circumstances such as were sufficient to indicate that he did so as a passenger, and not as a mere assistant to the passengers whom he was conducting, and that he did so without giving notice to the train crew of his object or purpose. After having done so and the train started, he then informed his daughters that he must leave or disembark. He reached the platform of the vestibule and saw the brakeman, and asked him if the train would stop at the coal chute. When informed that it would not, he announced that he must get off, and started down the steps and the brakeman up; they passing each other on the step. Up to this time there can be no question but appellee was acting on his own volition, without having been invited or requested thereto by the servants of appellant. He had not been invited to leave, or requested to do so, by any servant of the appellant. We know of no duty which would require the brakeman to stop or hold him. The danger was not apparent, or necessarily so, at that time. The train was moving, it is true, but just starting, and had gone but a few feet. When he reached the last step, preparatory to leaving the train, we will assume the jury found the brakeman told him to jump with the train. This statement was not a command or request by the brakeman for him to jump, but in the light of this record was advice as to the manner of the jump to be made or manner in which to leave the train while in motion. Appellee had entered with the purpose of leaving; had announced to his daughters when he felt the train move that he must go, and told the brakeman he must get off and, while telling him so, was proceeding to do so, and when he reached the last step, as he says, preparatory to the jump, he heard the instructions given by the brakeman. If he had heeded the instructions it is not probable that he would have received the injury, but he jumped at right angles to the train, or in the opposite direction, and he states positively he did not jump the way the train was going. We think it is manifest that the appellee did not rely on what the brakeman said, and did not jump because of what had been said by the brakeman; that what he did or said neither in act nor word was the inducing cause to appellee in jumping from the train. The appellant learned for the first time that appellee desired to leave the train after he reached the vestibule on his way out of the car. There appears to have been no perceptible halt made by him in leaving the car and in jump-

ing. It is urged because the brakeman gave appellee room on the steps to pass that this was a direction or invitation to jump from the train. Under the facts of this case we cannot see how it could be so construed. The brakeman was himself boarding the train as it started. There was no duty owing appellee by appellant at that time further than that which ordinary care required. To have blocked the way of appellee would have been an extraordinary proceeding after appellee declared he must get off and was proceeding to do so. He did not ask that the train be stopped or held for that purpose. The use of the words, "jump with the train," was clearly given in the nature of information, after it was manifest appellee intended to do so. Under no construction can it be interpreted as a command or a declaration in the nature of a requirement. *Pittsburgh, etc., Railway Co. v. Gray*, 28 Ind. App. 588, 64 N. E. 39; *Vimont v. Railway Co.*, 71 Iowa, 58, 32 N. W. 100. It is urged that the brakeman having failed to stop the train after he learned appellee desired to get off was negligence. This issue was not submitted to the jury by the trial court. Under the facts in this record, we see no negligence on the part of the train crew in failing to stop the train after it had started, after learning that appellee intended to leave the train. There was no duty due from appellant to appellee to stop the train. He had not given notice that he would want time in which to disembark before he entered. After learning that it was appellee's purpose to leave, and after the train was in motion, there is no fact showing that the train could have been stopped by the use of the utmost diligence before appellee had stepped off. In the absence of a request to stop, there was no duty to inquire of appellee if he wanted the train stopped—no such duty then rested on appellant—but if appellee had felt himself unskilled in the manner of alighting and was unwilling to take the risk, he should have notified the brakeman. It was not negligence on the part of appellant in simply permitting him to do what he notified the brakeman he was going to do and in carrying out his own will and purpose. He had never established a relationship between himself and the railway that placed an obligation upon it to protect him further than, after it was known his purpose was to leave the train, to use ordinary care in permitting him to do so. The brakeman appears to have given him good and wholesome advice in the matter, and it occurs to us there was no failure shown to use ordinary care on the part of appellant. Especially is this true under the immediate facts then surrounding the parties. We do not see what more the brakeman could have done, unless he had taken hold of and held appellee until he could have reached the conductor, or the stop signal. This was

not required of appellant, even if the appellee had been a passenger on the train, as we understand the authorities of this state and others.

We believe the trial court should have given the peremptory charge, and that the jury should have been instructed to return a verdict for the appellant. We see no reason for remanding the case for another trial, as it appears to have been fully developed. The case will be reversed and rendered.

AMERICAN NAT. INS. CO. v. ANDERSON et al. (No. 6930.)

(Court of Civil Appeals of Texas. Galveston.
June 9, 1915. Rehearing Denied
Oct. 7, 1915.)

1. INSURANCE — 291—WARRANTY—HEALTH.

Under a life insurance policy providing that the insurer assumed no obligation prior to its date nor unless insured should be in sound health on the date of its delivery, the fact that insured was not in sound health at its delivery would constitute a good defense to an action thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 681-690, 694-696; Dec. Dig. — 291.]

2. APPEAL AND ERROR — 173—REVIEW—THEORY OF CASE.

In an action on a policy of life insurance, the insurer, who did not set up in the trial court a provision of the policy that it assumed no obligation unless insured was in good health at its delivery, could not urge the defense for the first time in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098; Dec. Dig. — 173.]

3. INSURANCE — 265—CONSTRUCTION—WARRANTY.

Under a policy providing, as required by Rev. St. 1911, art. 4741, subd. 4, that statements in the application, in the absence of fraud, should be representations, and not warranties, a statement as to a material matter fraudulently made would be construed as a warranty.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 560; Dec. Dig. — 265.]

4. INSURANCE — 265 — "WARRANTY" — DISTINGUISHED FROM "REPRESENTATION."

A "warranty" enters into and forms a part of the contract itself, defining the limits of the obligation beyond which no liability arises; a "representation," made before or at the time of the contract, presents the elements on which the risk to be assumed is to be estimated, and does not necessarily merge in, or become waived by, the subsequent contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 560; Dec. Dig. — 265.]

For other definitions, see Words and Phrases, First and Second Series, Representation; Warranty.]

5. INSURANCE — 256—MISREPRESENTATIONS—MATERIALITY.

To avoid a policy for misrepresentation, the false statement must have been made willfully and with the intent to deceive, and must have been relied upon by the insurer; and a misrepresentation made innocently and in the belief of its truth will not avoid the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 540, 549; Dec. Dig. — 256.]

6. INSURANCE — 291 — LIFE INSURANCE — MISREPRESENTATION—MATERIALITY AND EFFECT.

Rev. St. 1911, art. 4741, subd. 4, requires all life policies to provide that statements by the insured in his application, in the absence of fraud, shall be deemed representations, and not warranties, and article 4947 provides that any provision in any policy that false statements in the application or contract shall render it void shall be ineffective and no defense, unless the misrepresentation was material to the risk or contributed to the contingency on which the policy became payable. Insured, a 16 year old school-boy, who had been treated by a physician and told that he had tuberculosis, but not told what tuberculosis was, stated that he had not had consumption, from which disease he died a few months after issuance of the policy. *Held*, that the misrepresentation was not excused by any ignorance as to what the disease was, that it was material to the risk, and a defense to an action on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 681-690, 694-696; Dec. Dig. 291.]

Appeal from Galveston County Court; George E. Mann, Judge.

Action by Jane Anderson and husband against the American National Insurance Company. Judgment for plaintiffs, and defendant appeals. Reversed, and judgment rendered for defendant.

Wilson & Webb and Williams & Neethe, all of Galveston, for appellant. O. S. York, of Galveston, for appellees.

McMEANS, J. Jane Anderson, joined by her husband, John Anderson, brought this suit in the justice court of Galveston county against the American National Insurance Company to recover \$147 which she alleged to be due her as beneficiary in an insurance policy issued by defendant on the life of Leon Anderson, her son. A trial resulted in a judgment for plaintiff for the amount sued for. Defendant appealed to the county court, where, upon a trial before the court without a jury, judgment was again rendered in plaintiff's favor for the amount sued for, from which judgment the defendant has prosecuted an appeal to this court. The record does not disclose what defenses, if any, were pleaded by the defendant in the justice court. In the county court it pleaded that the policy in question was obtained by the insured through fraud and misrepresentations, in that the answers of the insured to the questions in his application for insurance, which application constituted a part of the policy, were false, and were known to the insured to be false, and were made for the purpose of obtaining the policy and of defrauding the defendant. No exception was urged to this pleading.

[1, 2] Appellant by its first assignment of error complains that the court erred in rendering judgment for the plaintiff, for the reason that the policy sued on contains the provision that no obligation was assumed by the appellant company prior to its date, nor

unless the insured should be alive and in sound health on the date of its delivery, and that uncontradicted evidence showed that on the date the policy was delivered the insured was not in good health. If, in fact, the policy contained such a provision, and if, in fact, the insured was not in sound health at the time of its delivery, this, if pleaded, would constitute a good defense to plaintiff's suit. *Metropolitan Life Ins. Co. v. Betz*, 44 Tex. Civ. App. 557, 99 S. W. 1140. But this defense, to be available to the defendant, must have been pleaded in the trial court, and, not having been pleaded there, it cannot be urged for the first time in the appellate court. The assignment, for this reason, must be overruled.

The second assignment complains of the action of the court in rendering judgment for plaintiff on the evidence adduced, for the reason that the insured, Leon Anderson, at the time of making application for insurance, was suffering from pulmonary tuberculosis, and so knew, but, when questioned, stated in his application that he did not have such disease; that such misrepresentation was material to the risk; and that therefore the court should have rendered judgment for the defendant.

On December 11, 1913, Leon Anderson applied to defendant for a policy of insurance upon his life. In his written application he made answers to questions, as follows:

"When last sick? Answer: No. What is the present condition of health? Answer: Good. Does any mental or physical defect exist? Answer: No. Has the life proposed ever suffered from consumption, etc.? Answer: No. State what disease. Answer: None."

The testimony shows without dispute that at the time the applicant made these answers he was suffering from pulmonary tuberculosis, or consumption. On this point Dr. W. L. Hoecker testified:

"I treated and attended Leon Anderson during his lifetime. I first treated Leon Anderson on the 24th day of November, 1913. He called at my office. I examined him, and found that he was suffering from pulmonary tuberculosis, a large cavity in his right lung. I told him at that time that he had a very bad lung. * * * I saw Leon Anderson again on the 1st day of December. I saw him no more until the 28th day of February, and again on March 2d, and he died on March 3d. He died of pulmonary tuberculosis."

On cross-examination he testified:

"In November I told the boy he had a bad lung. I saw him again in December and told him he had tuberculosis."

The policy sued on contained this provision:

"All statements made by the insured in the application hereof shall, in the absence of fraud, be deemed representations and not warranties."

This provision is required, by subdivision 4 of article 4741 of the Revised Statutes 1911, to be written in all policies of life insurance, and, no doubt, was written in the policy in question in obedience to the statute.

It is shown by the undisputed testimony that Leon Anderson was not in good health at the time he made his application for insurance, and that at said time he was afflicted with consumption, and it necessarily follows that his representations that he was then in good health and that he had never had consumption were false. It is further shown without contradiction that the appellant did not discover the falsity of the representations until after the death of the insured, and that it then promptly gave notice to the beneficiary that it refused to be bound by the contract of insurance. R. S. art. 4948.

Article 4947, Revised Statutes 1911, provides:

"Any provision in any contract or policy of insurance issued or contracted for in this state, which provides that the answers or statements made in the application for such contract, or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract, unless it be shown upon the trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed in any case shall be a question of fact to be determined by the court or jury trying such case."

The undisputed evidence shows that the misrepresentation made by the insured was as to a "matter or thing" material to the risk, and actually contributed to the contingency or event on which said policy became due and payable," and the finding by the court trying the case to the contrary was not only without evidence to support it, but against the uncontradicted facts.

[3] But the policy provides that the statements made by the insured in his application should, in the absence of fraud, be deemed representations, and not warranties. It follows as a corollary, we think, that if a statement as to a material matter was fraudulently made, then such statement or representation was intended to be a warranty and should be so construed.

[4] If a warranty, it entered into and formed a part of the contract itself. It defined by way of particular stipulation and condition the precise limits of the obligation which the insurer undertook to assume, and no liability could arise except within these limits. If, however, the statement should be construed as a representation, then it was no part of the contract of insurance, but its relation to the contract was collateral. It preceded the written instrument, and was not necessarily merged in or waived by the subsequent writing. Representations made to the insurer before or at the time of making the contract are a presentation of the elements on which the risk to be assumed is to be estimated. They are the basis of the contract on the faith of which it is entered into, and, if false in any respect material to the risk, the contract will not take effect. 3 Cooley's Briefs Ins. p. 1931 et seq.

In the absence of the statute above quoted (article 4947), a warranty would be held to stipulate for the absolute truth of any statement made the falsity of any of which, regardless of their materiality to the risk, will avoid the contract (Id. p. 1950); but since the adoption of the statute warranties and representations seem to have been placed on the same level, and before the falsity of either shall be sufficient ground for avoiding the policy the thing warranted or represented must have been material to the risk or actually contribute to the contingency or event which rendered the policy payable.

[5] But where misrepresentation of a material fact is pleaded in defense by the insurer, to what extent is the insured excused by want of knowledge and good faith? In 1 May on Insurance, §§ 156, 181, the rule is stated to be that a misrepresentation, whether the result of intent or mistake in good faith, will avoid the policy. In 2 Joyce on Insurance, § 1884, the rule is stated to be that as to misrepresentations the statements must be made with an intent to deceive, or must be statements of something as positively true, without being known to be true, and at the same time having a tendency to mislead or deceive, in both cases relating to material facts.

The rule stated in May on Insurance above referred to seems to have been somewhat qualified by the author, for in volume 1, § 81, he lays down the principle that a statement simply untrue is not a palpably fraudulent one, and that good faith is always sufficient, if the policy provides merely that the statements are true so far as is known to the applicant, or limits the effect of false statements to avoid the policy to those that are designedly false. But we think the better rule, and the one supported by the weight of authority, is as stated by Mr. Cooley in his Briefs on the Law of Insurance (volume 3, p. 1956), as follows:

"The rule may, indeed, be regarded as well established that, to avoid a policy for misrepresentation, the false statement must have been made willfully and with the intent to deceive, and must have been relied upon by the insurer."

And the author adds:

"It naturally follows that a misrepresentation, made innocently and in the belief that it is true, will not avoid the policy."

[6] Now we come back to the facts of this case. Leon Anderson made written application to the appellant for a policy of life insurance on December 11, 1913. Less than three weeks before that date he had consulted a physician, and had been examined and told that he had a very bad lung. Less than two weeks before that date he again consulted the same physician, and was told that he had tuberculosis; yet in his application for insurance he stated that he was in good health, and that he never had had consumption. It is too clear for argument that it was the condition of his health that caused him to consult the physician, and when, added

to this fact, he was told that he had a very bad lung and that he was afflicted with tuberculosis, it is inconceivable that he believed that his health was good when he stated it to be so in his application. But appellee argues, in effect, that the doctor did not explain to him what tuberculosis was, and that, although he had been told that he had tuberculosis, it did not follow that he knew he had consumption, and that answering as he did that he did not have consumption is no evidence that he answered in bad faith or with intent to deceive. We cannot believe that at this time, when the fight against the dread malady is world-wide, when campaigns of education have been conducted everywhere to instruct people as to danger of contracting it and the best methods for its avoidance, that an average 16 year old schoolboy, such as the insured was shown to be, when he was told by the physician he consulted that he had a very bad lung, and that he had tuberculosis, did not know that he was suffering from consumption. He at least knew that he was not in good health when he represented that he was. His statements in the regard mentioned were relied upon by the insurance company, and but for the misrepresentations the policy would not have been issued. "The matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable."

We think, therefore, that the judgment in favor of the plaintiff was erroneous and should be set aside, and that judgment should be here rendered for the appellant; and it has been so ordered.

Reversed and rendered.

QUANAH, A. & P. RY. CO. v. DICKEY. (No. 794.)

(Court of Civil Appeals of Texas. Amarillo. June 5, 1915. On Motion for Rehearing, Oct. 9, 1915.)

1. ESTOPPEL \Leftrightarrow 93—EQUITABLE ESTOPPEL—GROUNDS OF ESTOPPEL—PERMITTING EXPENDITURES.

An owner of property abutting on a street who has joined with other citizens in subscribing to a fund to provide a bonus to induce a railroad company to build a road, and who has agreed to secure permission from the city to operate tracks in the street upon which his property is situated and to procure a relinquishment of damages from abutting owners, is estopped from claiming damages due to the construction of the road.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 264-275; Dec. Dig. \Leftrightarrow 93.]

2. SUBSCRIPTIONS \Leftrightarrow 12—CONSTRUCTION OF CONTRACT—SCOPE AND EXTENT OF LIABILITY.

A contract by a subscriber to a fund in aid of railway construction, whereby he agreed that if relinquishments of damages to abutting owners were not obtained, he would furnish a bond conditioned that the sureties should pay any judgment against the railway for damages,

is an indemnity contract with an agreement for bond, under which the subscriber is jointly and severally liable primarily to the amount of his subscription for damages occasioned by the construction of the railway, and is enforceable by the latter, although the claims are not first reduced to judgment.

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. § 11; Dec. Dig. \Leftrightarrow 12.]

3. SUBSCRIPTIONS \Leftrightarrow 10—ACCEPTANCE—ESTOPPEL.

Where the heading of a subscription list for a fund in aid of railway construction recited that a memorandum was attached which authorized trustees to enter into a contract with the railway relating to such construction, a subscriber will not be permitted to deny the contract, and that he knew of its terms, although the evidence is conflicting as to whether the memorandum was attached when the list was signed.

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. §§ 10, 23; Dec. Dig. \Leftrightarrow 10.]

4. SUBSCRIPTIONS \Leftrightarrow 18—JOINT CONTRACT—TERMINATION OF AUTHORITY.

Where the signer of a contract to raise a bonus for railway construction, and which authorized trustees to contract in the name of the subscribers with the railway to procure permission from the city to construct a road over certain streets and to procure relinquishments of damages, attempted to withdraw the sum subscribed by him, such act did not constitute a revocation of the power of the trustees to contract.

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. §§ 20, 21; Dec. Dig. \Leftrightarrow 13.]

5. SUBSCRIPTIONS \Leftrightarrow 18—REVOCATION—POWER COUPLED WITH INTEREST.

A subscription contract signed by numerous property holders, giving trustees power to contract with a railway to procure permission from the city for the construction of its lines and for relinquishment of damages, when accepted by the railroad, is not a naked power revocable at the subscriber's pleasure.

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. §§ 20, 21; Dec. Dig. \Leftrightarrow 18.]

6. PRINCIPAL AND AGENT \Leftrightarrow 34—POWER COUPLED WITH INTEREST—REVOCATION.

Powers are irrevocable by the principal when they form part of an act deemed valuable in law, or which forms part of the contract and is a security for money or for the performance of any act deemed valuable.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 55; Dec. Dig. \Leftrightarrow 34.]

7. EMINENT DOMAIN \Leftrightarrow 295—DAMAGES—RELINQUISHMENT—NOTICE—BURDEN OF PROOF.

In an action by an abutting owner for damages due to construction of a railroad in the street, the burden was upon him to allege and prove that an instrument executed by his authority, constituting a relinquishment of damages, was revoked, and that the railroad had notice thereof.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 803; Dec. Dig. \Leftrightarrow 295.]

8. EVIDENCE \Leftrightarrow 67—PRESUMPTION—CONTINUATION OF AGENCY.

Where a power is shown to have existed, it will be presumed that it continues, and that third parties, without notice of a revocation thereof, are justified in so presuming.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 87, 88, 106; Dec. Dig. \Leftrightarrow 67.]

Appeal from District Court, Hardeman County; J. A. Nabers, Judge.

Action by W. T. Dickey against the Quanah, Acme & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered, and rehearing denied.

D. E. Decker, of Quanah, for appellant. Love, Channell & Fouts, of Houston, and W. T. Perkins, of Quanah, for appellee.

HUFF, C. J. Appellee, Dickey, brought suit against the appellant, the Quanah, Acme & Pacific Railway Company, for damages alleged to have been occasioned to his property abutting on a street in the town of Quanah, known as South Front street, by reason of the appellant constructing its road in the street and adjacent to his property, and in operating trains over the track so constructed. Appellant answered, setting up that the appellee had invited the railroad company to construct its road by certain contracts and instruments, the purport of which will be hereinafter set out, alleging that the contracts so made were executed by the agents and trustees of Dickey. Dickey, by supplemental petition, replied that they had no such right or power to so contract for him, and that he had revoked the power by demanding the money back which he had subscribed to be paid on a certain subscription contract, after he learned that the road was to be constructed upon the street near his property.

The facts upon which we base our opinion are, substantially, that the citizens of Quanah desired to procure the construction of a railway from the town of Quanah in a westerly direction 40 miles, and prepared a subscription contract as follows:

"In accordance with the annexed memoranda of contract, we, the subscribers hereto, constitute J. E. Ledbetter and J. B. Goodlett trustees to enter into contracts with the Acme, Red River & Northern Railroad Company, in accordance with said memoranda; and on demand by said trustees, promise to pay to them the said several sums set opposite our names; it being contemplated that said sums shall be payable as soon as the sum of \$40,000 is subscribed and that one subscriber hereto is not responsible for the subscription of another,"

Signed by a great many citizens, among whom is:

"W. T. Dickey.....\$500.00"

The first provision of the memorandum contract, attached to the above subscription contract, is:

"This contract made this the — day of October, A. D. 1908, by and between the Acme, Red River & Northern Railway Company, a corporation organized and chartered under the laws of Texas, and now operating a line of railway from Quanah to Acme, Texas, acting herein by its president, who is duly authorized to act in the premises, by its board of directors, hereinafter styled party of the first part, and J. B. Goodlett and J. E. Ledbetter, acting as trustees, for and in behalf of each and every person who has now or shall contribute to the funds by said trustee held for the purposes hereinafter stated, hereinafter styled parties of the second part," etc.

The contract states that \$40,000 had been deposited with the trustees, and a sum sufficient to procure right of way for the rail-

way company from Acme in a western direction, to the Hardeman and Cottle county boundary line and railway terminals in the town of Quanah, which is to be paid and furnished to the parties of the first part in consideration of the performance of the matters and things thereafter set out. It is further stipulated that the railway company should obtain an amendment of its charter, changing its name to the Acme & Western Railway Company; and it is further stipulated that the railway would, in 18 months from the date thereof, perform its part of the contract.

It was further provided in said memoranda that the parties of the second part should procure, from the city council of Quanah for the railway, permission to construct and operate one main track and one side track in, upon, and along the street known as South Front street, from the Frisco track to the western terminus of said street.

Parties of the second part also agreed to furnish necessary abstracts to the property obtained for a roundhouse, machine shops, depot, etc.

The eighth provision is as follows:

"That parties of the second part will procure from such owners of property abutting on South Front street, a relinquishment from any damages that may result to such property occasioned by constructing and operating its railway and trains over and along said street."

They further agreed to pay \$40,000 in cash to the railway when it had run its first train into its station, not less than 40 miles out of Quanah, in Cottle county.

On the 6th day of May, 1909, the city council passed an ordinance authorizing the construction and operation of a railway along the street mentioned in the contract. On the 26th day of February, 1909, the trustees, for the several subscribers, entered into a contract with the railway company, the first paragraph of which is substantially the same as quoted in the memorandum, except as to the name of the railway, reciting that the \$40,000 had been deposited with the trustees, and agreeing to furnish the money for a right of way for a railway and obtain suitable property, designated in the contract, for a depot, freight depot, roundhouse, and terminal facilities, designating the property; and in the seventh provision that the parties of the second part will procure from each owner of property abutting on South Front street a relinquishment of any damages that may result to such property occasioned by constructing and operating trains in, over, and along said street from its yards to the Frisco railway. In the event the relinquishment cannot be obtained from property owners that the parties of the second part shall furnish the railway company a good and sufficient bond, signed by the citizens of Quanah, conditioned that said sureties should pay any judgment which should be obtained against said railway by abutting property owners, for damages which

may be occasioned by constructing and operating said railway.

The evidence shows, in this case, that the railway company substantially complied with its contract with reference to establishing its depot, etc., and the construction of the road within less than 12 months from the date of the contract. The contract was properly signed by the president of the road and attested by the secretary, and by the trustees, Ledbetter and Goodlett.

The evidence in this case shows that the Acme, Red River & Northern Railway Company was chartered the 12th day of July, 1902, and that it obtained an amendment of its charter the 28th day of January, 1909, changing the name of the corporation to Quanah, Acme & Pacific Railway Company. Charters were offered for the purpose of showing that the roads named are one and the same and that at the time the contract was made between the parties it was understood an amendment would be secured, changing the name of the corporation to the present one, Quanah, Acme & Pacific Railway Company.

The evidence is not clear at just what time the appellee, Dickey, signed the subscription contract. He says in one part of his testimony that it was 30 or 60 days before he executed his note to the bank. On the 19th day of December, 1908, Dickey executed his note to the Quanah National Bank for the sum of \$500 due July 1, 1909. On that date Ledbetter, as trustee, gave a receipt to Dickey for the sum of \$500, in which it is recited the sum was deposited with the trustees under the articles of agreement to be entered into by Goodlett and Ledbetter, with the railroad mentioned in the memorandum contract, and the money was to be refunded in the event the railway did not comply with its contract. Dickey testified that at the time he signed the contract he did not know that the road was to be constructed by his property on that street, and stated:

"When I learned that there was some talk or idea about locating the track along that street, I had a conversation with Mr. Ledbetter, the man I delivered this money to, about it. My understanding was that the location of the road was to be away along up here [indicating the west part of the city somewhere]. I finally went to Mr. Ledbetter and talked to him about the matter before it was finally determined to locate the railroad along that street by my property. I asked him to keep that note subject to where the road would be built; that if the road was built anywhere else except down that street, I would pay it, and if not I would not pay it, and he agreed to keep it and protect the note so it could not get out of his hands into some one else's hands until it could be determined where the road was to be built, and if it was down that street where it is now, I was not to pay it. If it was not built on some other street, but was built along that street by my property, I was to have my note back. After I had this agreement, about which I have testified, I subsequently learned of a determination to locate the road down that street by my property, and I then, or later on, tried to get my note back from Ledbetter."

At another place he said:

"I went to Ledbetter because he represented the committee. I went to him when I learned there was talk of a railroad being located down there on that street and told him if they decided to locate it down there my subscription did not go. I did not know at that time the railroad would go down that street. It had not been determined at that time where it would go. There was some talk about it. However, I wanted to make that condition. * * * After I found the railroad tracks were going to be located along that street, I never did go to any officer of the railway company and tell him I protested against it going there. I did not because I did not know anything about the officers of that company. I did not make any inquiry as to whom the officers were. I went to the committee—the one getting up this bonus—and they told me it was not yet completed; that only about half the bonus had been completed."

Mr. Ledbetter testified:

"It is a fact after this note was executed Dickey called my attention to the fact that there was some likelihood of the railroad being located where it is now, near his property, and he came to see me about the matter. I had a conversation with him at that time about the matter. I went with him and looked over the situation with reference to his property, and he instructed me, or requested me, at that time, not to deliver his note until the location of the road was determined; that if it was decided to locate the railroad on that street by his property, to return his note to him. That was about the substance of the matter."

Dickey further testified:

"The first notice I gave this defendant railroad that I did not want the track there was when I filed this suit."

From the facts in this case it is shown that no notice was given the railway company, or its officers, that Dickey had, in any way, revoked the authority of Ledbetter and Goodlett. It is shown that while the subscription list was not actually delivered to the railway company, its officers were aware of the signers' names on the list, and that W. T. Dickey had signed it and constituted Ledbetter and Goodlett as trustees, to make the contract with the road. Ledbetter was also president of the Quanah National Bank, and the note was made payable to that bank; and the money obtained on the note and placed with the trustees to hold under the contract with the railroad company. Dickey contends that he did not actually pay the note, but that he had some money on deposit with the bank, and afterwards that money was taken by the bank and applied on the note, and that he did not consent thereto.

The case was submitted to the jury upon special issues, and they found that the property, immediately before the construction of the railway, was worth \$18,000 and immediately afterwards \$16,000. They found that J. E. Ledbetter and J. B. Goodlett were authorized by plaintiff to contract with appellant company to construct a line of railway into the town of Quanah, and that Dickey signed the subscription list offered in evidence. They were unable to agree as to whether or not the memorandum contract

called for in the subscription list was attached to the subscription list at the time he signed it. They found also that Ledbetter and Goodlett executed the contract admitted in evidence; and they found that the company constructed its railway in conformity to the contract satisfactory to the committee, but not in letter.

Appellee Dickey further testified that he did not know whether the memorandum contract was attached to the subscription list at the time he signed it; that he could not say, as he did not see it, and if it was attached, he did not know it.

Harry Koch testified that he was present at the time Dickey signed the contract, and that the memorandum contract was attached at that time.

The court rendered judgment on motion of the appellee for \$2,000 against the appellant. Appellant requested the court to instruct the jury peremptorily to find a verdict for it, and also made a motion to the court to render judgment on the findings of the jury for appellant, which motion the court overruled. This action of the court is assigned as error.

[1] We believe under the terms of the contract that Dickey is estopped to recover damages to his property as an abutting owner. He had, with his co-obligors, agreed in the memorandum contract to procure from the city permission for the railway to construct and operate one main track and one side track in and upon the street upon which his property was situated, from the Frisco track to the western terminus of the street. He further agreed to procure the owners abutting on the street to relinquish any damages that might result to the property, occasioned by the construction of the railway operating trains on and over the street. The city passed an ordinance authorizing the railway to construct and operate its railway on the street. The contract entered into by the trustees for appellee and his co-obligors has the same provision as the memorandum attached to the subscription contract with reference to obtaining relinquishments from abutting property owners. This was an invitation to the railway to build along that street, by appellee, under an agreement to obtain relinquishments for damages from the abutting owners. In effect, it amounted to a relinquishment on his part of the damages to his property. He is now, after so having induced the railway to build on the street, estopped from recovering damages therefor. *Railway Co. v. Jarrell*, 60 Tex. 267; *Evans v. Railway Co.*, 9 Tex. Civ. App. 124, 28 S. W. 903; *Railway Co. v. Adams*, 58 Tex. 476, 482.

[2] Again, he agreed that if relinquishments were not obtained, he would furnish a bond that the sureties should pay any judgment which should be obtained against said

railway by abutting property owners for damages which should be occasioned by constructing and operating said railway. This is clearly an indemnity contract, with the further agreement to give a bond guaranteeing the payment of any judgment rendered against the railway company. As an indemnitor, appellee was one of the joint obligors, and primarily liable for the damages occasioned by the construction of the railway. If the bondsmen had been forced to pay they could have looked to him as the primary obligor. His liability on the contract was joint and several; he was liable for the entire amount of the damages, with the right of contribution from his co-obligors. The fact that by the terms of the subscription his liability was only for an amount of the subscription, and not for that of others, will not defeat his joint obligation to procure a relinquishment of the damages, or secure the payment of them. *Faires v. Cockerill* (Civ. App.) 29 S. W. 669 (this case was reversed by the Supreme Court on another point, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528); *Mateer v. Cockerill*, 18 Tex. Civ. App. 391, 45 S. W. 751. We see no reason why the railway company may not enforce against appellee, as one of the indemnitors who indemnified it against damages, without first being compelled to reduce them to a certainty by judgment and then pay such damages out of his property and forced to sue the grantors and they in turn sue the indemnitors. Certainly if appellee has indemnified the road against such damages, there is no necessity for this circuitry of route. *Pope v. Hays*, 19 Tex. 375; *Croft v. Peck*, 64 Tex. 627; *Morton v. Lowell*, 56 Tex. 643. Appellee sues appellant for damages he obligated himself to procure a release or to pay; he did neither. He induced appellant to inflict the damages, under an agreement to have them relinquished, or, if not, be obligated himself to pay them. The suit of appellee is based upon his own wrongful act and a breach of his obligation to relinquish the damages, or to pay them.

[3] Appellee contends that he did not know the railway was to be constructed on that street when he signed the subscription. The memorandum attached to the subscription so stated and instructed the named trustees to make the contract in the terms of the memorandum. It is contended the memorandum was not attached when appellee signed the subscription. His testimony is he did not see it, and if it was attached he did not know it. One of the parties who was present when he signed it testified positively the memorandum was attached. The heading for the subscription itself asserts it was attached, and constituted the named trustees as agents, with authority to enter into a contract in accordance with it. Under such circumstances, appellee will not be permitted to deny the

contract, or that the proposition was not his, and that he did not know of its terms. He does not allege or prove fraud or misrepresentation inducing him to so sign. It must therefore be held to be his contract, and that he authorized the trustees to execute the same, and who acted for him, as found by the jury. It is regarded by us as immaterial that the jury were unable to agree whether the memorandum was attached when appellee signed the subscription.

[4] Appellee pleaded that he revoked the power of the trustees to the contract for him, and so notified them. It will be noted from his testimony hereto set out that he told one of the trustees that he would not pay the \$500 subscribed by him if the road was to be constructed on the street by his property. At the time he made this statement he had, some time previous, paid the money to the trustees. He had executed his note to the bank to obtain the money. In some portions of his testimony he demanded of Ledbetter, who was president of the bank, as well as one of the trustees named in the contract, to return his note, or to hold it until he ascertained definitely whether the road would be constructed. We do not find from the testimony that he anywhere revoked the power of the trustees to make the contract. We think it should be borne in mind that the trustees were invested with double power: One was to demand and collect the money subscribed and to pay the same over to the railway when it constructed according to its contract; the subscribers further authorized the trustees to contract in the name of the subscribers, with the railway, to procure a permit from the city to construct the road over the street and to procure a relinquishment of the damages occasioned thereby from the abutting owners and to hold the railway harmless from such damages. The appellee did not erase, or ask that his name be erased from, the instrument granting this power. He did not in terms revoke the power, but asked for his money back or for the return of his note. We find nothing from his testimony that he was unwilling that the trustees should contract to procure a relinquishment of the damages or indemnified the railway against them. His testimony is when he signed he did not know that the road was to be so constructed; he afterwards learned of it and was unwilling to pay \$500 if it passed his property on the street, but the testimony fails to show he was unwilling to secure the railway company against the damages. He may have been willing to so secure the right on the street, but unwilling to pay in addition \$500. The withdrawal of that sum subscribed did not necessarily revoke the power to the trustees for other purposes. It was understood that the money subscribed was not to be paid until the full \$40,000 was subscribed. This appears to have been accomplished at least by December 19, 1908.

[5] However, there are facts in the record which would authorize the inference that the subscription was not completed until after appellee executed his note, December 19, 1908. On this date appellee executed his note to the bank to obtain the money, which he paid to the trustees and took a receipt therefor, to hold until the railway company complied with the terms of its contract. This subscription and memoranda contract we are inclined to believe amounted to a covenant between the co-obligors to secure the right over the street and indemnify the railway. The power given trustees, under circumstances of this case, indicates that it was not a mere naked power. There were rights of appellee's co-obligors to be considered and protected. We are clear, if the railway company had accepted the proposition, it was not a mere naked power which could be revoked at the will of the appellee. The testimony is not clear just when the railway accepted the proposition. The appellee says he learned that the road was to be constructed on the street after executing the note. The contract the trustees last made with the railway is dated February 26, 1909. Just when appellee gave the notice to Ledbetter is left to conjecture. We believe he should show that such notification was given before acceptance by the railway company. If he did not do so, then he cannot defeat estoppel or his contract by showing at some time he notified one of the trustees he would not pay the \$500 and that it must be returned to him. *Williams v. Rogan*, 59 Tex. 438.

[6] This case presents a serious question whether, even before acceptance, the appellee could revoke the powers granted. The testimony would indicate, while not conclusive, that all the subscription was paid and in the hands of the trustees before the purported revocation. The power given the trustees was to secure the right of way and jointly for the signers to indemnify the railway company. The various subscribers must be understood to have mutually agreed with each other to secure such right, and selected a given agency to perform that work and contract to that end. Powers are held irrevocable by the principal when such powers form part of an act deemed valuable in law, or—

“which forms part of the contract and is a security for money or for the performance of any act which is deemed valuable.” *Hunt v. Rousmanier*, 8 Wheat. 175, 5 L. Ed. 539; *Mechem on Agency*, vol. 1, §§ 570, 588, inc.; *Chapman v. Bates*, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459; *Smith v. Railway*, 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119.

This was an agreement between the joint obligors, for their benefit, to secure the construction of the railway and the selection of joint trustees to contract and obtain specific property and obtain relinquishments, with the power vested in the trustees so to contract. Without intending to hold it as the

law that such powers so conferred were irrevocable by the principal, we nevertheless suggest the question, and refrain from holding that it in fact was such a power.

[7] In this case there is no plea or proof that notice was given to the railway that the powers of the trustees were revoked. While this is a special agency, we think, under the circumstances, the same rule should apply as to general agency. In this case appellee, in writing, specially authorized the trustees to make the contract; in other words, he in writing accredited the trustees to contract with the appellant. If the contract was not consummated at the time of the renunciation, appellee knew that the purported contract was on foot and had not yet been completed, and to permit the appellant to deal with the trustees without notice of the dissolution of the relationship would be unreasonable and unjust. He left in the hands of his agents a written power to execute a contract, in his behalf, prescribing the things to be agreed to. The appellant could reasonably conclude that the authority still continued and be thereby induced to act upon it. Appellee owed to appellant the duty to prevent that prejudice or injury.

The facts show, in this case, that the railroad entered into the contract with appellee and his co-obligors relying upon the fact that the trustees were empowered to make it by virtue of the written instruments, executed and yet in the hands of the trustees, unchanged or unaltered. Mechem on Agency, vol. 1, §§ 628-633, inc. We believe the burden was on the appellee to allege and prove that the instrument was not only revoked, but that appellant had notice of that fact. Appellant had set up the contract as a defense, alleging it had been made by the authority of appellee. The writings prove the contract and the power. It was alleged by virtue thereof the appellant made a contract and complied with its provisions by constructing and operating the road where and within the time stipulated. Our Supreme Court in this state has said:

"The rule of our law, as to the time when the revocation of an authority by the act of the principal takes effect, is equally clear, comprehensive, and just. As to the agent himself, it takes effect from the time when the revocation is made known to him, and as to third persons, when it is made known to them, and not before. And this the principal may do by making the revocation as notorious as the fact of agency was. Until it is thus made known the principal is bound by the acts of his agent done within the scope of his authority, upon the familiar principle that when one of two innocent persons must suffer, he shall suffer most who by his confidence, or silence, or conduct, has misled the other." *Cleveland v. Williams*, 29 Tex. 214, 94 Am. Dec. 274; *Ins. Co. v. McKinnon*, 59 Tex. 507; *Amarillo, etc., v. Brown* (Civ. App.) 166 S. W. 653.

[8] We think also, it being shown that the power existed at one time, the presumption should prevail that it continued, and that third parties without notice of a revocation

were justified in so presuming and acting on the apparent unrevoked authority. We believe, under the facts of this case, the court should have given the requested peremptory instruction, and also should have sustained appellant's motion to render a judgment for it upon the findings of the jury. The facts, we do not think, as contended by appellee, uncontroverted that appellee revoked the authority of the trustees to contract. They go only to the extent of withdrawing the agreement to pay \$500, as heretofore pointed out, and there are no facts showing that notice was given appellant of any changed relationship whatever, and that appellant acted upon such power without any notice of the change.

The judgment will be reversed, and here rendered, that appellee take nothing by this suit, and that appellant recover its costs in this court and in the court below.

HALL, J., not sitting.

On Motion for Rehearing.

HUFF, C. J. It occurs to us appellee, in his motion for rehearing, overlooks the finding of the jury that Ledbetter and Goodlett executed the contract with appellant as trustee for appellee and others, and that appellee signed the subscription contract which empowered the trustees to act for him. The contract was therefore the contract of appellee. The jury, by their findings, substantially find the trustees were acting for appellee when they signed the contract as trustees and were authorized thereto by the subscription contract. They certainly would not have so found if the power had been revoked, as contended by appellee. After appellant set up the contract which induced it to construct the railway where it did, appellee, in order to meet this phase of the case, alleged a revocation, and we think it was necessary on the part of appellee to so allege and prove it. As pointed out in the original opinion, after having given the power to contract to the trustees, we believe the burden was on the appellee to show appellant had notice of such revocation before he can set aside the contract, apparently lawfully executed. The trial court refused to submit the issue, at the request of appellant, to the jury as to whether appellant had notice of the revocation before signing the contract. The trial court, in his explanation to the bill of exceptions explains that he refused the request because there was no evidence on that point. We believe all the evidence in this case of notice is that given to Ledbetter, who was appellee's agent and not appellant's. The answer of appellant sets out the terms of the contract, in which it is alleged that appellant was induced to construct a railway in the street thereby. In the original opinion we used the term "invited" instead of "induced," used by the pleadings. We think this contract entered into by the authority of appellee was suffi-

cient to estop him from recovering damages to his property abutting on the street, which the appellee and others agreed they would pay or cause to be relinquished.

Under the facts of this case and the findings of the jury, we think the trial court should have rendered judgment for appellant. We find no reason for changing our view, as expressed in the original opinion, and the motion will be overruled.

HALL, J., not sitting.

MOOSE v. MISSOURI, K. & T. RY. CO. OF TEXAS. (No. 6978.)

(Court of Civil Appeals of Texas. Galveston. June 28, 1915. Rehearing Denied Oct. 7, 1915.)

1. RAILROADS — 484 — OPERATION — FIRES — QUESTION FOR JURY.

In an action against a railway company for the destruction of plaintiff's house by fire from the spark of a locomotive, evidence held to justify direction of verdict for defendant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740-1746; Dec. Dig. 484.]

2. RAILROADS — 481 — OPERATION — FIRES — EVIDENCE — ADMISSIBILITY.

In an action for the destruction of plaintiff's house by fire from defendant's locomotive, evidence that engines had thrown out sparks on the right of way the day before was properly excluded, where it appeared that, if the fire was caused by sparks from any engine, it was from a certain engine that had passed at the time of the fire, and as to the construction, operation and condition of which the inquiry should be limited.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1717-1729; Dec. Dig. 481.]

3. APPEAL AND ERROR — 1170 — REVIEW — HARMLESS ERROR.

In an action for the destruction of plaintiff's house by fire from defendant's locomotive, the admission of the conductor's report as to the arrival of the train at a certain station, not verified by evidence that it was correctly kept, was harmless error, under rule 62 for the Court of Civil Appeals (149 S. W. 2), providing that no judgment shall be reversed for errors not reasonably calculated to cause the rendition of an improper judgment, or a denial of the rights of appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. 1170.]

Error from District Court, Harris County; Wm. Masterson, Judge.

Action by J. W. Moose against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for defendant, and plaintiff brings error. Affirmed.

L. E. Blankenbecker, of Houston, for plaintiff in error. Baker, Botts, Parker & Garwood and W. A. Parish, all of Houston, for defendant in error.

LANE, J. Plaintiff in error, J. W. Moose, sued defendant in error to recover damages in the sum of \$1,000 for the loss of a certain house destroyed by fire, which he alleges was caused by sparks from one of defendant's

locomotives on the 2d day of June, 1913, which were negligently permitted to escape and fall upon plaintiff's said house and thereby burn and destroy the same. The defendant company answered by general demurrer, general denial, and denying that any engine or locomotive operated by it was defective in its machinery, appliances, or equipment, or that it was negligently operated so as to cause sparks to escape therefrom, which were the proximate cause of the fire which destroyed plaintiff's house; that the only locomotive of defendant which passed the premises of plaintiff on June 2, 1913, between midnight and 6:30 a. m., the time plaintiff's house was destroyed, was its locomotive No. 491, and that said locomotive was properly equipped with the best and most approved mechanical appliances then in use for the prevention of the escape of sparks; that it was carefully and skillfully operated when it passed plaintiff's premises shortly before the time plaintiff's house was destroyed; and that plaintiff's house was not destroyed by defendant or any of its agents or employees. Plaintiff by supplemental petition denied all the material defenses pleaded by defendant. Upon these pleadings the case was tried before a jury. After both parties had closed their evidence, the court instructed the jury that plaintiff had failed to show that his house was destroyed by fire set out by defendant's locomotive, and that therefore they should return a verdict for the defendant. Upon such instruction the jury returned their verdict as follows: "We, the jury, find for the defendant." Thereupon judgment was rendered for defendant.

[1] Plaintiff in error by his first assignment insists that the evidence was sufficient to require the court to submit the issue to the jury, and that the court erred in instructing a verdict for defendant. After a careful examination of the statement of facts we have reached the conclusion that the evidence admitted wholly fails to connect defendant with the fire which destroyed plaintiff's house, and that the court did not err in so finding, and if there be no error in the other rulings of the trial court, complained of by appellant, which should cause a reversal, the judgment rendered by the trial court should be affirmed.

The undisputed evidence shows that the house of plaintiff was destroyed by fire June 2, 1913; that it was located near where the track of the railroad of defendant crosses the track of the Houston & Texas Central Railway Company; that the only locomotive of defendant which passed the house, which was burned about 5 or 6 o'clock a. m., June 2, 1913, was engine No. 491. The substance of the testimony of the witnesses, who testified with reference to the fire, is as follows:

John Westbrook, for plaintiff, testified that he was living in the house at the time it was destroyed; that he had had no fire in the

house, except a lamp, for two weeks before the fire; that he left the house about 4 o'clock on the evening before the fire occurred; that he locked the door when he left; that the house was about 15 feet from the track of defendant; that trains on defendant's railroad going from west to east stopped at the crossing of the two railroads near the house and would blow the whistle before crossing; that in starting up again the locomotive would puff strongly and would throw sparks.

Green Watson for plaintiff testified, that when he went to the fire the door was locked, and that he broke it open and got inside, and, continuing, said:

"When I first saw it and went over there that house was not burning anywhere except on the roof and it was falling in; that was on the railroad side of the house; right opposite on the side over here next to my place there was no fire at all, but it burned clear across on the railroad side on the roof of the house. I did not hear any train pass by there that morning: I was asleep when that train passed. I see that fire after I got up between 4 and 5 o'clock in the morning. I got up that morning as soon as I woke up."

O. H. Little for plaintiff testified:

"I heard a train pass there that morning before the fire occurred, somewhere like an hour or something before it happened. I did not get up to see which way that train was going. Neither do I know whether it was a passenger or a freight train. That train made right smart noise that morning. You know they generally stop there and start again and they make right smart of noise starting off sometimes. After the train passed I laid down and went back to sleep. I never did get up; in fact, I was already laying down; I never did get up at all. When these trains are coming towards town they stop pretty close to Moose's house. They have to stop so many feet from the crossing; and sometimes they stop further back than others, but most generally they stop right close to his house when they are going towards town. When a train stops there or checks up and starts again it is noticeable that the engine is doing additional and harder work than before; they generally work hard, a heavy train does when they go to make a start. There is no grade right there coming in the direction of town; there is a grade further back as you leave the city, leaving that yard they have got over there; when they start from there it is a kind of grade coming over, but there is no grade right along there. I have lived along that track there for 12 years. I am acquainted with about the time that the passenger trains were in the habit of passing along there; I know what the regular schedule time of the passengers along there is. I don't think there was a passenger train due along there at the time that happened at that time in the morning; the passenger was due there later in the morning, along about 6:30 or 7 o'clock; two passenger trains went by there about that time. I stated I had heard a train pass there that morning before the fire broke out. When my attention was first attracted to the fire it was real early in the morning; I couldn't state exactly the correct time, but it was very early in the morning; daylight in June is very early, somewhere between 4 and 5 o'clock, I reckon. Seeing the excitement I ran over there, and when I ran out I never thought about the time or anything like that; I just thought we would save the house if we could, or something like that. It was good daylight when I got over there, it

was daylight when I got out of the house. When I got down to the house that was burning it hadn't burned but a small bit; it was burning on the other side from me, on the side next to the track over there, and next to the track. The house was burning in front toward Herkimer street; it was burning on the roof in front next to Herkimer street, but on the side next to the track on what we call the south front; it fronted Herkimer street. I did not go to the house that morning. When I got there they already had the door open; somebody had been in the house."

Charlie Hill for plaintiff testified that he got to the house about 5:30 and took an axe and broke the door down, and, continuing, said:

"As I stated a while ago, when I first saw that house it was burning from the side over there by the 'Katy' tracks and when it burned from the side at the 'Katy' tracks, it entered up yonder the front part, and then I went over there and taken an axe and bursted the front door open, and then went inside and taken out a wash stand, dresser, and mattress."

J. W. Moose, owner of the house destroyed, knew nothing of the origin of the fire; he did not get to the house until the roof had fallen in. He testified that his house was about 18 or 20 feet from the track of the defendant company, and about 1½ blocks from the Houston & Texas Central track; that the house was celled overhead and there was no way of getting upstairs; that when the trains of defendant company stopped at the crossing they work hard to start up again.

J. D. Roberts, for defendant, testified that on the night on which plaintiff's house was burned, as engineer for defendant company, he made a trip over defendant's railroad from Smithville to Houston; that he used engine No. 491 and pulled about 25 cars; he could not remember the exact time he got to Houston; that as well as he could recall he got there some time between 5 and 7 o'clock in the morning, about daylight, that the report made by the conductor in charge of the train drawn by his engine shows that his train reached Houston at 3:30 a. m. on the morning of the fire which destroyed plaintiff's house, and he supposed that this report showed the proper time of arrival; that in going from Smithville to Houston when you reach the crossing of the Houston & Texas Central Railway, trains on the defendant road stop or check up and start again, and in so starting more working pressure is thrown upon the engine than when you have the train in motion, but not much with a light train; that at this crossing the grade is about level, and he could pull 90 to 100 cars with his engine; that if his engine threw any sparks when he passed the premises of plaintiff on the morning of the fire, he did not notice them.

The testimony set out above is substantially all the evidence admitted in an effort to connect the defendant company with the fire which destroyed plaintiff's house. This testimony does, perhaps, show that it was

possible for the fire to have been set out by sparks which escaped from appellee's engine, if any did so escape, of which no proof is made, but it must be remembered that the burden to show that plaintiff has been damaged by the negligence of defendant is upon the plaintiff, and testimony tending to show only that it was possible that the fire was set out by defendant's engine is not sufficient proof of that fact to entitle plaintiff to recover. No one testified that sparks escaped from defendant's engine on the morning of the fire which destroyed plaintiff's house.

In *Manning v. Railway Co.*, 137 Mo. App. 631, 119 S. W. 464, it is said:

"The evidence in an action against a railroad company for damages from fire communicated by its locomotive is insufficient to sustain a verdict for plaintiff, where there is no evidence that sparks were emitted by the locomotive as it passed plaintiff's property, nor that a fire could be kindled by sparks or coals thrown out by a locomotive on property at the distance from the locomotive that plaintiff's property was located."

In *Railway Co. v. Sadleville Mfg. Co.*, 137 Ky. 568, 126 S. W. 118, the court said:

"In the case under consideration no one saw any of appellant's trains pass by on the night of the fire; no one testified as to sparks coming from them; nor was there any testimony as to how the trains were managed or operated. * * * To hold a railroad company responsible in this case would make it responsible in every case for every fire occurring along its right of way, just so it was shown that its engines, shortly before and after the fire, emitted large sparks. While the courts have been liberal in authorizing the submission of this class of cases to the jury upon the ground that fires of this kind frequently occur in the night when no one is present, and it is impossible to make out a case except from the attendant circumstances, they have never gone to the extent of holding that the mere fact that other engines, shortly before and after the fire, emitted large sparks was sufficient to make out a prima facie case of negligence, in the absence of direct testimony, or some circumstances tending to show that the trains which passed before the fire, and whose passing would reasonably account for the fire, emitted sparks of fire or were otherwise negligently managed."

In *Funk v. Railway Company*, 122 Mo. App. 160, 100 S. W. 504, the court said:

"Though proof that a fire * * * was caused by a passing engine may, like other facts, be proved circumstantially, we think this testimony affords ground for no more than a guess that one of defendant's locomotives started the fire. The circumstances relied on are too loosely connected with the main fact in issue to serve as proof of it. Nothing was proved having the least tendency to show the fire was set by an engine, except that the railroad ran through the meadow and a train passed over it in the morning."

For other cases in point see *Railway Co. v. Cullers*, 81 Tex. 382, 17 S. W. 19, 13 L. R. A. 542; *Railway Co. v. McIntosh*, 126 S. W. 692; *Fritz v. Railway Co.*, 243 Mo. 62, 148 S. W. at page 78; *Louisville Ry. Co. v. Insurance Co.*, 152 Ky. 510, 153 S. W. at page 746.

From the testimony admitted in evidence, the jury could do nothing more than guess

as to what caused the fire that destroyed plaintiff's house, and the defendant's rights should not be guessed away for one upon whom the burden rests to establish a cause of action against it. We therefore conclude that the trial court did not err in instructing a verdict for the defendant.

In arriving at the conclusion above stated we have not overlooked the holding of the court in the cases of *S. A. & A. P. Ry. Co. v. Ins. Co.*, 70 S. W. 999; and *M. K. & T. Ry. Co. v. Beard*, 34 Tex. Civ. App. 188, 78 S. W. 253, cited in appellant's brief. These cases go a long way toward supporting the contention of appellant that the evidence in the instant case was sufficient to demand the submission of the issue to the jury as to what caused the fire which destroyed plaintiff's house, but we think the rule laid down herein, in support of the instruction of the trial court, the better rule, and that the same is supported by the great weight of authority and by sound reason, and we therefore overrule appellant's first assignment.

[2] Appellant's second, third, fourth, fifth, and sixth assignments complain of the action of the trial court in refusing to permit appellant to prove by several witnesses that, the day before appellant's house was destroyed by fire, some of defendant's engines had thrown out sparks and set out fire on its right of way. The contention of appellant in support of these assignments is that, as appellee had pleaded that none of its locomotives operated by it was defective in machinery, appliances, or equipment, appellant should have been permitted to show that some of its engines did throw out sparks shortly prior to the fire which destroyed his house, regardless of the fact that the only engine that passed appellant's house at or near same was engine No. 491, and in support of this contention he cites *T. & P. Ry. Co. v. Rutherford*, 28 Tex. Civ. App. 590, 68 S. W. 825; *T. & P. Ry. Co. v. Ins. Co.*, 73 S. W. 1083; *Morgan Bros. v. M. K. & T. Ry. Co.*, 50 Tex. Civ. App. 420, 110 S. W. 988. We do not think that any of the cases cited is authority for sustaining appellant's contention. In *Railway Co. v. Rutherford*, supra, complaint was made of the action of the trial court in admitting testimony to the effect that, a week or two before the fire in question in that case occurred, there was another fire on defendant's right of way. In passing upon this complaint Judge Bookhout, speaking for the court, said:

"The action of the court in admitting the testimony presents no reversible error. There was sufficient competent evidence to support the judgment, and the admission of this evidence could not have affected the result. The case was tried by the court without a jury. The trial court must have discriminated between the evidence which was legal and the evidence which was not, and based his judgment on the legal evidence."

This opinion, in effect, holds that the admission of such evidence was error, but, un-

der the facts of that case, not such error as to call for a reversal of the judgment. In *Railway Co. v. Scottish Ins. Co.*, supra, in sustaining testimony admitted as to other fires set out by defendant's engine, the appellate court uses this suggestive language:

"It was the same engine that passed the depot platform when the cotton appears to have been ignited, and what was testified to occurred on the same occasion, and in close proximity to the fire in question."

In *Morgan Bros. v. Railway Co.*, supra, Justice McMeans, speaking for this court, said:

"Appellants sought to prove by the witness Psencik that he had, on the 19th of November, 1906, seen an engine of the appellee railway company set out a fire near Plum. An objection to the testimony was sustained, and on this action of the court appellants base their thirty-seventh assignment of error. The testimony shows that the engine that was being operated at the time of the destruction of the cotton was No. 419. It was not attempted to be shown by Psencik that the engine which set out the fire near Plum was engine 419. The rule seems to be that, when the particular engine which caused the fire complained of cannot be identified, evidence that sparks and burning coals were frequently dropped or fires set out by engines passing upon the same road on other occasions, at about the time of the fire, is admissible to show habitual negligence, and to make it probable that appellants' injury proceeded from the same cause. In the present case it is evident that the only engine which would have set out the fire that destroyed the compress and appellants' cotton was engine 419, and the inquiry was properly limited to the construction, condition, and operation of that particular engine. *Railway Co. v. Home Ins. Co.*, 70 S. W. 1000; *Railway Co. v. Chittim*, 31 Tex. Civ. App. 40, 71 S. W. 297."

It is practically conceded by both parties that if the fire which destroyed appellant's house was caused by sparks thrown from any engine of appellee, it was from engine No. 491, and therefore the inquiry was properly limited to the construction, condition, and operation of that particular engine. *S. A. & A. P. Ry. Co. v. Home Ins. Co.*, on rehearing, 70 S. W. 1000; *Morgan Bros. v. M., K. & T. Ry. Co.*, 110 S. W. at page 988; *Nussbaum v. Railway Co.*, 149 S. W. 1083; *McFarland v. Railway Co.*, 88 S. W. 450.

[3] J. E. Roberts for defendant testified that he was the engineer on engine No. 491 on its run from Smithville to Houston on June 2, 1913; that it was his impression that he reached Houston on that run some time between 5 and 7 o'clock a. m., June 2d, but on being shown a report of the conductor in charge of the train drawn by said engine No. 491 on June 2d, he stated that such report was one required by the rules of the defendant company, and that such report would more likely show the correct time of the arrival of said train at Houston than his present recollection of said arrival; that he did not see the conductor make said report. He also testified that under the rules of said defendant company he also made a report of the

time of the arrival of said engine, and that he had the same in his book at Smithville, but as he had not been requested to produce the same he did not have it with him. The conductor who made the report was not sworn as a witness, nor did any witness testify that the report of the conductor was correctly made, or that it did in fact show the correct time of the arrival of said train. Over the objection of appellant, Moose, this report was admitted in evidence, and on this action of the court appellant bases his seventh assignment of error. We think the assignment well taken. No witness testified that the report introduced in evidence was correctly kept, or that it did in fact show the correct time of the arrival of said engine at Houston. But we are of the opinion that such error did not amount to such a denial of the rights of appellant as was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court, and therefore under the provisions of rule 62a (149 S. W. x) for the Court of Civil Appeals, we overrule appellant's assignment No. 7. We think that the fact that said report shows that said engine No. 491 passed appellant's premises at or about 3:30 a. m., about an hour before the fire which destroyed appellant's house was discovered, was more favorable to appellant than was the testimony of the engineer Roberts, to the effect that he thought that said engine arrived at Houston between 5 and 7 o'clock, as evidently if the fire which destroyed appellant's house originated from a spark thrown thereon from defendant's engine, it must have been thrown upon said house some time before the house was discovered burning, at or about 4:30 or 5 o'clock.

We find no such error in the trial of this case in the lower court which should cause a reversal of the judgment there rendered; therefore the judgment of the trial court is affirmed.

Affirmed.

KNIGHTS OF THE MACCABEES OF THE WORLD v. PARSONS. (No. 6938.)

(Court of Civil Appeals of Texas. Galveston. June 9, 1915. Rehearing Denied Oct. 14, 1915.)

1. INSURANCE—740—MUTUAL BENEFIT INSURANCE—ASSESSMENTS—PAYMENT.

Where assured, being the record keeper of a local tent of a mutual benefit association, carrying two certificates in the order and entitled to a percentage of all assessments collected from members of the tent as remuneration, deposited the assessments collected by him in the bank selected by the local tent, without deducting his commission, such commission being more than sufficient to pay the assessments due on the certificates held by him, and while the funds were on deposit and after the time in which assessments were required to be paid,

but before the expiration of the time allowed for remittance of assessments by the record keeper to the Supreme Tent assured died, there was a distinct appropriation and setting apart of the requisite sum amounting to due payment of assured's assessments.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1887; Dec. Dig. ¶740.]

2. APPEAL AND ERROR ¶1001 — VERDICT — CONCLUSIVENESS.

In an action on insurance policies, finding of the jury that assured was in good standing at the time of his death is conclusive on appeal where the evidence was sufficient to raise that issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. ¶1001.]

3. INSURANCE ¶744—MUTUAL BENEFIT INSURANCE—FORFEITURE—GROUNDS.

Where there is no provision in the laws of the order or the policies of insurance therein held by assured avoiding the policies for embezzlement, the fact that assured, the record keeper of a local tent of a mutual benefit association, whose duty it was to collect assessments, was in arrears to the local tent at his death, does not render his policies void because of an obligation taken by assured to not knowingly wrong or defraud the tent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1889; Dec. Dig. ¶744.]

4. INSURANCE ¶819—MUTUAL BENEFIT INSURANCE—DEATH OF ASSURED—SUFFICIENCY OF EVIDENCE.

In an action on life insurance policies, evidence held to authorize a finding that assured was dead.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. ¶819.]

5. INSURANCE ¶819—MUTUAL BENEFIT INSURANCE—DEATH OF INSURED—DEGREE OF PROOF.

In an action on life insurance policies, it is not necessary that the evidence conclusively show the death of assured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. ¶819.]

6. APPEAL AND ERROR ¶1002—SUFFICIENCY OF EVIDENCE—FINDING OF JURY—EFFECT.

In an action on life insurance policies, where the evidence is sufficient to warrant it, the finding of the jury that assured is dead is conclusive on the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ¶1002.]

Appeal from District Court, Nacogdoches County; L. D. Guinn, Judge.

Action by Lena Parsons against the Knights of the Maccabees of the World. From a judgment for plaintiff, defendant appeals. Affirmed.

J. E. Yantis, of Austin, Chas. B. Braun, of Waco, and D. D. Aitken, of Flint, Mich., for appellant. Blount & Strong, of Nacogdoches, and Kahn & Williams and Geo. S. King, all of Houston, for appellee.

McMEANS, J. Lena Parsons brought this suit against the Knights of the Maccabees of the World, an insurance organization, to recover \$3,000, the sum of two life insurance policies, or benefit certificates, issued by the defendant to George Frank Parsons, the assured, payable at his death to the

plaintiff, Lena Parsons, his stepmother, who was named as beneficiary in the policies. She alleged that George Frank Parsons, the assured, was dead, and that she had furnished to defendant proper notices and proofs of his death.

The defendant answered, admitting the issuance by it of the policies sued on, and specially pleaded that it was a fraternal beneficiary association without capital stock and that it was organized for the mutual benefit of its members, and further that in each of said policies it was contracted that the laws of the association in force at the maturity of the contract and the policies or certificates constituted the contract between the association and the assured, and that the benefits would only be paid at the death of the assured in the event he had complied with the laws of the association then in force or thereafter adopted. It denied that George Frank Parsons was dead, and specially denied plaintiff's right to recover upon the policies, even if he were dead, for the reason that he was not in good standing in the order at the date of his alleged death on March 2, 1913, in that he had failed to pay the assessments due upon his policies for the month of February, 1913, which failure, under the laws of the association and by the terms of the policies, ipso facto worked a forfeiture of said policies. It further alleged that the said George Frank Parsons had violated the obligations taken by him upon becoming a member of the association by knowingly embezzling the funds of the association.

The case was submitted by the court to the jury upon the three following special issues: (1) Is George Frank Parsons dead? (2) If you have answered first special issue, "Yes," then was George Frank Parsons in good standing in defendant order at the time of his death? (3) Did plaintiff furnish to defendant order proof of the death of George Frank Parsons as required by the benefit certificates sued on and the by-laws of defendant in force at the time and as pleaded by plaintiff? The jury answered each of the three special issues in the affirmative. At the request of the defendant the court submitted the following special issue:

"Is the evidence conclusive that George Frank Parsons was killed in the explosion of the Lufkin depot, March 2, 1913, or is it less than conclusive?"

To which the jury answered:

"We, the jury, answer the last issue that the evidence is conclusive that George Frank Parsons was killed in the explosion of the Lufkin depot on March 2, 1913."

Upon the return of the verdict, the court, upon motion of plaintiff, entered judgment thereon in favor of the plaintiff and overruled the motion of defendant to enter judgment upon the answers to the special issues in its favor. From the judgment thus

entered, the defendant, after its motion for a new trial had been overruled, has appealed.

[1] Appellant's first assignment of error is as follows:

"The court erred in overruling the defendant's motion for a new trial because the evidence is insufficient to show that George Frank Parsons had paid his dues and assessments for the month of February, 1913, by the 1st day of March in said year, in compliance with defendant's by-laws and contract."

In his second application for a benefit certificate, made in December, 1912, George Frank Parsons agreed and warranted that his failure to pay any monthly rate or assessment which should be made by the order within the time provided by its laws, or to pay the dues fixed by its laws, or in the manner and at the time provided by its laws or the by-laws of the local lodge or "tent" to which he might belong, should vitiate his benefit certificate and forfeit all payments made thereon.

Section 330 of the laws of the order provides that:

"A life benefit member failing to pay a monthly rate, per capita tax, or additional assessment within a month from the first day on which it is due, shall stand suspended, without notice, from all rights of life benefit membership and from all the benefits and privileges of his tent."

Section 332 provides:

"These monthly rates will be due, without notice, on the first day of each month and must be paid by the member to his tent record keeper on or before the last day of the month. The first of the above monthly rates shall become due and payable on the date of admission, or on the delivery of the certificate in case of increase in the benefits, and must be paid in either case before the member shall have any right to participate in the life benefit fund of the association."

Section 309 provides that a member shall not be entitled to participate in the life benefit fund of the association for an increased amount until he has paid the record keeper of his tent an advance monthly rate of such increase.

Section 159 provides that the tent or local lodge, in performing the duties and administering the powers provided by the laws of the association, shall be the agent of the members thereof and not of the association, and that no act or failure to act by the tent, or by any officer or member thereof, shall create or be construed to create any liability on the part of the association.

Section 270 provides:

"No member shall be in good standing in the association unless he has paid all monthly rates, additional assessments, the per capita taxes, fraternal tax, dues and fines levied against him, and has complied in every particular with the laws of the association."

Section 234 declares the record keeper of the local tent to be the agent of the tent and its members and not the agent of the association, and that no act or failure to act on his part shall have the effect of creating any liability on the part of the association, or of waiving any right belonging to it.

George Frank Parsons held two policies or benefit certificates, one for \$1,000 and the other for \$2,000. The smaller was taken out first, and the larger, being known as the "increased benefit," was applied for by him on December 23, 1912, and the certificate therefor, duly executed by the proper officers of the association on January 7, 1913, was delivered to him on February 1, 1913. Defendant failed to show on the trial that the rates on the increased insurance had not been paid at a proper time, although resting under the burden to prove this if it would escape liability by reason of his failure to so pay; but, on the contrary, the proof adduced by plaintiff was sufficient to justify a finding that he did pay such rates in advance, and we so find.

Parsons was record keeper of his tent or lodge, and under the laws of the order it was made his duty, as such officer, to collect from each member of the local tent his monthly dues, assessments, etc., all of which fell due on the 1st day of the month. Under the laws of the association, while the dues, assessments, etc., became due on the 1st day of the month, the members had a right to pay the same at any time before the 1st day of the next succeeding month, thus giving to each member a full month after maturity in which to make payment. Under the laws of the defendant the record keeper was required to remit to the Supreme Tent the assessments collected by him during the month on the first week day after the 15th day of the next succeeding month. Thus assessments collected during the month of February, 1913, were required to be remitted on the first week day after the 15th day of March, 1913. The local tent of which Parsons was a member had selected a bank in Lufkin as a depository for the funds collected by the record keeper, and required Parsons, as such officer, to deposit such funds therein as collected. Parsons, for his services in making such collections, was allowed ten cents for the amount collected from each member. In the month of February, 1913, he collected from 34 members, thus being entitled to \$3.40 as compensation; and the amount of such collections, including the \$3.40 he was entitled to as his compensation, was deposited by him in the depository bank. The evidence shows that the \$3.40 due him as such compensation and so deposited with other funds to be remitted to the Supreme Tent after the 15th of March was more than sufficient to pay the assessments due on February 1st, on both of the certificates held by him. In this connection P. A. McCarthy, the commander of the tent at Lufkin, testified:

"Mr. Parsons was the 'record keeper' during the months of January and February, 1913. His duties, as I before said, were to collect these dues as they became due from the individual members of the tent. He would, of course, collect from himself, or was supposed to, just the same as from anybody else. I sup-

pose that he had the money to pay his dues with. There was nothing to do except to include it when he made his report. I do not suppose he would have to do anything else except include his when he made his report. As to whether or not I understand that the way he would collect his dues from himself would be to just include his in the report, will say that is the way I would do. So far as we could tell and were advised when we made that report, Parsons was in good standing. * * * As to whether or not I feel now that he was in good standing, will say that I do not question that at all."

The jury found that Parsons was killed in an explosion in the Lufkin depot in March 2, 1913, which was nearly two weeks prior to the time he was required by the laws of the order to remit the collections made by him from the members, including himself.

[2] We think that Parsons placed in the depository of the tent, with other funds for remittance to the Supreme Tent, a sum of money sufficient to pay the amount due upon his benefit certificates for the month of February, although it was from his earnings for collections, as before shown, there was a distinct appropriation and setting apart of the requisite amount for that purpose, and that it amounted to and in fact was a payment. At least the evidence was sufficient to raise the issue, and the finding of the jury that he was in good standing at the time of his death is conclusive upon us. The court did not err therefore in refusing to grant a new trial upon the ground stated in the first assignment of error, and the assignment is overruled.

[3] Appellant by its third assignment of error complains that the court erred in overruling its motion for a new trial for the reason that the undisputed evidence shows that George Frank Parsons had embezzled a sum of money belonging to appellant in violation of his obligations to appellant. The assignment is without merit. There is nothing in the laws of the association or the contract of insurance that would render the policies void by reason of a defalcation by Parsons in his accounts. If the evidence is sufficient to show that Parsons was in arrears, it was only to the local tent, and the only contention by appellant that the policies were void on that account is the fact that Parsons, on becoming a member of the association, took upon himself an obligation to the effect that he would not knowingly wrong, or defraud, a tent, a member, or any of his family, nor permit it to be done by another if he could prevent it. The assignment is overruled.

The fourth assignment is sufficiently disposed of by our fact findings and what we have said in reaching the conclusion that the first assignment should not be sustained. The assignment is overruled.

[4] The sixth, seventh, eighth, and thirty-first assignments are grouped and presented as the tenth assignment. It is complained that the court erred in overruling appellant's motion for a new trial because: (a) The un-

disputed evidence shows that Parsons is still alive; (b) that disregarding Parson's absence the evidence failed to show conclusively that he is dead; (c) that the great preponderance of the evidence shows that Parsons is not dead; and (d) that the finding of the jury that the evidence was sufficient to show conclusively that Parsons is dead is contrary to the evidence.

On the issue of Parsons' death, the following proof was admitted:

Frank Parsons had a desk in the northeast corner of the warehouse at the depot of the Houston East & West Texas Railway Company at Lufkin on March 2, 1913, and that at 10:03 p. m. on said date from 200 to 400 pounds of dynamite which was situated near his desk in the warehouse exploded, which completely demolished the warehouse; that there was an immense fire following the explosion of dynamite and gasoline, which practically consumed the wrecked part of the building and some 18 box cars immediately surrounding the wrecked portion of the building.

Gus Stroble testified that he was with Parsons all during Sunday afternoon, and attended church with him and his sister that night; that when they returned from church Parsons bade him good-bye at the steps at their home, and said that he had to go to the depot, about a block away, to work for a while; and that he turned and started towards the depot.

Everett Parsons testified that she was with the witness Stroble and her brother, Frank Parsons, on Sunday afternoon, and that the three attended church that night, and upon their return home that Parsons said, "I am going over to the depot and finish up my work, and if Mamma needs me I will be at the office," and that he then turned and started to the depot.

The witness Runnells testified that he worked for the railroad as fireman; that he saw Parsons at the depot with the witness Holland, who was night operator, about ten minutes before the explosion; and that "Frank Parsons told me at the time that he sometimes had business down there at night."

The witness Holland testified that he was night operator at the depot, and that Parsons came to the depot first about 7 o'clock, and that he then went to church and came back about 9:55, and that they started to the W. O. W. restaurant to get a piece of pie and a cup of coffee, when Parsons stated that he had some unfinished business that he had to attend to right away in the warehouse, and turned and started back. And further:

"He was about 70 feet from the depot when he turned, and when I last saw him he was going in the baggage room. I was just then just on the edge of the W. O. W. restaurant. I was going in there to order a cup of coffee and a piece of pie for Frank Parsons and myself. When I last saw Frank Parsons he was going in the baggage room. I was going into the W. O. W. restaurant myself, ordered two

cups of coffee and two pieces of pie. It was about four minutes from the last time that I saw Frank Parsons. I was just taking a drink of the coffee at the time I heard the explosion."

And further:

"I was in front of the W. O. W. restaurant when the explosion occurred, and that is about 140 feet from the depot. As to the effect of the explosion on the building I was in, all of the plate glass in windows and doors were broken out, and I got up—was thrown out of my chair and crawled to midway the restaurant. I got up thinking the front part of the restaurant was falling in; then I afterwards went out into the street to see what had happened."

And further:

"The whole warehouse and part of the baggage room were torn up. It was on fire. As to the effect of the fire, it was partly put out by the fire department; several cars burned up close in. There was not much there to be consumed in the warehouse department with the exception of the cars."

Mrs. Lena Parsons testified:

"My son worked on that Sunday at least part of the day. Generally he did not have to work all day on Sunday. His business was to load and unload the freight, and they run the freight trains on Sunday, and he had to work every Sunday just like every other day of the week. He worked on that Sunday that the explosion occurred. He worked until 12 o'clock, or just a little after. In the afternoon he did not work, but he went back there to work a while that night, and he would run up his local freight bills and such as that, and would generally get through when he went back that way at night about 10 o'clock at night. * * * He went to the depot that night after church to finish up his work."

And further:

"Frank was the head of our household, and had been since his father died. He had assisted me in raising the other children, his half sisters and brothers, and had always paid his money or gave it to me to run the house on, and take care of the little children. He never did have anything at all to do with society or anything like that, and he was at home always when he wasn't at work."

And further that she had not seen or heard of anything from George Frank Parsons since he left her house Sunday night to go to church; that he did not have any baggage or anything of that sort with him when he left to go to church. All of his belongings, including his trunk and all of his clothes except what he had on, were left at her house and were still there.

Everett Parsons testified:

"I have not seen or heard of George Frank Parsons since that night when he left us at the house and said he was going back to the depot to do some work."

The witness Rose testified that he had been to church with his family, and at the time of the explosion at the depot he was about 200 feet away, and was going in the direction of the crossing just south of the depot. At the time of the explosion he was looking right at the depot. And further:

"It seems there was a light at the depot that attracted my attention, and I was looking at the light at the time of the explosion. My attention had been attracted or directed to the light before the explosion occurred, not more than a minute. * * * Will say that the first

thing I observed was the building of the depot going up into the elements."

The witness Moore testified that he had been at the depot on Saturday morning before the explosion to get some dynamite; that he was using dynamite in railroad construction work; that he got 1,000 pounds of dynamite out of the depot Saturday morning, and left 400 pounds in there. And further:

"I knew George Frank Parsons. * * * He was warehouse clerk there at the depot. I knew where his desk was situated, and it was there in this warehouse or freightroom of the depot. I suppose this dynamite that was left in the depot was somewhere about six feet from his desk."

And further:

"I saw some gasoline in the freightroom, and it was leaking and I called his attention to it. I told him if he did not get that gasoline out of there and this dynamite that he was going to get blowed up."

And further that he had been using dynamite for 30 years and was acquainted with the effect of its explosion upon animate and inanimate objects, and had seen persons killed by such explosion. And further:

"It would be my opinion, from my experience in the use of dynamite and what I have seen of it in an explosion, that if Parsons had been anywhere in that room and this 400 pounds of dynamite had exploded it would have blown him to pieces. I believe if he had been anywhere in that room it would have blown him to pieces. If you can blow rock into fine sand as hard as they are, I think it would do the same with a human body, as it is nothing like a rock."

Milton Largent testified that he found Parsons' bunch of keys with his marker on it 102 steps from the depot between 10:30 and 11 o'clock on the day after the explosion.

O. Matthews testified that certain bones were found by others and himself close to the scene of the explosion about the size of a half, or a quarter, of a dollar, and that they were fresh bones and had blood on them, and that the bones were turned over to Dr. Bledsoe for a scientific examination of the bones and blood.

Dr. Bledsoe testified that he was present when the bones which were found by Matthews and assisted Dr. James, J. Terrell, professor of pathology of the Medical Department of the State University at Galveston, in making a test of the bones and blood, and that the blood, under the test, was positively demonstrated to be human blood, and that the bones were fresh green skull bones; but the particles were too small to tell whether they were human skull bones or not.

Dr. J. J. Terrell testified that he was professor of pathology in the Medical Department of the State University at Galveston at the time he and Dr. Bledsoe scientifically examined the particles of bones, blood, and hair brought by Dr. Bledsoe from the explosion at Lufkin. He testified positively that the blood upon the bones was human blood; that the bones were fresh green skull bones, and, while most too small to state positively that

they were human skull bones, that in his judgment they were human skull bones, and that the hair found imbedded in the blood, after having been compared with the hair of some 15 different animals, showed every characteristic of human hair, and was inconsistent with any other conclusion.

[5.] This proof, standing alone, was sufficient to authorize the jury in answering that Parsons was dead, and that he was killed in the explosion at the Lufkin depot on March 2, 1913. It was not necessary to require a finding by the jury that the evidence conclusively showed that Parsons was dead, and we are not therefore called upon to pass upon the question of whether the jury was justified in so finding. Appellant introduced in evidence quite a number of circumstances tending to combat the evidence introduced by the plaintiff on this issue, the effect of which was to show that Parsons was not dead, but this only raised a conflict in the evidence which the jury settled in favor of plaintiff; and, the testimony being sufficient to warrant a finding that he was dead, the finding of the jury is conclusive upon us. *Fid. Mut. Life Ass'n v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922. The assignment is overruled.

The eleventh assignment complains that the court erred in overruling appellant's motion for a new trial, for the reason that the evidence was insufficient to show that the plaintiff offered proof of death in compliance with the by-laws and the contract of insurance.

We have carefully examined the evidence in this regard, and find as a fact that proof of the death of Parsons was made in substantial compliance with the by-laws and contract. We had occasion to pass upon this question in *National Life Ass'n v. Parsons*, 170 S. W. 1038, where the proof on that issue was in all material respects the same as in this case, and there held the proof, which is set out in the opinion, was sufficient. We overrule the assignment.

The other assignments presented by appellant in its brief and not hereinbefore discussed have been carefully examined by us, and it is our opinion that none of them points out reversible error. We are of the opinion that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

IMPERIAL SUGAR CO. v. CABELL et al.
(No. 6736.)

(Court of Civil Appeals of Texas. Galveston.
July 1, 1915. Rehearing Denied
Oct. 14, 1915.)

1. STATES \S 191 — ACTION AGAINST — SUIT AGAINST AGENTS.

That defendants in trespass to try title are claiming possession as agents for the state will not defeat the right to maintain the action by

one who has shown title and right of possession, on the ground that suit is brought without the state's consent; the only necessary party being, under Rev. St. 1911, arts. 7737, 7738, the person in possession.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179-184; Dec. Dig. \S 191.]

2. DEEDS \S 165 — CONDITION — EFFECT OF BREACH.

Where a vendor sold certain land to the board of penitentiary commissioners under a deed expressly retaining a vendor's lien to insure the vendees' obligation to make payment and to raise and sell to the vendor a certain amount of sugar cane for 10 years, and reciting that the deed should become absolute upon final payment and performance of the vendees' obligations, but the vendees failed to comply with their contract and repudiated its obligations, the vendor's title remained unimpaired, and he was entitled to possession of the premises.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 521; Dec. Dig. \S 165.]

3. DEEDS \S 147—CONDITIONS—VALIDITY.

A deed of land provided that the superior title should remain in the vendor, and pass to the vendee only upon the condition that the contract be fully performed, is not rendered ineffectual because the consideration for the contract was partly the sale of personal property, since a conveyance may be made conditional upon the performance of any lawful contract.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 473-477; Dec. Dig. \S 147.]

4. DEEDS \S 145—CONSTRUCTION—CONDITIONS—COVENANTS.

Where a deed of land was made conditional upon the performance of a contract whereby the vendees were to cultivate a certain part of the land in sugar cane for 10 years and sell the cane to the vendor, such agreement was a condition, the breach of which would prevent title from vesting in the vendees, and not a covenant, though such in form.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 471; Dec. Dig. \S 145.]

5. VENDOR AND PURCHASER \S 296—REMEDIES OF VENDOR—LIEN.

A vendor, who has reserved an express vendor's lien to secure the consideration for a conveyance, may, on default by the vendee, rescind the contract and recover the land in trespass to try title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 832; Dec. Dig. \S 296.]

6. VENDOR AND PURCHASER \S 267—REMEDIES OF VENDOR—LIEN—RELEASE.

A vendor sold land and retained a vendor's lien to secure the payment of the consideration and the performance of an agreement whereby the vendees were to raise a certain amount of sugar cane and sell it to the vendor for a period of 10 years. On payment of the money consideration agreed upon, the vendor executed a release of his lien, which provided that the cane contract should continue in full force and effect and that the release should not be construed as a cancellation thereof. *Held*, that reference was made to the cane contract in its entirety, and therefore did not release the reservation of title for its performance, since, although a release concludes with general words, it will be construed to relate to the particular matter recited, which the parties intended to release.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 751-758; Dec. Dig. \S 267.]

7. VENDOR AND PURCHASER — 266 — REMEDIES OF VENDOR — LIEN — WAIVER.

Where a contract for the sale of land and the cultivation of cane for 10 years was secured by a vendor's lien, failure to assert the lien upon a partial breach of the contract was no waiver of future performance, and suit to recover the land was not required to be brought until the vendee's repudiation of the entire contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 687, 713-750; Dec. Dig. § 266.]

Appeal from District Court, Ft. Bend County; Samuel J. Styles, Judge.

Action by the Imperial Sugar Company against Ben E. Cabell and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Lane, Wolters & Storey and Wm. A. Vinson, all of Houston, Williams & Neethe, of Galveston, D. R. Pearson and Thos. B. Pearson, both of Richmond, and Hill & Eakins, of Huntsville, for appellant. B. F. Looney, Atty. Gen., and G. B. Smedley and C. M. Cureton, Asst. Attys. Gen., for appellees.

PLEASANTS, C. J. This is an action of trespass to try title, brought by the appellant against Ben E. Cabell, L. W. Tittle, and R. W. Brahan to recover about 5,200 acres of land, known as the "Sartartia Plantation," in Ft. Bend county. The defendants, by plea in abatement, disclaimed any right, title, or interest in the land sued for as individuals, and alleged that they together constituted the board of prison commissioners of the state of Texas, and as such were holding the land in question for the state of Texas, and as officers of the state; that the fee-simple title to said land was in the state of Texas, and not in the defendants, or either of them; that, while the suit was brought against them, the effect of a judgment against them would be to divest the title to said land out of the state of Texas; that the suit was in fact against the state, and could not be maintained under the laws and Constitution of Texas. In their first amended original answer the defendants, both by exception and plea, raised substantially the same question. It was further specially alleged that the respective rights and contentions of the parties arose out of the following transaction, viz.: That on February 17, 1908, the Imperial Sugar Company executed and delivered to W. H. Gill, R. H. Hicks, and J. T. Mewshaw, the then board of penitentiary commissioners of Texas, a general warranty deed to the land in question, and also to a large amount of personal property therein described, for the use and benefit of the state of Texas; that as a part of the same transaction, although not contemporaneously executed, the said board of penitentiary commissioners executed and delivered to the Imperial Sugar Company a certain instrument in writing, the two instruments being executed, it was alleged, as

the result of a verbal agreement and negotiations between the Imperial Sugar Company and the board of penitentiary commissioners.

The deed referred to in defendants' answer is a deed of general warranty executed by the appellant, and conveys to the persons last above named, composing the board of penitentiary commissioners, for the use and benefit of the state of Texas, the land in controversy, and also the following personal property:

"134 hogs, 139 work mules, 17 saddle horses, 80 tram cars, 75 sections of portable track, 49 cultivators, 16 disc cultivators, 115 turning plows, 6 disc plows, 35 sweep stocks, 7 stubble shavers, 5 stubble diggers, 8 middle bursters, 13 subsoilers, 6 cane scrapers, 12 cotton planters, 2 mowing machines, 30 hoes, 6 post hole diggers, 3 rice seeders, 12 shovels, 10 spades, 20 stubble hoes, 12 briar hooks, 30 axes, 6 scrapers, 6 pitchforks, a large number of double and single treas, 150 cane knives, 60 sets of plow gear, 17 cane wagons (secondhand), 10 cane wagons (new), 9 road wagons, 2 good graders, 1 corn crusher, about 20 dozen tract chains for unloading cane, 6 saddles for guards, 18 wagon saddles, and 3 complete derricks; about 1,000 bushels of ear corn, 2 large barns of crushed corn, about 50 tons of rice bran, about 200 bales of alfalfa and hay, 75 bushels of field peas, about 1,500 bushels of cotton seed for planting purposes; also one blacksmith and wheelwright shop and tools; also a large amount of repair material, such as clew lap links, etc., and such other similar personality and chattels as were on hand and used in connection with the plantation, and all machinery improvements and buildings of every description then on the land."

Following the covenant of general warranty the deed contains the following:

"But it is expressly stipulated, agreed, and understood, by and between the parties hereto, that a vendor's lien and the superior title to all lands and personality hereby conveyed is hereby retained and reserved by the company and granted by the board to secure full, complete, and prompt payment of the consideration herein agreed to be paid therefor, as is hereinafter fully set forth, and to fully insure the obligations herein assumed by the board [the vendee], and upon the full payment of the said consideration and performance of said obligations this deed shall become absolute. The consideration agreed to be paid for said land and personal property is the amount and upon the terms and conditions following, as is evidenced by the one certain obligation in writing, for the sum of one hundred and sixty thousand (\$160,000.00) dollars, to bear interest from the — day of January, 1908, at 6 per cent. per annum, interest payable annually, executed by said board in behalf of said penitentiary system, and duly approved by his excellency, T. M. Campbell, Governor of the state of Texas, of even date herewith, and made payable to the Imperial Sugar Company, or its order, at Houston, Harris county, Texas. The full purchase price of said land and personality is one hundred and sixty thousand (\$160,000.00) dollars, to be paid by said board causing to be delivered to the company, or its assigns or legal representatives, as is hereinafter provided, 40 per cent. gross of the annual crops of cane and cotton raised and grown upon the lands herein conveyed; the value of said per cent. of said products so delivered to the company is to be applied annually as a credit upon the obligations given for said purchase money, first discharging and paying all accrued interest and the balance to be applied to the reduction of such principal sums, and this method to continue until the full

amount thereof has been paid, when full release thereof shall be given. In connection with and as a part of this sale and purchase, the following covenants and agreements, by the company and the board, respectively, are made and entered into, and is a part of the consideration therefor."

Here follows a number of mutual agreements and covenants, among which are the following:

"(b) For the term of ten years, including the year A. D. 1908, the purchaser [the board] agrees and binds itself to sell and deliver the annual cane crop grown on the land hereby conveyed to Imperial Sugar Company or its successors or assigns, f. o. b. cars at its sugar mill at Sartartia, and when same is so delivered the company agrees to purchase the same and to pay therefor a minimum price of \$3 per ton on a 79 per cent. purity test, and as much more as the test shall indicate, at the rate of 10 cents per ton for each degree or point over and above 79 per cent. test, and plus, also, such additional price per ton as the advance price of sugar at New Orleans, Louisiana, shall indicate or justify, from time to time; this agreement, sale, and purchase having been made on a basis of the price of sugar at New Orleans, Louisiana, on January 24, 1908. Such cane shall be delivered by the purchaser at proper times and in proper quantities, so as to facilitate the operation of the company's mill when the company is grinding the cane of the purchaser, and the company agrees to take and receive daily, during the grinding season, from the purchaser, a reasonable quantity of cane, so as to facilitate the harvesting of the crop, each party looking, not only to its own interest in this respect, but to their mutual interest. The vendee may, however, require the company to accept a daily average of 500 tons of cane from the beginning of delivery until the close of the season, but shall not compel the company to receive a greater daily average. The cane to be delivered under the provisions hereof shall be in good marketable condition, and reasonably clean of fodder and trash; that is to say, in such condition as cane is usually and customarily accepted by mills generally in this section, and shall be topped or cut no higher than the last full red joint. In loading same for the mill on cars, the chains shall be properly placed in cars, and if any cars are delivered without chains properly placed, the company will have the right to charge against such cars the reasonable additional cost of handling the same, and if any cane not meeting the above requirements as to marketable condition is accepted, a reasonable deduction shall be made and allowed thereon, so as to bring it to the proper standard."

"(c) It shall be the duty of the state, acting through its board aforesaid, to maintain on said plantation at all times at least 2,250 acres in good cane stubble, and to keep and maintain the personal property hereby conveyed, and the improvements on the real estate, in approximately as good condition as they are when delivered to the board. Under the provisions of this conveyance, and this provision with reference to the maintenance of said property, shall apply to the quantity as well as to the quality of all such personal property, and shall continue in force until at least 50 per cent. of the purchase money has been paid, including all interest."

The agreement referred to in defendants' pleading is as follows:

"Whereas, the Imperial Sugar Company, a corporation, has this day executed and delivered to the board of penitentiary commissioners of the state of Texas, a warranty deed conveying to said board and its successors in office, for the use of said state in fee simple, 5,435 acres of land situated in Ft. Bend county, and known as the 'Sartartia Plantation' (less 200 acres with improvements on same, less also the railroad of

the Imperial Valley Railroad Company, and an easement for its right of way 100 feet in width through said plantation); and whereas, there was also sold and transferred to the vendee by said deed all the personal property, farming utensils, and improvements on said lands conveyed, which personalty has already been delivered to vendee; and whereas, it is desirable that the contract and undertaking of the vendee shall be evidenced by a separate writing officially signed by the members of the board of penitentiary commissioners: Now, therefore, this instrument is to declare: That said board, in consideration of said deed and the covenants therein contained, undertakes, agrees, and promises, and so far as may be lawful binds its successors in office and the state of Texas, to pay the purchase money, to wit, \$160,000, with 6 per cent. interest from January 24, 1909, as stipulated in said deed, as follows, to wit: (1) To maintain the present acreage of sugar cane and to pay said vendor forty per cent. (40%) of the annual crop of cane and cotton grown on said premises, to be credited first to the accrued interest on the \$160,000 purchase money, the remainder to be credited upon the principal, and to so continue from year to year until the entire purchase money, principal and interest, is fully paid off and discharged. (2) In consideration of said deed and transfer, and the undertakings therein set out, on the part of the vendor, said board agrees, and as far as may be lawfully done binds its successors in office and the state of Texas, to sell and deliver f. o. b. cars at the cane mill of said vendor situated on the 200 acres reserved as expressed in the deed the annual output of cane (less such amounts as may be reserved for replanting and extension of acreage), and to sell same to the vendor at the minimum price of \$3 (three dollars) per ton on a 79 per cent. (seventy-nine per cent.) test, and as much more per ton as the test above that or the price of crude sugar at New Orleans may indicate at the date of delivery, the vendor having bound itself to purchase said cane upon the terms above stated. The price of \$3 per ton above named is predicated upon the price of crude sugar at New Orleans on the 24th day of January, 1908, and shall be the basis of comparison in arriving at the increased price of cane per ton from time to time. This obligation for the sale and purchase of cane upon these terms shall be mutually binding for the term of ten years; that is to say, it shall run from the year 1908 to 1917, inclusive, and shall include the crop of 1917, whether harvested and delivered before or after the expiration of that year, and this whether the property transferred by said deed is sooner paid for or not. (3) The vendee in said deed shall maintain the condition of the personalty on the sold premises in practically as good condition as when delivered, both as to quality and quantity, until at least half the purchase money is paid. (4) It is agreed that the vendees shall not undertake to raise on said premises a greater amount of corn, oats, or other forage crops than are necessary for the maintenance of the live stock now on the premises sold, or which may hereafter be placed thereon for the proper cultivation and handling of said premises. But if the vendee should conclude to raise such crops for sale, or for the maintenance of the live stock on other state farms, then the vendor shall have forty per cent. (40%) of such excess so sold or used elsewhere, to go as a credit on the principal and interest of the purchase price; but this restriction as to the use of the premises shall not be in force after the property is paid for."

The defendants alleged that each and all of the covenants and agreements contained in the deed and agreement, which were obligations upon the board of penitentiary commissioners, or upon the defendants as their

successors in office, were complied with and discharged; that the vendor's lien note for \$160,000, described in the deed, was paid in full on October 15, 1910, and that upon the payment thereof the vendor's lien contained in said deed became and was satisfied, and the legal title to the lands in controversy became fully vested in the state of Texas; that the plaintiff, on or about the date mentioned, executed and delivered a complete release of said vendor's lien. The release, omitting formal parts, is as follows:

"Whereas, by deed dated March 11, 1908, recorded in the county clerk's office of Ft. Bend county, Texas, in Book —, page —, the Imperial Sugar Company conveyed to the board of penitentiary commissioners of the state of Texas, for the use of said state, in fee simple, 5,434 acres of land situated in Ft. Bend county, Texas, and known as the 'Sartartia Plantation' (less 200 acres with improvements on same, less also the railroad of the Imperial Valley Railroad Company, and an easement for the right of way 100 feet in width through said plantation); and whereas, there was also sold and transferred to the vendee by said deed all the personal property, farming utensils, and improvements on said land conveyed, all of which are fully described in said deed, to which reference is here made for all purposes, retaining therein a vendor's lien securing the payment of a certain note for the sum of one hundred and sixty thousand (\$160,000.00) dollars with six per cent. interest from January 24, 1908; and whereas, said note and all interest thereon, in full satisfaction of said incumbrance, have been paid so far as the said vendor's lien note is concerned, but not as regards a certain cane contract, which is to continue in full force and effect: Now, therefore, know all men by these presents, that we, the Imperial Sugar Company (a corporation acting herein through its duly authorized president and secretary), being the legal owner of the above referred to note at the time of its payment, do hereby release the above-described properties from the vendor's lien aforesaid, and declare the same extinguished; but this release is in no manner to be construed as a cancellation of the above-mentioned cane contract, entered into between the said board of penitentiary commissioners and the Imperial Sugar Company, which was also a part of the consideration for the transfer of the property above described."

The defendants alleged that this suit could not be maintained, for the reason that the vendor's lien retained in the deed was attempted to be retained in consideration of the purchase price of the land in controversy, and of a large amount of personal property therein described; that the purchase price of the land and of the personalty was not separated at the time, and is not now capable of being separated, so as to show accurately what part represents the purchase price of the land; that the considerations were so interblended as to produce confusion to such an extent that the vendor's lien did not and could not arise; that in addition thereto, by reason of the various and sundry covenants contained therein, particularly those with reference to the sale, purchase, and delivery of cane covering the period of ten years time, and as to the amount which should be cultivated in cane during any period of time, the agreement was so complicated, and the sum total of the consideration produced such con-

fusion, that it was impossible to separate the actual purchase money for the land from the other matters of consideration, and that the vendor's lien therefore could not arise. It was further alleged that as to the covenants obligating the board of penitentiary commissioners to deliver the cane from the land in controversy, and to sell the same to the plaintiff upon the terms and conditions named therein, that the vendor's lien did not and could not arise, because the same was not a fixed consideration, either of money or its equivalent, whereby there arose a certain absolute debt of the vendees to the plaintiff, in consideration of the transfer of the lands in controversy; that such obligations, when breached, would authorize a suit only for an uncertain and unliquidated demand; that the covenant or obligation was one merely collateral to the purchase of the realty, and was and is not susceptible of accurate ascertainment as to the amount of damages, for the breach of which a vendor's lien could be retained, or would be impressed upon the land; and that to secure same there did not arise and could not exist a vendor's lien.

The defendants further alleged, with reference to the particular covenant to maintain 2,250 acres of land in cane for a period of 10 years, that it was complied with and was satisfied when the vendor's lien note for \$160,000 was paid; that, if mistaken in such allegation, then it was understood and agreed that the land should be cultivated in cane in the usual and ordinary way, which was to rotate the crops, so as to keep the same at the usual state of efficiency as cane-producing land; that, if mistaken in that, that the reservation of 2,250 acres as being the amount which should be cultivated was a mutual mistake; that the land was not surveyed at the time the deed was drawn, and the board of penitentiary commissioners did not know accurately the number of acres described in the plaintiff's petition which were capable of being cultivated in and of producing cane, and that as a matter of fact there were only about 1,700 acres thereof capable of being cultivated in and of producing cane; that after observing that there were not 2,250 acres of cane land on said land, and after the fact was fully known to the plaintiff, that the plaintiff continued, without objection, to receive cane from said lands, and that its officers and agents advised with the defendants, and authorized them to cultivate only that portion of land described in its petition as would produce cane, and authorized and advised them to permit said amounts of said cane-producing land to be cultivated in other crops, for the purpose of causing the land to continue as cane-producing land. The defendants further alleged that said covenant was contrary to public policy and void, in that it restricted the use of the land conveyed by the deed, and restricted the rights of sovereignty; that it was not a covenant and agreement concern-

ing the land, or any estate conveyed by said deed; that it was not an easement, was not a covenant running with the realty, and that its breach or violation was no ground for forfeiture, and would not prevent the legal title from vesting in the state, or in the defendants, for the use and benefit of the state. The defendants further alleged that the plaintiff was estopped to seek a recovery of the land in controversy for any breach of any of the covenants set forth in the deed, for the reason that the plaintiff, by said instruments, agreed and promised and became bound to pay for cane delivered to it in accordance with the provisions of said instruments; that during the year 1911 the defendants caused to be grown upon the land in controversy a large quantity of cane, which plaintiff was bound to receive and pay for, but that, although the defendants had delivered the cane in accordance with the covenants and agreements set forth in said instruments, the plaintiff had wholly failed, refused, and declined to pay for the same, and had thereby breached the terms of said covenants and agreements; that the defendants had complied with said covenants up to that time, and would have continued to do so, except for the breach thereof by the plaintiff.

W. O. Murray, S. J. Bass, and W. O. Stamps having been appointed prison commissioners to succeed the original defendants, plaintiff by supplemental petition made them parties defendant.

The plaintiff, by its second supplemental petition specially excepted on numerous grounds to the plea in abatement of the defendants, and also to various allegations in their first amended original answer, which exceptions need not be further noticed. The plaintiff admitted that it executed the deed referred to on February 17, 1908, and that it conditionally conveyed thereby the lands sued for; that notwithstanding the fact that the prison commissioners agreed for the term of 10 years, including the year 1908, to sell to the plaintiff under the terms therein mentioned all of the cane grown upon said premises, and notwithstanding the further fact that they contracted and agreed as a part of the contract price of said land that they would maintain on said plantation to be delivered under the contract of sale aforesaid, at all times, at least 2,250 acres in good cane stubble, and notwithstanding the fact that the vendor agreed to give and the state accepted an option during said 10-year period to sell and to buy the sugar mill and lands upon which it was situated as a part of the consideration for said contract of sale, the state directly failed and refused to comply with the provisions of said contract of sale, and refused and has failed for 10 years to sell, under the terms of said contract, to the plaintiff, the cane grown upon said premises, as it was bound to do, but only sold and delivered the cane grown upon said premises dur-

ing the years 1908, 1909, and 1910; that the state failed and refused to maintain on said plantation at all times 2,250 acres in good cane stubble, and to properly cultivate and harvest the same, as it was bound to do, and to deliver and sell same to the plaintiff under the terms of the contract, but, on the contrary, 2,250 acres of the cane were maintained on said land, and the crops therefrom sold to the plaintiff only for the year 1908; that for the year 1908 the cane raised on said plantation was sold to the plaintiff under the terms of the said contract, but much of the stubble which existed during the year 1908 was plowed up, so that not more than 1,700 acres of said land were planted in cane during the year 1909 and delivered to the plaintiff under the terms of said contract, and a much less acreage was planted in cane during the year 1910, and sold and delivered to the plaintiff, and the state of Texas, acting through its duly authorized agents and officers, openly, boldly, and clearly repudiated the obligations contained in said conveyance, and the defendants openly declared that the state would not continue after 1910, and during the year 1911 and subsequent years, to maintain 2,250 acres in cane, and sell the same under the terms of said contract to the plaintiff, nor would the state sell any of the cane under the terms of said contract which might be raised upon said premises to the plaintiff, and completely repudiated any obligation so to do on the part of the state; that the state, acting through its said agents and officers, had repudiated any obligation whatever to maintain on said premises 2,250 acres of cane, or any other acreage, by reason of the conditions and obligations contained in said contract of sale; that, the contract of sale having been repudiated by the state, plaintiff had exercised its right to declare the conditional sale abandoned and forfeited, and asserted its superior title retained in the conveyance, and instituted this suit to remove the defendants and their agents therefrom as trespassers.

It is further alleged that the part of the contract of sale of the land in controversy which provided for the annual maintaining and cultivation of 2,250 acres in cane, to be sold to the plaintiff for a term of 10 years, including the year 1908, as well as other cane which might be grown on said lands for 10 years, was and constituted the greater part of the consideration agreed to be paid for said lands, which fact was well known to the state of Texas and its officers and agents then acting for it in the purchase of said lands; that if said contract had been faithfully performed and carried out on the part of the state, as was by all parties contemplated and agreed, said 2,250 acres would have produced annually not less than 33,750 tons of good cane, and ought to have produced 40,000 tons; that such cane would have been worth to the plaintiff, and would have produced a profit to it, of not less than

\$2 per ton; that, if the contract had been faithfully performed by the state of Texas, plaintiff would have realized a profit annually from said cane of not less than \$87,500, and possibly a larger sum, but the state had deprived the plaintiff of this sum by the nonperformance and repudiation of said contract, and to that extent had failed and refused to pay to the plaintiff that part of the consideration agreed to be paid for said lands. That with reference to the personal property sold with said lands, the contract itself as written shows that the parties thereto understood and agreed that when one-half of said \$160,000 had been paid the lien and superior title reserved would be canceled and eliminated in so far as the personal property was concerned, and after the payment of said \$160,000 it was so dealt with and treated by both parties. Plaintiff further alleged that it had paid the state of Texas for all cane it had ever received from it from or off of said lands since same was contracted to be sold to the state, and that it now owed the state nothing therefor, and all such cane was in fact paid for long before it was delivered to the plaintiff by the state of Texas.

The plaintiff further alleged that there was no mistake in said contract, mutual or otherwise, relative to the number of acres of cane contracted to be maintained and cultivated on said lands for the 10 years; that all the parties participating in the making and executing of said contract well understood and agreed that there was to be maintained and properly cultivated on said land each year for 10 years, from and embracing the year 1908, 2,250 acres in good cane, and that all the cane upon said land was to be sold and delivered by the state to the plaintiff under the terms of said contract of sale, and this regardless of the number of acres then planted in cane upon said land; that in fact there was at the time of the execution of said contract of sale then planted in cane upon said land at least 2,250 acres, all then in good cane stubble and ready for cultivation; that there was at no time any good reason or necessity for abandoning any part of said acreage for the growing of cane, nor was there any use to plant any portion thereof in any other kind of crop; that if any of said lands planted in cane, by reason of the death of the stubble, or for any other reason, was rendered unsuitable to cultivate in cane, it was the duty of the state under the terms of the contract to replant the same in cane, or to plant additional and new acreage upon said land in cane to replace the plowed-up stubble or abandoned land, as there was plenty of good land on said plantation useful and suitable for growing cane profitably to make up said quantity of 2,250 acres.

By first supplemental answer the defendants excepted to certain portions of the plaintiff's second supplemental petition, and denied that they had openly declared to the plaintiff that the state would not continue to

maintain after 1910, and during the year 1911 and subsequent years, 2,250 acres in cane, and sell the same under the terms of said contract. They further denied that they sold cane under any other contract than that contained in the deed to the premises in controversy, and averred that they were ready and willing to carry out the terms of said contract up to and including 1911, and would have continued to do so, but for the failure of plaintiff to pay for the cane delivered to it during the year 1911, as alleged in their first amended original answer.

By agreement of the parties the judgment of the court upon the pleas and exceptions was withheld until the evidence was heard. After the evidence had been introduced, the cause was by consent of parties withdrawn from the jury, and the matters of fact as well as of law submitted to the court. After having the case under advisement for some time the court rendered the following judgment:

"The court being of the opinion that this is a suit against the state of Texas, and there appearing nothing in the pleadings or evidence to show that the state had given permission to the plaintiff to sue, nor had consented to the prosecution of said suit, the court is of the opinion that the defendants' pleas in abatement should be sustained and this case be dismissed. The court is further of the opinion that the provisions, agreements, and contracts contained in a deed offered in evidence by both parties, of date February 17, 1908, from Imperial Sugar Company to W. H. Gill and others, for and in behalf of the state, wherein the state agreed to cultivate in cane the number of acres set forth in said deed for a term of ten years, and to deliver the cane so raised to and sell the same to Imperial Sugar Company at the price in said deed stipulated, constitute a covenant, for the breach of which, if breached, the right to recover the land in an action of trespass to try title in law does not lie, and that for this reason plaintiff should not have judgment, but the defendant should."

[1] Appellant under an appropriate assignment of error complains of the judgment sustaining the defendants' plea in abatement. The proposition submitted under this assignment is as follows:

"It appearing that the defendants were in actual possession of the land in controversy, the action of trespass to try title was maintainable against them, although they claimed no personal interest therein, and held such possession only as officers and agents of the state, and the suit was not one against the state."

The suit is one to recover the title and possession of the land against defendants, who are alleged to be wrongfully withholding possession from plaintiff. If plaintiff has shown title and the right of possession, the fact that those wrongfully holding possession are not claiming any interest in the property for themselves, but are holding and claiming for and as agents of the state, does not defeat plaintiff's right to maintain the suit on the ground that it is a suit against the state brought without its consent. The right of the citizen to maintain a suit and recover property wrongfully withheld from him by an officer or agent of the state without first

obtaining the consent of the state to bring the suit is firmly established by the decisions of the Supreme Court of the United States and of this state, and so far as we are informed is no longer questioned by the courts of any state in the Union. The question was definitely settled by the Supreme Court of the United States in the case of *United States v. Lee*, 106 U. S. 197, 1 Sup. Ct. 240, 27 L. Ed. 171. The question as presented in that case was stated and answered by Mr. Justice Miller as follows:

"Could any action be maintained against the defendants for the possession of the land in controversy, under the circumstances of the relation of that possession to the United States, however clear the legal right to that possession might be in plaintiff? * * * The counsel for plaintiffs in error and in behalf of the United States assert the proposition that, though it has been ascertained by the verdict of the jury, in which no error is found, that the plaintiff has the title to the land in controversy, and that what is set up in behalf of the United States is no title at all, the court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses. This proposition rests on the principle that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents for the government. * * * Under our system the *people*, who are there [in England] called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right."

The learned justice sustained his opinion in that case by citation and discussion of the opinions in many previous cases decided by that court and by argument which places his opinion among the greatest of that great court. This decision has remained unassailed and unassailable, and been uniformly followed by the courts of the several states. There is a clear distinction between a suit against an officer for a wrong committed by him in the name of the state, and suits brought against an officer to prevent the exercise by the state through such officer of some act of sovereignty, or suits against an officer or agent of the state to enforce specific performance of a contract made for the state, or to enjoin the breach of such contract, or recover damages for such breach, or to cancel or nullify a contract made for the benefit of the state.

Suits of the second class named above, while nominally against the officer, are really suits against the state. This character of

suits are illustrated by the following cases: In *re Ayers*, 123 U. S. 505, 8 Sup. Ct. 164, 31 L. Ed. 216; *Fitz v. McGhee*, 172 U. S. 526, 19 Sup. Ct. 269, 43 L. Ed. 535; *Stephens v. Railway Co.*, 100 Tex. 179, 97 S. W. 309; *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805; *Railway Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613; *Thomson v. Baker*, 90 Tex. 163, 38 S. W. 21. This distinction is discussed in the case of *Polindexter v. Greenhow*, 114 U. S. 291, 5 Sup. Ct. 908, 962, 29 L. Ed. 185; and the reason for holding that suits against an officer for wrongs committed by him in the name of the state are not to be regarded as suits against the state is thus forcibly stated:

"This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables, the agent of the state to declare and decree that he is the state—to say, '*L'état c'est moi*.' Of what avail are written Constitutions, whose Bills of Right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the state? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, state and federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked, and of communism, which is its twin—the double progeny of the same evil birth."

Plaintiff in this suit does not seek specific performance of the contract made with the penitentiary commissioners, nor to enjoin its breach, nor to recover damages for its breach, but, claiming the title and right of possession to the land, sues to regain that title and possession from the persons alleged to be wrongfully withholding such possession. Our statute requires that such suit shall be brought against the person in possession, and, while any other person claiming title to the land may be made a party, the only necessary party is the person in possession. R. S. arts. 7737 and 7738. It is well settled by the decisions of the higher courts of this state that a suit to recover the title and possession of property wrongfully held by an officer or agent of the state, who claims no interest in the property, but is holding only for the state, is not a suit against the state, which can only be brought with the consent of the state. *Whatley v. Patten*, 10 Tex. Civ. App. 77, 31 S. W. 60; *Stanley v. Schwalby*,

85 Tex. 349, 19 S. W. 264; Conley v. Daughters of the Republic, 156 S. W. 197.

The fact that the defendants in this case were rightfully in possession of the land under the contract prior to its alleged breach and repudiation by them does not affect the question of whether the suit is one against the state. If the superior title remained in appellant, and could only vest in the state upon the performance by the state of the contract which formed a part of the consideration for the conveyance, upon breach of the contract by the state the appellant had the right to treat the contract of sale as forfeited and sue the persons in possession for recovery of the land, and such suit cannot be defeated on the ground that it is a suit to enforce the contract against the state. The contention of appellees, that the suit is one against the state to enforce the contract, is fully answered by the Supreme Court of Michigan in the cases of *State Bank v. Hastings*, 1 Doug. 225, 41 Am. Dec. 549, and *State Bank v. Hammond*, 1 Doug. 527. The trial court erred in sustaining the plea in abatement.

[2] This brings us to a consideration of the second ground upon which the trial court rendered judgment for the defendants, as before set out, and which is assailed by appellant under an appropriate assignment of error. The court, though specially requested to find whether or not there was a breach of the contract by the board to maintain 2,250 acres of the land in good cane stubble and to sell and deliver the annual crop grown on said land to appellant for a term of 10 years upon the terms stated in the contract, failed to make a fact finding upon this issue. The evidence amply justified, if it does not compel, the finding that defendants failed to comply with these provisions of the contract and expressly repudiated this portion of their contract obligation and notified appellant that they would not be bound thereby. The evidence shows that the agreement of the defendants to cultivate 2,250 acres of the land in cane and deliver the annual crop to plaintiff at the price and upon the terms stated in the contract was a material part of the consideration for the sale of the land, and such contract, if performed by the defendants, would have been of more value to the plaintiff than the amount of money paid it as part of the consideration for the sale. The deed, as before set out, expressly provides that a vendor's lien and "the superior title to the land" is retained and reserved by the plaintiff to fully insure the obligation assumed by the defendants and that "upon the final payment of said consideration and performance of said obligations this deed shall become absolute." This provision of the deed is plain and unambiguous and there is no room for construction. The superior title is reserved in the seller and is to pass to the buyer only upon condition of the final

performance of the contract in consideration of which the conveyance was made. It follows that, if defendants failed to comply with their contract and have repudiated its obligations, plaintiff's title remains in it unimpaired by the executory contract of sale or conditional deed executed and delivered to defendants.

[3] There is no merit in appellees' contention that the attempted reservation of a vendor's lien and the superior title to the land was ineffectual because the deed conveyed personal property as well as land, and the price of the land and of the personal property not being separately stated, it cannot be determined what part of the consideration was given for the personal property nor what part for the land. In the first place, we are inclined to think that the contract shows that the \$160,000 paid in money included all of the consideration given for the personal property. We think the provision in the contract, that the agreement of the defendants to keep and maintain the personal property in good condition should only remain in force until 50 per cent. of the purchase money was paid, indicates that all of the purchase price of the personal property was included in the \$160,000. But, be this as it may, the parties have stipulated that the superior title should remain in the vendor and pass to the vendee only upon condition that the contract be fully performed, and the fact that the consideration for the contract may have been partly the conveyance of the personal property cannot affect the binding force of these stipulations. The right to annex a condition to a conveyance is a necessary incident to the right to own and convey the property, and a conveyance may be made conditional upon the performance of any lawful contract. *State Bank v. Hastings*, supra. The parties having made the passing of the title conditional, the question of whether an implied vendor's lien would exist to enforce the performance of the contract, or the mere reservation of an express vendor's lien would make the conveyance executory and the title one upon condition, becomes immaterial.

[4] The contention that the contract to cultivate the land in cane and sell the cane grown thereon to the appellant is a covenant, and not a condition, and that therefore the breach of the contract would not prevent the title vesting in defendants, is equally untenable. The contract is in form a covenant, and so is a contract to pay money; but the performance of either may be made a condition for the vesting of title.

[5] It is unnecessary to cite authorities upon the proposition that a vendor, who has reserved an express vendor's lien to secure the consideration for a conveyance, in event of default by the vendee, may rescind the contract, and sue in trespass to try title, and recover the land. The authorities are also uniform in support of the doctrine that where

a conveyance is made upon condition, and the condition is broken, the vendor may recover the land. *Alford v. Alford*, 1 Tex. Civ. App. 245, 21 S. W. 283; *Railway Co. v. Dunman*, 74 Tex. 265, 11 S. W. 1094; *Gibson v. Fifer*, 21 Tex. 262. There is no sounder principle in law nor in morals than that one cannot hold property bought under a contract and repudiate the obligation of the contract upon which title is conditioned. *White v. Cole*, 87 Tex. 502, 29 S. W. 759; *Railway Co. v. Gurley*, 92 Tex. 233, 47 S. W. 513; *McPherson v. Johnson*, 69 Tex. 484, 6 S. W. 798. These general principles of law are in no way affected by the fact that the deed to the defendants was for the use and benefit of the state. The Supreme Court of this state, in the case of *Fristoe v. Blum*, 92 Tex. 80, 45 S. W. 998, in discussing the rights of parties under contracts of this kind, say:

"A clear understanding of the relation in which the state stands to the purchasers in these contracts will greatly facilitate a proper solution of the questions upon which this case depends. It is well settled that so long as the state is engaged in making or enforcing laws, or in the discharge of any other governmental function, it is to be regarded as a sovereign, and has prerogatives which do not appertain to the individual citizen; but when it becomes a suitor in its own courts, or a party to a contract with a citizen, the same law applies to it as under like conditions governs the contracts of an individual."

[8] We cannot agree with the trial judge that the release executed by the appellant of the vendor's lien retained in the deed to secure the payment of the \$180,000 can be construed as a release of the reservation of title in the deed retained to secure the performance by defendants of the contract in regard to the cultivation of the land in cane and the sale to appellant of the cane grown thereon. On the contrary, the release, which we have before set out, expressly provides that the cane contract shall "continue in full force and effect," and that the release "is in no manner to be construed as a cancellation of the above-mentioned cane contract, * * * which was also a part of the consideration for the transfer of the property." This reference to the cane contract should be construed as referring to the contract in its entirety, which includes as well the agreement that the title is reserved to secure the performance by the vendees of the contract, and that the deed shall become absolute only upon such performance, as the obligation of the vendees to cultivate the land in cane and sell and deliver the cane grown thereon to appellant. If there are any general words in the release which could be construed as affecting the reservation of title to secure the performance of the cane contract, the provision of the instrument above quoted would restrict the meaning of such words. The rule of construction is thus stated by our Supreme Court in the case of *Railway Co.*

v. McCarty, 94 Tex. 302, 60 S. W. 429, 53 L. R. A. 507, 86 Am. St. Rep. 854:

"Notwithstanding that the release concludes with general words, yet the law, in order to prevent surprises, will construe it to relate to the particular matter recited, which was under the contemplation of the parties, and intended to be released."

This rule was also applied by our Supreme Court in the case of *Sanborn v. Crowds*, 100 Tex. 605, 102 S. W. 719.

[7] The failure of appellant to assert its superior title to the land upon the first partial breach of the contract by defendants was not a waiver of its title. The contract of defendants was to continue for 10 years, and no acquiescence in or waiver of one failure could be regarded as a waiver of future performance, and suit to recover the land was not required to be brought until there was a repudiation of the entire contract by the defendants. *Thompson v. Robinson*, 93 Tex. 171, 54 S. W. 243, 77 Am. St. Rep. 843. If the contract had been breached and repudiated as claimed by appellant, it has the right to assert its superior title to the land expressly reserved in the deed to secure the performance of the contract. If the state had made itself a party to the suit, it might have shown equities which would have entitled it, upon offering to do equity and compensate appellant for the loss sustained by it by reason of the breach of the contract by the agents of the state, to defeat appellant's suit to recover the land; but it cannot repudiate the obligations upon the performance of which its title is conditioned, and by its agents hold appellant's land and deny it any redress for the damages sustained by the breach of the contract.

From the conclusions before expressed, it follows that the judgment of the court below must be reversed, and the cause remanded; and it is so ordered.

Reversed and remanded.

LANE, J., not sitting.

GRUBBS et al. v. EDDLEMAN et al.
(No. 6957.)

(Court of Civil Appeals of Texas. Galveston.
June 21, 1915. Rehearing Denied
Oct. 14, 1915.)

1. INDEMNITY — 6 — RIGHT OF ACTION —
BILLS AND NOTES.

A purchaser of land borrowed money to make the initial payment, giving therefor a note upon which plaintiffs were indorsers. Subsequently he executed a note to indemnify plaintiffs, secured by a deed of trust upon the premises purchased. Plaintiffs paid the note upon which they were indorsers, but defendant failed to pay the indemnity note. Held, that plaintiffs were entitled to judgment against defendant on the indemnity note for such a sum as they paid to the holder of the original note and to a foreclosure of the trust deed.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. §§ 7, 9, 18, 19; Dec. Dig. § 6.]

2. VENDOR AND PURCHASER ⇐260—RIGHTS OF VENDOR—VENDOR'S LIEN—PRIORITY.

A purchaser of land borrowed money to make the initial payment, giving therefor a note upon which plaintiffs were indorsers, and also giving vendor's lien notes for deferred payments, some of which passed into the hands of one of the defendants. To indemnify plaintiffs as to the original note, the purchaser executed to them the note sued on, and gave a trust deed on the property as security therefor. Subsequently he deeded the land to the holder of the vendor's lien notes, who assumed the payment thereof. The indorsers of the original note, having paid it, brought suit on the indemnity note and for foreclosure of the trust deed. *Held*, that the execution and record of the indemnity note and trust deed created a lien on the original purchaser's equity of redemption which plaintiffs were entitled to foreclose, subject to the superior lien of the holder of the vendor's lien notes, who by his purchase of the land and surrender of the notes did not lose his equity in the property.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 664-669; Dec. Dig. ⇐260.]

3. VENDOR AND PURCHASER ⇐260—RIGHTS OF VENDOR—VENDOR'S LIEN—PRIORITY.

Where a purchaser of property executed a note secured by a deed of trust to indemnify plaintiffs, who had advanced money for the purchase price, and the holder of vendor's lien notes given for the remainder of the purchase price subsequently purchased the property, such latter purchaser had no lien superior to the lien of plaintiffs for improvements placed by him on the property; he having constructive notice of their lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 664-669; Dec. Dig. ⇐260.]

4. VENDOR AND PURCHASER ⇐263—RIGHTS OF VENDOR—LIENS.

Where the purchaser of property executed a note secured by deed of trust on the property to indemnify indorsers upon a purchase-money note, such lien was not destroyed by a sale subsequently made by him in consideration of the vendee's assumption of the original vendor's lien notes.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 696, 697; Dec. Dig. ⇐263.]

Appeal from District Court, Orange County; A. E. Davis, Judge.

Action by L. T. Grubbs and others against J. P. Eddleman and another. Judgment for defendants, and plaintiffs appeal. Reversed and rendered.

Bisland & Bruce, of Orange, for appellants. Holland & Holland, of Orange, for appellees.

LANE, J. That the nature of this case and the transactions leading up to the bringing of this suit may be readily understood, we here make a brief statement of such transactions as we gather them from the fact findings of the trial court; there being no statement of facts filed with the record.

On March 19, 1909, J. P. Eddleman desired to purchase lots 1, 2, 3, and 4, block 51, of the amended Sheldon survey to the city of Orange, from Mary C. Harmon and husband, Jesse Harmon. For the purpose of procuring the cash payment demanded by the Harmons he borrowed from George Call \$1,020,

for which he executed his note, with George A. Foreman, H. W. Bland, L. T. Grubbs, and John Burton, plaintiffs herein, as indorsers thereon. On the 22d day of March, 1909, said Eddleman purchased said lots from the Harmons, which the Harmons conveyed to him by a general warranty deed reciting the payment of \$1,000 cash and the execution and delivery by said Eddleman to them of one note for \$800, due one year after date, one note for \$1,350 due two years after date, and one note for \$1,350 due three years after date, all bearing 10 per cent. interest per annum, and retaining a vendor's lien on said lots to secure the payment of said notes. The note given Call by Eddleman was renewed, with these plaintiffs as indorsers, and the last renewal was due January 18, 1913, on which date the Eddleman note was taken up and satisfied by the plaintiffs in this cause. W. H. Stark came into possession of the first two vendor's lien notes in the due course of business, by indorsement, before maturity. On September 28, 1909, Eddleman, for the purpose of securing these plaintiffs as indorsers on the \$1,020 note given George Call, executed and delivered to them a note for \$1,000, due one year after date, and secured the same by a deed of trust of that date on the lots conveyed to him by Harmon and wife. On March 28, 1911, J. P. Eddleman, by general warranty deed, conveyed this property to W. H. Stark, the consideration named in said deed being \$1 and the assumption of the three vendor's lien notes given by Eddleman to Harmon and wife, which notes are fully described in the deed of March 22, 1909, from Harmon and wife to Eddleman. After the institution of this suit defendant Stark procured a deed from Harmon and wife to this land; consideration named therein being the release of said Harmon and wife as indorsers on the original Eddleman notes. On the 19th day of January, 1913, the plaintiffs in this case paid to George Call \$1,245, being the amount due Call from Eddleman on the loan as originally made. Eddleman has never paid the \$1,000 note sued on in this case. The deed of trust given plaintiffs to secure the \$1,000 note sued on was filed for record on October 13, 1909, and duly recorded on the 15th day of October, 1909, in the deed of trust records of Orange county, and properly indexed. The \$1,000 note sued on in this cause was placed on the hands of attorneys for collection.

Plaintiffs having paid Call \$1,245 in satisfaction of the original note which was indorsed by them for the accommodation of Eddleman, and Eddleman having failed and refused to repay the money so paid to Call, they brought this suit against Eddleman upon the note given by him to indemnify them, and for a foreclosure of the deed of trust given by Eddleman to secure said indemnifying note. They also sued defendant W. H. Stark, alleging that he is in possession of the

lots upon which they have a lien, and that he is asserting some kind of claim thereto, and pray for a foreclosure of said lien as against said Stark.

Defendant Eddleman answered: First, by general denial; second, that the note sued upon is but a collateral note given to plaintiffs by him to indemnify them against loss as indorsers of the note given by him to Call, which said note has never been paid by said plaintiffs; and, third, that the note and mortgage sued on was released by plaintiffs and said mortgage returned to him as a release from further liability upon said note and mortgage.

Defendant Stark, in effect, answered that he (Stark) was the owner of the three vendor's lien notes executed and delivered by Eddleman to the Harmons, aggregating \$3,200, and interest, etc., given in part payment for the lots involved in this suit, and that he purchased said lots from Eddleman by warranty deed in payment of said notes, and that he thereby got title to the same freed from the lien asserted by plaintiffs, as plaintiffs' lien was obtained from Eddleman, who at the time said lien was given did not hold the superior legal title to the lots in question, but held only secondary to the superior vendor's lien, as evidenced by the deed from the Harmons to Eddleman, and by the notes of Eddleman held by the said Stark, and prayed, however, that in the event the court should hold that he did not hold title to said lots free from the lien held by plaintiffs he be permitted to recover judgment against Eddleman for the amount due upon said vendor's lien notes, and that said property be sold, and that out of the proceeds of such sale he (Stark) be paid: First, the amount due on said notes; second, the sum paid out by him (Stark) for improvements on said lots; and, third, for judgment over against Eddleman upon his warranty.

Plaintiffs by supplemental petition deny all the material defenses of the defendants, and aver that, when Stark purchased the said lots from Eddleman and in part payment therefor assumed the payment of the note executed by Eddleman to Harmon, said note became Stark's debt, and that they were no longer liens on said lots, and therefore Stark holds said lots subject to the lien given by Eddleman to secure the note sued upon, and that therefore they should be permitted to have their judgment against Eddleman for the full amount due on the note sued upon and for a foreclosure of their said lien against both Eddleman and Stark unincumbered by the lien asserted by Stark.

Upon these pleadings, substantially given, the case was tried before the court without a jury. Upon a finding of facts by the trial court substantially the same as hereinbefore set out, the trial judge reached the conclusion, as set out in the transcript, that plaintiffs should not recover as against either of the defendants, Eddleman or Stark, and

therefore rendered judgment against plaintiffs and in favor of both of said defendants. From this judgment, all the plaintiffs have appealed.

[1] Appellants' first assignment of error is that the court erred in failing to render judgment for appellants against Eddleman for the amount due upon the note sued upon, for a foreclosure of their lien, for attorney's fees as prayed for, and for costs of suit.

The findings of fact of the court, which are not challenged by either party, are that the note for \$1,020 given by Eddleman to Call was indorsed by plaintiffs and was renewed with said plaintiffs as indorsers for Eddleman on January 18, 1913, at which time the plaintiffs paid Call the sum of \$1,245, the amount then due upon the same; that said payment was made for Eddleman; that on September 28, 1909, Eddleman, for the purpose of securing plaintiffs as indorsers on the \$1,020 note given by him to Call, executed and delivered to plaintiffs a note for \$1,000 due one year after date (being the note sued on), and to secure payment of the same executed and delivered to plaintiffs a deed of trust of that date on the lots conveyed to him by the Harmons; that Eddleman has never paid the \$1,000 note sued on in this case; that said deed of trust was promptly and properly recorded on the 15th day of October, 1909.

We are unable to understand upon what theory the trial court rendered judgment in favor of defendant Eddleman against plaintiffs under the foregoing fact findings. The facts found by the court not only warrant, but demand, that judgment be entered for plaintiffs against Eddleman on the note sued for, for such a sum as plaintiffs paid to Call in satisfaction of the original note of \$1,020 given by Eddleman to Call and which plaintiffs had indorsed for the accommodation of Eddleman, and for a foreclosure of their lien upon the lots in question evidenced by the deed of trust executed by Eddleman and delivered to them. Therefore appellants' first assignment is sustained, and judgment as above indicated will be here rendered for plaintiffs.

[2] We now come to appellants' second and last assignment, which is, in substance, that the court erred in not rendering judgment foreclosing plaintiffs' lien on the lots in question against defendant W. H. Stark, free from any superior claim of said Stark. Appellants' proposition under this assignment is that, as Stark had purchased and become the owner of the original purchase-money notes executed and delivered by Eddleman to the Harmons in part payment for said lots, and had thereafter purchased said lots from Eddleman, and in part payment therefor agreed to and did assume the payment of said notes owned by him, said notes became Stark's debt, and the lien upon the property which had existed by virtue of

said purchase-money notes was released, and appellants' deed of trust lien is now a lien upon said lots freed from former vendor's lien. To this proposition we cannot fully agree. The execution, delivery, and record of the deed of trust of Eddleman to plaintiffs on the 28th day of September, 1909, and the 15th day of October, 1909, respectively, created a lien upon Eddleman's equity of redemption in the lots involved in this suit, and plaintiffs (appellants), under their pleadings and the facts proven, as shown by the fact findings of the trial court, were entitled to a judgment against Eddleman as prayed for and a foreclosure of their lien on the property as against both Eddleman and Stark, subject, however, to Stark's superior lien held by him as owner of the original vendor's lien notes given by Eddleman to the Harmons, and by them transferred to Stark. *Silliman v. Gammage*, 55 Tex. 365; *McDonald v. Miller*, 90 Tex. 309, 39 S. W. 89; *Gamble v. Martin*, 129 S. W. 387; *Rodgers v. Houston*, 60 S. W. 445; *Avery v. Loan Co.*, 62 S. W. 793.

[3] Stark, however, would have no lien superior to the lien of plaintiffs for improvements placed by him on the property. He had constructive notice of plaintiffs' lien, and therefore whatever improvements he put upon the property were put there at his own risk, and must go with it. Hence, even if there were proof of any improvements made, such proofs would not affect the case. *McDonald v. Miller*, 90 Tex. 309, 39 S. W. 89.

In support of the foregoing proposition we cite the case of *Silliman v. Gammage*, 55 Tex. 365. In that case it is shown that one Ben Parker was the owner of a tract of land; that on December 22, 1874, he borrowed \$500 from one Silliman, for which he executed and delivered to Silliman his promissory note, payable to Silliman six months after date. To secure said note Parker mortgaged to Silliman his said land, which mortgage was promptly and properly recorded. In July, 1876, one Longeton recovered a judgment against Parker, under which said land was sold as the property of Parker. At said sale one Gammage became the purchaser of the land. On June 17, 1879, while the debt and mortgage of Silliman were still valid, subsisting obligations, Parker, the mortgagor, sold the land to Silliman in full satisfaction and discharge of the debt and mortgage of Silliman; the real and true value of the land being, however, less than the amount due Silliman. Silliman took this conveyance to the land to save the expense of making sale under the power given in said mortgage or through the court. Parker being unable to pay more than the land conveyed, Silliman surrendered his said note, mortgage, and the balance of his indebtedness over and above the value of the land to Parker at the time he conveyed the land to Silliman. At the time of this sale Parker

knew that Gammage had bought the land at the sale under Longeton's judgment, but he was not consulted about the transaction. Gammage brought suit against Silliman for the land, and upon the facts as above stated the trial court held that the mortgage of Silliman was merged in the deed of Parker to him, and that Gammage had the superior title to the land, and rendered judgment for him for same. On an appeal from such judgment to the Supreme Court Judge Gould, in speaking for the court in that case, says:

"In his pleadings the defendant [Silliman] stated the facts, and claimed that under them he had the better title and right of possession, but, in the event the court held otherwise, claimed a mortgage lien for the note and interest, asked that 'said lien be enforced, and that he have judgment for said sum of money against said Ben Parker, and said land be ordered to be sold, and that said Ben Parker be cited to appear in this case and answer, etc., and for all proper judgment.' As we have seen, the court disregarded this part of the answer, holding that the mortgage was merged in the deed, and thereupon gave judgment in favor of Gammage for the land sued for.

"Counsel for appellant insists that, under the facts, Silliman had the superior title. In this state the mortgagor is regarded as the real owner, and until foreclosure, entitled to the possession of the mortgaged premises. By the execution sale that ownership and right of possession vested in Gammage, subject to Silliman's mortgage. *Wright v. Henderson*, 12 Tex. 43; *Duty v. Graham*, 12 Tex. 427 [62 Am. Dec. 534]; *Mann v. Falcon*, 25 Tex. 271; *Buchanan v. Monroe*, 22 Tex. 537. A foreclosure and sale thereafter had, in a proceeding against Parker, without making Gammage a party, would have left Gammage's title and right of possession unimpaired. *Preston v. Breedlove*, 45 Tex. 47; *Morrow v. Morgan*, 43 Tex. 304, and numerous subsequent cases. So the voluntary deed by Parker to Silliman, made without Gammage's consent, could not affect his title or right of possession, whatever may have been its effect as between the parties thereto. As against Silliman, Gammage continued to hold the superior title and right of possession, but held subject to whatever rights as mortgagee yet remained in Silliman, if any.

"Strictly, the mortgage was not merged in the deed, as in case where a greater and less estate meet in the same person; for by the execution sale and sheriff's deed Parker had been divested of his entire interest, and his deed to Silliman, although it might as against himself have the same effect as a foreclosure sale, conveyed no greater estate in which the mortgage could merge. But we understand the court to find substantially that under the facts Silliman's rights as creditor and mortgagee were totally satisfied, extinguished, and lost; and it is not to be denied that numerous authorities, in cases strictly of merger, are supported on reasons which seem equally applicable to cases where the debt and mortgage have been in any way extinguished. Those authorities hold that the intention of the parties is the controlling consideration, and in this case, because Silliman had accepted the deed in full satisfaction of his debt and had surrendered up the note and mortgage, would infer that he did not intend for any purpose to keep the mortgage alive.

"But there are other authorities supporting a different view of the law, one which we think more consistent with the principles of equity, and more in accord with the course of decision in this state. In the case of *Stantons v. Thompson*, 49 N. H. 272, the authorities were largely discussed, and the court say: 'We think

it may be deduced from the authorities quoted that, when the estates of the mortgagee and mortgagor are united in the former, he has in equity an election to keep the mortgage title on foot, and that whenever it is his interest, by reason of some intervening title or other cause, that the mortgage should be upheld as a source of title, it will not at law be regarded as merged. This is based upon the presumption, as matter of law, that the party must have intended to keep on foot his mortgage title, when it was essential to his security against an intervening title, or for other purposes of security; and it is no matter whether the parties, through ignorance of such intervening title or through inadvertence, actually discharged the mortgage and canceled the note, and really intended to extinguish them. Still, on its being made to appear that such intervening title existed, the law would presume conclusively that the mortgagee could not have intended to postpone his mortgage to the subsequent title.' In a recent treatise on mortgages the law is thus summed up: 'It may therefore be deduced from the authorities, as a general rule, that when the mortgagee acquires the equity of redemption, in whatever way, and whatever he does with his mortgage, he will be regarded as holding the legal and equitable titles separately, if his interest requires this severance. The law presumes the intention to be in accordance with his real interest, whatever he may at the time have seemed to intend.' 1 Jones on Mortg. § 873.

"In the case of *Monroe v. Buchanan* [27 Tex. 246], where there had been an invalid trust sale, at which, however, the purchase money had been paid and the note delivered up, this court says: 'The lot was still chargeable with the debt. The lien upon it was not extinguished, and equity required, if necessary that justice might be done all parties, that the note, although lost or destroyed, and the mortgage, should be recognized as a subsisting and valid charge upon the lot. It is a familiar maxim that equity will hold that as having been done which should have been done; and it is equally true that, in proper cases for its application, the converse of this proposition is as well established, and will hold that which should not have been done as still unperformed.'

"A class of cases involving the same principle, that, to prevent injustice, equity will keep alive a debt, mortgage, or judgment, although in law it may have been satisfied and the parties at the time so intended, is where there have been sales under decrees foreclosing liens, without making a subsequent vendee or mortgagee a party. This court has uniformly intimated its opinion that the purchaser, though he be himself the mortgagee or lienholder, might still, in a proceeding with proper parties, have the premises resold, and the first sale and the satisfaction of the debt thereby being set aside or disregarded; the object being that equity might still be done between all parties. *Pitman v. Henry*, 50 Tex. 364, 365; *Carter v. Attoaway*, 46 Tex. 111; *Jemison v. Halbert*, 47 Tex. 180. To the same effect are *Besser v. Hawthorn*, 3 Or. 131, and *Hollister v. Dillon*, 4 Ohio St. 197. In the latter case the mortgagee had obtained judgment for his debt without subjecting the land, and at an execution sale under that judgment became himself the purchaser. In consequence of intervening rights, no title passed by this sale; but the court denied that such a sale could operate a payment of the debt for the benefit of those who had purchased subject to the mortgage. It says: 'Such a sale of mortgaged property to the mortgagee cannot operate to deprive him of rights existing anterior to and independent of the judgment; that, if such a mistake does not, on the one hand, lay a foundation for equitable relief, it does not, on the other, give any advantage to the debtor, when set up as a defense in a suit

brought upon the mortgage, over which a court of equity has unquestioned jurisdiction.'

"The case of *Jemison v. Halbert* is one much in point, and fully supports the conclusion that the court erred in holding the mortgage extinguished as to Gammage. See, also, *Robinson v. McWhirter*, 52 Tex. 201.

"In the present case Silliman acted in ignorance of the existence of Gammage's title, and therefore labored under a mistake of fact, and, notwithstanding he for some purposes had constructive notice, our opinion is that equity would give him relief. For the purpose of protecting Silliman against the intervening claim of Gammage, the court should have treated the mortgage as in force."

We think from what has been said and from the authorities cited it is clear, without further discussion, that had Stark kept the notes executed by Eddleman in part payment for the property, he would have had a lien thereon, superior to the lien asserted by plaintiffs, to the amount due on said notes, and that by his purchase of the land from Eddleman and the surrender of said notes he did not lose his equity in the property.

[4] We also think it clear that, as Eddleman held the legal title to the property at the time he executed and delivered to plaintiffs (appellants) the note sued upon and the deed of trust on the property, he created a lien in favor of plaintiffs which could not be and which was not destroyed by a sale made by Eddleman to Stark in consideration of Stark's assuming to pay said original vendor's lien notes held and owned by him, and that said lien should be foreclosed as prayed for, to be secondary, however, to the lien of appellee Stark. In every judicial investigation the discovery of truth and justice should be the aim and desire of the court, and if this discovery is made, the paramount effort of the court should be to see that justice is done to all parties to the suit.

After a most careful examination of the record and the law applicable to this case, we have reached the conclusion that the judgment of the trial court should be reversed, and that judgment should be here rendered for appellants against J. P. Eddleman for the sum of \$1,245, with interest thereon from the 19th day of January, 1913, at the rate of 10 per cent. per annum until paid, and for 10 per cent. upon the amount above adjudged as attorneys' fees, and for a foreclosure of their lien upon the property in question against both the appellees, Eddleman and Stark, and for all costs of suit incurred by them, and that judgment should be here rendered for appellee W. H. Stark against J. P. Eddleman for the sum of \$3,200, the aggregate sum of the vendor's lien notes held and owned by him, dated March 22, 1909, with 10 per cent. interest per annum thereon from the 22d day of March, 1909, until paid, and for 10 per cent. upon the amount so adjudged as attorneys' fees, and for a foreclosure of his said lien on said property, and that appellants and appellee

Stark may have an order for the sale of the property involved in this suit, and that, if said property be sold under such order, the proceeds of such sale shall be applied: First, to the payment of the amount due to Stark upon the judgment here rendered; and, second, if there remains any balance of said proceeds, the judgment here rendered for plaintiffs shall be paid, and any balance remaining after making such payments shall be paid over to Stark. Having reached such conclusion, the judgment of the trial court is reversed, and judgment is here rendered in accordance with such conclusions.

Reversed and rendered.

QUANAH, A. & P. RY. CO. v. COLLIER et al.
(No. 815.)

(Court of Civil Appeals of Texas. Amarillo.
June 19, 1915. Rehearing Denied
Oct. 9, 1915.)

1. CARRIERS — §230 — CARRIAGE OF LIVE STOCK — DELAY IN TRANSPORTATION — INSTRUCTIONS.

In an action for delay in the interstate transportation of live stock, whereby the shipment had to be diverted to a point within the state, it was not error to refuse an instruction for defendant, if a connecting carrier failed to run a special train from the point of connection to destination, where such carrier owed no duty to do so.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 961, 962; Dec. Dig. §230.]

2. APPEAL AND ERROR — §930 — ASSIGNMENT OF ERROR—ISSUES NOT REQUESTED.

In an action for delay in transportation of a stock shipment, whereby it became necessary to divert it to another market, an assignment of error that the verdict was insufficient to support a judgment for plaintiff in failing to find the weight of the cattle when sold and their market value at that time, or what they sold for, will be overruled, where the issue was not requested and the market value of the cattle was sufficiently proven, under Vernon's Sayles' Ann. Civ. St. 1914, art. 1985, providing that upon appeal an issue not submitted and not requested by a party to the cause shall be deemed as found by the court in such manner as to support the judgment, provided there be evidence to sustain such a finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. §930.]

Appeal from District Court, Motley County; J. A. P. Dickson, Judge.

Action by R. L. Collier and another against the Quanah, Acme & Pacific Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

D. E. Decker, of Quanah, and G. E. Hamilton, of Matador, for appellant. T. T. Bouldin, of Matador, and C. D. Russell, of Plainview, for appellees.

HENDRICKS, J. Collier and Chalk, the appellees, as owners of eleven car loads of cattle, sued the appellant, the Quanah, Acme & Pacific Railway Company, for damages to the cattle, alleging a contract of shipment

with appellant from Roaring Springs, Tex., to Kansas City, Mo., with the privilege of the Oklahoma City market. They aver that they delivered the 345 head of cattle to defendants at its stock pens at 8 o'clock, August 12, 1913, according to an agreement with the carrier, for the purpose of shipment, and that defendant detained said cattle at Roaring Springs until 2 o'clock of that date, at least five hours longer than they should have been detained, and that by reason of such delay the defendant failed to make connection at Quanah with the St. Louis & San Francisco cattle train, over which road said cattle were to be carried to Oklahoma City; that on account of its failure to make such connection, and on account of the fact that the cattle would have to be held at Quanah practically 24 hours, without feed or water, before the transportation from Quanah could be continued, the said cattle were shipped to Ft. Worth over the Ft. Worth & Denver City Railway Company at the request of the defendant; that by reason of the defendant's negligence said cattle had to be carried to Ft. Worth and could not reach there in time for market on August 13th, but were sold on that market August 14th—suing for the difference in the Oklahoma City and Ft. Worth markets, for the shrinkage, also damages for marketable appearance of the cattle.

The jury, upon submission of special issues, found that it was agreed that the cattle should be penned for shipment not later than 8 o'clock a. m. (presumably the 12th of August, 1913); that the owners yarded the cattle at Roaring Springs by 7 a. m., and that the same were not loaded on the cars for shipment until 2 p. m.; that said train left Roaring Springs for Quanah about 3 p. m., arriving at the latter station upon the Ft. Worth & Denver about 8 p. m. of the same day; and found that the shipment was diverted to the Ft. Worth & Denver City Railway Company at Quanah for transportation to Ft. Worth, on account of the failure of the defendant to make connection with the Frisco at that point for Oklahoma City; also found that the agent of appellant at Roaring Springs informed the shippers that it would be necessary to pen the cattle at 8 a. m. in order to make said connection, and that the railroad company failed to furnish the cars for the purpose indicated. The jury found the market price of the cattle on the Oklahoma City market August 13th at \$5.25 per hundredweight, and that the market price of the same upon the same date at Ft. Worth was about \$5 per hundredweight; that the loss of the cattle by reason of the delay was about 18 pounds per head, and that the loss of the marketable appearance of said cattle by reason of the delay was 25 cents per hundredweight. The court found in his judgment \$595.35 damages on account

of the marketable appearance (25 cents per hundredweight of the cattle), and also found the same amount difference in the market value, and further found the sum of \$328 for loss of weight, aggregating \$1,516.70 recovered against the appellant.

[1] The appellant railway company, in various phases, assigns, and undertakes to show in its brief, that the appellees were seeking to recover against the Quanah, Acme & Pacific Railroad, the initial carrier, in an interstate shipment, for negligence of the St. Louis & San Francisco and the Ft. Worth & Denver City Railroads, and, though initiated as an interstate shipment, but having been converted into a state shipment, the appellant was not liable, except for damages upon its own line.

Appellant has a misconception, as we view this record, of appellees' cause of action. The railway company made a contract to ship these cattle to Kansas City, with the privilege of the Oklahoma City market. There is no dispute but what it failed to furnish the cars at the proper time for the purpose of transporting these cattle from Roaring Springs, Tex., so as to meet the St. Louis & San Francisco train at Quanah, for the continued transportation of the cattle to Oklahoma City. The general manager of the Quanah, Acme & Pacific Railway Company accompanied this shipment from Roaring Springs to Quanah. Before arrival there, by telegram, he attempted to get the Frisco management to hold its Oklahoma City freight train, but his efforts were unavailing. There were no facilities at Quanah to feed and water the 11 car loads of cattle, and they would have to have been held at that station about 24 hours for another train for the purpose of continuing the original plan of shipment. The owners of the cattle testified that at the solicitation of Mr. McCray, the general manager, the cattle were diverted to Ft. Worth, over the Ft. Worth & Denver City Railroad, which made a run of a little over 14 hours from Quanah to Ft. Worth, about which no complaint is made, nor could be made; the cattle arriving, however, at that destination too late on August 13th for the market of that day. The cattle were held over until the next day and sold for \$4.75 per hundredweight. Appellant says, in one proposition:

"The theory of appellees' counsel, which theory was followed by the court, is that the initial carrier, Quanah, Acme & Pacific Railway Company, having made an interstate shipping contract, is responsible for the negligent acts of the Frisco Railway Company in not running a train out of Quanah on arrival of the Quanah, Acme & Pacific train; that the appellant is responsible for the negligence of the Denver in not making the market at Ft. Worth on the 13th of August, on the theory that a carrier cannot limit its liability to its own line in domestic or intrastate shipment."

Whatever theory the trial court may have applied, however, the case pleaded, made by

the evidence, and as found by the jury responding to the special issues, constitutes a contract and a duty to ship certain cattle to certain markets outside the state, and on account of the fault of the carrier making the contract and originating the shipment the transportation to those markets was abandoned, and the cattle were shipped to a different market inside the state, with certain resultant damages, ensuing, practically without contradiction, as the proximate result of the acts and omissions of said carrier. The failure of the Frisco, or the Denver, is not in the case. The former road, by any stretch, is not a relevant factor; and the latter road is not found to be negligent. In a statement following its proposition under the tenth assignment, appellant does say:

"There was evidence that the Denver was negligent in not making the Ft. Worth market on August 13th"

—without informing us of the substance of such evidence. All that we can find in this record upon such a question is that one of the owners of the cattle said that the run from Quanah to Ft. Worth on the Ft. Worth & Denver was from 12 to 16 hours, which, in connection with the testimony most favorable to appellant as to when the train on the Denver left Quanah, the Denver road made the run in a little more than 14 hours.

There are several academic propositions propounded and urged, involving the Carmack amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 593 [U. S. Comp. St. 1913, § 8592]), and whether the several liability contracts of the Denver and the Quanah, Acme & Pacific affect certain questions, which, as applied to the contract made to ship these cattle to Oklahoma City, the duty imposed, the violation of same, and the damages flowing therefrom, as exhibited in this record, are almost unnecessary to discuss. For example: The appellant requests the submission of an issue:

"If the Frisco had received the cattle of plaintiff at Quanah, at the time they arrived there over defendant's line, and [had] transported them with reasonable care and dispatch, would said cattle have reached Oklahoma City in time for the market there on August 13, 1913?"

The record is as certain as a question of this kind could be made so that if the initial carrier, the appellant, had furnished the cars and transported the cattle as it should have done, the train would have reached Quanah in ample time to have connected with the Frisco, to have reached the Oklahoma City market on that date.

Again, it was requested:

"If you find that it was the negligence of the Frisco Railway Company, in its failure to run a train from Quanah to Oklahoma City and transport plaintiff's cattle after the same arrived at Quanah, which was the proximate cause of the injury and damage to plaintiffs, then you will return a verdict for defendant."

What the Frisco failed to do, when no duty whatever is shown that it should have made

up a special train, after appellant had failed to make the connection, is wholly immaterial.

There are a number of objections to the charge of the court, without any exceptions, which we will not consider.

[2] The appellant's nineteenth assignment of error (not in its motion for new trial) complains that:

"The verdict of the jury, having failed to find the weight of the cattle on the day sold, and the market value of the same on the day sold, or what they sold for, is not sufficient upon which a judgment for plaintiff can be rendered for any sum."

This matter should have been called to the attention of the lower court. However, the appellee accompanying the cattle testified:

"I do know the market value of that class of cattle on the Ft. Worth market on August 13, 1913. It was a good strong 5 cents the day I got there, and there was very little difference in that day's market and the next day. The market was pretty steady along about that time. These cattle, the day they got on the market, brought \$4.75 and they brought all they could bring on that day," etc.

The market of the 14th with reference to the particular cattle was sufficiently proven. *St. Louis, Iron Mountain & South. Ry. Co. v. Rogers*, 49 Tex. Civ. App. 309, 108 S. W. 1027, writ of error refused; *Reeves v. Texas & Pacific Railway Co.*, 11 Tex. Civ. App. 514, 32 S. W. 920. It is true the jury did not find specifically the market of that day, and found the market of the day previous, which, as compared to the Oklahoma City market of the same day, was 25 cents per hundred. Under article 1985, Vernon's Sayles' Civil Statutes:

"Upon appeal or writ of error, an issue not submitted, and not requested by a party to the cause, shall be deemed as found by the court in such manner as to support the judgment, provided there be evidence to sustain such a finding."

The pleading embraces the issue not specifically found, and the evidence supports it. A careful reading of the judgment and of the manner in which the trial court finds the amounts makes it clear that, as to a part of his judgment, he bases it upon the findings of the jury. As to the judgment for the difference of the market value in the cattle, as to the two markets, the court's language is ambiguous. Whether the difference in the market value, \$595.35, as found by the court, was based upon the specific findings of the jury, is not at all clear, unless you would say that he found that difference 25 cents, the same as the jury, would show that intention. Appellant, however, did not plead more than the 25 cents difference in market value, but specifically alleged that amount, and consequently the court could not have found more. This statute reads that upon appeal an issue not submitted and not requested shall be deemed as found in such a manner as to support the judgment, if there be evidence for that purpose. Such an issue was not requested, and upon the command of the

statute the assignment is overruled. We think the judgment of the trial court should be affirmed.

Affirmed.

CALVERT v. STATE. (No. 3654.)

(Court of Criminal Appeals of Texas. June 25, 1915. Rehearing Denied Oct. 13, 1915.)

CRIMINAL LAW §1090—APPEAL—STATEMENT OF FACTS.

Where there is neither a statement of facts nor any bill of exceptions, nothing is presented which the Court of Criminal Appeals can review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. §1090.]

Appeal from McLennan County Court; Geo. N. Denton, Judge.

Doc Calvert was convicted of unlawfully carrying a pistol, and he appeals. Affirmed.

Elbert Pearce, of Waco, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of unlawfully carrying a pistol and fined \$100.

There is neither a statement of facts nor any bill of exceptions. Nothing is presented which we can review.

The judgment is affirmed.

THOMPSON v. STATE. (No. 3624.)

(Court of Criminal Appeals of Texas. June 16, 1915. Rehearing Denied Oct. 13, 1915.)

DISORDERLY HOUSE §17—CONVICTION—SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for unlawfully keeping and being concerned in keeping a bawdyhouse held sufficient to support a conviction.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 28-29; Dec. Dig. §17.]

Appeal from Harris County Court at Law; C. C. Wren, Judge.

Mrs. Jennie Thompson was convicted of unlawfully keeping and being concerned in keeping a bawdyhouse, and she appeals. Affirmed.

Heidingsfelders, of Houston, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. An information was filed against appellant in which she was charged in two counts with unlawfully keeping and being concerned in keeping a bawdyhouse, a house where prostitutes were permitted to resort and reside, and with keeping a disorderly house, the same being a place where men and women met by mutual appointment for the purpose of sexual intercourse. A jury was waived, and the court adjudged

her guilty; her punishment being assessed at a fine of \$200 and 20 days' imprisonment in the county jail.

The sole ground relied on is that the evidence does not support the conviction.

Mrs. A. B. Crook testified she lived near appellant; that she had seen men and women go to this house a number of times; that they would not go together, but she would see men go, and in a short time a lady would go; they would remain an hour or hour and a half, when she noticed; that this happened most of the time in the afternoon, but at other times about dark. She did not know the purpose of the men and women, and did not know the reputation of the house.

Mrs. Schaeffer testified also she lived near appellant; that she had seen men and women go to the house, and had seen men leave the house as late as 11 or 12 o'clock at night; that the house had a bad reputation.

Mrs. Sanderson testified she had seen men and women go to this house at different times during the day; did not know the reputation of the house, but she was a "little suspicious."

Mr. Crooker testified he raided appellant's house on the night of the 27th of last June; it was between 1 and 2 o'clock at night; that he found C. H. Collins in bed in the front room, undressed; that Miss Davis was undressed, and in her nightgown, in the room with Collins, when he peeped in the house, but when he got in the house appellant and Miss Davis were in another room. He arrested all three of them.

Officer Gallney testified he was with Mr. Crooker when they made a raid on the house. He also says that Collins was undressed and in bed, and the two women in their nightclothes.

Appellant testified that Collins and Miss Davis came to her house that night; that she knew Collins well, but did not know Miss Davis; that Collins introduced Miss Davis as his wife; that Collins complained of not feeling well, and asked permission to lay down, and she granted it to him, and he went into the front room. She says Miss Davis did not go into the front room, but, having torn her dress, she took it off and was mending it when the officers came, having put on an apron. She testified she had run a rooming and boarding house in Houston for a number of years; that she had one gentleman as a roomer, who came in late at night and left early in the morning; that she also had two ladies rooming with her. She denies that anything improper occurred in her rooming house. She says she was looking for her husband that night is the reason she was up at that hour of the night.

Miss Davis testified that she did not go in the room where Collins was undressed on the bed; says she went there with Collins

after having been out taking supper with him, as Collins expressed a desire to go to Mrs. Thompson's house. She denies anything improper taking place, and denies being in her gown, as testified to by the officers. She also denies that Collins introduced her to Mrs. Thompson as his wife.

It is true that only one witness testifies that the reputation of the house was bad, but several testify to seeing men and women visit there frequently, remaining a short time, leaving separately. One officer testifies positively to finding Collins and Miss Davis in the same room, both being undressed, one being in bed, the other being in the room in her nightgown. Mrs. Thompson and Miss Davis cross each other about Collins introducing her as his wife. The trial court heard and saw the witnesses, and heard them testify, and if, as a matter of fact, he found as true that Miss Davis and Collins were in the same room, both being undressed, the other facts and circumstances would authorize him to find the purpose they had gone to this house that night. Others are seen going there, and we cannot say that the evidence would not authorize him to find that this was a house where men and women would meet for the purpose of sexual intercourse.

The judgment is affirmed.

CELO v. STATE. (No. 3622.)

(Court of Criminal Appeals of Texas. June 16, 1915. Rehearing Denied Oct. 13, 1915.)

CRIMINAL LAW §1099—APPEAL—BILLS OF EXCEPTION—MISDEMEANOR.

After conviction for unlawfully carrying a pistol, which is a misdemeanor, a statement of facts not filed until 81 days after adjournment of the county court will be stricken.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.]

Appeal from Harris County Court at Law; C. C. Wren, Judge.

George Celo was convicted of unlawfully carrying a pistol, and he appeals. Affirmed.

A. D. Austin, of Houston, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of unlawfully carrying a pistol, and prosecutes this appeal.

The term of court at which he was tried adjourned October 31, 1914. No bills of exception are in the record, and the statement of facts shows to not have been approved nor filed until January 20, 1915—81 days after court adjourned. This being a misdemeanor, the state's motion to strike out the statement of facts is sustained.

The judgment is affirmed.

NYE v. STATE. (No. 3620.)

(Court of Criminal Appeals of Texas. June 10, 1915. Rehearing Denied Oct. 13, 1915. Dissenting Opinion, Oct. 14, 1915.)

1. FORNICATION — EVIDENCE — PROSECUTION.

In a prosecution for fornication, evidence held insufficient to show accused's common-law marriage to the woman.

[Ed. Note.—For other cases, see *Fornication*, Cent. Dig. § 7; Dec. Dig. ¶9.]

2. MARRIAGE — COMMON-LAW MARRIAGE — VALIDITY.

A real common-law marriage, properly agreed to by both parties and consummated by both, is a valid and legal marriage.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 4; Dec. Dig. ¶13.]

3. MARRIAGE — COMMON-LAW MARRIAGE — EVIDENCE — ACTS OF ACCUSED.

In determining whether the parties consummated a valid common-law marriage, the acts of the man in celebrating a ceremonial marriage with another, without divorce, are admissible.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 75; Dec. Dig. ¶47.]

Davidson, J., dissenting.

Appeal from Harris County Court, at Law; C. C. Wren, Judge.

J. Nye was convicted of fornication, and he appeals. Affirmed.

A. B. Wilson, of Houston, for appellant. C. Q. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was prosecuted and convicted of fornication. He waived a jury, and tried his case before the judge, who found him guilty and assessed a \$250 fine as his punishment.

[1] The woman with whom he is charged to have committed this offense was Kittie Ensby. On her direct examination she testified:

"My name is Kittie Ensby. I have lived in Houston two years. I came here in January, 1913. I came by myself. Since I came here I have been working at Levy Bros.' dry goods store. After I came here I lived with Mr. Nye, the defendant. I first began living with him along about May, 1911, and I began to live with him in Houston after I came here in 1918. I do not know just the exact date to which I continued to live with him; but it was up to about a month ago, some time in February, 1915. During the time I lived with the defendant in Houston, our room was at Mr. Lieder's residence. We had the same room there, occupied it, and slept together there. He had carnal intercourse with me during the time I lived with him here in Houston. I am not a married woman. I know about the defendant marrying recently. It has been about two weeks ago that he married; I am not positive of the exact date. I do not know where he and his wife are now living."

This is the whole of her testimony on direct examination. Appellant's defense, as we understand it, was that this woman was his common-law wife, and therefore his cohabiting and carnal intercourse with her

would not make him guilty of fornication. After Kittie Ensby had so testified on direct examination, she was cross-examined, then, after that was concluded, redirectly examined, and this occurred back and forth several times. The trend of these examinations might tend to show some facts indicating a common-law marriage between these parties; yet, when it is considered as a whole, the reasonable conclusion only can be drawn that their apparently assumed relationship of husband and wife was merely for the purpose of covering up and preventing detection in their real illicit relationship, or, as expressed by the judge before whom the case was tried, in his qualification to one bill, as follows:

"The court was of the opinion, and found as a fact, that both defendant and Miss Ensby were unmarried at the time of the alleged fornication, and that the arrangement that had been made between them was in substance and actual effect to appear married rather than to be married, and thus cover up their illicit relations."

And as expressed by the judge in his qualification of the other bill:

"The court found from the evidence that such arrangement as existed between defendant and Miss Ensby was merely to cover up their illicit relations, and its purpose was to insure that the parties appear married without being married."

We think it unnecessary to go into a detailed statement of this woman's testimony, which established the state of fact as found by the trial judge. Suffice it to say that the effect of it is that she claims they first met in Nebraska in January, 1911; that about May, 1911, as expressed by her in one place in her testimony:

"I said to him, 'Let's live together as man and wife,' and he said, 'All right;' and no mention was ever made of a ceremony or anything of that sort."

And in another place she says the proposition to thus live together came from her, and not from him. She then shows that they announced it to their friends that they were married, and that they went to living together as husband and wife would; that he traveled for awhile, and in some of his travels she went about with him, and they registered as man and wife; that they were not together all the time, but were separated a part of this time, presumably because of his traveling about, or her visiting others; that in about January, 1913, he landed in Houston, and six weeks later she followed him there, and they renewed their relationship at Houston, and continued such relationship until he married another woman under a regular license and by a proper officer in Houston on March 2, 1915.

There is an entire absence of any evidence whatever showing that, before they assumed the said relationship, he wooed and won her for his real wife. In one place she testified that, at the time of the said agree-

ment that they were to live together as man and wife, it was made at her instance and suggestion, and she said:

"I thought some day I would be his wife. I was his wife then; but by saying that some day I thought I would be his wife I mean that I thought that some day we would get a marriage license and go through the ceremony."

She says at that time *she* really intended and expected to be his wife some time, and she *thought* that was *his* intention; that he said it was. In another place she says:

"Mr. Nye did not tell me recently that our marriage was a mock marriage. I knew I was not married to him, and he did not have to tell me I was not. I did not regard myself as his legal wife. I went by his name for protection, so that people would not know how we came to be living together."

In another place she said:

"I do not know what Mr. Nye intended when we first went together. I do know that he is not living with me now. I have not talked to him with reference to his being married again. I do not know the exact date we quit living together, but it is somewhere in the neighborhood of a month. As to the reason I took Mr. Nye's name, we agreed to be man and wife, and naturally I would take his name. I do not still claim to be his wife. I could not very well be his wife now. He has got another one now."

[2] It is beyond controversy the law of this state that a real common-law marriage, properly agreed to by both parties, and properly consummated by both, is a valid and legal marriage. *Grigsby v. Reib*, 105 Tex. 597, 153 S. W. 1124, Ann. Cas. 1915C, 1011; *Melton v. State*, 71 Tex. Cr. R. 146, 158 S. W. 550. And if these parties had really thus been married appellant would not have been guilty, even though without a divorce he subsequently attempted to legally marry, and would otherwise have legally married, another woman. As the testimony in this case, without any sort of doubt, authorized the trial judge to find that these parties were not thus married, we deem it unnecessary to discuss this question further.

[3] As the question of appellant's intent in the sexual relation between him and said woman, Miss Ensby, was a material inquiry, the marriage license procured by him on March 2, 1915, authorizing him to marry Lennie B. Williams, another woman, and the return thereon, showing that he did so marry her on that date, was clearly admissible. Not only did the testimony of said woman, Kittle Ensby, show that they were not legally married under the common-law, but his act of marrying another woman without any pretense of a divorce from her, would show and tend to show that he never intended that the relationship that existed between him and said Kittle Ensby was really and truly that of husband and wife. His acts showing his intent speak louder than words. Even though the intention of the woman was that they should be husband and wife, her intention could not control. It took the intent of both and each of them, and if his intent was lacking there could be no common-law mar-

riage, even though that might have been her intention.

We have carefully examined the record in this case, and read and studied the evidence, in addition to hearing appellant's attorney read it in the submission of the case, and we think, without doubt, the correct conclusion was reached by the trial judge; and the judgment is affirmed.

DAVIDSON, J. (dissenting). The conviction was for fornication. I am persuaded that from the evidence appellant was guilty of bigamy. The testimony of the woman with whom the fornication was alleged shows that she first met the defendant in January, 1911, and they began living together as husband and wife in May, 1911, and that they continued to live together as such until about a month before this prosecution was instituted, which was the 8th of March, 1915, as husband and wife, and that they lived together nearly four years. She says:

"He and I had an understanding and agreement that we would be man and wife. I introduced him as my husband, and he introduced me as his wife. Since that time I have been known as Mrs. Nye. Prior to that time there was no improper relationship between us at all; that is, prior to May, 1911. Since that time we have lived together continuously as husband and wife, during the time we have been together, up until about a month ago. During that time we have resided together and been introduced as husband and wife, and gone about together as husband and wife. That has been ever since May, 1911. I came to Houston from Oklahoma in January, 1913. Prior to that time I had been absent from Mr. Nye about a month. I had been visiting my sister in Oklahoma. That was the occasion of my absence from Mr. Nye. Then I came right on to Houston. Mr. Nye was stopping at the Bristol Hotel in Houston, and I went right on to his room immediately on my arrival in Houston. Then he and I began to look for a boarding place, and went out to Mr. Lieder's, and have been boarding there since that time. Since the time he and I agreed to marry, we have both recognized each other publicly and introduced ourselves publicly everywhere as Mr. and Mrs. Nye. During that time I was certainly in every way faithful to him as his wife. Mr. and Mrs. Lieder addressed me as Mrs. Nye. While I was employed at Levy Bros. I was employed as Mrs. Nye. I received my mail as Mrs. Nye. Mr. Nye traveled for a while when we first married, and we stopped at hotels and registered as Mr. and Mrs. Nye. I have never been known by any other name, except Mrs. J. H. Nye, since we agreed to be married in May, 1911. My relatives and friends know me as Mrs. Nye, and so do my sisters and brothers. At the time this agreement was entered into that Mr. Nye and I should marry and live together as husband and wife, I thought some day I would be his wife. I was his wife then; but by saying that some day I thought I would be his wife I mean that I thought that some day we would get a marriage license and go through the ceremony. At the time we agreed to live together as husband and wife, I really intended and expected to be his wife from then on. I thought that was his intention. He said it was. The agreement that we should live together as man and wife was made in Omaha, Neb. Immediately after we made that agreement, Mr. Nye introduced me as his wife. I do not remember any particular names of people

to whom he introduced me, but they were just friends that we would meet. My brother lived in Omaha at that time, and we introduced ourselves to him as man and wife right afterwards, and told him that we had married. It was published in the Omaha paper that we had married. During the time we lived together Mr. Nye has been supporting me as a man does his wife. From the date we made the agreement it was my intention to be his wife from that day on. That was my purpose in making the agreement, and I have complied with that agreement, and have remained his wife as much as I could outside of a formal ceremony. Mr. Nye did not tell me recently that our marriage was a mock marriage. * * * I went by his name for protection, so that people would not know how we came to be living together. I used the money that I made when I worked at Levy Bros.' for my own self. I do not know whether Mr. Nye got any of the money I made. He did not take my earnings. As a matter of fact, Mr. Nye did not in any way mislead me. We both agreed to be husband and wife. We have lived together continuously since then as husband and wife, and he has supported me as his wife. When I say that I took his name for protection, I mean for him to protect me as his wife. I never had any other intention than to be his wife; had no other purpose in view. We were not just temporarily living together, but I intended to be and to remain his wife, and the only thing that we did not do was to follow out a formal ceremony by getting a license. As to my earnings, each one of us has at times let the other have money, just as a man and wife would. I have let him have some of my earnings at various times but I never kept any account whatever of it, and never charged him with any of it. It was all in the family. Mr. Nye took out insurance on his life in my favor as his wife, and named me in the policies as his wife."

Mr. Fred Lieder testified:

That the defendant and Mrs. Nye, with whom he is charged with committing fornication, lived at his house and did light housekeeping for nearly two years. They slept together; had one bedroom and one bed. "When they were living in my house, I understood they were man and wife, and they went under the name of Mr. and Mrs. Joseph Nye."

Another witness testified, speaking of Miss Ensby, or Mrs. Nye, says:

"She came to the store, and addressed Mr. Nye as her husband, and asked for him as her husband. The first I knew that Miss Ensby was not Mrs. Nye was when some investigation was made by the federal officers. Prior to that time, as far as I know, she was reputed to be Mrs. J. H. Nye, the wife of the defendant, and they were living together as man and wife, and were known as such to me and to everybody else, so far as I know, and I never heard anything to the contrary until this investigation."

This is enough of the testimony to indicate the relation of the parties. I do not care to enter into a discussion of this testimony. For nearly four years these parties lived together as husband and wife, publicly and everywhere, known among their relatives as being husband and wife, and wherever they went and wherever they traveled they were known as husband and wife publicly and to everybody. Enough of the testimony has been repeated to show that, if a common-law marriage could be had by the facts and acts and circumstances, there is enough here to

satisfy any fair mind, it occurs to me, that this was a common-law marriage. This comes within the rule laid down by the Supreme Court in *Grigsby v. Reib*, 105 Tex. 597, 153 S. W. 1124, Ann. Cas. 1915C, 1011. The *Grigsby* Case lays down the correct rule, and under that rule this was a common-law marriage. The "status" was fixed by the parties to be annulled only by death or divorce. This question has been so often decided in Texas that it would be a work of supererogation to cite the cases. I, however, cite *Cuneo v. De Cuneo*, 24 Tex. Civ. App. 436, 59 S. W. 284; *Simmons v. Simmons* (Civ. App.) 39 S. W. 639; *Burnett v. Burnett* (Civ. App.) 83 S. W. 238; *Simon v. State*, 31 Tex. Cr. R. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802; 26 Cyc. 382; 19 Am. & Eng. Ency. of Law, p. 1204.

A common-law marriage is valid if the parties agree to live together and carry out the contract. Defendant and this woman lived together, took upon themselves all the responsibilities, duties, and obligations that belong to the marital relation, such as holding themselves out to the world as husband and wife, and carrying on their business relations and matters of that sort, dealings with society, and were so received and acknowledged, and they themselves so acknowledged and thus fixed their "status." I do not know how facts could more clearly show a common-law marriage than this record shows. It is in evidence by the state that the husband, or appellant, took out a life insurance policy in favor of the woman as *his wife*, traveled with her as such, registered at hotels, paid all her expenses, and they handled their funds as a family usually does, and as husband and wife. Everybody understood them to be husband and wife; they published it in the newspaper at the time of the marriage, and announced it to her brothers and sisters, and were by them so accepted, received, and treated. It would hardly be questioned, if there had been a child born of this relation and one of the parties died, that the child would have inherited legally whatever was coming to it as an heir of the deceased parent. I would ask: How long would it take parties to recognize each other as married people in order to constitute such relation of common-law marriage? If four years is not sufficient length of time to fix and determine that status, how long would it take for the parties to publish to the world and hold themselves out as husband and wife to constitute such status a common-law marriage?

I make these short observations, believing the opinion to be wrong in holding the relation of these parties to be that of fornication. The case shows bigamy on the part of appellant, and not fornication.

The judgment ought to be reversed, and the cause remanded.

CHISOM v. STATE. (No. 3618.)

(Court of Criminal Appeals of Texas. June 16, 1915. Rehearing Denied Oct. 13, 1915.)

1. INDICTMENT AND INFORMATION ⇨122—ACCU-SATION—VARIANCE—SUBSTANTIAL AGREEMENT—COMMON NAME.

A complaint charged that an assault was committed with "knucks, commonly known as brass knucks," while the information based on the complaint described the weapon merely as "knucks." *Held*, that the omission of the phrase "commonly known as brass knucks" was not a fatal variance.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 321-325; Dec. Dig. ⇨122.]

2. CRIMINAL LAW ⇨476—EVIDENCE—EXPERT WITNESSES—OPINION.

Where a doctor has qualified as an expert, it is not error to admit his opinion as to causes of the injuries complained of, especially where his opinion is supported by his statement of the nature of the wounds.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1062; Dec. Dig. ⇨476.]

3. ASSAULT AND BATTERY ⇨91—PROOF—VARIANCE—SUBSTANTIAL PROOF.

An information charging an assault with "knucks" will be supported by substantial proof of the means used.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 186; Dec. Dig. ⇨91.]

4. CRIMINAL LAW ⇨200—EVIDENCE—RELEVANCY—OTHER OFFENSES.

On a charge of assault with "knucks," it is immaterial that the defendant has already been acquitted on the charge of unlawfully carrying knucks on the occasion of the assault; the question of unlawful carrying not being in issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 347, 386-409; Dec. Dig. ⇨200.]

Appeal from Harris County Court, at Law; O. C. Wren, Judge.

Wash Chisom was convicted of aggravated assault, and he appeals. Affirmed.

Meek & Kahn, of Houston, for appellant. John H. Crooker, Cr. Dist. Atty., and E. T. Branch, both of Houston, and O. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was charged by information with "unlawfully making an aggravated assault and battery upon the person of Oscar P. Steckel, with a weapon then and there calculated to inflict serious bodily injury, to wit, knucks, and by the use of said weapon did then and there inflict serious bodily injury to the said Oscar P. Steckel," etc. The Assistant Attorney General and Mr. E. T. Branch have filed a brief, which in our opinion correctly disposes of each question presented, and we therefore adopt the brief as the opinion of the court:

[1] "1. The complaint on which the information is based recites that the assault was committed with a weapon, 'to wit, knucks, commonly known as brass knucks,' while the information describes the weapon as 'knucks.' Appellant contends that there is a fatal variance between the information and the complaint as to the description of the weapon with which the assault is alleged to have been committed, on

account of the fact that the words 'commonly known as brass knucks,' which appear in the complaint, are not contained in the information. The terms 'knuckle,' 'knuckles,' 'knucks,' 'brass knuckles,' and 'brass knucks' have the same meaning. *Mills v. State*, 36 Tex. Cr. R. 71, 35 S. W. 370; *Morrison v. State*, 38 Tex. Cr. R. 392, 43 S. W. 113. Where there is substantial agreement between the information and the complaint on which it is based, a variance is immaterial. *Meier v. State*, 10 Tex. App. 39; *Cole v. State*, 11 Tex. App. 67; *Steinberger v. State*, 35 Tex. Cr. R. 492, 34 S. W. 617; *Baker v. State*, 35 S. W. 666; *Huizar v. State*, 63 S. W. 329; *Moreno v. State*, 64 Tex. Cr. R. 660, 143 S. W. 157, Ann. Cas. 1914C, 863; *Brown v. State*, 170 S. W. 714. This is an information for an assault, and it is not sought to charge the unlawful carrying of a prohibited weapon on the person. The name by which a thing is commonly called is in law its name, though in fact it may bear a different name. *Roman v. State*, 64 Tex. Cr. R. 515, 142 S. W. 912; *Schenk v. State*, 174 S. W. 357. We think the variance is immaterial and could in no way have affected the rights of the appellant. The ground of aggravation relied on was that serious bodily injury was inflicted.

[2] "2. There was no error in permitting the doctor, who had qualified as an expert, to give his opinion as to the probable cause and nature of the injuries inflicted on the alleged injured party. *Waite v. State*, 13 Tex. App. 180; *Banks v. State*, 13 Tex. App. 182; *Streight v. State*, 62 Tex. Cr. R. 453, 138 S. W. 742; *Spates v. State*, 62 Tex. Cr. R. 532, 138 S. W. 395; *Lacoume v. State*, 143 S. W. 626; *Williams v. State*, 144 S. W. 626; *Harris v. State*, 148 S. W. 1076; *Singleton v. State*, 167 S. W. 46; *Brown v. State*, 174 S. W. 362. The opinion of the doctor that the injured party was struck with metal knucks, or with some instrument capable of inflicting a similar injury, is borne out by his description of the wounds inflicted, the number of fractures, and the direct connection between the fractures and the surface of the skin.

[3] "3. The proof is sufficient to sustain the finding of the trial judge, as shown by his qualification to bill of exceptions No. 4, accepted and filed by appellant, to the effect that the testimony was amply sufficient to show circumstantially that the prosecuting witness was struck with knucks, as found by the jury, whom the judge had charged to acquit unless they found he was struck with knucks. The qualification to this bill shows, also, that the trial judge was clearly convinced that the prosecutor was either struck with knucks made of metal or some hard substance, or with some instrument capable of and which did produce the same injury as if he had been struck with knucks. In proving the means used in committing a murder, or any grade of assault, *only the substance of the issue need be proven*. *Douglass v. State*, 26 Tex. App. 109, 9 S. W. 439, 8 Am. St. Rep. 459; *Monk v. State*, 27 Tex. App. 450, 11 S. W. 460; *Johnson v. State*, 29 Tex. App. 150, 15 S. W. 647; *Morris v. State*, 35 Tex. Cr. R. 317, 33 S. W. 539; *Brown v. State*, 43 Tex. Cr. R. 293, 65 S. W. 529; *Taylor v. State*, 44 Tex. Cr. R. 550, 72 S. W. 396; *Lopez v. State*, 73 Tex. Cr. R. 624, 166 S. W. 155."

[4] The fact that appellant had been tried and acquitted of unlawfully carrying brass knucks on this occasion would not bar a prosecution for an assault with knuckles. They are two separate and distinct offenses, and even though the proof on the trial for carrying the knucks might have been insufficient to sustain a verdict that he had

knucks, or that he unlawfully carried them, yet on this trial it was wholly unnecessary to prove that he unlawfully carried the knucks; that would not be an issue in this case. Or if the state in that case failed to prove he had on or about his person knucks, this would not prevent the state on this trial adducing additional testimony and showing that he did in fact strike Steckel with knucks. We do not know what the testimony was on the trial of the case when he was charged with carrying the knucks; we only have the testimony adduced on this trial, and the facts and circumstances offered in evidence by the state will support the finding of the trial court and jury that Steckel was struck with knucks.

The judgment is affirmed.

MOSER v. STATE. (No. 3647.)

(Court of Criminal Appeals of Texas. June 23, 1915. Rehearing Denied Oct. 13, 1915.)

1. HOMICIDE — §300 — SELF-DEFENSE — ABSTRACT INSTRUCTIONS.

In a prosecution of a peace officer for murder in having killed deceased after the latter had made an attack upon two brothers, where the testimony conclusively showed that such brothers passed out of the difficulty entirely when defendant came up and took hold of deceased, failure of the court to tell the jury that the brothers were not bound to retreat when attacked by deceased was not erroneous, as there was no such issue in the case.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. §300.]

2. HOMICIDE — §300 — TRIAL — ABSTRACT INSTRUCTIONS.

In a prosecution for murder, where defendant peace officer killed deceased in the scuffle that ensued upon the officer's coming up when deceased was attacking two brothers with a knife, there being no question of retreat involved under any theory of the facts in the case, the failure of the court to charge upon the law of retreat as applied to the two brothers and the peace officer was not erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. §300.]

3. HOMICIDE — §250 — MANSLAUGHTER — SUFFICIENCY OF EVIDENCE.

In a prosecution for murder against a peace officer, evidence held sufficient to sustain a conviction of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. §250.]

Appeal from District Court, Zavala County; R. H. Burney, Judge.

J. M. Moser was convicted of manslaughter, and he appeals. Affirmed.

L. Old, of Uvalde, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was indicted for murder, in the second degree, of Morton Barnard, alleged to have been committed on or about September 14, 1912. He

was convicted of manslaughter and assessed the lowest punishment.

It will be seen that this offense is alleged to have been committed prior to the act of the Legislature doing away with the degrees of murder. The indictment is unquestionably correct under the old law and was properly preferred thereunder.

The state's first witness, Acle Stapleton, testified:

"I reside in Uvalde, Uvalde county, Tex., and have known the defendant in this case for seven or eight years, and knew the deceased, Morton Barnard. I was present on the night of the 12th day of September, 1912, at the time that Morton Barnard was shot. Along about 12 o'clock of that night, I went into the Hollingsworth drug store, and Morton Barnard was in there and was talking to the Cobb boys, that is, to Walter and Henry Cobb, and they were having some kind of an argument, and I got a drink of water and went on out in front, and immediately after I got out in front of the building Walter and Henry Cobb came out and sat down on the little bench in front of the store under the window, and after they had been there a few minutes, the deceased, Morton Barnard, came out, and attempted to renew the argument, and some words passed, and Henry Cobb got up, and said something about leaving, but I did not understand exactly what he did say, and started off down the sidewalk, going west, with his back turned towards the deceased. At that time, the deceased, Morton Barnard, was standing in front of Walter Cobb, and when Henry Cobb made the statement about going away, and started west, the deceased started down the sidewalk after him, and rushed up to him, and struck at him with a knife, and Henry Cobb turned around, and the deceased backed out in the street, and the Cobb boys approached him, and the deceased still had a knife in his hand, and he rushed up to Henry Cobb and struck at him with the knife, and then rushed up to Walter Cobb and struck him with the knife. About this time, the defendant in this case, Jim Moser, and Will Watkins came up from behind, and Moser grabbed hold of the deceased from behind and jerked him down, and the deceased got up on his feet, and they got into a scuffle, and were hugging and going around and around, and I heard either Moser or Watkins say, 'Give me the knife,' or, 'Turn the knife loose,' or something to that effect, and I heard the deceased say, 'I have already thrown the knife down;' but they continued to scuffle around, and up between the wheels of a buggy that was standing there, which belonged to the Howard boys, and, after they had gotten up between the buggy wheels, Jim Moser got out his pistol, and began trying to hit the deceased over the head with it, and I saw it come up and down two or three times, and finally Moser had hit the deceased over the head with the pistol, and knocked him loose from him, and knocked him down, practically, on his knees, and, as soon as he had done this, he (the defendant) stepped back, and fired point blank at the deceased, and at the time that he fired the muzzle of the pistol was not more than 18 inches from the body of the deceased. This all happened in three or four minutes. Immediately after the shot was fired, the deceased arose to his feet, and his clothes on his left breast were on fire, and Will Watkins and I began to put out the fire, and the deceased, Morton Barnard, said: 'You have killed me, and you have killed a man that never did you a particle of harm in your life.' The defendant said, 'No, Blondy, you are not hurt,' and the deceased was carried on into the drug store by myself and Will Watkins, and we got the doctor there. During the time of the

struggle, and just before the deceased stated that he had thrown down the knife, I saw a white shining object fall on the ground. Of course, at the time, I did not know what it was, just simply saw it was a white object, and that it fell from some of the parties engaged in the scuffle, and it fell out in front of the buggy, that is, westward from the buggy, and very near the sidewalk. This all happened in Uvalde, Uvalde county, Tex., on the 12th day of September, 1912, and the deceased died some three or four days after that, in a hotel at Uvalde, Uvalde county, Tex.

"Cross-examination: I can say that there was plenty of light there for me to see all that was going on. There was the street light right across the street at Rice's corner, and there was also some light coming from the lamps in Hollingsworth's drug store, and I could see everything that was going on, and I say positively that I saw a white object fall towards the west of the buggy. I do not remember that I testified before that I saw the knife fall east of the buggy, but, if I did, I got my directions mixed up. Yes, it is a fact that, up to the time that the deceased cut at Cobb on the sidewalk with the knife, no one had made any assault upon him, and no one had done or said anything to him to make him mad. Yes, it is a fact that he seemed mad about something, and it is a fact that he rushed up behind Henry Cobb as he was going away from him. Yes, it is a fact that this is the first that I knew that there was going to be any fight. Yes, it is a fact that I heard one of the Cobb boys say out in the street, after the deceased had already struck at Henry: 'Boys, somebody give me a club. He has a knife.' Yes, it is a fact that, at the time that the defendant grabbed hold of the deceased, he had already cut at Henry Cobb with the knife on the sidewalk, and had already cut at Henry Cobb out in the street, and, at the time he was seized hold of by the defendant, he was in the act of cutting at Walter Cobb with the knife. Yes, the defendant in this case was deputy sheriff of Uvalde county, at the time, and was also night watchman, and Will Watkins, who was with him at the time, was also deputy sheriff.

"Redirect examination: No, I never heard either Will Watkins or the defendant in this case call upon the deceased to submit to arrest, and I never heard either one of them tell him that they were trying to arrest him. There was nothing whatever said about an arrest—just grabbed hold of him. But at the time that the defendant jerked the deceased down, I heard some one say, 'Look out, he has got a knife,' and then I heard some one say, 'I have handled lots of worse men than he is, many a time.'"

The state introduced other witnesses who testified substantially as did Stapleton. The knife of the deceased was found after the shooting about where Stapleton said he saw it dropped. It was identified, produced on the trial, and introduced in evidence.

Dr. Myrick testified that he was called to deceased immediately after the shooting and reached him very soon; that he was bleeding profusely from a gunshot wound, which entered his left side about three inches above the left nipple; the ball ranged downward and backward, and its exit was in his back, left of his kidney about 12 or 14 inches below the place of entrance; the wound was made with a large caliber pistol, and it was fatal. Deceased died therefrom a few days later.

The appellant's side of the case is fairly presented by the testimony of Will Watkins,

said officer, who was with him at the time he shot deceased. He testified:

"The shooting occurred in Uvalde, right in front of the Hollingsworth drug store, between 11 and 12 o'clock, on the night of the 12th day of September, 1912. At the time I was deputy sheriff of Uvalde county, and was also night watchman of the town of Uvalde; both of us being salaried officers. On that night, between 11 and 12 o'clock, the defendant and I were across the street from what is known as the Hollingsworth drug store corner, and we heard some loud wrangling, and heard some cursing, and heard some one whom we afterwards found to be the deceased, Morton Barnard, using the words, 'God damned!' and we got up and started across the street to see what the trouble was, and when we started the deceased was in sight of us, but just immediately after we started we heard footsteps going down the cement sidewalk in a western direction, and saw the deceased start towards the direction in which the steps were going, and he passed from our view, but we kept going, and we did not go upon the sidewalk for four or five seconds after the deceased disappeared. He came back into our view out into the street, and he made a run at Henry Cobb, and struck at him with a knife, and then turned and made a run at Walter Cobb and struck at him with a knife, and, just at the time that he was in the act of striking at Walter Cobb with a knife, the defendant in this case, Jim Moser, seized hold of him from the side, and pulled him backwards, and I was on the other side of him, and stepped between him and the Cobb boys. When the defendant in the case pulled him backwards, he very nearly jerked him down, and the right hand of the deceased struck the ground, and I saw in his hand at the time a large pocket-knife with the blade open, and I said to the defendant: 'Look out, Jim! He has got a knife.' And the deceased immediately jumped up, and seized hold of the defendant, and caught him around the neck, and hugged him up close to him, and began trying to cut him with the knife which was in his right hand, and they struggled around for a minute or so, and got up between the buggy wheels of the buggy which belonged to the Howard boys, which was there, and, after they had gotten up there, the deceased got Moser some way around the neck and throat, and pulled his head around to one side and up, and Jim said: 'Hit him, Bill! He is choking me.' And again repeated the words: 'Hit him, Bill! He is choking me.' In the meantime, I had seized hold of the right hand of the deceased in which the knife was, and the deceased was struggling with this hand, trying to get it loose, and trying to cut Moser with the open knife that he had in his hand, and when Moser said the second time to, 'Hit him, Bill! he is choking me,' it sounded like he was choked, and immediately, the second after he said that, the deceased said: 'I have got one of the God damn sons of bitches now.' Up to this time, Moser had never drawn his pistol, but the deceased had been trying to cut him with the knife, and, about the instant that the deceased made this remark, I saw Moser's pistol come up and come around over the arm of the deceased in some way, and was fired, and at the time it was fired the muzzle of the pistol was right against the deceased and set his clothes afire, and at the time that it was fired they were both hugged together between the buggy wheels, very close to each other, and the defendant did not step back, and shoot the deceased, nor did he hit him with the pistol, and knock him down on his knees. When the shot was fired, both the deceased and the defendant turned loose of each other, and the deceased walked around to the west in front of the horse and buggy belonging to the Howard boys, and went up on the sidewalk, and his clothes were on fire at the time from the shot, and the defendant and

myself put out the fire. Yes, at the very time that the shot was fired, the deceased had in his right hand an open knife, and was trying to cut the defendant with it, and he was surging this right hand forward in the direction of the defendant, and all the time he had the knife in his hand continually from the time that Moser took hold of him until the time that the shot was fired, but I do not know what became of the knife after the shot was fired.

"Cross-examination: Yes, it is a fact that I had hold of the deceased from the time that Moser caught him, and from the time that he seized Moser around the neck until the shot was fired, and it is a fact that he had the knife in his hand all the time. I did not get up between the wheels of the buggy, but was standing on the outside of the wheels, holding his right arm. Just at the instant that the shot was fired, I let go his right arm, with one hand, and reached up and caught hold of the hand that was on Moser's throat, and gave it a jerk, and just as I did that Moser gave his head a jerk, and just at the instant that the shot was fired they came apart, but the two actions occurred at the same instant, but I never let go my hold of his right arm, the hand in which the knife was at any time after I got hold of it until the shot was fired. Yes, it is a fact that neither Moser nor myself called upon the deceased to surrender, and we did not even tell him that we were going to arrest him, nor tell him what we wanted; just seized hold of him, and the struggle began.

"Redirect examination: At the very time that the defendant Moser seized hold of the deceased, he was in the act of striking at Walter Cobb with a knife, and there was not time to do or say anything; but during the struggle I heard Moser say to the deceased, 'Give me that knife,' and the deceased said, 'I will give you nothing.'

The court charged on murder in the second degree, manslaughter, self-defense, and accidental killing. It presented in a fair, full, and apt way every question raised by the testimony and is subject to none of appellant's attacks upon it.

[1] Appellant attacked various paragraphs of the charge, numerous. We deem it unnecessary to discuss them separately—except such as appellant mentions in his brief. In his first, he contends the court erred in not telling the jury that the witnesses Walter and Henry Cobb were not bound to retreat when attacked by deceased. This was wholly unnecessary. The testimony conclusively shows that they passed out of the difficulty entirely when appellant took hold of deceased, and they had nothing whatever further to do with the deceased, nor did deceased have anything further whatever to do with them.

[2] His next complaint is that the court erred in not applying the law of retreat as to both the defendant and the said Cobbs. What we have said about the Cobbs above equally applies here. The question of retreat was wholly inapplicable to any state of facts in this case, as shown by the two theories of the case in the above stated testimony.

The evidence clearly raised the issue of manslaughter and likewise self-defense. Both issues were fully and completely submitted, wholly separate and distinct one from the other, by the court's charge, and appellant's complaint that there is a conflict be-

tween them so as to make them confusing is entirely untenable.

Appellant's attack of various paragraphs of the court's charge on self-defense is without merit. The court gave a clear and apt charge on the various phases raised by the evidence of self-defense and every way as favorable to appellant as the evidence on any issue called for or raised. It is unnecessary to take up each of these attacks separately.

[3] We have carefully considered the evidence, charge of the court, and each of appellant's attacks thereon. No error was committed in the trial of this cause.

The evidence amply sustained the verdict, and the judgment is affirmed.

ROBERTSON v. STATE. (No. 3546.)

(Court of Criminal Appeals of Texas. May 19, 1915. On Motion for Rehearing, June 23, 1915. On Second Motion for Rehearing, Oct. 13, 1915.)

1. BAIL ~~§ 66~~—RECOGNIZANCE ON APPEAL—SUFFICIENCY.

A recognizance on appeal by one convicted of violating the local option law which recites no specific offense and does not comply with the statute requiring that the punishment itself must be stated is insufficient and requires a dismissal of the appeal.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 279-283; Dec. Dig. ~~§ 66~~.]

On Second Motion for Rehearing.

2. CRIMINAL LAW ~~§ 1133~~—APPEAL AND ERROR—REHEARING—MOTION.

A motion for rehearing, based upon statements that appellant was deprived of a statement of facts and bill of exceptions through the fault of the trial judge, will be denied, where the statement is in no way verified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2984; Dec. Dig. ~~§ 1133~~.]

Appeal from Rains County Court; J. B. Allred, Judge.

Allen Robertson was convicted of violating the local option law, and he appeals. Appeal dismissed. Affirmed on rehearing, and another hearing denied.

A. R. Cornelius, of Emory, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of violating the local option law; his punishment being assessed at a fine of \$25 and 20 days' imprisonment in the county jail.

[1] The recognizance was in the sum of \$250, "conditioned that the said Allen Robertson who stands charged in this court with the offense of selling intoxicating liquor in violation of law, and who has been convicted of said offense in this court, shall appear before this court from day to day and from term to term of the same," etc. The recognizance is not in compliance with the law. Selling intoxicating liquor in violation of the law recites no specific offense. That general charge may have involved any sell-

ing of intoxicating liquors violative of the law, and does not even refer to the fact that the party was charged with violating the local option law, nor does it state the punishment which was required by the statute. While the statute says that it is sufficient to recite that appellant was convicted of a misdemeanor and given the following punishment, yet if the recognizance, in the writer's opinion, would state the specific misdemeanor of which the party was charged and convicted sufficiently as required by the law, this might answer the requirements of the statute that it was a misdemeanor, provided the offense was a misdemeanor, but it requires further that the punishment itself must be stated. This recognizance does not comply with the law in these respects, and therefore is not sufficient. For that reason this appeal must be dismissed.

In addition, however, we might further say that, so far as the record is concerned, there is no reason shown why the judgment should be reversed, in the absence of a statement of facts which does not accompany this record. The first ground of the motion for a new trial asserts that the verdict of the jury is contrary to the law and the evidence. The evidence, as before stated, is not in the record. The second ground complains of the refusal of the court to grant appellant's application for a continuance for a certain witness. There was no bill of exceptions reserved to this ruling of the court. The third ground of the motion was reserved to the refusal of the court to give special charge No. 1 asked by appellant. This charge may or may not have been required under the facts, but, as we have not the facts before us, it is impossible for us to review this question, even if the court had acquired jurisdiction. We mention these because the accused might supply a good recognizance and attach the jurisdiction of this court, although the one in the record is insufficient, but it would be useless, it occurs to us, to follow this procedure, unless there was something in the record that would justify a review of the questions presented.

The appeal will be dismissed.

On Motion for Rehearing.

On a former day of this term the appeal herein was dismissed for want of a valid recognizance. Since the rendition of that opinion appellant has filed a sufficient recognizance, which reinstates the case upon the docket. The record is now before us on its merits.

We noticed the fact in the former opinion that the record was in such condition, even had the jurisdiction of this court attached, the judgment would have to be affirmed. We notice again the fact that the record is

before us without a statement of facts or bill of exceptions. There is therefore nothing before the court which can be reviewed or discussed.

The motion for new trial insists on three grounds: First, the verdict is contrary to the evidence; second, the refusal of the court to grant a continuance; and, third, refusal to give special charge No. 1. With reference to the first and third grounds it may be stated that we cannot review those matters for want of the evidence. There is nothing before us to indicate that the jury was wrong in their verdict, or that the charge was applicable to any situation presented by the evidence that would be favorable to appellant. In regard to the third ground it may be sufficient to state there was no bill of exceptions reserved to the ruling of the court overruling the application for continuance.

The dismissal is set aside, and the judgment is now affirmed.

On Second Motion for Rehearing.

[2] At a previous term of this court the judgment herein was affirmed. After the adjournment of the term, which occurred the latter part of June, appellant filed a motion for rehearing, because appellant has been deprived of a statement of facts and bills of exception by the trial judge without fault or neglect on the part of appellant or his counsel, and appellant represents to this court that he thought his attorney made and prepared a statement of facts, which was agreed to by the county attorney on 27th of October, 1914, and which statement of facts and bills of exception were immediately presented to the trial judge with the request to approve same, or prepare a statement himself, which said judge failed and refused to do, though requested to approve the same and return same to appellant's attorney so they could be filed with the clerk. Appellant further says that the trial judge arbitrarily held in his possession the statement of facts and bills of exception until after the time allowed for filing same, and refused to approve same. Therefore he asks this court to consider the matter. This statement is signed by counsel for appellant, but there is no affidavit made. This application is not sworn to; in other words, it is not sufficiently presented so that this court can act upon it. The judge makes no certificate, and in fact the unsworn statement by counsel is all that is presented to the court with reference to it. Under this showing we are not authorized to consider the statements in the motion, and in order to do so they must be verified in some way.

The motion for rehearing therefore will be overruled.

VOLLINTINE v. STATE. (No. 3635.)

(Court of Criminal Appeals of Texas. June 25, 1915. On Rehearing, Oct. 13, 1915.)

1. CRIMINAL LAW §193½ — FORMER JEOPARDY.

Where defendant tried for murder was acquitted by a conviction of manslaughter, the issue of murder could not be submitted in another trial, though the court, in submitting manslaughter, might charge as to what constituted murder.

[For other cases, see Criminal Law, Cent. Dig. §§ 366, 387, 389, 394; Dec. Dig. §193½.]

2. HOMICIDE §300 — INSTRUCTIONS — SELF-DEFENSE.

In a trial for murder, where the issue of self-defense was raised, an instruction that defendant, in exercising such right, could use only such degree of force as it reasonably appeared to him at the time and place was necessary to protect himself against unlawful violence, was erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. §300.]

3. HOMICIDE §300 — INSTRUCTIONS — THREATS.

Where the evidence in a trial for murder raised the issue of self-defense based on threats, the refusal to submit it was error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. §300.]

4. HOMICIDE §47 — MANSLAUGHTER — "ADEQUATE CAUSE."

Adultery of the deceased with the wife of appellant was "adequate cause" which might reduce the homicide to manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 71; Dec. Dig. §47.]

For other definitions, see Words and Phrases, First and Second Series, Adequate Cause.]

5. HOMICIDE §341 — INSTRUCTIONS — MANSLAUGHTER — ADEQUATE CAUSE.

In a prosecution for murder, a charge on manslaughter that, if defendant believed that the deceased had improper relations with his wife, it would be adequate cause, was sufficient, and a failure to further charge that, if he believed that deceased had had improper relations with appellant's wife, such belief by him would be real to him, whether such relations existed or not, is not error requiring reversal.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 721; Dec. Dig. §341.]

6. HOMICIDE §181 — EVIDENCE — LETTER.

In a prosecution for murder, wherein defendant alleged as provocation that deceased had had improper relations with defendant's wife, the contents of her letter to deceased was inadmissible, but the fact that deceased received a letter from her and the registry receipt for it to which his answer to her was in reply was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 383-385; Dec. Dig. §181.]

Prendergast, P. J., dissenting in part.

Appeal from District Court, Tarrant County; R. B. Young, Judge.

J. T. Vollintine was convicted of manslaughter, and he appeals. Reversed, and cause remanded.

Baskin, Dodge, Baskin & Eastus, of Ft. Worth, and Snodgrass, Dibrell & Snodgrass, of Coleman, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Upon a trial for murder appellant was convicted of manslaughter and assessed the highest punishment.

[1] In view of the disposition we make of this case, we will give no extended statement of the evidence. Unquestionably the evidence raised, and it was the duty of the court to submit, the issue of murder, and the court did not err in so doing. However, under the law, as appellant was acquitted of murder, of course, that issue cannot be submitted in another trial, although it may be proper for the court, in order to properly submit the issue of manslaughter, to inform the jury what is murder, as is frequently necessary to do when an accused is tried for manslaughter only.

[2] By appellant's testimony alone self-defense was raised, and this issue, based on his testimony, was as favorably submitted in his behalf by the court's charge as the law and facts would authorize. However, after thus submitting the issue the court added thereto subdivision 14 as follows:

"You are further instructed that, in exercising his right of self-defense, the defendant is permitted only to use such degree of violence as it reasonably appeared to him at the time and place was necessary to prevent or protect himself against such unlawful violence."

In proper time appellant specially excepted to this. We think it clear under the authorities that this instruction under the facts of this case should not have been given. Branch's Crim. Law, § 451.

[3] The court refused to submit a charge on self-defense based on threats. This was properly excepted to and the point saved, and appellant even requested a special charge on the subject. In our opinion, the evidence raised this issue, and the court erred in refusing to submit it.

[4, 5] In the charge on manslaughter the court properly told the jury that adultery of the deceased with the wife of appellant was adequate cause. He further told them that, if the defendant believed that the deceased had improper relations with his wife, this would constitute adequate cause. Appellant complains of these charges in that the court should have gone further and told the jury as requested in his special charge, that if they believed from the evidence that appellant believed that deceased had had improper relations with appellant's wife on the occasions of their meeting at a certain place in Dallas and at a certain other place in Ft. Worth, or either, then such belief by him would be real to him, whether such improper relation was, in fact, had or not. We think it may have been proper to have given such an instruction under the facts of this case, but it is not such error as we think would justify a reversal. However, it might be better for the court to embrace this matter in a proper charge on another trial.

[6] In the opinion of this writer, the letter of appellant's wife to deceased, dated September 12, 1914, in view of appellant's testimony and the letter of the deceased in reply to appellant's wife, introduced in evidence by him, was properly admitted in evidence. His Brethren, however, incline to the opinion that the contents of the letter should not have been admitted in evidence, but the fact that deceased received a letter from her and the registry receipt for it to which his answer to her was in reply was admissible in evidence.

There is nothing else raised which presents any error or needs any discussion. Owing to the near approach of the adjournment of this court for the term and the press of many other matters, a full discussion of the questions decided is pretermitted.

For the errors above pointed out, the judgment is reversed, and the cause remanded.

On Rehearing.

We think the original opinion, wherein we held the court on another trial should charge, as insisted by appellant, to the effect that, if appellant believed deceased had had improper relations with his wife, "then such belief by him would be real to him," is not correct, but the court's charge, as given, is sufficient. With this correction in the original opinion, the motion for rehearing is overruled.

Ex parte SAPP et al. (No. 3659.)

(Court of Criminal Appeals of Texas. June 23, 1915. Rehearing Denied Oct. 13, 1915.)

1. HABEAS CORPUS — 113 — ADMISSION TO BAIL—APPEAL—EVIDENCE.

On appeal from an order denying admission to bail, the Court of Criminal Appeals will not discuss the evidence.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 114; Dec. Dig. —113; Appeal and Error, Cent. Dig. § 3400.]

2. BAIL — 42—ADMISSION TO BAIL.

Under Const. art. 1, § 11, all prisoners are to be admitted to bail, save when the proof is evident, not only that accused is guilty, but that the jury will, if they properly enforce the law, probably assess capital punishment.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 139-144, 147-152; Dec. Dig. —42.]

3. HABEAS CORPUS — 113—APPEAL—REVIEW—EVIDENCE.

Where there was evidence warranting the conclusion, in habeas corpus, denying relator bail in a prosecution for a capital offense, that proof of guilt was strong, its order will be upheld on appeal.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 114; Dec. Dig. —113; Appeal and Error, Cent. Dig. § 3400.]

Appeal from District Court, Hardin County; J. Llewellyn, Judge.

Ex parte application by E. E. Sapp and others for a writ of habeas corpus for admission to bail. From an order denying bail, they appeal. Affirmed.

F. J. & C. T. Duff, of Beaumont, Coe & Coe, of Kountze, and Howth & Adams, of Beaumont, for appellants. D. J. Harrison, Dist. Atty., of Liberty, W. R. Blain, of Beaumont, and C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellants were indicted for the murder of Dick Watts. They sued out a writ of habeas corpus before the district judge, who, after hearing all the evidence, denied them bail. Hence this appeal.

[1] The statement of facts is voluminous. We have given it, and appellants' briefs, careful consideration, in addition to having heard the evidence discussed on submission for an hour on each side, by the able attorneys representing the appellants and the state. It is the rule of this court not to discuss the evidence in appeals of this character, and we shall adhere to that rule now.

[2, 3] "The rule is: 'All prisoners shall be bailable.' Section 11, art. 1, of our Constitution. The exception is: 'When the proof is evident' that not only the accused is guilty, but that the jury will, if they properly enforce the law, probably assess capital punishment; this conclusion to be reached by the well-guarded and dispassionate judgment of the court or judge passing upon the question." Ex parte Stephenson, 71 Tex. Cr. R. 382, 160 S. W. 77. As we understood appellant's attorney, on the submission hereof, it was conceded that in all probability a jury will assess the death penalty, if on final trial the guilt of appellants is shown. At any rate, whether conceded by appellants or not, in our opinion, if their guilt is so shown, a "jury will, if they properly enforce the law, probably assess capital punishment." That feature need not be further considered.

The only other question, then, is whether or not the evidence as a whole was clear and strong enough to "lead a well-guarded and dispassionate judgment to the conclusion * * * that the accused is the guilty agent." Ex parte Russell, 71 Tex. Cr. R. 378, 160 S. W. 76. If so, bail was correctly denied. The law of our state on this question is well, and has long been, established, not only by our constitutional and statutory provisions, but by our decisions as well. We will cite and quote from some of our decisions—not all of them to the same effect, by any means.

In Ex parte Evers, 29 Tex. App. 560, 16 S. W. 343, this court, by Judge Davidson, said:

"All prisoners shall be bailable by sufficient sureties unless for capital offenses when the proof is evident." Bill of Rights, § 11. By virtue of this provision the right of bail is secured to all persons in this state who are accused of crime, except in cases where the evidence manifests with reasonable certainty that the accused party is guilty of a capital offense. McCoy v. State, 25 Tex. 33 [78 Am. Dec. 520]; Ex parte Coldiron, 15 Tex. App. 464; Ex parte Smith,

23 Tex. App. 100, 5 S. W. 99. The rule in this state for determining whether or not bail should be granted is as follows: 'If the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offense has been committed, that the accused is the guilty agent, and that he would probably be punished capitally if the law is administered, bail is not a matter of right.' Ex parte Smith, 23 Tex. App. 126 [5 S. W. 102]. Stated in another form it is thus laid down: 'If, upon the whole testimony adduced, the court or judge entertains a reasonable doubt whether the relator committed the act, or whether in doing so he was guilty of a capital crime, bail should be granted.' Same authority. *'This rule applies when the case is considered on appeal, the court keeping in mind the prima facie legal presumption that the action of the trial judge was correct.'* (Italics added.) Same authority. 'To the mind of the tribunal passing upon the evidence the guilt of the applicant of a capital offense may be evident * * * and yet there may be evidence in conflict with such inculpatory evidence. It is not all conflicting, exculpatory evidence that will have the effect to raise a reasonable doubt of guilt and destroy or impair the force of "evident proof" made by inculpatory evidence.' Same authority."

In Smith v. State, 23 Tex. App. 125-127, 5 S. W. 102, cited by Judge Davidson, it is said the rule is:

"If the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offense has been committed, that the accused is the guilty agent, and that he would probably be punished capitally if the law is administered, bail is not a matter of right."

And further:

This rule "is, as we understand it, in harmony with the constitutional requirement that bail shall be granted unless the proof is evident. It is, in effect, the same rule stated as a correct one in Bridewell's Case, 57 Miss. 39, but in different language; that is: 'If, upon the whole testimony adduced, the court or judge entertains a reasonable doubt whether the relator committed the act, or whether in so doing he was guilty of a capital crime, bail should be granted.' This rule applies when the case is considered on appeal, the court keeping in mind the prima facie legal presumption that the action of the trial judge was correct. A majority of the court are not to be understood as holding that under the operation of this rule the evidence, though *conflicting*, may not at the same time be *evident*. To the mind of the tribunal passing upon the evidence the guilt of the applicant of a capital offense may be *evident*—that is, clear, strong, not admitting of a reasonable doubt—and yet there may be evidence in conflict with such inculpatory evidence. It is not all conflicting, exculpatory evidence that will have the effect to raise a reasonable doubt of guilt, and destroy or impair the force of 'evident proof' made by inculpatory evidence. It is for the judge or court who hears the testimony to consider the evidence as a whole, and if by the entire evidence a reasonable doubt of the applicant's guilt of a capital offense is not generated, the proof is evident, and bail should be denied."

In Ex parte Jones, 31 Tex. Cr. R. 445, 20 S. W. 983, this court, by Judge Simkins, again said:

"Bail should be granted in murder cases unless, upon examination of all the evidence adduced, the court should conclude that the proof of guilt is evident, and the accused would be convicted of murder in the first degree if the law was administered. The guilt of the accused

may be evident, though there may be conflicting testimony. Ex parte Smith, 23 Tex. App. 126 [5 S. W. 99]; Drury's Case, 25 Tex. 45. 'Proof is evident,' if the evidence adduced on an application for bail would sustain a verdict convicting the applicant of murder in the first degree. Foster's Case, 5 Tex. App. 625 [32 Am. Rep. 577]."

In Ex parte King, 56 Tex. Cr. R. 68, 118 S. W. 1032, this court, by Judge Ramsey, said:

"The testimony introduced on the part of the state is amply sufficient, if true, to show that relator is guilty of murder in the first degree. His defense consists of proof of alibi, and also involves to some extent an attack and impeachment of the state's witnesses. The case is peculiarly one of fact, and in respect to a matter of this sort, as we view it from the statement of the evidence contained in the record, the judgment of the trial court should not be set aside where there is proof showing the defendant's guilt to be evident. We are not prepared to say the action of the court below was without ample warrant, and without comment on the testimony we deem it our duty to affirm the judgment of the court below, which is here done."

That case is specially and peculiarly applicable to this. See, also, Ex parte Cabrera, 53 Tex. Cr. R. 466, 110 S. W. 898; Ex parte Brown, 63 Tex. Cr. R. 613, 614, 140 S. W. 1191; Ex parte Finney, 70 Tex. Cr. R. 284, 156 S. W. 636. As said by Judge Ramsey in King, supra, so we say in this case:

"We are not prepared to say the action of the court below was without ample warrant, and without comment on the testimony we deem it our duty to affirm the judgment of the court below, which is here done."

LOOPER v. STATE. (No. 8650.)

(Court of Criminal Appeals of Texas. June 25, 1915. Rehearing Denied Oct. 13, 1915.)

1. CRIMINAL LAW §1114—APPEAL AND ERROR—QUESTION PRESENTED—SUFFICIENCY OF EVIDENCE.

Where, on appeal from a conviction of crime, there were no bills of exception in the record, no complaints as to the charge of the court, and no special charges requested below, the only question presented was the sufficiency of the evidence to sustain the conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2913, 2921; Dec. Dig. § 1114.]

2. VAGRANCY §3 — SUFFICIENCY OF EVIDENCE.

In a prosecution for being an idle person without visible means of support, evidence held to support conviction.

[Ed. Note.—For other cases, see Vagrancy, Cent. Dig. § 3; Dec. Dig. § 3.]

Appeal from Johnson County Court; B. Jay Jackson, Judge.

Jake Looper was convicted of being an idle person without visible means of support, and he appeals. Affirmed.

W. B. Featherston, of Cleburne, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Under a complaint charging him with, on or about January 1, 1915, and continuously up to the time of filing the com-

plaint, February 19th, being then and there an idle person, the appellant being an able-bodied person, who habitually loafed and loitered about the streets of Cleburne, having no regular employment and no visible means of support, appellant was convicted.

[1, 2] There are no bills of exception in the record, no complaints as to the charge of the court, and no special charges were requested. So the only question presented is the sufficiency of the evidence. W. M. Battle, A. C. White, Jim Hughes, Emmett Dillard, Bob Ewing, and Lee Bizzell testify to facts which fully support the allegations in the complaint. As a defense appellant relies on the fact that he owned a home in Cleburne valued at \$400, two vacant lots, value not given, and some other property, value not given. None of them are shown to produce any revenue, or that he has any income therefrom. If the testimony would show that appellant had visible means of support, or an income sufficient to support himself, wife, and children, we would agree with appellant that the provisions of the law under which he was indicted did not reach his case. But, as no such showing is made, we cannot say that the jury, with the law properly presented to them in the charge, was not authorized to return the verdict they did.

The judgment is affirmed.

SLOAN v. STATE. (No. 3649.)

(Court of Criminal Appeals of Texas. June 25, 1915. Rehearing Denied Oct. 13, 1915.)

1. INTOXICATING LIQUORS \Leftrightarrow 236—PROHIBITION LAWS—VIOLATION—SUFFICIENCY OF EVIDENCE.

In a prosecution for violating the prohibition law, evidence held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. \Leftrightarrow 236.]

2. CRIMINAL LAW \Leftrightarrow 147 — LIMITATION OF PROSECUTION—COMPUTATION OF TIME FROM FILING OF INDICTMENT.

In a prosecution for violating the prohibition law, a conviction could only be had for an offense committed within two years prior to the filing of the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 271, 272; Dec. Dig. \Leftrightarrow 147.]

3. CRIMINAL LAW \Leftrightarrow 1172—APPEAL AND ERROR—HARMLESS ERROR—MISCHARGE AS TO LIMITATION OF PROSECUTION.

Where, in a prosecution for violating the prohibition law, the court erred in authorizing a conviction for the commission of the offense other than within two years prior to the filing of the indictment, all the evidence nevertheless showing that, if a sale was made at all, it was made within less than two years prior to the return of the indictment, the error was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. \Leftrightarrow 1172.]

Appeal from Johnson County Court; B. Jay Jackson, Judge.

Henry Sloan was convicted of violating the prohibition law, and he appeals. Affirmed.

W. B. Featherston, of Cleburne, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of violating the prohibition law in Johnson county and his punishment assessed at imprisonment in jail for thirty days and a fine of \$25.

[1] The evidence is amply sufficient to sustain the verdict, as Warren Clark testifies he purchased a bottle of whisky from him about the 10th day of February, 1914, and paid him 50 cents for it. Appellant introduced evidence tending to show that he was on the county road in Johnson county, working out a fine from February 4, 1914, until March 4, 1914. However, the judgment introduced by him states the judgment of conviction was had on March 10, 1914. In addition to this Warren Clark testified that he knew when appellant went on the road, and he purchased the whisky a little while before he went on the county road.

[2, 3] Appellant insists that the court erred in authorizing a conviction for any period of time two years prior to February 14, 1914, when he should have counted the time within two years prior to the filing of the indictment in this case. Appellant's contention is correct, and if the evidence suggested that the alleged sale may have been any time prior to two years before the filing of the indictment, his contention would be ground for reversal of the case. But, as the evidence and all the evidence shows that if a sale was made, it was made within less than two years prior to the return of the indictment, the assignment presents no ground for reversal. The judgment is affirmed.

VAN DYKE v. STATE. (No. 3591.)

(Court of Criminal Appeals of Texas. June 9, 1915. On Motion for Rehearing, Oct. 13, 1915.)

1. CRIMINAL LAW \Leftrightarrow 1092, 1099—APPEAL—RECORD—TIME FOR FILING STATEMENT AND BILLS OF EXCEPTION.

Where the statement of facts and bills of exception were filed after adjournment of court without an order for that purpose, such papers will not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2866-2880, 2919; Dec. Dig. \Leftrightarrow 1092, 1099.]

On Motion for Rehearing.

2. CRIMINAL LAW \Leftrightarrow 1092, 1099 — APPEAL AND ERROR — RECORD — TIME FOR FILING STATEMENT—BILLS OF EXCEPTION—STATUTE. Code Cr. Proc. 1911, art. 845, regulating the filing of statement of facts and bills of exception when the appeal is taken from a judg-

ment of conviction in a district or county court, does not authorize such papers to be filed after adjournment of court, whether there was an order entered to that effect or not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2866-2880, 2919; Dec. Dig. §=1092, 1099.]

8. CRIMINAL LAW §=1092, 1099 — APPEAL AND ERROR — RECORD — TIME FOR FILING STATEMENT AND BILLS OF EXCEPTION—ORDER OF COURT.

Where, on appeal, the clerk of the trial court sent up a certificate showing that the court entered upon its private docket, "Defendant's motion having been this day overruled, and he having given notice of appeal, and his bond fixed at \$700, defendant asked and was granted the time provided by law in which to file his statement of facts," such order not carried forward into the minutes of the court, does not authorize the filing of statement of facts and bills of exceptions after adjournment of court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2866-2880, 2919; Dec. Dig. §=1092, 1099.]

4. CRIMINAL LAW §=1121—APPEAL—QUESTIONS REVIEWABLE—RECORD.

Where, in a prosecution for violating the local option law, motion was made to quash the information and affidavit because the prohibition election in the county and the publication of the result had not been in conformity with statute, the court on appeal could not consider the question of the invalidity of the election in the absence of evidence on the point.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2938, 2939; Dec. Dig. §=1121.]

Appeal from Scurry County Court; O. R. Buchanan, Judge.

A. B. Van Dyke was convicted of violating the local option law, and he appeals. Affirmed.

Smith & Spiller, of Snyder, and W. A. Anderson, of San Angelo, for appellant. O. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. [1] Appellant was charged with violating the local option law. There are several interesting questions raised in the motion for new trial and bills of exception, but the record is in such condition that the statement of facts and bills of exception cannot be considered. All these papers were filed after adjournment of court, without an order having been entered for that purpose; at least the record is before us without an order authorizing the filing of statement of facts and bills of exception after adjournment of court. In this attitude of the record these papers cannot be considered, and the questions suggested in motion for new trial and bills of exception cannot be revised.

The judgment therefore will be affirmed.

On Motion for Rehearing.

[2] Just before the adjournment of the term of court in June last the judgment herein was affirmed. The statement of facts and bills of exception were filed out of term time, without an order of the court entered granting time for such purpose. Appellant

insists we were in error in not considering his statement of facts and bills of exception, referring us to the act of 1911, art. 845, of the Procedure as authority authorizing such papers to be filed whether there was an order entered or not. In view of the numerous decisions holding to the contrary, and that that law did not apply to county court cases, and only applied to the stenographer's act, the statement of facts and bills of exception cannot be considered. It is deemed unnecessary to cite these cases.

[3] The clerk sends a certificate showing that the court entered upon his private docket the following:

"Defendant's motion having been this day overruled, and he having given notice of appeal, and his bond fixed at \$700, defendant asked and was granted the time provided by law in which to file his statement of facts."

This order was not carried forward into the minutes of the court, and therefore cannot be considered. The writer was under the impression that this court would be authorized to consider such an order and consider the statement of facts and bills of exception, but upon looking over the session acts fails to find that the Legislature enacted such a statute. We find that the acts of the last Legislature contain a statute to the effect that where notice of appeal has been given and not carried into the minutes, this may be shown either in vacation or term time, and the proper order entered, and it shall be regarded as having occurred at the time the notice of appeal was given, but statement of facts and bills of exception were not included in that statute. We therefore cannot consider the statement of facts and bills of exception.

[4] Motion was made to quash the information and affidavit because prohibition of the sale of intoxicating liquors in the county of Scurry is not in effect, for the reason that the election wherein the question was submitted to the voters of said county and the publication of the result thereof was not in conformity with the statute governing such election, as is shown by the records of the minutes of the commissioners court of Scurry county. Without evidence of that fact before us this question cannot be considered. Where the validity of the election is attacked, the evidence must show such election to be invalid, and that the law was not in force. Whether this could be done on motion to quash or not it is not necessary here to decide, but inasmuch as this court must presume that the election was properly held in the absence of an attack on it, that question cannot under condition of this record, be considered on motion to quash. It might come up in the evidence, and if the evidence showed there was no valid election, of course the evidence would not be sufficient to support a conviction. There must be a law in force punishing the offense, else a

conviction cannot occur. But as the matter is presented we cannot consider it.

The motion for rehearing, therefore, will be overruled.

TAYLOR v. STATE. (No. 3595.)

(Court of Criminal Appeals of Texas. June 9, 1915. Rehearing Denied Oct. 13, 1915.)

1. CRIMINAL LAW \S 59—PRINCIPLES—WHO ARE.

Mere presence, without participation in the commission of an offense, will not constitute one a principal, but presence, with other circumstances, may be sufficient to show that such person was a principal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 71, 73, 74, 76-81; Dec. Dig. \S 59.]

2. HOMICIDE \S 281 — EVIDENCE — ADMISSIBILITY.

In a prosecution for homicide, evidence that accused was a principal held sufficient to go to the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 573; Dec. Dig. \S 281.]

3. HOMICIDE \S 305 — EVIDENCE — INSTRUCTIONS.

In a prosecution for homicide, where it appeared that accused was the father of the one who fired the fatal shot, and that he had brought with him the gun used in the killing, a charge that all persons are principals who are guilty of acting together in the commission of an offense, and, when an offense has been committed by one and others are present, the criterion is, Did the parties act together in the commission of the offense? and, if so, all are alike guilty, is erroneous under the circumstances.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 637; Dec. Dig. \S 305.]

4. WITNESSES \S 255 — EXAMINATION — REFRESHING MEMORY.

The memory of a witness may be refreshed by propounding questions to her and exhibiting to her her testimony given at the coroner's inquest.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 870-890; Dec. Dig. \S 255.]

5. WITNESSES \S 321 — EXAMINATION — IMPEACHMENT.

Under Code Cr. Proc. 1911, art. 815, a party introducing a witness may attack his testimony when the facts stated by the witness are injurious to his cause, the state, when it introduces a witness cannot attack the witness because, even after an attempt to refresh her memory, the witness fails to recall matters testified to at the coroner's inquest; in such case there being no injury to the state's case.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1094, 1099, 1100; Dec. Dig. \S 321.]

6. CRIMINAL LAW \S 380 — CHARACTER EVIDENCE—ADMISSIBILITY.

Where accused put his good character as a peaceable citizen in issue, testimony that it had been reported some 30 years before that he killed a man in another state and was a member of a gang of outlaws is too remote to be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 843, 845; Dec. Dig. \S 380.]

7. HOMICIDE \S 300—PRINCIPALS—WHO ARE.

Where accused, charged as being a principal with his son, who shot deceased, testified

that deceased reached for a pistol, a charge on self-defense should have been given.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 614, 616-620, 622-630; Dec. Dig. \S 300.]

8. HOMICIDE \S 300—PRINCIPALS—LIABILITY.

Where accused was charged as being a principal with his son, who actually did the killing, he could not be convicted if he believed the killing was necessary to their mutual safety, or if the son so believed on reasonable grounds.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 614, 616-620, 622-630; Dec. Dig. \S 300.]

Appeal from District Court, Smith County; J. A. Bulloch, Special Judge.

J. B. Taylor was convicted of manslaughter, and he appeals. Reversed and remanded.

Simpson, Lasseter & Gentry, of Tyler, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted, charged with murder. When tried he was adjudged guilty of manslaughter, and his punishment assessed at two years' confinement in the penitentiary.

The evidence in this case would show that the deceased, John Gilley, was a deputy sheriff and on the 24th of last December had arrested some negroes living on Frank Taylor's farm. While carrying them to Tyler, Jesse Taylor overtook the officers. What then took place is a mooted question. The state's evidence is that, when Jesse Taylor overtook the officers, he cursed and abused them, and assaulted Mr. Broadwater, who was assisting Deputy Sheriff Gilley. Broadwater's testimony is that deceased, Gilley, struck Jesse Taylor on the head with a pistol, it being accidentally discharged, killing Jesse Taylor. Appellant and his other two sons, Frank and Willis Taylor, placed no confidence in this theory of the case, but from what they heard they believed that Gilley had intentionally shot Jesse Taylor, when he had committed no assault; that he had followed Gilley and Broadwater to secure the release of the negroes, and had only requested their release, when words ensued, and Gilley shot Jesse Taylor in the back of the head. Without discussing further the evidence in regard to the killing of Jesse Taylor, or commenting thereon, the record makes it evident that a bad state of feeling existed between deceased, Gilley, and Broadwater, on the one hand, and appellant and his two sons, Frank and Willis, on the other hand, up until the time Gilley was killed on the morning of February 5th last.

Willis Taylor fired the shot that killed Gilley. This is shown by all the evidence, both for the state and defendant. The state sought the conviction of appellant on the theory that he was a principal in the commission of the offense. To sustain this it showed that after the killing of Jesse Tay-

lor by Gilley appellant purchased a box of shotgun shells containing buckshot, and carried his gun with him wherever he went. This is not denied by appellant, but he gives as a reason that he did so to defend himself, as he had been informed that Gilley and Broadwater had said they would kill the entire Taylor family. The state further introduced evidence to the effect that after the killing of his son Jesse Taylor appellant had said to Travis Hanks that he believed Gilley had murdered Jesse, and they could not both live in the same community or county. In addition to this, the state introduced evidence which would show that the grand jury was in session and were examining into the facts relating to the killing of Jesse Taylor, Gilley having been bound over to the grand jury for having killed Jesse Taylor; that a subpoena had issued for Broadwater summoning him to appear before the grand jury on a given date; and that appellant was in Tyler on the date of the issuance of this subpoena. On the day Broadwater had been summoned to appear before the grand jury, appellant left his home and went to the home of his son, Frank Taylor, who lived on one of the roads leading from Gilley's and Broadwater's home to Tyler, carrying a shotgun with him loaded with buckshot. Willis Taylor was at the home of Frank Taylor, and the state contends that he watched the road, and when he saw Gilley and Broadwater coming he walked into the hall and called, "Pa;" that appellant walked into the hall. Willis Taylor had the gun appellant had carried to the home of Frank Taylor that morning, and as Gilley and Broadwater were driving past Willis fired, killing Gilley and wounding Broadwater.

[1, 2] One of the contentions of appellant is that these facts and circumstances, if true, would not support a finding that appellant was guilty as a principal in the commission of the offense, even though Willis Taylor was guilty of some grade of culpable homicide. This contention cannot be sustained. While the contention of the state is that appellant was also armed at the time with another shotgun, this is vigorously contested by the appellant; also the fact that he knew that Willis intended to shoot Gilley, or that he aided by acts, or encouraged by words or gestures, his son, who did the shooting. It is true mere presence, without participation in any manner in the commission of an offense, will not constitute one a principal. His presence, however, is a circumstance tending to prove that fact, which, taken with other facts and circumstances, may be sufficient to warrant the conclusion he was a participant, in that he had advised the commission of the offense, was personally present, and by his acts and conduct encouraged the person doing so to commit the offense. It is also true that one personally present must have a knowledge

that the person committing the act intends doing so. But knowledge in this instance could be inferred if the jury should find that the state's contention is the correct theory; that appellant had carried the gun to Frank's, knowing Willis would be there; that he perhaps had knowledge that deceased Gilley and Broadwater would probably pass there that morning; that he could see Willis watching the road; that when Gilley and Broadwater came in sight Willis had walked into the hall and called appellant, appellant immediately following him, and was with Willis when he shot. These facts and circumstances would support a finding that appellant was a principal, and we would not disturb the verdict on that ground. However, appellant complains of the charge on who are principals.

[3] In his main charge the court instructed the jury:

"Now, all persons are principals who are guilty of acting together in the commission of an offense. When an offense has been actually committed by one or more persons, and others are present, the true criterion for determining who are principals is: Did the parties act together in the commission of the offense? Was the act done in pursuance of a common intent and in pursuance of a previously formed design in which the minds of all united and concurred? If so, then the law is that all are alike guilty, provided the offense was actually committed during the existence and in the execution of the common design and intent of all."

Under the peculiar facts in this case, we think the criticisms of this paragraph meritorious, and this in and of itself would present reversible error had the court not given a special charge requested on this issue. As the case will be reversed on other grounds, we will say that on another trial, in connection with the above paragraph of the charge, as it is admitted that appellant was present, he merely contending that he did not encourage by words or gestures his son Willis, and did no act that would constitute him a principal, the court should instruct the jury that his mere presence would not constitute him a principal, and that, although appellant was present, unless he gave Willis some aid, or encouraged him by his words, gestures, or conduct on the occasion, or had advised the commission of the offense, he would not be a principal in the commission of the offense. Having instructed the jury what would constitute one a principal, appellant, under the evidence offered by him, had the right to have presented in the same connection the rules of law governing when mere presence will not constitute one a principal offender.

[4, 5] The state's theory of the case being as above stated, it called Mrs. Frank Taylor as a witness. She says appellant came to her home that morning, but she did not know whether or not he brought a gun with him. She testified that appellant and Willis Taylor were in one room of the house, and that Willis got up and walked out in

the hall and called, "Pa," that she did not remember hearing him say anything else. She was asked if, when they walked out in the hall, she did not put her hands over her ears to keep from hearing the report of the gun. She says after the shot she placed her hands over her ears to keep from hearing any more shots if they were fired. This witness had testified at the coroner's inquest and her testimony reduced to writing. The state was permitted to show her this written statement to refresh her memory and propound to her certain questions with this end in view. It is always permissible to refresh the memory of a witness. *McLain v. State*, 48 Tex. Cr. R. 551, 90 S. W. 1107; *Spangler v. State*, 41 Tex. Cr. R. 430, 55 S. W. 326. But, after having attempted to do so, one is not permitted to prove what his own witness had testified on a former occasion, unless the witness swears to facts injurious to his cause. Mere failure to swear to facts that one expects to prove by a witness furnishes no grounds to prove that the witness had so testified on a former occasion. At common law one could not impeach his own witness. By placing the witness on the stand he was supposed to vouch for the truthfulness of the witness. Our Code has so far modified the rule that a party may attack the testimony of his own witness when the facts stated by the witness called by him are injurious to him, but in no other instance can he attack a witness whom he calls. Article 815, C. C. P. Mr. Branch, in his Criminal Law, has well stated the correct rule, in section 886:

"Error to permit the state to impeach her own witness, where such witness merely fails to remember, or refuses to testify, or fails to make out the state's case. A mere failure to make proof is no ground for impeaching such witness. *Bennett v. State*, 24 Tex. App. 77, 5 S. W. 527 [5 Am. St. Rep. 875]; *Dunagain v. State*, 38 Tex. Cr. R. 614, 44 S. W. 148; *Smith v. State*, 45 Tex. Cr. R. 520, 78 S. W. 519; *Scott v. State*, 52 Tex. Cr. R. 165, 105 S. W. 796; *Wells v. State*, 43 Tex. Cr. R. 451, 67 S. W. 1020; *Owens v. State*, 46 Tex. Cr. R. 16, 79 S. W. 575; *Hanna v. State*, 46 Tex. Cr. R. 8, 79 S. W. 544; *Ware v. State*, 49 Tex. Cr. R. 415, 92 S. W. 1093; *Skeen v. State*, 51 Tex. Cr. R. 40, 100 S. W. 770; *Quinn v. State*, 51 Tex. Cr. R. 166, 101 S. W. 248; *Shackleford v. State*, 27 S. W. 8; *Finley v. State*, 47 S. W. 1015; *Knight v. State*, 65 S. W. 89; *Gibson v. State*, 29 S. W. 471; *Kessinger v. State*, 71 S. W. 597; *Erwin v. State*, 32 Tex. Cr. R. 519, 24 S. W. 904; *Willford v. State*, 36 Tex. Cr. R. 425, 37 S. W. 761; *Ozark v. State*, 51 Tex. Cr. R. 108, 100 S. W. 927; *Gill v. State*, 36 Tex. Cr. R. 596, 38 S. W. 190; *Largin v. State*, 37 Tex. Cr. R. 574, 40 S. W. 250; *Thomas v. State*, 14 Tex. App. 72; *Dawson v. State*, 74 S. W. 912; *Goss v. State*, 57 Tex. Cr. R. 557, 124 S. W. 108."

Having attempted to refresh the witness' memory by exhibiting to her a copy of the statement she made at the coroner's inquest, and she having denied making such statement, it was error to permit the state to introduce the following portions of her statement made at the coroner's inquest:

"Willis Taylor was sitting down in the east room near the north window, and got up and went to the north window and said, 'Yonder they are [or go], Pa.' I don't remember which; I think he said, 'Yonder they are.' * * * He [J. B. Taylor] came here this morning afoot, and brought a double-barrel shotgun with him. This is the gun that was on the bed in the west room. * * * When J. B. Taylor and his son Willis left the room, I placed my hands over my ears to keep from hearing the gun."

It was also error to permit Justice of the Peace Gaines to testify to the same facts.

As Mrs. Frank Taylor is a daughter-in-law of appellant, and consequently likely to feel a deep interest in his trial, it may seem a harsh rule of law to the state that under such circumstances, she having testified to facts at the coroner's inquest which would have a strong tendency to show that Willis Taylor killed Gilley in accordance with a preconceived design of himself and appellant, and therefore was guilty of murder, and would have a strong tendency to show that appellant was a principal in the commission of the offense, he being present, yet the state cannot prove she did so testify at the coroner's inquest, although she on the trial declines to so testify; yet such is the law. If, in addition to testifying that she did not recollect so testifying, she had testified to facts affirmatively hurtful to the state, she could have been impeached, but it was simply an instance where a witness declined to testify to facts that she had once before testified to, and the state had a good right to believe she would testify on this trial. The witness insisted she had no recollection of whether or not J. B. Taylor brought a gun with him that morning; that she does not recollect Willis Taylor going to the north window and saying, "Yonder they come, Pa," just before the shooting, and that she had no recollection of putting her hands over her ears as they went out of the room to keep from hearing the shot. As before stated, at common law one could not impeach his own witness, and the Legislature has seen proper to modify this rule only to the extent that one may impeach his own witness when, to his surprise, he not only fails to testify as he expected, but instead thereof testifies to facts adversely to the interest of the person placing him on the witness stand.

[6] In a couple of other bills it is shown that after appellant had testified in his own behalf he placed witnesses on the stand who say they had known him for 30 years; that appellant had lived in Smith county that long, and his reputation during all that time was that of a peaceable, law-abiding citizen. On cross-examination state's counsel asked the witnesses if they had heard that appellant killed a man in Georgia before he came to Texas. The first witness answered, "No," before the court could rule on the objection that such circumstance was too remote to affect his reputation. The court,

however, sustained the objection when made. Notwithstanding the court did so, when the next witness took the stand, the prosecuting officer again propounded the same question, and before an objection could be made the witness answered, "Yes," and stated that he had also heard that before appellant came to Texas he was a member of the Jesse James gang of outlaws. This was improper, and such testimony was wholly inadmissible for any purpose, being too remote in time to affect his standing as a law-abiding citizen. If it was true that appellant had killed a man in Georgia more than 30 years ago, and at that time was a member of the Jesse James gang, yet if during the entire 30 years he has been a citizen of Smith county, Tex., his life and conduct has been that of a peaceable, law-abiding citizen, the remote circumstances should not, and will not be permitted to be, explored as affecting his standing as a citizen at this time.

[7, 8] These are all the bills in the record, except the objections to the charge as given, and the exceptions to the refusal to give a number of special charges requested. Appellant was found guilty of manslaughter only, and a number of exceptions would pass out, but we do not deem it necessary to detail the various objections raised, nor give the 17 special charges requested and refused, but rather state simply the law as applicable to the facts in this case. As appellant testified that before Willis Taylor fired the gun deceased drew a pistol, etc., the court should have given in charge the law of self-defense as to Willis Taylor both from apparent danger to himself and his father and the right to defend from danger viewed in the light of threats communicated, and told the jury, if Willis Taylor was justifiable, appellant would be guilty of no offense; and instructed them that, even though they found Willis Taylor was not justifiable in killing deceased, yet they would find appellant not guilty, unless they found beyond a reasonable doubt he was a principal in the commission of the offense, and should also have instructed the jury, that, even though appellant was present and aided Willis Taylor, or by his conduct, words or gestures encouraged Willis, to commit the offense, yet if at the time he did so it reasonably appeared to him that his life or that of his son Willis was in danger, and, acting under such belief, he did acts that might otherwise constitute him a principal, he would not be guilty; in other words, if Willis Taylor was justifiable, as viewed from his standpoint, appellant would not be guilty. If Willis Taylor was guilty, unless the jury found beyond a reasonable doubt appellant was a principal in the commission of the offense, he would not be guilty, or if he did acts that would constitute him a principal, yet in so doing, viewing the matter from appellant's

standpoint, it reasonably appeared to him that his life or the life of his son Willis was in danger, and this was the occasion of his doing such acts, he would not be guilty. The court's charge as given did not aptly and tersely state all these propositions of law, but we are satisfied it is only necessary to call the court's attention to them and he will do so on another trial.

There are some other verbal criticisms of the charge that we do not deem it necessary to discuss, but will only add that the court used inappropriate language in the following paragraph:

"If you shall find, or have a reasonable doubt thereof, that the defendant is guilty of some grade of homicide, and that he is not justified under the charge of self-defense, you will acquit him of murder, and find him guilty of no higher grade of offense than manslaughter."

Appellant contends that paragraph suggests to the jury to find appellant guilty of manslaughter, even though they may have a reasonable doubt of his guilt of such offense. A man who did not read the paragraph critically might be misled into such belief, but on another trial it cannot again arise as appellant has been acquitted of murder, but language of such doubtful construction should not be used in applying the law of reasonable doubt as between murder and manslaughter.

The judgment is reversed, and the cause remanded.

MITCHELL v. STATE. (No. 3612.)

(Court of Criminal Appeals of Texas. June 23, 1915. State's Rehearing Denied Oct. 18, 1915.)

1. HOMICIDE \S 47—MANSLAUGHTER—PROVOCATION.

To reduce a killing to manslaughter, and upon defendant's belief of adultery between his wife and deceased, the killing must take place at the first meeting of the parties after he has become aware of the facts.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 71; Dec. Dig. \S 47.]

2. CRIMINAL LAW \S 1159—REVIEW—QUESTIONS OF FACT.

The jury is the trier of facts, and an appellate court seldom feels authorized to reverse a criminal case solely on the ground of the insufficiency of the evidence, if the state's evidence is worthy of credit, and, if true, supports the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3074-3083; Dec. Dig. \S 1159.]

3. HOMICIDE \S 309—MANSLAUGHTER—INSTRUCTIONS—PROPER PROVOCATION.

In a prosecution for murder, where the evidence showed that the killing was occasioned by defendant's belief of adultery of his wife with deceased, and that defendant, though he had no knowledge of it, had information authorizing him to believe that it had occurred, that he had come in contact with deceased after having such information, and that when he observed the efforts of deceased to renew such relations he shot from the window of his house and killed deceased near his store, an instruction that, if defendant's wife and deceased had

been guilty of adultery before the killing, and that defendant had no knowledge thereof and no information from which he could believe such to be the case, the mere fact of adultery would not of itself reduce the killing to manslaughter, was erroneous, as not fairly presenting the issues made.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.]

4. HOMICIDE §309 — MANSLAUGHTER — INSTRUCTIONS—ADEQUATE CAUSE.

Adultery with the wife may reduce a homicide to manslaughter, and accused, relying on such defense, is entitled to an instruction to that effect.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.]

5. HOMICIDE §47—MANSLAUGHTER—PROVOCATION.

Adultery of defendant's wife with deceased need not be such as to cause offense to the wife, and where it is shown that she is equally at fault, yet, if the conduct is such as to be an outrage against the husband, adequate cause would exist reducing the homicide to manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 71; Dec. Dig. § 47.]

6. HOMICIDE §47 — PROVOCATION — MANSLAUGHTER.

Where defendant had reason to believe that his wife had committed adultery with deceased, and that the latter was then endeavoring to have such relations renewed, and it rendered his mind incapable of cool reflection, he would be guilty only of manslaughter on killing deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 71; Dec. Dig. § 47.]

7. WITNESSES §269—CROSS-EXAMINATION—SCOPE.

Where defendant claimed provocation arising from the adultery of his wife with the deceased, and the wife at the trial admitted such relations, the state on her cross-examination could prove her statements to the county attorney immediately after the homicide that she and deceased had been guilty of no misconduct, but could not elicit from her that defendant kept his gun downstairs and slept there, where he shot deceased from an upstairs window, as tending to show preconceived killing, as not proper cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.]

Appeal from District Court, Ellis County; F. L. Hawkins, Judge.

J. C. Mitchell was convicted of murder, and he appeals. Reversed and remanded.

Farrar & McRae, of Waxahachie, for appellant. Tom Whipple, Co. Atty., of Waxahachie, and C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER J. Appellant was convicted of murder, and his punishment assessed at ten years' confinement in the state penitentiary.

[1] Appellant insists that the evidence in this case would only support a verdict for manslaughter, and the court erred in submitting the issue of murder. In this we think he is in error, for, although it is apparent from the whole record that appellant killed deceased because of his belief that im-

proper relations existed between deceased and his wife, it is the law of this state that in order to reduce a killing to manslaughter, when this ground is relied on, the killing must take place at the first meeting of the parties after he has become aware of the facts. The state's theory is that, although the record discloses that perhaps the reason why appellant killed deceased was his belief that improper relations existed between him and his wife, yet he had met deceased on several occasions after he came to such conclusion, and on the occasion in question appellant went upstairs in his residence, waited until deceased came out of his store, and shot deceased from ambush when he was doing nothing more than standing talking to a friend. If this is true, the appellant would be guilty of murder, and we would not disturb the verdict on the ground of the insufficiency of the evidence. It is true, if we accept the defendant's theory of the case, and he has some evidence to support it, it would be, as said by appellant's counsel, a typical manslaughter case.

[2] But the jury is the trier of facts under our system of jurisprudence, and it is seldom an appellate court feels authorized to reverse a case solely on the ground of the insufficiency of the evidence, no matter what the court's individual opinion of the evidence might be, if the state's evidence is worthy of credit, and, if true, will support the verdict rendered.

[3] The most serious question is, and virtually the only question as made by the record: Did the court properly submit the law of manslaughter as applicable to the evidence adduced on this trial? No other theory or idea can be gathered from the reading of this record other than that appellant killed deceased because of his belief that improper relations existed between deceased and his (appellant's) wife. It would be a different question, though he believed this, as to whether the killing would occur under circumstances which would reduce the offense to manslaughter. One cannot meet the wrongdoer frequently, and, while brooding over his wrongs, deliberately determine to slay him, and then kill him from ambush and hope to have the offense reduced to manslaughter. Under such circumstances it would be a premeditated killing, and not a killing from an impulse of the character defined by the manslaughter statute created by the wrong done or sight of the wrongdoer. We say that there can be no doubt that the killing was occasioned by the belief of appellant that deceased and appellant's wife were guilty of improper relations, because the record suggests no other thought or motive, and the state's witnesses themselves testify to such a state of facts as, we think, shows this beyond a shadow of a doubt. Mr. Odom, a state's witness, says that appellant came to him to borrow money

to send his wife away, and he loaned it to him for that purpose. He says:

"Defendant told me that his wife and Sparks were, he thought, too thick, and he had just kept for some time from killing the man, and could not stand it any longer if he could not get shed of the woman, and asked me if I would loan him the money. I told him if it was agreeable for all parties and would save trouble I would."

After the loan was made appellant gave the money to his wife, and she left. Mr. Odom says that appellant talked to him twice, and he seemed greatly troubled about the conduct of his wife and deceased. He and all other witnesses for the state, who lived in the community, show that the conduct of deceased and appellant's wife was a matter of common talk; that, while no one knew that any act of intercourse had occurred, yet her frequent visits to the store and their conduct towards each other, had caused in the community generally an impression that everything was not exactly right. Appellant sent his wife away, but she went only to Dallas. Two days thereafter deceased also went to Dallas, and the evidence would show to a moral certainty that deceased and appellant's wife were in the same room in a hotel in Dallas. The testimony of the hotel clerk and Mrs. Brown, housekeeper of the hotel, show this, and Mrs. Brown made them leave the hotel. Appellant's wife now admits that she and deceased occupied the same room in the hotel, and there had carnal intercourse; that she went home with deceased (his wife being absent) and spent the night with him. It is true appellant was not apprised of this as a fact until after he killed deceased. After this appellant's wife came back home. Appellant insisted on her leaving, telling her that she would disgrace their children by her course of conduct with deceased. It is not a case where appellant is alone shown to have had that opinion, but all the witnesses from that community who testify show that such was the common rumor. A state's witness, Mr. Dillehay, who stayed at deceased's store while he was gone to Dallas, went to appellant and explained to him he would not have stayed at the store for deceased if he had known he was going to Dallas, where appellant's wife was staying; that deceased misled him, and led him to believe he was only going to Waxahachie. This in and of itself was enough to let appellant know that his neighbors held the same opinion which he held. Appellant says that after his wife came home from Dallas, and insisted on staying over his protest, he finally agreed that she could do so if she would not go to deceased's store again, and have no further communication with him. Appellant then says that a few days after his wife's return to her home he saw deceased making signs to her and waving a handkerchief at her. The testimony of the state's witness Odom shows that deceased at this time knew how appellant was viewing

the matter. Appellant and his wife had words over this incident. Appellant says he went on with his farming until the day of the homicide, when he says, not feeling well, he was lying down upstairs, and upon looking out the window saw deceased again making signs, as he thought, to his wife, when he grabbed his gun and shot.

The court instructed the jury:

"If you believe from the evidence that defendant's wife and the deceased had been guilty of carnal intercourse with each other prior to the killing, and you further believe from the evidence, beyond a reasonable doubt, that the defendant had no knowledge thereof, and no information from which he could reasonably believe such to be the case, then you are instructed that the mere fact of defendant's wife and the deceased having had carnal connection with each other would not of itself reduce the killing to manslaughter.

Appellant filed written objections to this paragraph of the charge, and we think the objections well taken. It is an incorrect proposition of law as applicable to the evidence in this case. It is true that there is no positive testimony that appellant knew that an act or acts of intercourse had taken place, yet the record is replete with evidence that he knew of facts and circumstances and had information that would authorize him to believe, and he did believe, that improper relations existed, and that they were guilty of improper conduct. There is nothing in evidence to base a finding that appellant "had no information from which he could reasonably believe such to be the case." The record, and the entire record, shows that appellant was in possession of information that led him to believe, and he did believe, that improper relations existed, and the killing took place because of such belief; and in this instance we think the record discloses that his belief was well founded. This paragraph instructed a conviction for a higher grade of offense than manslaughter on grounds unauthorized by law under the evidence. As we view this record, there is but one ground that would authorize a conviction for a higher grade of offense than manslaughter, and that is that appellant did not slay deceased at the first meeting; for while appellant had this information the record shows he had come in contact with deceased since receiving such information, and, unless at the time of the homicide deceased did the acts appellant contends he did do, and from such conduct appellant was led to believe that deceased was endeavoring to get his wife to renew such relations, then a jury would be authorized to find him guilty of murder. On this issue the state has evidence that appellant's contention is not correct, but the issue should be fairly presented in the charge that, if deceased made the signs appellant contends he did, and this conduct, viewed in the light of the information appellant had received prior to that time, led appellant to believe it was an effort on the part of deceased to induce appellant's wife to renew the

relations, and this conduct raised such degree of anger, rage, or resentment as to render his mind incapable of cool reflection, he would only be guilty of manslaughter.

[4] Adultery with the wife is declared by the statute to be adequate cause, and the court should have so instructed the jury, and he erred in refusing to do so at appellant's request. The court, in defining "adequate cause," instructed the jury:

"You are charged that insulting conduct of the person killed towards the wife of the party doing the killing is adequate cause; provided the killing occurs immediately upon the happening of the insulting conduct or so soon thereafter as the party killing may meet with the party killed after having learned of such insulting conduct."

[5] Appellant introduced testimony tending strongly to show that deceased and his wife had been guilty of adultery, if it did not conclusively show that fact; yet the evidence and all the evidence would tend to show that this was with the connivance and consent of his wife. As said in *Garrett v. State*, 30 Tex. Cr. R. 230, 36 S. W. 454, the conduct need not be such as to cause offense to the female herself, and in a case like this, where it is shown that the wife is equally at fault with the deceased, it ought to be made clear to the jury in the charge that, even though the wife takes no offense, and the conduct is no offense to her, yet, if the conduct is such as to be an insult and outrage against the husband, adequate cause would exist.

[6] Appellant testifies to a course of conduct continuing from April until the homicide, at one time appellant becoming so incensed at the conduct of deceased and his wife as to cause him to force his wife to leave home, and when she returned, although she agreed to cease all relations with the deceased, yet, if what appellant says is true, he witnessed deceased attempting on two occasions to induce her to renew such relations, the last time being when he killed him; and if appellant believed their conduct had been improper, and he had condoned the past, yet if he was caused to believe, and in fact did believe, that deceased was endeavoring at the time he shot to have the relations renewed, this would be such insult to him, if it caused anger or resentment, as would reduce the offense to manslaughter. Even though deceased had not attempted to renew the relations, the matter would be real to him if he so believed from the acts of deceased, and the charge should be so framed as to so inform the jury. *Jones v. State*, 33 Tex. Cr. R. 492, 26 S. W. 1082, 47 Am. St. Rep. 46; *Messer v. State*, 43 Tex. Cr. R. 97, 63 S. W. 643; *Canister v. State*, 46 Tex. Cr. R. 223, 79 S. W. 24; *Bays v. State*, 50 Tex. Cr. R. 551, 99 S. W. 561; *Gillespie v. State*, 53 Tex. Cr. R. 168, 109 S. W. 158. In *Miles v. State*, 18 Tex. App. 168, the court discusses the principles underlying this character of case, and without quoting therefrom we respectfully refer thereto.

Without taking up each paragraph of the charge on manslaughter and the objections urged thereto, we simply say that appellant is correct in his contention that it does not present the law as applicable to the facts of this case.

An act of adultery is shown, and yet the court does not tell the jury that this, in law, is adequate cause. It may be the court did not do so because appellant does not testify that he knew the act had occurred, but appellant says that after Dillehay had told him about deceased going to Dallas as soon as his wife had gone there he believed it as firmly as if he had been present and witnessed it; and, while he may be said to have condoned the act by agreeing to continue to live with her, yet, if the deceased subsequently did acts which led him to believe, and he did believe, that deceased was endeavoring to have the relations renewed, and he killed him while he was engaged in such an act, the adequate cause of the adulterous act would become a part and parcel of the act when deceased was attempting to have the relations renewed. As said before, there is but one theory upon which the state would be entitled to a verdict for a graver offense than manslaughter, and that is that appellant had come in contact with deceased since the adulterous conduct, and he did not act at that time, and deceased at the time he was slain was not engaged in conduct which would lead appellant to believe that he was then endeavoring to renew such relations with his wife. The case was not presented to the jury from this standpoint, but a jury under the charge was authorized to convict of murder, even though they might have believed that it thus appeared to appellant. The court should tell the jury that adultery with the wife is adequate cause, and, if appellant did not know of the adulterous relations, yet the conduct of the parties was such as to lead him to believe that such relations existed, and deceased was endeavoring at the time to have the relations renewed, or it so appeared to defendant, and this rendered the mind of appellant incapable of cool reflection, he would be guilty of only manslaughter. As appellant was found guilty of murder and given ten years in the penitentiary, and the law of manslaughter was not correctly applied to the facts in the case, this will necessitate a reversal of the judgment; and, as the case will be reversed, we will call attention to another matter.

[7] As the wife of appellant was introduced as a witness, and she admitted the adulterous relations, the state on cross-examination was and should have been permitted to prove her statements to the county attorney immediately after the homicide, when she told him that she and the deceased had been guilty of no improper conduct. This was legitimate cross-examination. But the state ought not to have been permitted to

elicit from her that appellant kept his gun downstairs and slept downstairs. The shot was fired from an upstairs window, and this evidence tended strongly to support the state's theory of a preconceived killing or murder; that the appellant had taken his gun from where it usually stayed and gone upstairs with it and there remained in ambush until deceased appeared in front of his store. This was material testimony adduced by the state from the wife and in support of its theory. This was improper, as the defendant in his examination of his wife had limited it solely to her relations with deceased. Appellant objected to all the cross-examination, and any part of it being admissible. We might not feel authorized to reverse the case because of this improperly admitted testimony, as the exception should have pointed out the inadmissible or objectionable part of the testimony. On another trial, however, if objection is made to this portion of her testimony, and appellant's direct examination embraces no more than it did on this trial, such objection should be sustained, for the state cannot prove a material fact by the wife because she has been called to testify by the defendant on an entirely different branch of the case.

The judgment is reversed, and the cause remanded.

DENMAN v. STATE. (No. 3621.)

(Court of Criminal Appeals of Texas. June 16, 1915. Rehearing Denied Oct. 13, 1915.)

1. CRIMINAL LAW — 507—PROSTITUTION — 1—SOLICITATION OF FEMALE—ELEMENTS OF OFFENSE—STATUTE—"ACCOMPLICE."

Under Pen. Code 1911, art. 498, providing that it shall be unlawful to invite, solicit, procure, or use any means for the purpose of alluring or procuring any female to have unlawful sexual intercourse, the mere solicitation completes the offense, and the fact that the female solicited at once consents, without persuasion, does not render her an "accomplice," making requisite corroboration of her testimony for a conviction based solely thereon of the person soliciting.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096; Dec. Dig. — 507; Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. — 1.

For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

2. PROSTITUTION — 4—SOLICITATION—SUFFICIENCY OF EVIDENCE.

In a prosecution for soliciting and procuring a female to meet and have unlawful sexual intercourse with a male person an offense denounced by Pen. Code 1911, art. 498, evidence held sufficient to support a conviction.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. — 4.]

Appeal from Harris County Court, at Law; C. C. Wren, Judge.

Bill Denman was convicted of crime, and she appeals. Affirmed.

Heldingsfelders, of Houston, for appellant. John H. Crooker, Crim. Dist. Atty., and E. T. Branch, both of Houston, and C. O. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was tried by the court without a jury and adjudged guilty of soliciting and procuring a female, Margaret Clayton, to meet and have unlawful intercourse with a male person. The court adjudged him guilty and assessed his punishment at one month's imprisonment in the county jail, and a fine of \$50.

The only question raised that need be discussed is: Do the facts sustain the judgment of the court? The state introduced but one witness, Margaret Clayton, and her testimony makes a case against appellant. The only question is, is she an accomplice to the crime, for, if she is, her testimony is not corroborated in any essential particular. In fact, appellant by his testimony denies that he under any circumstances induced or procured Margaret Clayton to meet any man. The facts in this case are different from the facts in the companion case against appellant, in which he was charged with soliciting and procuring Grace Johnston to meet men for the purpose named, and in the case wherein Joe Dooms is charged with procuring Grace Johnston to meet men, in this: In those two cases Grace Johnston testifies she approached appellant and Dooms and solicited and requested them to make dates for her under an agreement by which Grace Johnston would pay them for so doing. In this case Margaret Clayton testifies she did not approach appellant and solicit him to make dates; but, when she went to the Capitol Hotel and secured a room, appellant approached her, and asked "if there was anything doing," and upon her telling him, yes, it would be all right, he proceeded to make dates with men, and would come and carry her to the rooms of the men, or would give her the number of the room and she would go.

[1, 2] It is thus seen that in this case the woman did not instigate the crime; she was not the procuring cause; but appellant of his own motion, with the intent to commit the crime, if it was agreeable with the woman, approached her. If an act of intercourse was essential to a completion of the offense, it might well be contended that, even under such circumstances, she would be such a party to the crime as to require that her testimony be corroborated before a conviction was authorized. But the statute makes it an offense to "solicit and procure," even though an act of intercourse should not occur, if intervening causes should prevent the sexual intercourse. For, if appellant should solicit a woman to go with him to any place to meet a man for the purpose of engaging in carnal intercourse, he would be guilty even though the woman refused, and the fact that she consents does not make her an accom-

plice, for his offense was complete when he made the solicitation. The Code provides (article 498) it shall be unlawful to invite, solicit, procure, or use any means for the purpose of alluring or procuring any female to meet a man for the purpose of having sexual intercourse with him. Margaret Clayton testified:

"I know the defendant, Bill Denman, who occupies the position of porter and bell boy at the Capitol hotel. He was a negro porter at said hotel at the time stated. On or about the 9th of January, 1915, I did go with Bill Denman, defendant, from the place or room in which I was stopping, to another part or room there in the Capitol hotel, Houston, Harris county, Tex., for the purpose of having unlawful sexual intercourse with a man. Bill Denman had a conversation with me, which caused me to go to some other place or room in said hotel. He asked me if there was anything doing, and I told him yes, by which I meant that I would fill dates with men up there; that is, that I would meet them and have unlawful sexual intercourse with a man, not my husband. The part that defendant had with it was that he would come to my room and tell me where to go, tell me the number of the room to go to."

On cross-examination she testified:

"The defendant knew I would make dates because he asked me 'if there was anything doing,' and I told him, 'Yes.' The defendant asked me if I would meet men. I did not ask him first; never had seen him before. He just asked me, 'Anything doing?' and I told him, 'Yes.'"

It is thus seen she was not the instigator in this instance, not the procuring cause for the crime to be committed, and the evidence does not bring this case within the rule announced in the companion case and the case against Joe Dooms.

The evidence not showing that she was an accomplice to the crime of soliciting and procuring, her unsupported testimony will support a conviction, and the judgment is affirmed.

MARTIN v. STATE. (No. 3539.)

(Court of Criminal Appeals of Texas. June 9, 1915. Rehearing Denied Oct. 13, 1915. Dissenting Opinion, Oct. 14, 1915.)

1. CRIMINAL LAW §1092, 1099 — APPEAL AND ERROR — PROCEEDINGS FOR TRANSFER — LIMITATION OF TIME.

Statement of facts and bills of exceptions on an appeal from a conviction of slander, approved and filed about 75 days after the term of court at which accused was tried had adjourned, cannot be considered.

[Ed. Note.—For other cases, see Criminal Law. Cent. Dig. §§ 2803, 2829, 2834-2861, 2866-2880, 2919; Dec. Dig. §1092, 1099.]

2. LIBEL AND SLANDER §152 — CRIMINAL RESPONSIBILITY — INFORMATION — SUFFICIENCY.

An information for slander, based on an imputation of unchastity, which avers that "he, the said J. M., did then and there * * * say of and concerning the said E. S. in substance and effect the following," and then states what accused said, using the third person "he," is not defective as merely alleging what accused said or imported, without setting forth the language used, in view of Pen. Code, art. 10, requiring words to be taken and construed in their ordinary sense, Code Cr. Proc. art. 452, making it un-

necessary to plead that which need not be proved, article 453, providing that the certainty required in an indictment is such as will enable the accused to plead the judgment, in bar of any prosecution for the same offense, article 460, providing that an indictment shall be deemed sufficient which charges the offense so a person of common understanding may know what is meant, and article 25, providing that Code provisions shall be liberally construed.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 417, 419-424, 426, 427; Dec. Dig. §152.]

Davidson, J., dissenting.

Appeal from Hamilton County Court; J. L. Lewis, Judge.

Joe Martin was convicted of slander, and he appeals. Affirmed.

Langford & Chesley, of Hamilton, and Ramsey, Black & Ramsey, of Austin, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of slander and assessed the lowest punishment.

[1] The statement of facts and bills of exceptions were approved and filed about 75 days after the term of court at which he was tried had adjourned. Hence they cannot be considered.

The only question we can review is the sufficiency of the pleading. The prosecution was had upon a complaint and information, the latter following the former and based thereon.

After the necessary usual allegations in the first and closing parts, the information avers that on July 1, 1914:

"One Joe Martin did then and there orally, falsely and maliciously, and falsely and wantonly, impute to one Elner Stephens, then and there an unmarried female in this state, a want of chastity, in this, to wit: He, the said Joe Martin, did then and there, in the presence and hearing of G. D. Smith, falsely, maliciously and wantonly say of and concerning the said Elner Stephens, in substance and effect the following: That Elner Stephens was all out of shape and that John Robison had left the country. That old man Stephens had written him, Robison, a note that he, Robison, would have to marry her or take a load of shot. That he, Joe Martin, had told him, Robison, that there was no use of his going because it could be proved that others had been there besides him, Robison. The said Joe Martin meaning by the expression that 'Elner Stephens was all out of shape' that the said Elner Stephens was pregnant; and meaning by the expression 'that others had been there' that other persons had been having carnal intercourse with the said Elner Stephens."

Appellant made a motion to quash it on several grounds. We will discuss only his first. None of the others present any sufficient cause to quash, or to require any discussion.

[2] His first ground is:

"Because the information does not purport to set out the language claimed to have been used by the defendant, but only purports to set out the substance and effect of same, whereas, under the law the exact language should be set out,

the substance thereof proven by the state, and the effect thereof left to the court and jury."

His able and eminent attorneys in their brief now say:

"We concede as well settled the rule many times declared by this court that in a slander case it is essential that the information or indictment set forth substantially the language which constitutes the imputation of a want of chastity. See *Conlee v. State*, 14 Tex. App. 222; *Frisby v. State*, 26 Tex. App. 180 [9 S. W. 463]. We do not contend that it is necessary to set out the language exactly or literally. * * * This court has declared in the above-cited cases, as well as in others, that it is necessary only to set out substantially the language relied upon."

There can be no question but that our law is as stated. So that it is unnecessary to cite the other cases to that effect, or discuss that question at all.

Appellant in his brief further says:

"The question here involved is whether or not this rule (that it is necessary only to set out substantially the language, 'it is not necessary to set out the language exactly or literally') permits the pleader to state what on the face of the information purports to be merely the substance and effect of what was stated," his contention being that said conceded rule "does not mean that he (the pleader) may set out merely the meaning or import of the words said."

His contention might be conceded and yet in no way result in the information being held bad, for it does not aver "merely the meaning or import" of the words said, but instead it avers that "he, the said Joe Martin, did then and there say, in substance and effect, the following," then gives what he said, using the third person, "he," and, not the first person, "I." In other words, appellant would have us hold that when it is alleged that appellant said "in substance and effect" the following, then states what he said, is the same as alleging that appellant "meant or imported" the following, then states what he meant or imported merely, and not what he said. This we cannot do. Averring that he "in substance and effect" said or did say, is by no means the same, as by what it is averred he said he "merely meant or imported," a certain result or effect of his language uttered. In our opinion the averment is radically different from what appellant contends it should be held to be, and to hold as he contends, we think, would do violence to the language used.

As we further understand appellant's contention, it is, if the pleading had left off the word "effect," and averred he (Joe Martin) did, etc., say "in substance" the following, then the pleading would have been good. In our opinion, averring he did say "in substance and effect," ought not, and cannot reasonably, be held to mean that what is then averred he said is "merely the meaning or import" of the language actually used.

Neither the case of *Barnett v. State*, 35 Tex. Cr. R. 280, 33 S. W. 340, nor *Simer v. State*, 62 Tex. Cr. R. 514, 138 S. W. 388, mentioned by appellant, have any application to the question herein. Neither of those cases

discussed or decided any question of pleading. No such question was raised therein. But in each of them was discussed a variance between the allegation and the proof, and decided only that question.

Our statute (P. C. art. 10) is:

"Words which have their meaning specially defined shall be understood in that sense, though it be contrary to their usual meaning; and all words used in this Code, except where a word, term or phrase is specially defined, are to be taken and construed in the sense in which they are understood in common language, taking into consideration the context and subject-matter relative to which they are employed."

This but prescribes a rule for the construction of the Code, which is equally, and practically universally, applicable to "a word, term or phrase" used in a pleading or other writing. Taking into consideration the context and subject-matter of the whole of the pleading herein, we think there can be no question but that the phrase that "said Joe Martin did then and there * * * say of and concerning the said Elmer Stephens, in substance and effect the following," could not otherwise be "understood in common language" than what it is then alleged he said, was substantially what he did say, instead of "merely what he meant or imported."

Besides, we have other statutory provisions as to what allegations are necessary to constitute a good pleading: "* * * That which is not necessary to prove need not be stated" in a pleading. C. C. P. art. 452. It was unnecessary to allege the language exactly or literally, but sufficient to allege it substantially only. If it had been alleged literally, it would have been sufficient to have proved it substantially only.

Article 453, C. C. P., says:

"The certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it, in bar of any prosecution for the same offense."

Article 460 is:

"An indictment for any offense against the penal laws of this state shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment."

"The provisions of this Code shall be liberally construed, so as to attain the objects intended by the Legislature: The prevention, suppression and punishment of crime." Article 25, C. C. P.

Appellant truly says, "It is not necessary to set out the language exactly or literally—it is necessary only to set out substantially the language." And that, and that only, was what was done in said information. The information was good and valid.

The judgment is affirmed.

DAVIDSON, J. (dissenting). The charging part of the information is as follows:

"One Joe Martin did then and there orally, falsely and maliciously, and falsely and wantonly

ly impute to one Elner Stephens, then and there an unmarried female in this state, a want of chastity, in this, to wit: He, the said Joe Martin, did then and there, in the presence and hearing of G. D. Smith, falsely, maliciously and wantonly say of and concerning the said Elner Stephens, in substance and effect the following: That Elner Stephens was all out of shape and that John Robison had left the country. That old man Stephens had written him, Robison, a note that he, Robison, would have to marry her or take a load of shot. That he, Joe Martin, had told him, Robison, that there was no use of his going because it could be proved that others had been there besides him, Robison."

Outside of the innuendo matters, this is the charging part of the information.

The attack is made in various ways upon this information, the substance of which is it does not sufficiently charge a violation of the slander statute. The contention is, in order to charge the offense of oral slander the words used in the imputation of slander must be set out, and, if this cannot be done verbatim or exactly, then the words must be substantially set out. The tendency not only of the decisions, but all of the text-writers, has been to hold and lay down the rule that the language used in imputation of slander must be set out as used. This rule has been varied slightly to the extent that, where the words cannot be reproduced, they may be substantially stated. This has been the rule in Texas. The authorities are numerous and might here be mentioned, but Mr. Branch has collated the cases in his valuable work on Criminal Law, in section 602, and following sections, except those cases which have been decided since the publication of his work. The case of *Barnett v. State*, 35 Tex. Cr. R. 280, 33 S. W. 340, might be referred to as one of the leading cases and one of the best-considered cases. It was written by Judge Hurt when he was presiding judge of this court. The *Barnett Case* was reviewed in rather an exhaustive opinion by Judge Harper in *Simer v. State*, 62 Tex. Cr. R. 514, 138 S. W. 388, and approved. See, also, *Neely v. State*, 32 Tex. Cr. R. 371, 23 S. W. 798. Where a rule has been well settled, followed, and acquiesced in by the bench and bar, citation of numerous authorities are not necessary, nor would it be advisable to alter or change those decisions. Now, upon the face of this information it is clear that the language was not set out, nor attempted to be set out either exactly or in substance. The language in charging says "in substance and effect." The effect of the language is not sufficient. The effect of the imputation is the thing to be decided. It may or may not impute a want of chastity. The imputation must be found in the language itself. Sometimes when the words used are obscure, innuendo or explanatory averments may assist the pleader, but the words must be set out at least substantially, and not the effect of the substance of the words. The

information does not sufficiently charge slander, and must be held defective.

The other questions are not discussed.

The judgment ought to be reversed, and the prosecution ordered dismissed. This was written as the original opinion in this case, but the majority, not agreeing to it, took the case and wrote an affirmance.

CHAMBERS et al. v. ROBISON, General Land Office Com'r et al. (No. 2745.) (Supreme Court of Texas. Oct. 13, 1915.)

PUBLIC LANDS. \S 173—SALES—FORFEITURE.

Under Rev. St. 1911, art. 5423, providing that if interest due on an obligation for purchase of public land remains unpaid the land commissioner shall indorse on the obligation, "Land forfeited," and cause an entry to that effect to be indorsed on the account kept with the purchaser, and "thereupon" said land shall "thereby" be forfeited, indorsement on the obligation, without the entry on the account, is insufficient for a forfeiture.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. \S 544-551; Dec. Dig. \S 173.]

Original mandamus proceedings by Mrs. Lillian Chambers and others against J. T. Robison, Commissioner of the General Land Office, and others. Writ granted.

Ramsey, Black & Ramsey, of Austin, and Tatum & Tatum, of Dalhart, for relators. B. F. Looney, Atty. Gen., and G. B. Smedley, Asst. Atty. Gen., for respondents. Geo. P. Harris, pro se.

PHILLIPS, O. J. The case concerns a forfeiture by the Commissioner of the General Land Office of the sale of four sections of public school land. The validity of the forfeiture is the only question presented for decision.

The land was originally awarded and sold to J. M. Patterson. It was conveyed by him to B. H. Park, the former husband of Mrs. Chambers and the father of the other relators, who became the substitute purchaser in accordance with the law. Park died intestate in 1906. The sale preserved its good standing until November 1, 1913, when default was made in the payment of the annual interest due upon Park's obligations to the state. Because of this default, the commissioner on August 4, 1914, duly indorsed on the obligations of Park on file in his office the words, "Land forfeited," and placed the land upon the market for resale. It was resold to the co-respondent, George P. Harris, August 10, 1914, upon his application to purchase. On August 12, 1914, the relators made written request for the reinstatement of their claims, paying into the treasury the full amount of the interest then due, for which the official receipt of the commissioner was given. At no time prior to August 12, 1914, did the commissioner cause an entry of the forfeiture to be made on the account in his office kept with the purchaser, Park.

As to one of the sections, such an entry had never been made. On the accounts for the other three sections, it was made, but some days after the sale of the land to Harris and the filing of the relators' request for reinstatement.

This proceeding has for its purpose the reinstatement of the purchase of the land by Park upon the records of the Land Office, and the cancellation of its sale to Harris. If the forfeiture was invalid, the relators are entitled to the writ of mandamus for which they pray, since, in that event, the land stood unforfeited, in law, at the time of the transaction with Harris and the filing of the request for reinstatement; and, no rights of third parties having intervened, the relators were entitled to have their claims reinstated upon the official records upon the filing of their written request to that effect and their payment into the treasury of the full amount of the accrued interest. Article 5423, Revised Statutes 1911.

The provision of the law governing such forfeiture on account of default in the payment of interest is that found in article 5423, and is in the following language:

"If upon the first day of November of any year any portion of the interest due on any obligation remains unpaid, the Commissioner of the General Land Office shall indorse on such obligation, 'Land forfeited,' and shall cause an entry to that effect to be made on the account kept with the purchaser; and thereupon said land shall thereby be forfeited to the state without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this chapter, or any future laws."

That a forfeiture does not accrue under the statute except as the result of the performance by the commissioner of the acts enjoined is plain. Upon the default he is required to make the indorsement, "Land forfeited," upon the purchaser's obligation, and, in addition, there is enjoined as his duty the causing of an entry to that effect to be made on the account kept with the purchaser. "Thereupon" the land becomes "thereby" forfeited to the state, which means, of course, that it does not become forfeited until these things are done. While a strict compliance with the law in respect to the facts upon which the forfeiture proceeds is required, the rule of decision is that an exact and literal compliance with these provisions relating to the indorsement and entry is not necessary. A substantial compliance with them will suffice to effect the forfeiture. *Brightman v. Comanche County*, 94 Tex. 599, 63 S. W. 857; *Hoefer v. Robison*, 104 Tex. 159, 135 S. W. 371. The question here is whether, making the indorsement of forfeiture upon the obligation, alone, amounts to a substantial compliance.

Where a statute clearly provides that two distinct acts of this nature, which, though of the same general character, have to do with distinct and different official records,

shall be performed as a condition for the accrual of a forfeiture, it is difficult to find any stable ground for holding that the performance of one of them is a substantial observance of the dual requirement. There could be no warrant for thus ignoring a plain provision of the statute unless it be true that the act performed clearly accomplishes all that could have been reasonably intended by the other requirement. This, in its result, would mean that the requirement ignored was no essential part of the law, and in its administration could be dispensed with as surplusage.

Both the indorsement upon the obligation of the purchaser and the entry on his account are required by the statute only as authentic evidence of the forfeiture. But, while this is true, the statute is clear in its declaration that a forfeiture does not accrue until it is thus evidenced. It should be assumed that the Legislature had a purpose in extending the requirement as to the method of evidencing the forfeiture beyond the mere indorsement upon the purchaser's obligation. It is evident that that was not deemed a sufficient authentication of the forfeiture. For that reason the additional requirement that an entry to the same effect shall be made on the account was imposed. It was intended, in other words, that the forfeiture should in this manner be doubly evidenced, for the purpose of greater certainty and affording a more permanent and enduring record. We are not at liberty to construe out of the statute a provision which it is manifest was written into it to accomplish a distinct legislative purpose, and which it is clear was regarded as necessary to completely effectuate that purpose. The statute is not substantially complied with where only one of the requirements is observed. A substantial compliance with both of them is necessary.

To sustain the contention that the indorsement in this case upon the obligation amounted to a substantial observance of both requirements of the statute, the respondents rely upon the cases of *Brightman v. Comanche County* and *Hoefer v. Robison*, supra. Neither of these cases sustain the position. In the former the purchaser's obligation was not in the Land Office at the time of the declaration of the forfeiture, and under the condition of the law at that time was not required to be kept there. It was in the treasurer's office, its lawful custodian; and it was impossible therefore for the commissioner to make the indorsement upon it. The application, affidavit, field notes, and receipts of the treasurer, were archives of his office, and were in his custody, contained in the file wrapper pertaining to the purchase. In lieu of making the indorsement upon the obligation, the commissioner, under this condition, made the indorsement upon the file wrapper. It was held that this was

the only method available to him of complying with the requirement that the indorsement of the forfeiture should be made upon the obligation, and, since due entry of the forfeiture was made upon the purchaser's account, the entry upon the account and such indorsement upon the file wrapper constituted a substantial compliance with the law. In the latter case, it was held that the entry of the forfeiture upon the purchaser's account and an indorsement of forfeiture upon the file wrapper, which then contained the purchaser's obligation, was likewise a substantial compliance with the requirements of the statute. In neither of these decisions is it intimated that the observance of merely one of the requirements amounts to a substantial compliance with both of them. As noted, in both cases due entry of the forfeiture was made on the purchaser's account. Had this alone been deemed a substantial observance of both requirements, there would have been no need of discussing or giving any effect to the indorsement upon the file wrapper. Instead, the court gave substantial effect to that indorsement, holding, as stated, that such indorsement, under the facts of the cases, together with the entry upon the account, substantially met the requirements of the statute. In *Brightman v. Comanche County* decision of the question, whether entry of the forfeiture on the account alone would be sufficient where, as was the condition in that case, the obligation was not in the Land Office, was expressly pretermitted.

Adams v. Terrell, 101 Tex. 381, 107 S. W. 537, involved a forfeiture by the commissioner for failure to reside upon the land as required by the law. The question presented was whether such failure had the effect, in itself, of constituting a forfeiture, or whether, upon such failure, a declaration of the forfeiture by the commissioner was necessary. The act of 1895 provided that, in the event of the failure by the purchaser to reside upon and improve the land as required by law, he should forfeit it to the state "in the same manner as for the nonpayment of interest." The act of 1901 provided that, in the event of such failure, the purchaser should forfeit the land to the state "to the same extent as for nonpayment of interest." The court construed these provisions as requiring, for the accrual of a forfeiture, on account of nonoccupancy, the same character of declaration of the forfeiture as for the nonpayment of interest; that is, as found in the provision of article 5423, R. S. 1911, quoted in this opinion. And in applying that provision it is evident from the opinion that observance of the requirement that the entry be made upon the account was regarded as essential in order for a forfeiture to accrue for the nonpayment of interest. This language was made use of:

"Does any reason suggest itself why it should be necessary to a forfeiture of nonpayment of interest that the commissioner should enter it on the account, and why a like method should not be adopted in case of a forfeiture for non-occupancy? None presents itself to our minds. On the contrary, it would seem, since the accounts with the purchaser are kept in the Land Office, and since they will necessarily show the fact in case the interest is not paid, there is less reason for declaring the forfeiture in that case, than in case of nonoccupancy, where there is no public record to show the fact."

A usage in the Land Office, long pursued, of declaring forfeitures for nonpayment of interest by simply making the indorsement on the purchaser's obligation, to which our attention has been directed by the respondents, would be persuasive if the construction of the statute were doubtful. But we regard its provisions as plain.

LOWRY v. SOUTHERN RY. CO.

(Supreme Court of Tennessee. Oct. 9, 1915.)

MASTER AND SERVANT \S 258 — ACTION FOR INJURY—SUFFICIENCY OF DECLARATION.

In an action for the death of plaintiff's intestate while in the defendant's employ as a yard inspector, the declaration averred that it was customary for employes in defendant's yard to go under cars on the track during showers; that there was a rule under the federal and state law and of the Interstate Commerce Commission, adopted by defendant, that before a standing car would be moved in the yard notice would be given; that defendant and deceased were engaged in interstate commerce; that while he was inspecting cars in the yard deceased went under the car during a shower; and that defendant, in violation of the rule, switched cars against the one under which intestate was, and killed him. *Held*, that the dismissal of the action for failure to comply with a motion to make the declaration more specific, and to designate the name of the vice principals, etc., alleged to have been negligent, and what rule had been violated, was erroneous, as the declaration set out with particularity and in a substantial way the cause of action on which plaintiff sued, and as such matters were more within the knowledge of the defendant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. \S 816-836; Dec. Dig. \S 258.]

Appeal from Circuit Court, Hamilton County; Nathan L. Bachman, Judge.

Action by Mrs. Eliza Lowry, administratrix, against the Southern Railway Company. From a judgment of the Court of Civil Appeals, reversing and remanding a judgment for defendant, dismissing the case, defendant appeals. Affirmed.

Cooke, Swaney & Hope, of Chattanooga, for appellant. G. W. Chamlee, of Chattanooga, for appellee.

FANCHER, J. Plaintiff's intestate, Chas. J. Lowry, was killed in the yards of the defendant railway company on or about the 26th day of June, 1914, at Citico, near Chattanooga, while engaged as a yard inspector, track hand, and general repair servant for

the defendant. Just previous to the accident he was inspecting a car, to ascertain if it needed attention of any kind, when a rain came up.

It is averred in the declaration that it was customary for the men working in the yards of the company to go under cars left standing on the tracks during a shower; that in accordance with this custom Lowry went under a car, in order to keep out of the rain. It is further averred that it was a custom of the railroad that, in case of cars coming into the yards, signals would be set up or orders given that the cars should be inspected while on the tracks before they were moved; that there was a rule, regulation, or system, provided by law, ordinances, and rules, that in case a car was rolled into the yard and left standing, before that car would be moved, that notice would be given by the blowing of the whistle of the engine, the ringing of a bell, and giving general notice to the crew in and about the car that the same was going to be moved; that this rule was required by the federal and state laws, and by the Interstate Commerce Commission, and was covered by a rule, regulation, or system adopted by the Southern Railway; that the deceased and the defendant railway company were at the time engaged in interstate commerce, or in commerce being transported from points outside of Tennessee, into Tennessee, through Chattanooga and the switchyards, where the deceased was working, and forward to other points outside of and beyond the state of Tennessee, and it was averred that the said Chas. J. Lowry, while so actively engaged in said duties, was ordered to make certain repairs on a switch in the yards, and to inspect certain box or freight cars, which necessitated his getting under the cars; that a certain train of the defendant company had come into the yards with broken chains, and a part of the apparatus necessary to keep the air brakes in good order was in defective condition; that while performing this repair work he stooped, with the view of getting under the car to make an inspection, and immediately preceding this act it began to rain, and that while it was so raining there was no chance for employes to do very much in the way of work; that the defendant company violated and negligently disregarded each and all of the duties toward the deceased above enumerated, in that it failed to blow a whistle or give other warning that it was about to switch an engine to the train and move it, and that without notice, and without warning of any kind or character, the defendant railway company unlawfully, negligently, carelessly, and wrongfully moved an engine up to and against its train where the deceased was then engaged in such repair work, and caused its servants to move the train, and the wheels of such car or train ran over the body of Chas. J. Lowry, inflicting injuries from which he died.

Defendant moved the court to require the plaintiff to make her declaration more specific, and to designate the names of the alleged vice principals, foremen, or fellow servants who are alleged to have been careless, negligent, and unmindful of their duties; and, second, that plaintiff be required to make her declaration more specific, so as to allege and set out what particular rules and regulations for the prevention of accidents were violated by said vice principals, foremen, and fellow servants of the deceased. Whereupon the court ordered that the plaintiff make her declaration more specific upon these points, to which action she excepted, for the reason that the information required of her by this order is peculiarly within the knowledge and custody of the defendant itself. Plaintiff thereupon filed an amended declaration, but failed to comply with the order made upon her by the court, whereupon the defendant moved to dismiss the case, because of plaintiff's failure to so comply, and the court granted the motion, and dismissed the suit, to which action the plaintiff excepted, and appealed to the Court of Civil Appeals. That court reversed the action of the trial judge and remanded the case to the court below for further proceedings.

We think the trial judge was in error in granting the motion of the railway company to require plaintiff to specifically point out the names of the servants who neglected their duty toward the deceased, and to point out specifically the rules and regulations which were required of it. The declaration was undoubtedly sufficient, in that it set out with particularity and in a substantial way the cause of action for which plaintiff sued.

In the case of *May v. Railroad*, 129 Tenn. 521, 167 S. W. 477, L. R. A. 1915A, 781, the present Chief Justice of this court pointed out proper rules of practice with respect to this question and reviewed former cases in this state upon the subject. The court reviewed somewhat at length the authorities from other jurisdictions upon this particular question.

We will not undertake to review the subject here. It is sufficient to say that this court recognizes the right in a proper case and upon the proper showing of a defendant to require the plaintiff to state with greater particularity as to time or other material averment, so as to give necessary notice to the defendant; and it is true that when so required plaintiff's suit will be dismissed if he fails to comply, unless he shows that he is unable to state the date or fix the particular facts more definitely.

Having in mind the rules of practice as stated in *May v. Railroad*, supra, we are of opinion that plaintiff should not have been required to comply with defendant's motion. This motion was not supported by anything, so far as the record discloses, showing any necessity for a more specific statement of

the cause of action. The declaration on its face is full enough. The defendant does not show that it cannot prepare its defense without a more particular statement as to names of the persons who moved the train and the rules required of it, which it had adopted. The presumption is that the railroad would know more about these matters than plaintiff would. If persons bringing suits against railroad companies were required to comply with motions of this kind, in every instance, they would often fall in meritorious cases, because of their inability to point out by name the agents or servants whose negligence produced the injury, or to specifically state the exact wording of rules and regulations that were violated.

The declaration does state that the employees failed to sound a whistle, ring a bell, or pursue any other method of warning to the deceased that the cars were about to be moved. It states with sufficient certainty that there were rules requiring this. We think this was sufficient on the point in question to give the defendant reasonable notice of the grounds upon which the action was predicated.

The judgment of the Court of Civil Appeals, in reversing the case and remanding it for further proceedings in the court below, is affirmed.

CITY OF CHATTANOOGA v. CARTER et ux.
(Supreme Court of Tennessee. Oct. 2, 1915.)

HUSBAND AND WIFE — 209 — RIGHTS OF HUSBAND — SERVICES OF WIFE.

The Married Women's Act (Laws 1913, c. 26), which relieved married women from all disability on account of coverture, did not affect a wife's marital duties, and a husband, as at common law, may recover for loss of the services of his wife by reason of personal injuries sustained by her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 766-772, 968, 973; Dec. Dig. ¶ 209.]

Certiorari to Court of Civil Appeals.

Action by C. H. Carter and wife against the City of Chattanooga. From a judgment for plaintiffs, defendant appealed, and, it being affirmed by the Court of Civil Appeals, defendant brings certiorari. Affirmed.

W. J. Counts, Ford & Yarnell, all of Chattanooga, for plaintiffs. Coleman & Frierson, of Chattanooga, for defendant.

FANCHER, J. A recovery was had by C. H. Carter, the husband, for the loss of services of his wife by reason of personal injuries sustained by her. The judgment of the circuit court was sustained by the Court of Civil Appeals. It is assigned as error that no recovery can be had by the husband in such cases since the Married Women's Act of 1913, chapter 26, which provides as follows:

"That married women be, and are, hereby fully emancipated from all disability on account of coverture, and the common law as to the disabilities of married women and its effect on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of, all property, real and personal, in possession, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued with all the rights and incidents thereof, as if she were not married."

It is contended that this act is so broad in its provisions, and the emancipation is so complete, as to merge all rights of action arising from injuries to the wife into one right of action, vested in her.

The act in its caption is recited broadly to be:

"An act to remove disabilities of coverture from married women, and to repeal all acts and parts of acts in conflict with the provisions of this act."

At common law the wife was termed a feme "covert," and her condition during marriage was called her "coverture." Blackstone recognized two features of this coverture. One feature embraced personal rights; the other the rights of property. 1 Blackstone, Com. 442.

"Upon this principle of a union of person in husband and wife depend almost all the legal rights, duties and disabilities that either of them acquire by the marriage." Id.

The act in question does not affect the legal rights and duties of that relationship further than to emancipate the wife from her disabilities that attached to the relationship. Embraced in these disabilities are her incapacity to act for herself with respect to her property, to make contracts, to bind herself personally, to sue and be sued. In fact, the wife was placed on that footing enjoyed by the husband as to the right to hold, manage, control, use, enjoy, and dispose of all property; to make any contract in reference to it and to sue and be sued.

The act does not deprive either the husband or wife of the conjugal relationship, with its duties and rights.

It results that there was no error in the action of the Court of Civil Appeals in sustaining the judgment in favor of the husband, and it is affirmed.

BURROUGHS ADDING MACH. CO. v. FRYAR.

(Supreme Court of Tennessee. Oct. 5, 1915.)

NEGLIGENCE — 32 — OWNERS OF BUILDINGS — DUTIES TO LICENSEE — POLICE OFFICER.

A police officer, observing a door of the defendant company to be open, while the room was unoccupied, went into the store, and when coming out closed the door with such force as

to cause a screen over the transom to fall, injuring his foot. *Held*, that his acts, though in the performance of his duty, were those of a licensee, and that he could not recover for the injury, since a property owner is liable to a licensee only for willful injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. ¶32.]

Error to Circuit Court, Hamilton County; Nathan L. Bachman, Judge.

Action by Sevier Fryar against the Burroughs Adding Machine Company. A judgment for the plaintiff was reversed by the Court of Civil Appeals, and plaintiff brings error. Affirmed.

Watkins & Watkins, of Chattanooga, for plaintiff in error. Fleming & Shepherd, of Chattanooga, for defendant in error.

GREEN, J. Defendant in error, Fryar, was a police officer in the city of Chattanooga. While making his rounds after business hours he noticed that the front door of the store of plaintiff in error was open. The officer went into the house to see if any one was there and, finding no one, concluded that the door had been left open by inadvertence. He returned to the front and, standing in a vestibule leading from the sidewalk into the storehouse, he slammed the door. The door fastened with a spring lock, and the jar occasioned by shutting it caused a screen, covering the transom, to fall from its place onto the officer's foot, inflicting injuries for which he sues.

There was a verdict and judgment in favor of the plaintiff below. This judgment was reversed in the Court of Civil Appeals, that court holding that a motion for peremptory instructions should have been sustained, and dismissed the suit.

The Court of Civil Appeals was correct. The acts of the policeman in examining the premises and in closing the door were in the line of his duty, and the authorities are uniform to the effect that the owner of property is under no obligation to a policeman or fireman who goes thereupon in the discharge of his duty, except to refrain from inflicting upon such an officer a willful or wanton injury. That is to say, the officer is a mere licensee, and the property owner owes him no duty to keep the premises in safe condition.

Under such circumstances a policeman or fireman goes on the premises by permission of the law. In the discharge of his duty to the public he may enter upon the premises in disregard of the owner's wishes. He is not an invitee. He may enter whether the property owner is willing or unwilling, and his right to enter does not depend on the property owner's invitation, express or implied, but his entry is licensed by the public interest and what has been called "the law of overruling necessity." Such is the law in the absence of some statute or ordi-

nance. Cooley on Torts (3d Ed.) page 648; Lunt v. Post Printing & Pub. Co., 48 Colo. 316, 110 Pac. 203, 30 L. R. A. (N. S.) 60, 21 Ann. Cas. 492; Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182, 17 L. R. A. 588, 36 Am. St. Rep. 376; New Omaha Thompson-Houston Elec. Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89; New Omaha Thompson-Houston Elec. Light Co. v. Bensden, 73 Neb. 49, 102 N. W. 96; Casey v. Adams, 234 Ill. 350, 84 N. E. 933, 17 L. R. A. (N. S.) 776, 123 Am. St. Rep. 105; Creeden v. Boston & M. R. Co., 193 Mass. 280, 79 N. E. 344, 9 Ann. Cas. 1121. See notes under Lunt v. Post Ptg. & Pub. Company, as reported in 30 L. R. A. (N. S.) 60, and also under Creeden v. Boston & M. R. Co., as reported in 9 Ann. Cas. 1121.

The policeman was probably standing in the vestibule on the property of plaintiff in error, and not on the sidewalk, when he was injured. This is not a material question, however, because the injury resulted from an actual and indisputable entry on the property of plaintiff in error; that is, the reaching in, seizing, and slamming the door.

Accordingly the judgment of the Court of Civil Appeals is affirmed.

HOGAN v. HAMILTON COUNTY et al.

(Supreme Court of Tennessee. Sept. 20, 1915.)

1. OFFICERS ¶19—ELIGIBILITY — CONSTITUTIONAL AND STATUTORY PROVISIONS—DEFAULTER.

Under the express provisions of Const. art. 2, § 25, and Shannon's Code, § 1069, the election of a defaulter in the payment of state revenue to the office of clerk of the county board of road commissioners was absolutely void.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 22, 23; Dec. Dig. ¶19.]

2. OFFICERS ¶43 — DE FACTO OFFICER—RIGHTS.

The fact that one whose election as clerk of a county board of road commissioners was absolutely void was permitted by the county court to take the oath and to give bond added nothing to his rights, and he merely became a de facto officer and could assert no rights.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 65; Dec. Dig. ¶43.]

3. OFFICERS ¶54 — "DE JURE OFFICER" — RIGHT TO COMPENSATION.

The clerk of a county board of road commissioners entitled to hold over under the Constitution, after the void election of his intended successor, was the "de jure officer" entitled to serve and to receive the salary of the office.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 74, 75; Dec. Dig. ¶54.]

For other definitions, see Words and Phrases, First and Second Series, De Jure Officer.]

4. ELECTIONS ¶269—CONTEST — JURISDICTION—CHANCERY.

The Chancery Court has no jurisdiction of a bill brought to contest the election of the one receiving the highest number of votes, on the ground of his ineligibility, or to declare the election void.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 245, 246; Dec. Dig. ¶269.]

5. OFFICERS ¶101 — ACTION FOR SALARY— EVIDENCE—RIGHT TO OFFICE.

In a suit against a county for salary due the clerk of the board of road commissioners, plaintiff might show that the person who had been nominally elected as his successor, and who had given bond and taken the oath of office was a defaulter, and hence not a de jure officer, but only a de facto officer.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 158-162; Dec. Dig. ¶101.]

Appeal from Chancery Court, Hamilton County; W. B. Garvin, Chancellor.

Bill by John H. Hogan against Hamilton County and others. Decree for complainant, and the defendants appeal. Affirmed.

S. H. Ford, Lewis Shepherd, and Allison, Lynch & Phillips, all of Chattanooga, for appellants. J. H. Early and W. B. Swaney, both of Chattanooga, for appellee.

NEIL, C. J. Complainant was clerk and member of the board of public road commissioners of Hamilton county, with a term beginning the first Monday in September, 1912, and running to the first Monday of September, 1914, and until his successor should be elected and qualified. At the August election, 1914, one Joe N. McCutcheon received the highest number of votes, obtained a certificate of election, presented himself to the county court, and was permitted to take the oath and execute bond for the office. He thereupon demanded the possession of the books, papers, etc., from Hogan. The latter refused to surrender the office, or the books and papers. McCutcheon, after coming to the office a few days, desisted; an injunction having been sued out against him by Hogan. Hogan's refusal to surrender the office was based on the fact that McCutcheon had been clerk of the county court and had defaulted in the payment of state revenue, and still remained a defaulter on the day he was elected clerk. Hogan held the office until it was abolished by the Legislature of 1915. During this time a salary of \$1,050 accrued, but the county refused to pay it. When two months had elapsed Hogan sued for the amount then due, but subsequently filed an amended bill in which he claimed for the whole time. The question is whether the county can be compelled to pay this salary. In our judgment this question should be decided in the affirmative.

[1-3] It is fully proven, and not denied, that McCutcheon was a defaulter as previously stated. In view of this fact, his election was absolutely void under the Constitution, art. 2, § 25, and under Sh. Code, § 1069. The fact that he was, by the county court, permitted to take the oath and give bond, added nothing to his position. He simply became a de facto officer, and could assert no rights. *Newman v. Justices of Jefferson County*, 6 Humph. 41; *Pearce v. Hawkins*, 2 Swan. 88, 57 Am. Dec. 54. Hogan, being the de jure officer by virtue of his right to hold

over under the Constitution, was entitled to serve in the office and to take all of its emoluments. Even if McCutcheon had undertaken to perform the duties of the office, and had collected the salary, this would not have relieved the county from the duty to pay Hogan, the rightful officer. *Mayor and Aldermen of Memphis v. Woodward*, 12 Helsk. (59 Tenn.) 499, 27 Am. Rep. 750. There was therefore no error in the chancellor's action in rendering a decree in favor of Hogan and against the county.

[4] There was another case argued at the present term, brought by Hogan against McCutcheon, wherein complainant sought to enjoin McCutcheon from taking the office. It was properly held in an opinion filed by Mr. Special Justice Franz that the Chancery Court had no jurisdiction, since the bill referred to was but an effort to contest the election of McCutcheon; the ineligibility of a person having the highest number of votes being one ground of contest in order that the election may be declared void, as shown by well known cases in this state. The Chancery Court has no power to entertain jurisdiction of a contested election controversy. *Adcock v. Houk*, 122 Tenn. 269, 122 S. W. 979.

[5] The case now before us for decision is not in any sense an election contest, but a direct suit against the county for salary due. In such a case the fact may be proven that the person who was nominally elected, and who gave bond and took the oath of office, was a defaulter, and hence not a de jure officer, but only an officer de facto. Such proof being made, the consequences already mentioned naturally follow.

It results that the decree of the chancellor must be affirmed, with costs.

LOWENTHAL v. UNDERDOWN.

(Supreme Court of Tennessee. Sept. 29, 1915.)

1. LICENSES ¶15—MERCHANTS — PERSONS LIABLE—"SOLICITOR."

One who merely displays samples and takes orders, which he forwards to his employer for approval, collecting no money and delivering no goods, is a mere "solicitor," and not liable for a merchant's license fee.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 30-35; Dec. Dig. ¶15.

For other definitions, see Words and Phrases, First and Second Series, Solicitor.]

2. CONSTITUTIONAL LAW ¶68—JUDICIAL FUNCTIONS—POLITICAL QUESTIONS.

Whether nonresident merchants should be allowed to compete for local trade by employing solicitors without paying a merchant's license fee is a political question for the Legislature, with which the courts have no concern.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 125-127; Dec. Dig. ¶68.]

Appeal from Circuit Court, McMinn County; Sam C. Brown, Judge.

Action by L. Lowenthal, Jr., against G. K. Underdown. From an order dismissing his action, plaintiff appeals. Reversed.

Finlay, Campbell & Coffey, of Chattanooga, for appellant. The Attorney General, for appellee.

NEIL, C. J. H. Schwartz & Sons are retail shoe merchants in the city of Chattanooga. They sent plaintiff in error to Athens, in McMinn county, with samples of shoes. Plaintiff in error exhibited these shoes to persons who were not merchants, but merely private individuals or consumers, and took orders addressed to H. Schwartz & Sons. Plaintiff in error sold no shoes, did not undertake to sell any, collected no money, and delivered no shoes. H. Schwartz & Sons accepted these orders, if found satisfactory, and shipped the shoes to the purchasers by express. Plaintiff in error had no other part in the transaction than merely soliciting the orders. Under the course of business H. Schwartz & Sons were at liberty to refuse any orders that did not meet their approval. The defendant in error demanded of plaintiff in error \$5.25 as merchant's license. He paid the sum under protest, and sued to recover it back. The trial judge dismissed his suit, and an appeal was then prosecuted to this court.

We think the learned trial judge was in error. Lowenthal was not a merchant, under the facts stated, but a mere solicitor. It is said, in an opinion filed in the case by the learned trial judge, as a part of his judgment, that it is unjust to the merchants of Athens that Chattanooga merchants should be permitted to sell within their territory without obtaining a merchant's license, and thus paying taxes similar to those of such merchants of Athens. This is a political question for the consideration of the Legislature. Our duty is only to determine whether, under the laws as they now exist, the plaintiff in error is liable to the tax as a merchant. We think it very clear that, under the facts stated, he was not a merchant. No effort was made to reach H. Schwartz & Sons, or tax them as merchants doing business in Athens; therefore no question arises on that subject in the present case.

On the grounds stated the judgment of the trial court must be reversed, and judgment entered here in favor of the plaintiff for the amount paid, and costs.

LAUTERBACH v. STATE

(Supreme Court of Tennessee. Oct. 2, 1915.)

1. HOMICIDE — INTENT — UNLAWFUL ACT — NEGLIGENCE — PRESUMPTION.

Where defendant, while driving an automobile in excess of 20 miles per hour, in violation of Pub. Acts 1905, c. 173, killed a child who ran out in front of the automobile, he was guilty

of felonious homicide, since he was negligent in violating the statute.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 91, 92; Dec. Dig. —68.]

2. HOMICIDE — INTENT — UNLAWFUL ACT — PRESUMPTION.

One who, while violating the law by speeding an auto, kills another is not relieved by the fact that the other ran in front of the auto, since he is presumed to anticipate the possibility of any result of his recklessness.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 91, 92; Dec. Dig. —68.]

3. HOMICIDE — DEFENSES — CONTRIBUTORY NEGLIGENCE.

One who, while violating a law, kills another is not relieved by the negligence of the other, for the doctrine of contributory negligence does not apply to criminal acts.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 91, 92; Dec. Dig. —68.]

4. CRIMINAL LAW — TRIAL — CONDUCT OF COUNSEL — THREATS.

A statement of the prosecuting attorney that "if any one should run over a six years old child of his, he would take a cannon and shoot him," is improper, as calculated improperly to influence the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1679; Dec. Dig. —724.]

5. CRIMINAL LAW — NEW TRIAL — DISCRETION OF COURT — HARMLESS ERROR.

Under Pub. Acts 1911, c. 32, providing that no judgment shall be set aside nor new trial granted for error, unless in the opinion of the appellate court it affected the result of the trial, new trial will not be granted where, in spite of the error, the judgment is sustained by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. —1186.]

Appeal from Criminal Court, Hamilton County; S. D. McReynolds, Judge.

Max Lauterbach was convicted of "unlawfully, feloniously, and recklessly" driving an auto upon John D. White, and thereby causing his death, and he appeals. Affirmed.

Lewis Shepherd and J. H. Daly, both of Chattanooga, for appellant. The Assistant Attorney General, for the State.

NEIL, C. J. Plaintiff in error was indicted in the criminal court of Hamilton county, for "unlawfully, feloniously, and recklessly" driving an automobile upon John D. White, and thereby causing his death.

"At the time," continues the indictment, "said Max Lauterbach was driving said automobile along St. Elmo avenue, a public thoroughfare, at a rate of speed in excess of 20 miles an hour, and in disregard of the presence of said John D. White. Whereby the grand jurors present that the said Max Lauterbach has committed involuntary manslaughter," etc.

He was convicted and sentenced to an indeterminate period of from one to five years in the state penitentiary. He has appealed to this court and assigned errors.

The weight of the evidence shows that, on the occasion referred to, the plaintiff in error was driving his automobile at the rate of from 25 to 40 miles an hour, as estimated by the various witnesses who testified. The

weight of the evidence further shows that John D. White, a child six years old, was walking with his sister on the west side of the avenue, within the traveled way; there being no sidewalk at that point. His sister held him by the hand, but he suddenly jerked away just as the automobile was approaching, ran in front of it, and was killed.

Our act of 1905, chapter 173, provides:

"That no automobile shall be run or driven upon any road, street, highway, or other public thoroughfare at a rate of speed in excess of twenty miles per hour."

Section 6 of the same act makes the violation of any of the provisions thereof a misdemeanor punishable by a fine of not less than \$25, nor more than \$100. St. Elmo avenue is a much traveled street, in the town of St. Elmo, in Hamilton county.

[1] It is insisted for plaintiff in error that, under the facts stated, his conviction was erroneous. We do not think so. His violation of the statute by running in excess of the speed limit there prescribed was negligence. One who kills another in the act of committing such negligence is guilty of felonious homicide. *State v. Campbell*, 82 Conn. 671, 74 Atl. 927, 135 Am. St. Rep. 293, 18 Ann. Cas. 236; *State v. Goetz*, 83 Conn. 437, 76 Atl. 1000, 30 L. R. A. (N. S.) 459; *Schultz v. State*, 89 Neb. 34, 130 N. W. 972, 33 L. R. A. (N. S.) 403, Ann. Cas. 1912C, 495. And the rule is general at common law that one who kills another while committing an act of negligence is guilty in like manner. See extended note to case of *Johnson v. State*, 61 L. R. A. 277 et seq.

[2] The plaintiff in error is not relieved by the fact that the child ran suddenly in front of the machine. One who is engaged in the performance of an unlawful act must take the criminal consequences of whatever happens to third persons as a result of that act. It was his duty to anticipate that he might encounter, not only grown persons, but even little children, or even people who were afflicted with blindness or deafness. One who disobeys the statutory rule as to speed is acting in defiance of law, and must be held to have anticipated the possibility of any injury caused by his recklessness.

[3] The little child was too young to be guilty of contributory negligence; but, even if it had been a person who had arrived at years of discretion, and he had committed an act similar to that of the child, the plaintiff in error would not have been free of criminal liability, since the rule of contributory negligence does not apply in criminal cases. *State v. Campbell*, supra; *Reg. v. Longbottom*, 3 Cox C. C. (Eng.) 439; *Reg. v. Kew*, 129 Cox C. C. (Eng.) 335; *State v. Moore*, 129 Iowa, 514, 106 N. W. 16, and other cases cited in note to *Schultz v. State*, Ann. Cas. 1912C, 501 et seq.

An instruction was offered, in the trial court, to the effect that if the jury should

find that the death of the child "was caused by his suddenly breaking loose from his sister and running into the automobile," the plaintiff in error could not be convicted. In response, the trial judge said:

"The court gives you that instruction, gentlemen of the jury, and further states to you this proposition again that if the reckless running of the machine caused the death of this child, then he is guilty; if it did not, then he is not guilty."

From what has been already said, it is apparent that there is no error in the foregoing of which the plaintiff in error can complain. In our judgment the instruction, as requested, should not have been given at all.

[4, 5] There were certain improper statements made by the district attorney general in his address to the jury, to the effect that if anybody should run over a six years old child of his, he would take a cannon and shoot him. On objection being made by counsel for plaintiff in error, the attorney general said that he knew that it was against the law to do such a thing, but he would do it. These were very improper statements, and should have been rebuked by the trial judge. We do not think, however, there should be a reversal on this ground. The conviction was thoroughly grounded on the evidence, and we do not think that these improper statements made by the law officer of the state influenced the verdict. This being true, we cannot reverse. Acts of 1911, chapter 32.

There being no error in the judgment of the trial court it must be affirmed.

STUDER v. ROBERTS.

(Supreme Court of Tennessee. Oct. 2, 1915.)

PROCESS ~~6~~—SUMMONS—AMENDMENT—STATUTES.

Under Shannon's Code, § 4495, providing that new plaintiffs or defendants may be added to the suit by plaintiff upon supplemental process taken out and served, and section 4589, included in the same act, providing that the court may strike out and insert in the writ or pleadings the names of others as plaintiffs or defendants, process to bring in defendant after an amendment substituting plaintiff as administrator, instead of plaintiff in his own name, was not required, and a notification by the court's order, in place of formal process, was sufficient.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 5; Dec. Dig. ~~6~~.]

Certiorari to Court of Civil Appeals.

Suit by W. H. Roberts, administrator, against Otto Studer. From a judgment of the Court of Civil Appeals, affirming a judgment of the circuit court for Hamilton county for plaintiff, defendant brings certiorari. Affirmed.

J. H. Early, of Chattanooga, for plaintiff. Sizer, Chambliss & Chambliss, of Chattanooga, for defendant.

WILLIAMS, J. This suit was brought by W. H. Roberts in his own name to recover damages for the alleged wrongful death of his daughter, Bessie Roberts, due to the carelessness of Studer in the operation of an automobile.

Thereafter Roberts moved for and was granted leave to amend the writ or summons and the declaration so as to add after his name the words, "as administrator of the estate of Bessie Roberts, deceased."

Thereupon Studer filed his plea in abatement setting forth that since the amendment of the suit and the substitution of W. H. Roberts, administrator, for the original plaintiff, he had not been served with process; which plea was stricken by the court on motion of the plaintiff below.

A plea in bar of "not guilty" was then filed, and the trial was proceeded with.

The Court of Civil Appeals sustained this ruling on the plea in abatement and affirmed the judgment below.

The contention of Studer is that process to bring him in was required by Code (Shannon) § 4495, which is as follows:

"At any time before trial, new plaintiffs or defendants may be added to the suit by the plaintiff, upon supplemental process taken out and served, and subject to such terms in regard to costs as the court may impose."

By another section (4589) it is provided that the court shall have power to strike out and insert in the writ or pleadings the names of either plaintiffs or defendants, so as to have the proper parties before the court. Both of the above provisions appear in the same legislative act, from which they were brought forward into the Code. Acts 1851-52, c. 152, § 6.

In *Flatley v. Railroad*, 9 Helsk. (56 Tenn.) 230, it was said that previous to such legislative enactment the result of such a mistake as to the party plaintiff would have been to compel an abandonment of the action, but that this was obviated by the provisions before referred to, which allowed the name of a new plaintiff to be substituted. Judge McFarland said:

"The defendant being in court for a particular cause of action, it is not required that the expense and delay shall be incurred of new process."

In *Love v. Railroad*, 108 Tenn. 120, 65 S. W. 475, 55 L. R. A. 471, this language was quoted with approval.

Counsel for Studer insist that what was said in these two cases was obiter, since the question involved in each was whether the amendment by way of substitution of a party plaintiff related to the date of the original commencement of the suit in respect of the running of the statute of limitation; and, further, that the court in no reported decision has passed upon the question when raised, as here, by a plea in abatement.

This may be true, but we are of opinion

that the language used in the two cases above cited announced the correct rule.

The question was directly passed upon, in a case arising in this state, by the United States Circuit Court of Appeals of the Sixth Circuit in the case of *Person v. Fidelity, etc., Co.*, 92 Fed. 965, 35 C. C. A. 117 (reversing [C. C.] 84 Fed. 759), where it was held that the amendment by substitution, as in the instant case, was permissible under section 4589, and effective.

The defendant was already before the court and cognizant of the amendment. In respect of an addition of a new party defendant at the instance of a plaintiff, there is room for the application of the words of section 4495, "upon supplemental process taken out and served," without a conflict between the two sections thus drawn from the same act; and these words are not to be deemed to prescribe a requirement as to the notification of a defendant in such circumstance of a change, by substitution, in the plaintiff who may be prosecuting the cause of action. The notification by the court's order in the circumstances served in lieu of a notification by formal process.

Finding no reversible error on this or other points, the judgment of the Court of Civil Appeals is affirmed.

TURNER v. TURNER et al.

(Supreme Court of Tennessee. Oct. 2, 1915.)

1. LIFE ESTATES § 25 — LESSEES OF LIFE TENANT—RIGHTS OF.

Under Shannon's Code, § 4184, providing that, where a life tenant shall lease the estate and die before expiration of the lease the rent may be apportioned between his representative and the remainderman, a life tenant cannot create a lease on land which will extend beyond the life estate, the remainderman not joining; for the remainderman is entitled to share in the rental sum pro tanto under the statute or to disaffirm.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. § 47; Dec. Dig. § 25.]

2. LIFE ESTATES § 25 — LEASES BY LIFE TENANT—DISAFFIRMANCE BY REMAINDERMAN.

Where, after the death of a life tenant, the remainderman sought to recover possession of the land and compensation from lessees for use, there was no ratification of the lease within Shannon's Code, § 4184, authorizing an apportionment of rent.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. § 47; Dec. Dig. § 25.]

3. LIFE ESTATES § 25 — "EMBLEMENTS" — RIGHT TO.

Where a life tenant, having leased the premises, died, and the remainderman did not recognize the lease, the lessee of the life tenant was entitled to the emblements, which are the crops of grain growing yearly, but requiring an outlay of labor or industry, without payment of any compensation for use of the land in harvesting the emblements (citing *Words and Phrases*, First and Second Series, *Emblements*).

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. § 47; Dec. Dig. § 25.]

Certiorari to Court of Civil Appeals.

Action by Reuben S. Turner against G. S. Turner and others. From a judgment for defendants, plaintiff appealed to the Court of Civil Appeals, which rendered judgment in his favor, and defendants bring certiorari. Judgment of the Court of Civil Appeals reversed, and that of the lower court affirmed.

Simerly & Simerly, of Newport, for plaintiff. Ailor & Carty, of Newport, for defendants.

WILLIAMS, J. This is an action of unlawful detainer and to recover rent.

The mother of complainant was the life tenant of a tract of land which was leased by her authority to defendants for the year 1912. She died on June 2, 1912, and the bill was filed shortly thereafter by complainant, who was the remainderman.

The defendants, who are the lessees of the tenant for life, had sowed the land to corn, beans, and potatoes prior to June 2d, and in their answer they asserted their right to emblements.

The complainant set up a claim to compensation from the lessees for the use and possession of the land for the entire year of 1912, and sought a recovery thereof. The bill of complaint, moreover, alleged the falling in of the life estate, and that complainant became thereupon "entitled to the land and everything thereon," and prayed for the issuance of a writ of possession.

The Court of Civil Appeals treated the case as one where complainant had recognized the right of the lessee to the premises, under the life tenant's contract, thus making applicable the provisions of section 4184 of Shannon's Code (Acts 1877, c. 159) which is as follows:

"Where a tenant for life of real estate shall create a lease out of his said estate for one or more years, and shall die before the expiration of said lease, and before the term fixed for the payment of the rent, the rent may be apportioned, and the executor or administrator of said tenant for life may recover of the lessee, pro rata, according to the contract, and for the time said lessee had the use of the property until the death of said tenant for life."

That court, reversing the chancellor, rendered a decree in behalf of complainant for rents in accordance with the prayer of the bill. A review of its action is sought by writ of certiorari on the question of rents; the question of possession having been disposed of by an agreed order in the lower court.

[1, 2] It was competent for the complainant, as remainderman, to recognize or ratify that lease contract, and to thus share in the rental sum pro tanto under the statute, or to disaffirm. *Arnold v. Hodges*, 10 Humph. (29 Tenn.) 40. But we fail to see how in an effort to dispossess the subtenant and to recover for past use and occupation in his own right there was evidenced the ratification of the lease found by that court. The

contrary is true. The complainant did not recognize the contract of rental as one validly made by or under the authority of the life tenant, nor the right of the lessee to remain in possession thereunder accounting in part to the personal representative of the life tenant.

The above-quoted statute was not intended to put it within the power of a life tenant to create a lease upon the land which would extend beyond the date of the falling in of the life estate, the remainderman not joining. This was held in the case of *Collins v. Crownover* (Ch. App.) 57 S. W. 357, in an opinion by the present Chief Justice, while on the bench of that court, which ruling was affirmed by this court.

At common law the lease contract of a life tenant terminated at his death. *Arnold v. Hodges*, supra; *Collins v. Crownover*, supra; *Hoagland v. Crum*, 113 Ill. 365, 55 Am. Rep. 424; *Carman v. Mosier*, 105 Iowa, 367, 75 N. W. 323.

The purpose of the act of 1877 was to correct the harsh and artificial rule of the common law to the effect that such a contract of lease was so far an entirety as that the rent so arising could not be apportioned; therefore that on the death of the life tenant in the course of the year before the due date for the rent his lessee might quit the premises and pay no rent to any one for the occupation. *Collins v. Crownover*, supra.

[3] What, then, were the rights of the respective parties, on the basis of the statute not being applicable?

The lessee of the life tenant clearly was entitled to emblements. 24 Cyc. 1070. Coke on Littleton states the rule broadly:

"So, therefore, if tenant for life soweth the ground and dieth, his executors shall have the corn, for that his estate was uncertain and determined by the act of God; and the same law is of the lessee for years of the tenant for life."

See, also, *Edghill v. Mankey*, 79 Neb. 347, 112 N. W. 570, 11 L. R. A. (N. S.) 688, and note.

Emblements may be defined to be such crops of grain, roots, and the like as grow yearly, not spontaneously, but by reason of an outlay of labor or industry in the sowing or planting in one part of the year, the recompense for which is to be the crop maturing in the later part of the same year. Words and Phrases, First Series, 2359; Id., Second Series, 253.

The right to take emblements depends upon the fact of sowing or planting by the life tenant or lessee, and does not attach by reason merely of a preparation of the soil for planting. *Bradley v. Bailey*, 56 Conn. 374, 15 Atl. 746, 1 L. R. A. 427, 7 Am. St. Rep. 316; *Collins v. Crownover*, supra.

Where, as here, the life tenant makes a lease and dies before the expiration of the term, the lessee, if he has sown the land prior to such death for the production of

fructus industriales, is entitled to emblements. The doctrine is said to rest partly on the idea of compensation, but chiefly upon the policy of encouraging agriculture by assuring the fruits of his labor to one who cultivates soil thus held by uncertain tenure. The doctrine allows the life tenant or his lessee the right of ingress and egress for the cultivation of the crop if growing, for its preservation, and for its removal at maturity.

The record does not disclose that the lessee did more than exercise this right.

Is the remainderman, who disaffirms the lease contract made by the life tenant, entitled to recover rent or compensation for such qualified use made of his land? This appears to be a problem on which the authorities differ. Plowden at an early day raised the question in Queries appended to Plowden's Reports, p. 239, and inclines to the view that the remainderman would be. Williams, in his work on Executors, and Washburn on Real Property, raise the question, and refer to Plowden, but do not themselves venture an answer. Such a claim on the part of the remainderman is not well founded, in the opinion of Redfield in 3 Redf. Wills, 155, par. 5, and of Pingrey in 1 Pingrey, Real Prop. § 308. We do not find any adjudication of the point by the courts. It would seem that the latter view best comports with the idea of compensation to the lessee that underlies the doctrine of emblements. It is not apparent that he would be encouraged to enter and cultivate under the uncertain tenure of a tenant for life if he be held subject to be called to pay the remainderman for the qualified use a sum that is undetermined and indefinite as to amount.

However, this question does not stand for solution on the record. The complainant did not sue to recover for any such qualified use, nor did he adduce any proof as to the value of such a use.

In our view, the special chancellor, in disallowing rents as such, reached a correct result, and the Court of Civil Appeals erred in not so ruling. Reversed. Decree here affirming the decree of the chancery court; all costs to be paid by complainant.

HUTTON v. WATTERS et al.

(Supreme Court of Tennessee. Sept. 29, 1915.)

1. TORTS — 26—INJURY TO BUSINESS—LABILITY.

Plaintiff's petition alleged that she operated a boarding house near a school of which the defendant was president; that the defendant, having disagreed with one boarder at the plaintiff's house, demanded his ejection therefrom and was refused; that he, with others, then attempted to, and did, destroy the plaintiff's business, by threats against students who boarded with the plaintiff, by deterring new arrivals from going to the plaintiff's house, and by other means; that the plaintiff was of good character, and operated a reputable house;

and that the defendants acted from ill will, and not by reason of business rivalry or competition. *Held*, that the declaration was not demurrable, the facts showing a cause of action, even though the act itself was lawful, if the defendant was actuated by malice and destroyed the plaintiff's business without reasonable advantage to himself, since every person has the right to conduct a lawful business and to have that right enforced or the wrong redressed if the right is infringed upon.

[Ed. Note.—For other cases, see *Torts*, Cent. Dig. § 33; Dec. Dig. —26.]

2. TORTS — 10—INJURY TO BUSINESS.

In an action for wrongful injury to plaintiff's business, the question of whether the acts complained of were within the rights of the defendant as being in the due course of competition for his own advantage, or actuated solely by malice and unjustifiable, must be determined upon the facts in each case, and no rule can be laid down for its determination.

[Ed. Note.—For other cases, see *Torts*, Cent. Dig. § 10; Dec. Dig. —10.]

3. TORTS — 4—"MALICIOUS" ACT—JUSTIFICATION.

A "malicious" act is one injurious to another, intentional, and without legal justification, and is unlawful and actionable, but if an act, otherwise lawful, has a reasonable tendency to promote ends advantageous to the doer, malice in the doing does not bring it within the rule.

[Ed. Note.—For other cases, see *Torts*, Cent. Dig. § 4; Dec. Dig. —4.]

For other definitions, see *Words and Phrases*, First and Second Series, *Malicious*.]

Certiorari to Court of Civil Appeals.

Action by E. J. Hutton against H. E. Watters and others. Demurrer to the petition was sustained, and on appeal to the Court of Civil Appeals that judgment was reversed, and defendants bring certiorari. Affirmed.

L. E. Holladay, of Dresden, for appellants.
A. B. Adams, of Martin, and R. E. Maiden, of Dresden, for appellee.

NEIL, C. J. The averments of the declaration are, in substance, as follows:

One of the defendants, the Hall-Moody Institute, is a chartered institution of learning at Martin, Tenn. Defendant Watters is its president, and the 10 other defendants are its "directors, trustees, teachers, and advisors." The school has a large out of town patronage, and it is essential that boarding houses be conducted to accommodate these students, as well as some of the teachers. Mrs. Hutton is a widow who makes a business of keeping boarders. In June, 1910, she opened a business of the kind in Martin. During that year one James Wilson became one of her customers. Some students did the same. Defendants offered no objection until after a personal difficulty had occurred between Wilson and defendant Watters. The latter then demanded that plaintiff dismiss Wilson. She refused. Because of this refusal Watters became her enemy, and the other defendants ranged themselves with him, and all formed a conspiracy to drive her out of business. Thereupon, from time to time,

during the years 1911, 1912, and 1913, as soon as plaintiff secured student boarders, or teacher boarders, the defendants, in prosecution of this purpose, caused these, plaintiff's customers, to leave her house, by threats to deprive them of the benefits of the school, or of their places, if they should refuse. By similar threats other persons were prevented from taking board with plaintiff; the defendants even going to the length of meeting trains and watching for new arrivals and deterring these from patronizing her house. The plaintiff is a person of good moral character, stands well in the community, and has always conducted a reputable establishment. The defendants, in setting on foot and prosecuting the conspiracy referred to, were not influenced by any motive of business rivalry, or competition, but acted as they did merely because of a feeling of ill will induced by plaintiff's refusal to turn James Wilson out of her house, and her refusal to permit Watters to dictate the price which she charged her customers.

The conspiracy was successful, and destroyed, or practically destroyed, plaintiff's business.

The damages are laid at \$5,000.

The defendants interposed a demurrer purporting numerous grounds, but all resolvable into the single objection that the declaration stated no cause of action.

The trial judge sustained the demurrer, but the Court of Civil Appeals reversed that judgment, and the case then came to this court under the writ of certiorari.

[1-3] We think the declaration stated a good cause of action.

Every one has the right to establish and conduct a lawful business, and is entitled to the protection of organized society, through its courts, whenever that right is unlawfully invaded. Such right existing, the commission of an actionable wrong is established against any one who is shown to have intentionally interfered with it, without justifiable cause or excuse. To establish justification, it must be made to appear, not only that the act complained of was otherwise lawful and performed in a lawful manner, but likewise that it had some real tendency to effect a reasonable advantage to the doer of it. But in order to determine the reasonableness of such act it must be considered from the standpoint of both parties, with a view to ascertaining whether the defendant has acted merely in the due exercise of his own right to carry on business for himself. If this be found in his favor, while he may have done the plaintiff harm, he cannot be adjudged to have done an injury in the legal sense; that is, a wrongful act in violation of the legal right of another. Whether the defendant was in the reasonable exercise of his own similar rights must, from the viewpoint stated, be determined by the court, or

court and jury in each case as it arises, on the law and the evidence. A defendant cannot excuse himself by the mere fact that the means used were his own, his property, his servants. He cannot, with justification in law, use his property, or anything else that appertains to him, in such manner as to wantonly injure another. Still, it has been decided, by the weight of authority, that if the act complained of, being otherwise lawful in itself, had a reasonable tendency to promote ends advantageous to the defendant in the conduct of his own business, it cannot be correctly adjudged an illegal agency or operation by the fact that the doer of it was moved also by a feeling of ill will, or personal malice, towards the person against whom his act was directed (*West Va. Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895; 62 L. R. A. 673, note; L. R. A. 1915B, 1180, note); but if the act is otherwise wrongful, such personal malice may aggravate the damages (*Cooley on Torts* [2d Ed.] pp. 832, 836).

In short, if an act be hurtful to another, intentional, and without legal justification, it is malicious in the true legal sense (19 Am. & Eng. Ency. of Law [2d Ed.] 623, note 4), therefore unlawful, and is actionable.

Of course it is wholly impossible to formulate a description which will cover all acts which are intentionally hurtful to another, and at the same time justifiable in law. As already said, each case, as it arises, must be determined on its own facts, and in the light of the principles stated. It is left in each case for the court, or the court and jury, according to the way in which the controversy is presented, to say whether the defendant's conduct complained of was, in view of all the circumstances, a reasonable and proper exercise of his right of self-protection, or self-advancement, both as to the substance of it, and the method of it. *Huskie v. Griffin*, 75 N. H. 345, 74 Atl. 595, 27 L. R. A. (N. S.) 966, 139 Am. St. Rep. 718; *Dunshee v. Standard Oil Co.*, 152 Iowa, 623, 132 N. W. 371, 36 L. R. A. (N. S.) 263; *Gott v. Berea College*, 156 Ky. 376, 161 S. W. 204, 51 L. R. A. (N. S.) 17; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598; *Mod. Am. Law*, vol. 2, pp. 327-336.

In the latter authority it is said, quoting 28 *Law Quarterly Review*, 67:

"The theory of justification consists in a proper adjustment and compromise between the two competing rights that are equally protected in law. It has been already observed that the enjoyment by a particular individual of the right of freedom, as to how he should bestow his capital and labor, is not absolute, but qualified by the existence of equal rights in the other members, to such an extent as to be made compatible with an equally free enjoyment of these rights by the rest of the community. In fact, every case of justification reduces itself to the question how far the rights of an individual can be so circumscribed in accordance with a general law of freedom as to leave an

equal scope for the free enjoyment of the competing rights of his fellow men."

"But," said Lord Justice Bowen, in *Mogul S. S. Co. v. McGregor*, supra, "such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own right. The good sense of the tribunal which had to decide would have to analyze the circumstances and discover on which side of the line each case fell. But if the real object was to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not, in my opinion, properly be said that it was done without just cause or excuse." *Id.* 618, 619.

Although, as indicated, the defense of justification arising in such controversies is a question for decision in each case, as concreted in its own peculiar facts, yet the precedents shed much light in the way of illustrating the principles involved.

In an early English case, decided during the reign of Queen Anne (*Keeble v. Hickeringill*, 11 East, 574), reported in full as a note to *Carrington v. Taylor*, 11 East, 571, 574, 577, it appeared that the plaintiff had prepared a decoy pond for the purpose of taking wild fowl. The defendant knowing this, and purposing to injure the plaintiff by frightening away the wild fowl accustomed to resort to the pond, discharged guns on his own land, and the wild fowl were thus driven away. It was held that an action on the case would lie for the damages thus occasioned. Holt, Chief Justice, said that if the defendant had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the latter, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff; but when, without benefit to himself, real or intended, he successfully committed the act intending to accomplish the injury to the plaintiff, it was actionable.

In *International & G. N. Ry. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559, it was held that a railway company was liable to the proprietor of a boarding house for having deprived him of the patronage of its employes by threatening to discharge them if they patronized him. It did not appear that any interest of the railway company was served, or any benefit to it effected, by such order.

In *Graham v. St. Charles Street R. R. Co.*, 47 La. Ann. 214, 16 South. 806, 27 L. R. A. 416, 49 Am. St. Rep. 366, it appeared that the foreman of the railway company, without any purpose of advancing its interests, threatened to discharge its servants if they continued to trade with plaintiff, who was conducting a grocery store near the stables and buildings of the company, in New Orleans, and by this order caused injury to the plaintiff. This conduct was held unjustifiable and therefore actionable.

In *Wesley v. Native Lumber Co.*, 97 Miss.

814, 58 South. 846, Ann. Cas. 1912D, 796, it was held that an action for damages would lie against a corporation where it had maliciously injured a retail dealer by threatening to discharge any of its employes who should deal with him. To the same effect is *Globe & R. F. Ins. Co. v. Fireman's Fund Ins. Co.*, 97 Miss. 148, 52 South. 454, 29 L. R. A. (N. S.) 869.

In *Ertz v. Produce Exchange*, 79 Minn. 145, 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. Rep. 433, it was held that a conspiracy by several to refuse to deal with a dealer in farm produce, having a profitable business, and to induce others to do likewise, it not appearing that such interference of the persons so conspiring was to serve any legitimate interests of their own, but that it was done merely to injure him, and that the conspiracy had been carried into execution, whereby the plaintiff's business was ruined, furnished a cause of action in favor of the injured party.

On the other hand, it was held in *Robison v. Texas Pine Land Association* (Tex. Civ. App.) 40 S. W. 843, that an employer who issued store checks redeemable in merchandise was not liable to an action by another storekeeper for threatening to discharge its employes if they traded with him, and for refusing to take up any checks which had passed through the hands of plaintiff. The ground of the decision was that the plaintiff had no superior right to trade with defendant's employes; that defendant had the right to appropriate to itself all of the customers it could command, provided it did not violate a definite legal right of the plaintiff. The point of view is brought out more clearly in *Lewis v. Hule-Hodges Lumber Co.*, 121 La. 658, 46 South. 685. The defendant was the employer of a large number of people, and in connection with its business carried on a general mercantile store for the purpose of selling goods to its employes and others. It notified its employes that if they bought goods of the plaintiff they would be discharged. The court held that defendant's act was justifiable as a means of safeguarding its own interests.

An interesting case is *Delz v. Winfree*. The controversy was first presented on a petition stating, in substance, that the defendants, members of two different firms engaged in buying and slaughtering live animals fit to be slaughtered and sold as fresh butcher's meat, conspired with each other, and with a butcher, not to sell to the petitioner for cash live animals or slaughtered meat for the prosecution of his business, and that in pursuance of this conspiracy they refused to sell him, although offered their own price in money, by reason of which unlawful combination and malicious interference the petitioner was compelled to close his business, and so had been damaged. This was held to state a cause of action.

80 Tex. 400, 16 S. W. 111. But when the case came on for trial on the issues made, it appeared that the refusal was based on the fact that the petitioner was indebted to the defendants, and they had refused to sell him because, he being insolvent, they deemed it prudent to have no further dealings with him until he had paid them what was due them. There were verdict and judgment in favor of the defendants, and on appeal the judgment of the trial court was sustained, the court holding that the reason assigned and proven justified the act complained of. 6 Tex. Civ. App. 11, 25 S. W. 50.

But in *Dunshee v. Standard Oil Co.*, 152 Iowa, 623, 132 N. W. 371, 36 L. R. A. (N. S.) 263, it was held that the principle of reasonable self-protection, or self-advancement, did not justify the action taken. There it appeared that the defendant, a wholesaler, when its customer in a particular city began to purchase a portion of his stock from a rival concern, entered into a retail business solely for the purpose of driving him out of business, and when this had been accomplished ceased its said retail business. It was held that these facts made out a case for damages.

So, the case of *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946, 22 L. R. A. (N. S.) 599, 131 Am. St. Rep. 446, 16 Ann. Cas. 807. Here it appeared that the plaintiff, a barber, had for several years carried on a profitable business, and that the defendant, a wealthy banker, possessed of great influence, set up an opposition shop, solely for the purpose of injuring the plaintiff, and without profit to himself, employing and paying barbers to conduct such opposition business, whereby plaintiff's business was ruined. It was held that these facts made a case for relief. The court said:

"To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton and an actionable tort."

To the same effect is *Boggs v. Duncan-Schell Furniture Co.*, 163 Iowa, 106, 143 N. W. 482, L. R. A. 1915B, 1196, quoting and approving *Tuttle v. Buck*.

The illegal acts excluded by general reference in the excerpt we have made from *Mogul S. S. Co. v. McGregor*, supra, are thus particularized by the Lord Justice in an earlier part of his opinion:

"No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden. So is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of

customers by show of violence (*Tarleton v. McGawley*, Peak, N. P. C. 270); the obstruction of actors on the stage by preconcerted hissing (*Clifford v. Brandon*, 2 Camp. 858; *Gregory v. Brunswick*, 6 Man. & G. 205); the disturbance of wild fowl in decoys by the firing of guns (*Carrington v. Taylor*, 11 East, 571, and *Keeble v. Hickeringill*, 11 East, 574, n.); the impeding or threatening servants or workmen (*Garret v. Taylor*, Cro. Jac. 587); the inducing persons under personal contracts to break their contracts (*Bowen v. Hall*, 6 Q. B. D. 333; *Lumley v. Gye*, 2 E. & B., 216)—all are instances of such forbidden acts."

Applying the principles stated to the case before us, we are of the opinion that the defendants acted without legal excuse. They were not justified by plaintiff's refusal to dismiss her boarder, James Wilson, nor by her refusal to arrange her rates according to the directions of the defendant Watters. If the prices charged were pleasing to her patrons, no other person had any right to complain. No such defense appears as that set out in *Gott v. Berea College*, supra, based on the welfare of the students, or the right of the college to make rules for their control.

We are referred to the case of *Payne v. Railroad*, 13 Lea (81 Tenn.) 507, 49 Am. Rep. 606, as an authority in opposition to the views herein stated. While that case was ably reasoned by the learned special judge who wrote the majority opinion, and is not without support in the authorities, we are constrained to hold that it was erroneously decided. We are better satisfied with the dissenting opinion. It is certain that the prevailing opinion in that case is out of harmony with the great weight of authority as now understood. Moreover, we have long been dissatisfied with that opinion, believing that it was fundamentally wrong. The real question was not, as assumed in that opinion, whether a master had the right to discharge his servants without liability to account to a third party for his reasons, good or bad, but it was whether the defendant had the right to injure the business of the plaintiff without any purpose to effect an advantage or benefit to itself. The plaintiff in that case could not lawfully question defendant's authority over its servants, but he could question the defendant's exercise of that authority solely for the purpose of destroying his business, the infliction of an injury on his business without legal justification, and hence an act malicious in law.

It was said in that opinion that the act was not malicious in law, because although it inflicted a wrong on the plaintiff such wrong was not a legal wrong, but only a moral wrong, therefore, not an unlawful act. That position assumed the whole matter in controversy. We think the learned special judge confounded the right of a master to discharge his servants subject to legal accountability to no one save the servants themselves for breach of contract, with the supposed right to interfere with the lawful

business of another by threats made against those servants. It is said, if the master had the right to discharge his servants, he necessarily had the right to threaten to discharge them. The conclusion does not logically follow. He had no right to condition his threat, or the execution of his threat, on an injury to be inflicted, under his orders, by the servants on the personal business of another. The defendant could not lawfully threaten to discharge his servants if they should fail to assault and beat the plaintiff. Why? Because to assault and beat one who is doing no harm is unlawful. So, it is unlawful to interfere with another's business without a good excuse. The means cannot justify the act, or turn a wrong into a right. The opinion referred to is based on the hypothesis that the means used can effect this metamorphosis, if that means be the exercise of the power which the master has over his servants through their fear of losing their places, and hence their means of livelihood, and no violence be done. It cannot be that a master has power, within the law, to direct his servants where to buy for themselves, or where not to buy, when no rightful good to himself can be effected through such direction. That would be to sanction tyranny, the enslavement of servants, and the subversion of the law itself. The law wills freedom, save where a man is bound by its own behests, or has, through contract, submitted his duty to the will of another. Where one employs the power which the law gives him by contract for purposes other than those of the contract, to the end that he may enslave the will of the person who has contracted with him, he does wrong, and if injury to another occurs thereby, he does a legal wrong, and cannot shelter himself behind the contract which he has diverted from its purposes, and so prostituted.

It is said in the opinion we are criticizing that a man has the legal right to buy where he chooses and to sell to whom he will. This is true; but we think the point had no fitting part in the solution of the question then before the court. The right of a man to dispose of his own custom does not include the power, in law, to influence or control the custom of other people to the injury or destruction of the business of third parties. Such influence one can lawfully exercise only when it is used for the building up of his own business or the advancement of his own lawful interests. The true theory of the matter was fully discerned by Mr. Justice Freeman, and expressed by him in his masterly dissenting opinion filed in the cause in these words:

"The rule I have maintained is in strict accord with a maxim of the law, so well founded in reason as to need no argument or authority to support it; that is, that a man must so use his own as not to do an injury to others. That this means he shall so enjoy his legal right, as not to do wrong to the legal rights of another,

I freely concede. But here is a use of his legal right to discharge employes, for the direct purpose and with no other, and for no other reason except to prevent their trading with a party legitimately entitled by his location and the character of his business to such trade. Here is the use of a legal right, to deprive the other of that which is his legal right, to wit, the property he has in the good will of his business, which consists in his business character for integrity and fair dealing, his convenience of location to his customers, the character of goods he sells, and fairness of price for which they are sold, and the like. All these make up as elements of that property now well recognized in our law as the good will of a business. For a party who has the power, to use that power, to destroy or injure the value of this property, in the exercise of the right, not for any reason of advantage to himself, but solely to injure another, ought not to be permitted by an enlightened system of jurisprudence in this country.

"It is argued that a man ought to have the right to say where his employes shall trade. I do not recognize any such right. A father may well control his family in this, but an employer ought to have no such right conceded to him. In the case in hand and like cases under the rule we have maintained, the party may always show by way of defense that he has had reason for what he has done; that the trader was unworthy of patronage; that he debauched the employe, or sold, for instance, unsound food, or any other cause, that affected his employe's usefulness to him, or justified the withdrawal of custom from him. This is not in any way to interfere with the legal right to discharge an employe for good cause, or without any reason assigned if the contract justifies it, but only that he shall not do this solely for the purpose of injury to another, or hold a threat over the employe in terrorism to fetter the freedom of the employe, and for the purpose of injuring an obnoxious party.

"Such conduct is not justifiable in morals, and ought not to be in law, and when the injury is done as averred in this case, the party should respond in damages. The principle will not interfere with any proper use of the legal rights of the employer, an improper and injurious use is all it forbids." 13 Lea (81 Tenn.) 541, 542, 49 Am. Rep. 666.

All of the foregoing excerpt is in accord with the views now held by the court (including as matter of justification acts for the lawful advancement of the master's own interest), and in harmony with the best judicial thought of the present time, and in our judgment should have controlled the decision of the cause.

We overrule *Payne v. Railroad Co.*, in so far as it is in conflict with the present opinion.

The judgment of the Court of Civil Appeals in the case before us, reversing that of the trial court, must, on the grounds herein stated, be affirmed, and the cause remanded for issue and trial.

AMERICAN ZINC CO. v. GRAHAM.

(Supreme Court of Tennessee. Oct. 2, 1915.)

1. MASTER AND SERVANT \S 118—SAFE PLACE TO WORK—MINES—STATUTE.

Laws 1903, c. 237, \S 28, requiring that the buckets used in mines shall be covered and that there shall be certain structures inside

the shaft so as to make the ascent and descent of employes safe, applied to a mine not fully in operation, which had sunk a shaft more than 250 feet, from the foot of which ran a drift to an old shaft, intended as a means of conducting air into the mine, and which was used by the employes in going to and returning from their work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.]

2. MASTER AND SERVANT § 204—SAFE PLACE TO WORK—MINES—STATUTE—CONTRIBUTORY NEGLIGENCE.

In such case a servant, knowing that the master had failed to comply with the statute requiring certain structures inside the shaft to make it safe for employes going up and down, did not assume the risk; and the fact that the statute fixed a penalty for its violation did not exclude his action for damages.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546; Dec. Dig. § 204.]

3. MASTER AND SERVANT § 118—MASTER'S NEGLIGENCE—VIOLATION OF STATUTE.

A master's violation of the terms of a statute requiring structures to secure safety in mine shafts was negligence per se, and made him responsible for all injury suffered as a direct consequence thereof.

[Ed. Note.—For other cases, see Master & Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.]

Certiorari to Court of Civil Appeals.

Action by D. F. Graham against the American Zinc Company. From a judgment of the Court of Civil Appeals, affirming a judgment of the circuit court for Knox county for plaintiff, the defendant brings certiorari. Affirmed.

Pickle, Turner & Kennerly, of Knoxville, for plaintiff. Cornick, Frantz, McConnell & Seymour, of Knoxville, for defendant.

NEIL, C. J. Graham sued the zinc company to recover damages for an injury received by him while being drawn up a mine shaft belonging to the company. He recovered a judgment in the circuit court of Knox county for \$500, and on appeal to the Court of Civil Appeals that judgment was sustained. The case was then brought here by the writ of certiorari.

Plaintiff in error, the zinc company, is the owner of a zinc mine, and also a factory for reducing the ore. At the time the injury occurred the factory had not been built, nor had the mine been put fully in operation. A shaft had been sunk to the depth of more than 250 feet. From the foot of this shaft a drift was run to the location of an old shaft on the property with a view to drilling upwards and reaching the bottom of that shaft, thus connecting the two. This was intended as a means of properly conducting air into the mine. The rock and ore broken down in the course of running the drift were carried up through the new shaft by a metal bucket drawn over a windlass propelled by steam. In the same manner the employes of the company working in the mine were drawn to the surface. When employes were

to be drawn up, notice was given by a servant of the company standing at the foot of the shaft by means of a wire connected with a bell at the surface; three taps being given to indicate that an employe was entering the bucket. The wall of this shaft was not protected in any manner, but was in the state left by the excavation. The Acts of 1903, c. 237, § 28, requires that certain protections shall be furnished for the security of employes. One of these is that the bucket shall be covered; another is that there shall be certain structures inside the shaft to make safe the ascent and descent of the employes. None of these requirements were complied with. The reason assigned by the company is that they wanted first to make the air connection complete and that they could not do both at once. It is also insisted that the mine was not complete, and that the statute did not apply to an incomplete mine. The plaintiff in error, while being drawn up through this shaft, was considerably injured by striking against the walls caused by the swinging of the bucket.

[1] The first question to be determined is whether this statute applies to a mine incomplete in the respects herein stated. We are clearly of the opinion that it does. There is the same reason for protecting the miners going up and down the shaft in an incomplete mine as in one that is complete. The shaft itself was complete, except the building of the structures therein which the statute requires. This shaft had been put down some weeks, and, as already stated, the miners were then engaged in running a cross entry or drift from the foot of it. Of course, they had to go down this shaft in getting to their place of work on the drift, and at night had to be transported up the shaft to their homes. There was as much need to them of this protection as there ever could be.

[2] The second inquiry is whether the miner assumed the risk of the situation, knowing, as he did, that the plaintiff in error had failed to comply with the statute. To hold that he did assume the risk would be equivalent to a repeal of the statute, since it would be a continuing invitation to the company to forbear compliance with its provisions. The statute was passed under the police power of the state for the purpose of protecting those who are unable to protect themselves, occupying as they necessarily do a position much inferior in financial security to that of their employers; the physical necessity of themselves and their families making it essential that they should have work in order to secure the means of sustenance. It would defeat this beneficent purpose if it should be admitted as a sound principle that a failure of the employer to obey the statute could be condoned by the employe. Such a conclusion would place the employer in the position of power which

only the Legislature should occupy, since it would enable him to either destroy or maintain the policies of the state according to his own will and purpose. Moreover, it would be inconsistent to admit a mutual regulation by employer and employé of a matter which had been deemed of sufficient importance to require an act of the Legislature to express a specific state policy. Such acts being passed to define rights and duties for the better regulation of business, and hence indirectly for the better regulation of society, must be sustained. They are not amenable to the doctrine of assumption of risk for the reasons we have stated, since a contrary decision would result in the courts loosing that which the Legislature has bound. Nor is the result changed by the fact that the statute fixes a penalty for its violation. The doctrine that the assumption of the risk does not apply is in harmony with the purpose of the penalty, and there is nothing in the act to indicate that the penalty was exclusive of the employé's right to maintain an action for damages. The views herein expressed are sustained by the great weight of authority in this country. The question has never before been discussed in this state, so far as we are aware, yet has received much discussion in other jurisdictions. The cases are very numerous and will be found in the cited cases themselves and the notes to the cases. *Streeter v. Western Wheel Scraper Co.*, 254 Ill. 244, 98 N. E. 541, 41 L. R. A. (N. S.) 628, Ann. Cas. 1913C, 204, and note; *Fitzwater v. Warren*, 206 N. Y. 355, 99 N. E. 1042, 42 L. R. A. (N. S.) 1229, and note; *Curtis-Carlisle Co. v. Pribyl*, 38 Okl. 511, 134 Pac. 71, 49 L. R. A. (N. S.) 471, and note; *Poli v. Numa Block Coal Co.* 149 Iowa, 104, 127 N. W. 1105, 33 L. R. A. (N. S.) 646, and note; *Low v. Clear Creek Coal Co.*, 140 Ky. 754, 131 S. W. 1007, 33 L. R. A. (N. S.) 656, Ann. Cas. 1912B, 574; *Narramore v. Railroad*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68.

[3] We have several cases in this state which hold that a violation of the terms of a statute is negligence per se, and renders the person guilty of such conduct responsible for all injuries which may be suffered as a direct consequence thereof, among which are *Queen v. Dayton Coal & Iron Co.*, 95 Tenn. 458, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. Rep. 935; *Riden v. Grimm Bros.*, 97 Tenn. 220, 36 S. W. 1097, 35 L. R. A. 587; *Railway v. Haynes*, 112 Tenn. 712, 81 S. W. 374; *Adams v. Inn Co.*, 117 Tenn. 470, 101 S. W. 428. But we have no case on the narrow point covered by the preceding discussion and the authorities cited thereunder. However, in *Adams v. Inn Co.*, the same principle was applied to the case of a boarder at a hotel which, at the time of its destruction by fire, had not been equipped with fire escapes as required by statute.

We find no error in the judgment of the Court of Civil Appeals, and it must be affirmed.

WHITTAKER v. LOUISVILLE & N. R. CO.

(Supreme Court of Tennessee. Oct. 2, 1915.)

1. JUSTICES OF THE PEACE — PLEADING — WARRANT—SUFFICIENCY.

In a suit against a railroad for personal injury on or near its tracks, begun before a justice of the peace, the warrant must sufficiently advise the defendant of the nature of the suit.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 251-257; Dec. Dig. —80.]

2. RAILROADS — ACCIDENT AT CROSSING—SIGNALS.

Under Shannon's Code, § 1574, subsec. 1, requiring the overseers of public roads to place at each railroad crossing a sign marked, "Look out for the cars when you hear the whistle or bell," and providing that no engineer need blow the whistle or ring the bell unless so designated, an engineer is not required to sound the whistle or bell at a crossing not designated by such sign.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 998-1001, 1008-1005; Dec. Dig. —312.]

3. RAILROADS — ACCIDENT AT CROSSING—PLEADING—OBSTRUCTION.

A count, in an action for personal injury, under Shannon's Code, § 1574, subsec. 4, providing that every railroad shall keep the engineer or fireman always upon the lookout, and when any obstruction appears the whistle shall be sounded, the brakes put down, and all possible means taken to prevent an accident, is a count under the common law, unless it was further charged that the person or object on the track was struck by the train, and by the addition of such circumstance the count is brought within Shannon's Code, § 1575, providing that every railroad failing to observe specified precautions shall be responsible for all resulting damage to persons or property, and section 1576, providing that no railroad observing such precautions shall be responsible for injury to persons on its road, so that where the warrant did not charge that the train struck the plaintiff or her wagon, and it appeared that she jumped from the wagon, the action was under the common law, and there was no absolute liability for failure to take the specified precautions.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1014-1016, 1019, 1107-1112; Dec. Dig. —320, 344.]

4. RAILROADS — ACCIDENT AT CROSSING—INSTRUCTION.

In an action for personal injury at a crossing brought under Shannon's Code, § 1574, subsec. 4, an instruction that it was the duty of the railroad on seeing plaintiff's wagon on or near the track, and in view of the train's speed of 50 miles an hour, to sound the whistle and endeavor to prevent an accident, was proper; but an instruction that plaintiff was entitled to recover because the engineer made no effort to stop even though no collision occurred was improper.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1193-1211, 1213-1215; Dec. Dig. —351.]

5. RAILROADS — ACCIDENT AT CROSSING — QUESTION FOR JURY — CONTRIBUTORY NEGLIGENCE.

In an action for personal injury at a crossing brought under Shannon's Code, § 1574, subsec. 4, held on the evidence that it was for the jury to say whether plaintiff was negligent

in jumping from the wagon instead of trusting her safety to the speed of the horses as the driver of the team did.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.]

Certiorari to Court of Civil Appeals.

Action by Mrs. W. M. Whittaker against the Louisville & Nashville Railroad Company. From a judgment of the Court of Civil Appeals, reversing a judgment of the circuit court for Knox county for plaintiff and remanding for a new trial, the plaintiff brings certiorari. Affirmed.

J. Alvin Johnson and Pickle, Turner, Kennerly & Cate, all of Knoxville, for plaintiff. Johnson & Cox and Jas. B. Wright, all of Knoxville, for defendant.

NEIL, C. J. This action was originally brought before a justice of the peace to recover judgment for an injury alleged to have been inflicted upon the plaintiff by the defendant. There was a judgment in favor of the plaintiff before the justice, and from this an appeal was prosecuted to the circuit court of the county. In that court there was likewise a judgment against the railroad company. An appeal was then prosecuted to the Court of Civil Appeals, and the judgment of the circuit court was there reversed and the cause remanded for new trial. We are of the opinion that the conclusion reached by the Court of Civil Appeals was correct, and that the judgment of that court should be affirmed.

We shall now endeavor to make clear our reasons for this conclusion.

[1] Although the suit was begun before a justice of the peace, and, according to the practice before such officers, there was no declaration but only a warrant, yet this warrant was practically as full as the declaration in a circuit court, and necessarily so, inasmuch as under recent decisions of this court it has been held that the warrant must sufficiently advise the defendant of the nature of the suit brought against him in the class of cases before us.

The substance of the warrant is that Mrs. Whittaker, on a certain day stated, was in a wagon driven by one Luttrell; that before the horses entered upon the track of the defendant company the team was slowed down, and both plaintiff and Luttrell looked and listened, and neither saw nor heard a train; that when the horses had gotten upon the track she saw one of defendant in error's trains coming around a curve about 500 feet distant and running very rapidly; that she urged the driver to speed up his team, but the train was coming so fast she feared they could not clear the track in time, and therefore she ran to the front of the wagon and jumped out on the ground, falling in the midst of some slag and other rough material

on the side of the track, whereby she was injured.

[2] There is a paragraph in the warrant averring that the defendant failed to sound the whistle or bell of the locomotive at the distance of one-fourth of a mile from the crossing, and at short intervals till the train had passed the crossing, pursuant to subsection 2 of section 1574 of Shannon's Code, and that this was one cause of the injury. This portion of the warrant, however, is no longer insisted upon because under subsection 1 of the same section, as held in *Graves v. Railroad*, 126 Tenn. 149, 148 S. W. 239, there was no duty incumbent on the railroad to comply with the provision referred to, because it did not appear in the evidence that the county warning ("Look out for the cars when you hear the whistle or bell") had been erected at the crossing pursuant to said section 1. The section provided that no engine driver should be compelled to blow the whistle or ring the bell at any crossing unless so designated.

[3] There was another paragraph based on subsection 4 of section 1574. This subsection reads as follows:

"Every railroad company shall keep the engineer, fireman, or some other person, upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident."

It was held in *Railroad v. Crews*, 118 Tenn. 52, 62-64, 99 S. W. 368, that a count under subsection 2 was a count under the statute, but that a count under subsection 4 was a count under the common law, unless it were further charged that the injury was caused by contact with the moving train, or, in other words, unless the object on the track or road should be struck by the train. The reason given was that the provisions of subsection 2 were peculiar to the statute, while those of subsection 4 simply expressed common-law duties. That is to say, that in so far as concerned the provisions of subsection 4 the statute and the common law are concurrent, and that in order to bring a count under the statute the additional circumstance above referred to should be added. By the addition of such further matter the charge is brought within the scope of sections 1575 and 1576 of Shannon's Code, which read as follows:

"1575. Every railroad company that fails to observe these precautions, or cause them to be observed, by its agents and servants, shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur.

"1576. No railroad company that observes, or causes to be observed, these precautions shall be responsible for any damage done to person or property on its road. The proof that it has observed said precautions shall be upon the company."

In order to bring these sections into operation, it must appear that the obstruction or object on the road was actually struck by the moving train. It has been hitherto deemed that this point was fully settled by the case of *Holder v. R. Co.*, 11 Lea (79 Tenn.) 176. It is denied, however, by counsel in the present case, that the authority referred to settled the question. We need only refer to page 179 of the book in which the case is reported, where the question is stated thus:

"The question is whether the company shall be held liable for a loss to which, although the innocent cause, it in no way contributed, and which was not occasioned by a collision with its train."

This has been repeatedly referred to as settling the question. See *Railroads v. Sadler*, 7 Pickle (91 Tenn.) 508, 509, 19 S. W. 618, 30 Am. St. Rep. 896; *Railroad v. Phillips*, 16 Pickle (100 Tenn.) 130, 42 S. W. 925. If there be any doubt remaining after the citation of these cases, it cannot persist in the face of the following quotation from a more recent case:

"The first error assigned is that there is no evidence to sustain the verdict.

"This must be sustained. According to the testimony which the defendant in error, himself, gave upon the trial below, he was walking down the track at a point where he could have been seen for quite a hundred yards, but he was not seen, or if seen by the lookout upon the engine, none of the statutory precautions were complied with; the first warning he had was the glare of the headlight when the engine was almost on him; he sprang suddenly to one side, and cleared the track, but his foot slipped on the slag with which the track was ballasted: this caused him to fall backwards, and in some way his hand fell under the wheels and was severed from his arm a little ways above the wrist. He was not struck by the engine or any portion of the train; his hand and arm were simply run over in the manner stated. The company was negligent in not complying with the statutory precautions. The defendant in error was negligent in being upon the track at all, and using it as a passway at 10 o'clock at night. He was especially negligent because he went upon the track at that time of night in the physical condition he then was in, that is, considerably under the influence of intoxicating drink, and defective in eyesight, and also in hearing. Moreover, it is apparent from his testimony that he was looking down at his feet as he walked along picking his way, and was not either looking or listening for a train.

"The statute (Sh. Code, § 1575) provides that any railroad company that fails to comply with the precautions laid down in the preceding sections shall be responsible for all damages to person or property 'occasioned by or resulting from any accident or collision that may occur.'

"This statutory rule has been administered by this court with great strictness, nor do we in any wise desire to depart from the policy of the law as evidenced in our previous decisions. But it has not been held in any case, that there could be a recovery where there was no collision on the track, or within the sweep of the moving train. Here, there was no collision. The defendant in error had cleared the track and, after doing so, threw his hand back under the wheels of the passing train. This was not a collision in the sense of the statute. It is true that the railway company was grossly negligent, and so was the defendant in error; but no matter how negligent the railway company is, in this class of cases, its liability is

conditioned upon a collision. If there is no collision, there is no liability. If there is a collision, and the railway company fails to show that it complied with all the statutory precautions, it is liable for some damages, no matter how negligent the injured party was; such is the result of our decisions. But it could not be held, under the section of the Code referred to, that, if a trespasser upon the track of a railway company seeing the train coming and close upon him should jump off and break his leg, the company would be liable, on the ground that it did not comply with the statutory precautions. Here there would be an absence of liability because of the absence of a collision. But we need not further illustrate or discuss the matter, but sum up our views upon the question with the statement that on grounds of public policy the statute should be strictly enforced in all cases to which it applies, but should not be invoked at all in cases to which it does not apply." *Va. & S. W. Ry. Co. v. James S. Richardson*, *Mss.*, Knoxville, September term, 1904.

The warrant in the present case does not charge that the train struck the plaintiff, or even the wagon in which she had been riding. As a matter of fact, it appeared in the evidence that after the plaintiff jumped out of the wagon it cleared the track before the train reached the crossing, but only by the space of about 18 inches.

[4] The case was thus not under the statute, but under the common law; notwithstanding this, however, the trial judge charged the substance of section 1575 which made a case of absolute liability on failure to comply with the precautions. He thus, in effect, told the jury that, even though there had been no collision with the train, yet there was an absolute liability. This was clear error, and for this the Court of Civil Appeals rightly reversed the judgment.

[5] As the case, however, must go back for a new trial, it is proper to say that the circuit judge committed no error in charging the substance of subsection 4 of section 1574. It was the common-law duty of the railroad company, on seeing the wagon on the track, so near, and especially in view of the great speed at which the train was going—50 miles an hour—to do the things prescribed in that subsection. If an effort had been made to stop the train, it is very probable that the plaintiff would not have felt the necessity of jumping out of the wagon as she did, since she would have seen a better hope of escaping injury in the additional time thus allowed the wagon to clear the track. It was for the jury to say whether, under all the circumstances, she acted with reasonable prudence and caution; that is to say, whether she was reasonably justified in springing from the wagon instead of trusting her safety to the speed of the horses, as the driver did. The trial judge should not, in effect, have told the jury that, even though no collision resulted, she was entitled to a verdict merely from the fact that the engine driver made no effort to stop the train.

What we have said fully disposes of the first assignment of error filed by the plain-

tiff in this court showing that it is not well taken.

The second assignment is immaterial.

Let the judgment of the Court of Civil Appeals be affirmed, and the case remanded for new trial.

A copy of this opinion will go down with the procedendo.

CINCINNATI, N. O. & T. P. RY. CO. v.

RODDY et al.

(Supreme Court of Tennessee. Oct. 2, 1915.)

1. LIMITATION OF ACTIONS — FLOWAGE — DAMAGES — CONTINUING DAMAGES.

Where a railroad ditch along the right of way is allowed to fill up by the road's negligence, throwing water upon plaintiffs' lands, depositing gravel and cinders, a distinct right of action arises with each wrongful act in the overflow or submergence of plaintiffs' lands due to the railroad's negligence in failing to keep open the ditch.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.]

2. LIMITATION OF ACTIONS — FLOWAGE — DAMAGES — LIMITATIONS.

Where defendant railroad, by allowing the ditch along its roadbed to become filled up, periodically inundated plaintiffs' adjacent lands, depositing gravel and cinders, the only damages recoverable were those caused by the deposit of gravel within the period of the statute of limitations, taking the value of the land at the beginning of the period as normal, although it was then covered with gravel deposited by previous floodings, as to which plaintiffs' causes of action were barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.]

Appeal from Circuit Court, Rhea County; Frank L. Lynch, Judge.

Action by B. W. and M. S. Roddy against the Cincinnati, New Orleans & Texas Pacific Railway Company. Judgment for plaintiffs, and defendant appealed to the Court of Civil Appeals, which reversed the judgment and remanded the cause. Judgment modified in the Supreme Court, and cause remanded.

Wright & Jones, of Knoxville, for appellant. Givens & Rhea, for appellees.

WILLIAMS, J. This suit was commenced July 14, 1914, by B. W. and M. S. Roddy against the railway company to recover damages done to a tract of land through which the defendant's roadbed is constructed, it being alleged that a ditch made by the company along its right of way for the protection of the plaintiffs' farming land by negligence was allowed to fill up, thus throwing the flow of water out on their land and causing a deposit of sand, gravel, and cinders to form thereon to its injury.

The defendant company filed a plea of the statute of limitation of three years, applicable to injuries to realty.

Plaintiffs' own proof showed that the land was thus caused to be abandoned as unfit for

usual tillage about 15 years before the suit was brought; that all of this land continued to be usable for pasturage until about 2 years before the trial, when a part of same became wholly unfit for any purpose, while another portion yet remained capable of use for grazing purposes. The condition grew worse as the land was overflowed from time to time and as the deposits were made over its surface.

The Court of Civil Appeals properly reversed the judgment of the circuit court on account of the charge of the trial judge being too meager, contradictory, and confusing, and the cause was remanded for a new trial.

The only question discussed before us is the proper measure of damages to be applied in the retrial in the court below in view of the plea of the statute of limitation.

The Court of Civil Appeals held that the measure of plaintiffs' damages "is the reasonable rental value of the land during the three years next preceding the institution of this suit; that is, such rental value as they would have realized from it had the original wrong never been committed."

[1] The case clearly falls within the rule of recurrent or continuing damages in force in this state under which a distinct right of action arises with each wrongful act in the overflow or submergence of plaintiffs' land due to the negligence of the railroad company in failing to keep open the ditch. *Car-riger v. Railroad*, 7 Lea (75 Tenn.) 388, 396; *Railroad v. Higdon*, 111 Tenn. 124, 76 S. W. 895.

Many cases lay down in broad terms the further subsidiary rule that so long and as often as such a recurrent cause of action arises the plaintiff is not barred by the statute of limitation of a recovery for such damages as have accrued within the statutory period, although a cause of action based solely on the original wrong may be barred; the recovery in such case being limited to such damages as accrue within the statutory period before action brought. *Slisby Manufacturing Co. v. State*, 104 N. Y. 569, 11 N. E. 264; *McConnell v. Kibbe*, 29 Ill. 485; *Gabbett v. Atlanta*, 137 Ga. 180, 73 S. E. 372; *Knapp v. New York, etc., R. Co.*, 76 Conn. 311, 56 Atl. 512, 100 Am. St. Rep. 994; 25 Cyc. 1138.

[2] The difficulty experienced by the Court of Civil Appeals was in determining what "damages accrue" within the period of three years limited by the statute under the above rule which it recognized. The holding of that court finds support in what was said by way of argument in the case of *Pickens v. Coal River Boom, etc., Co.*, 66 W. Va. 10, 65 S. E. 864, 24 L. R. A. (N. S.) 354. In that case it appeared that the defendant had so erected its boom below plaintiff's property as to cause sedimentary deposits of sand to accumulate in the stream to the damage of plaintiff's mill property. The court held to

the doctrine of recurrent injuries and that the statute of limitations began to run, not from the construction of the boom, but from the date when the damages accrued, and, further, that sediment so deposited within a period earlier than the period saved for action by the statute (five years for damages to realty in that state) was to be deemed an element operating to effect damages accruing within the period limited by statute. It was said by the court:

"It is not material when the sand was deposited creating that condition which caused the damage. That condition or state of the stream coming from the construction of the boom, and that condition still continuing entitling Pickens to recovery, how is it material when the sand was deposited so it continued to work damage within the five years for which this suit was brought? * * * Pickens had right to operate his mill in its original condition not only during the five years involved in the first suit, but also during the five years involved in the second suit, * * * and it is utterly immaterial when that sand was deposited, so it continued to operate in diminishing the working capacity of the mill."

We need not stop to inquire how the working capacity of a mill property, if the deposit were made on the plaintiff's property, can be distinguished in that attitude from the capacity of farm lands to produce crops, but the above case may be fairly said, in its argument at least, to sustain the judgment here under review. But is that case, if sound on its immediate facts, sound in its argumentation in the respect indicated or as applied to a case like this?

In *Lentz v. Carnegie Bros. & Co.*, 145 Pa. 612, 23 Atl. 219, 27 Am. St. Rep. 717, the plaintiff was the owner of a farm a part of which was along a creek into which defendants habitually dumped slate and slack depending upon the current and floods to carry it past plaintiff's land and away. Beginning about twenty-five years before the commencement of the suit, the dumped materials by degrees were deposited on the land to its material injury. These deposits continued to be made within the statutory limitation period—six years in that state. The court held that the questions thus presented for jury determination were: What was the condition of the land of plaintiff six years before the writ was issued? Was it covered by the deposit complained of? Whether the situation had been made worse during the six years, and to what extent? Giving, as a reason why the measure of damages adopted by the court below was inapplicable, that it allowed a consideration by the jury of the land's value in its original condition, that is, before the deposits began to form, the court said:

"The defendants had pleaded the statute of limitations, and the inquiry was thereby limited to six years. The comparison which the testimony placed before the jury carried them

back to a time when the stream was not polluted, and the slate and slack had not been deposited on the plaintiff's land. It brought to their notice, not the injury done in six years, but the changes made from the beginning of operations on Brush creek, which was nearly or quite a quarter of a century before the trial. While the learned judge told the jury that the plaintiff could not recover for an injury sustained more than six years before his action was begun, he permitted testimony to be given which brought the entire change in the situation of the plaintiff's flat land to their attention, and which contrasted its value if in its original condition with its value in its present condition."

This was held to be error.

The ruling on the point in any case that is to the contrary of the doctrine thus announced by the Pennsylvania court, we think, disregards a fundamental principle in the law of torts, viz.:

"A single tort can be the foundation for but one claim for damages. * * * All damages which can by any possibility result from a single tort form an indivisible cause of action. Every cause of action in tort consists of two parts, to wit, the unlawful act, and all damages that can arise from it. For damages alone no action can be permitted. Hence, if a recovery has once been had for the unlawful act, no subsequent suit can be maintained. There must be a fresh act, as well as fresh damages." 1 Freeman on Judgments, § 2111; *Railroad v. Brigman*, 95 Tenn. 624, 32 S. W. 762; *Love v. Railroad*, 108 Tenn. 122, 65 S. W. 475, 55 L. R. A. 471; *Railroad v. Matthews*, 115 Tenn. 172, 91 S. W. 194.

For these reasons, in cases such as the one under review, the cause of action is not referable to the original obstruction of the ditch, but to the subsequent several recurrent tortious acts of overflow which affected injuriously the lands of the plaintiff, as fresh acts giving rise to fresh damages.

Each trespass or fresh tortious act thus producing injury constitutes a cause of action, and this is susceptible of being barred by the statute of limitations. When, for example, an overflow occurs on a date prior to the period of limitation, that wrongful act and equally its result, the damage done, are barred when the applicable statute is pleaded.

It is illogical, therefore, to treat such items of injury or damage as projected forward into the period of limitation as being themselves factors contributing to further injuries, as *acts* of wrong, since they are but the *result* of precedent acts, confessedly barred. When a cause of action is barred, it is barred in its entirety, not as to only one of the two elements of which it thus consists. The statute puts at repose all that preceded its period that was actionable.

The Court of Civil Appeals was in error on this point, and its judgment will be modified, and the cause be heard on the remand in accordance with the ruling embodied in this opinion.

LEE v. STATE.

(Supreme Court of Tennessee. Oct. 9, 1915.)

1. CRIMINAL LAW ⚡854—TRIAL—CUSTODY OF JURY.

In a capital case, it is improper and constitutes reversible error to permit the jury to go at large pending the trial, even though accused consent; this depriving him of his constitutional guaranties of fair and impartial trial by jury.

[Ed. Note.—For other cases, see Criminal Law. Cent. Dig. §§ 2039–2047; Dec. Dig. ⚡854.]

2. RAPE ⚡40—EVIDENCE—ADMISSIBILITY.

In a prosecution for rape, evidence of other acts of intercourse between the prosecutrix and other men is admissible, not only on the question of the prosecutrix's credibility, but on the probability of consent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 55–59; Dec. Dig. ⚡40.]

3. RAPE ⚡44—EVIDENCE—ADMISSIBILITY.

In a prosecution for rape, evidence of prior intercourse between prosecutrix and accused is admissible to raise an implication of consent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 63; Dec. Dig. ⚡44.]

Appeal from Circuit Court, Blount County; S. C. Brown, Judge.

Spencer Lee was convicted of rape, and he appeals. Reversed and remanded.

McTeer & Kramer, of Maryville, for appellant. Assistant Attorney General, for the State.

FANCHER, J. Spencer Lee was convicted of rape committed on the person of Mary Finger, a married woman. There are several assignments of error. We notice one incident on the trial which is not assigned as error, but, inasmuch as it is material to the case, we will look to it without an assignment.

[1] An order in the record showing the process of the trial in the case recites that after the jury had been selected, impaneled and sworn, and having heard a part of the evidence, they were respited from further hearing until the meeting of the court the next morning, and, by consent of the Attorney General, the defendant, and his counsel in open court, they were allowed to go without being put in charge of an officer. The record shows that the next morning the remaining evidence was introduced, and the case argued by counsel, whereupon the jury received their charge, and on the same day returned a verdict of guilty.

In the case of Bud Long v. State, 132 Tenn. —, 179 S. W. 315, decided at the present term, we held that it was improper and constituted reversible error to permit the jury to go at large pending the trial of the case, on the ground that the defendant, under his constitutional guaranties of a fair and impartial trial by a jury, is entitled to have the jury removed from all possible contamination and influence, and that to

permit the jury to depart and separate, and not to keep them under the charge of an officer, as is required by law, is such material innovation upon the rights of defendants to have this fair and impartial trial that the court will reverse the case for this alone. This was held, notwithstanding the fact that the defendant consented that the jury might separate. The reason for this ruling is stated in the opinion in that case, which is filed for publication, and will not be repeated in this opinion.

This case is also reversed for the same reason, and will be remanded to the lower court for a new trial.

[2, 3] There is an assignment of error with respect to the charge of the trial judge, which we deem it is proper to notice. The court charged the jury as follows:

"Further, gentlemen, should you believe that Mary Finger had had sexual intercourse with the defendant or with other men or boys before the time in question, the 22d of last July, you may look to said acts of lewdness, if shown in the proof, only for the purpose of shedding light upon her credibility as a witness in this case."

This instruction was not explained or qualified by any other portion of the charge. There was considerable evidence tending to show illicit acts with other men and boys, and also with the defendant previous to the act in question. The weight of this evidence should not have been limited to the effect upon the credibility and standing of the state's witness Mary Finger. Such proof is competent as bearing directly upon the principal question at issue, that is, whether the intercourse was by force or with the consent of the injured female, and this for the reason that no impartial mind can resist the conclusion that a female who had been in the recent habit of illicit intercourse with others will not be so likely to resist as one who is spotless and pure.

The rule in many states is in accordance with the holding of the trial judge, and such is the rule also laid down by Greenleaf, vol. 3, § 214, and it is said that it was probably derived from the English cases of *Rex v. Hodgson*, and *Rex v. Aspinwald*. However, as pointed out in *Benstine v. State*, 2 Lea, 169, 31 Am. Rep. 593, and *Titus v. State*, 7 Baxt. 132, that rule was not adhered to in Tennessee.

There is a very interesting review of authorities on this subject in the note in 14 L. R. A. (N. S.) pp. 714 to 723. It appears that there is great diversity of opinion, but that the greater number follow the ruling in *Rex v. Hodgson*, supra. So, if the weight of authority is to be determined by the number of reported opinions, the greater weight must be said to be on that side.

It appears, however, that a respectable number of courts are with our own Tennessee court in their adherence to the contra-

ry reasoning of Mr. Justice Cowan in *People v. Abbot*, 19 Wend. (N. Y.) 192. This learned judge contended that, inasmuch as the offense was always done in secret and commonly proved by the testimony of the prosecutrix alone, every fact ought to be received which tended to prove the absence on her part of the utmost reluctance and resistance to the connection. And, although the body of a harlot may, in law, no more be ravished than the person of a chaste woman, nevertheless it is true that the former is more likely than the latter voluntarily to have yielded.

Later the New York court, in *People v. Jackson*, 3 Park, Crim. Rep. 391, disapproved of the holding in *People v. Abbot*, on the ground that the weight of authority was against it, and that the remarks of Justice Cowan were obiter dicta. These views of that learned judge have been emphatically approved in other cases. Our own court, in *Titus v. State*, adopted his argument, and said: "We deem this reasoning unanswerable on the question." The Vermont court, in *State v. Johnson*, 28 Vt. 512, expressly approved the holding, as is done in *Brennan v. People*, 7 Hun (N. Y.) 171; *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *Watry v. Ferber*, 18 Wis. 501, 86 Am. Dec. 789; *Ford v. Jones*, 62 Barb. (N. Y.) 484.

In *State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374, *Sherwood, J.*, referred to Judge Cowan's opinion as having been criticized, but frequently followed, and that the reasoning of that case he had not seen answered, nor did he believe it could be.

After all, where opinions are in conflict, it is not so much the duty of a court to follow the greater number of decisions as it is to adopt the sounder reasoning. The opposite view has been sustained by some because it had the larger number of adherents. The best, and in fact the only valid, reason for this adherence is expressed by the Oregon court in the case of *State v. Ogden*, 39 Or. 195, 65 Pac. 449, as follows:

"* * * While a prosecutrix, as a witness in an action of rape alleged to have been committed upon her, is expected to defend her general reputation for chastity, she cannot anticipate the charges of specific acts of illicit intercourse which may be made by men who perhaps have been suborned to testify. * * *"

We admit that this affords reason for that view. But does it outweigh the other reason in favor of such proof, that a defendant charged with this capital crime should have the benefit of all facts which may show the probability of consent on the part of the woman? If her character is good, it will indeed be hard to successfully impeach it, and as a rule the effort will not be made. Former acts of this nature with other men might not indicate so much a probability of consent with this man, but the fact, if true,

as claimed, that she induced a relationship that began when he was a boy and continued on after she was married and up to the time of the alleged offense, would point most strongly in favor of her consent on this occasion. The rejection of the testimony for that purpose is very prejudicial.

Acts of sexual intercourse may always be proven between the prosecutrix and the defendant upon a trial for common-law rape prior to the alleged offense, for the purpose of raising an implication of consent. This has been held quite generally. *Reg. v. Cockroft*, 11 Cox C. C., 410; *Reg. v. Riley*, 16 Cox C. C., 191; *Rex v. Martin*, 6 Car & P., 562; *McQuirk v. State*, 84 Ala. 435, 4 South. 775, 5 Am. St. Rep. 381; *Rice v. State*, 35 Fla. 236, 17 South. 286, 48 Am. St. Rep. 245; *Shirwin v. People*, 69 Ill. 55; *Bedgood v. State*, 115 Ind. 275, 17 N. E. 621; *State v. Cook*, 65 Iowa, 560, 22 N. W. 675; *State v. Jefferson*, 28 N. C. 305; *State v. Reed*, 39 Vt. 417, 94 Am. Dec. 337.

It is here where the authorities divide. The sharp conflict in the decisions is over the competency of acts of intercourse between the prosecutrix and other men than the accused. There is a greater reason for its introduction where the proof is of acts between the direct parties, but all acts, conversations, and admissions of the woman tending to show that she is a prostitute, or of easy virtue, should be admitted for the twofold purpose of showing her character as affecting her testimony, and also to raise an implication of her consent.

The effect of the instruction of the trial judge to the jury on this subject was to reject, for the purpose of shedding light on the question of consent, not only acts with other men and boys, but the intimate relations testified to with the defendant.

The defendant in this case does not deny the act of carnal knowledge, but says that it was with her consent. This being the principal issue in the case, any previous acts upon her part testified to, if true, should be considered by the jury in coming to a conclusion as to whether she consented or not.

The court should have charged the jury that the evidence in question is proper and should be looked to, not only for the purpose of shedding light upon the credibility or standing of Mary Finger as a witness in the case, but also as an aid for the jury to determine whether the intercourse was by force or by her consent.

All the other assignments of error with respect to the admission of testimony and special requests to charge the jury are each and all overruled. We find no error on the part of the trial judge other than as set out in this opinion. We omit any other comment upon the testimony in the case, for the reason that it is to be again tried upon the facts.

IMBODEN et al. v. CITY OF BRISTOL
et al.

(Supreme Court of Tennessee. Oct. 2, 1915.)

1. MUNICIPAL CORPORATIONS — 918 — ISSUE OF BONDS.

Where the credit of a city is to be used for a proper city purpose, bonds may be issued, if due authority is given by the Legislature, without a submission of the matter to a vote of the people.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.]

2. MUNICIPAL CORPORATIONS — 871 — STREET IMPROVEMENTS — BONDS.

Const. art. 2, § 29, declares that the credit of no county, city, or town shall be given in aid of any person, association, or corporation except upon an election first held by the qualified voters. Priv. Acts 1913 (1st Ex. Sess.) c. 18, authorized the city of Bristol to improve streets and issue bonds to pay for the improvement; the bonds to be the absolute and general obligations of the municipality. The act further provided for the payment of two-thirds of the cost by abutting property owners, and they were allowed five years to complete payments. Held that, though the abutting property owners received a peculiar benefit and were specially assessed for it, yet, the improvement of the streets being for the benefit of the city and its inhabitants, the issuance of bonds for payment of the entire work was not a pledge of the city's credit for the benefit of such abutting owners.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1817; Dec. Dig. § 871.]

Appeal from Chancery Court, Sullivan County; Hal H. Haynes, Chancellor.

Bill by Robert Imboden and others against the City of Bristol and others. From a decree sustaining a demurrer, complainants appeal. Affirmed.

Harr & Burrow, of Bristol, for appellants.
C. J. St. John, of Bristol, for appellees.

GREEN, J. This bill was filed by residents and taxpayers of the city of Bristol to enjoin the issuance of certain bonds about to be negotiated by the city in connection with street improvement work. The bonds were authorized by chapter 18, Acts of the First Extra Session of the Legislature of 1913—a front foot assessment act. The bill challenges the constitutionality of this act. A demurrer was interposed by the city and sustained by the chancellor, and from this decree complainants have appealed.

The act in question is not materially different from other statutes of this state providing for special assessments for local improvements, and, among other things, it provides that two-thirds of the cost of the work shall be borne by the abutting owners and one-third by the city. It authorizes the city to issue bonds to pay for the part of the work charged to the abutting owners, and provides that the city shall be repaid by assessments levied on the adjacent property to be discharged by the property owners, at their option, in five annual payments.

[1,2] It is said that the last-mentioned provision of the act violates section 29, art. 2, of the Constitution, as follows:

"But the credit of no county, city or town shall be given or loaned to or in aid of any person, * * * association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election."

The argument against the validity of the statute is founded on one of the reasons given in our cases justifying special assessments. It is said in these cases that the justification for special assessments for local improvements is that property contiguous to such improvements receives a peculiar benefit not shared by property elsewhere located. So the cost of the improvement may be assessed in proportion to benefits conferred, and is not required to be imposed on the whole body of property or taxpayers equally. *Arnold v. Knoxville*, 115 Tenn. 195, 90 S. W. 469, 3 L. R. A. (N. S.) 837, 5 Ann. Cas. 881; *State ex rel. v. Powers*, 124 Tenn. 556, 137 S. W. 1110.

Taking this statement of the law as a basis, it is argued that such improvements are for the benefit of adjacent property owners, that bonds issued to pay for such improvements are in aid of such property owners, and therefore the issuance of such bonds is a giving or lending the city's credit in aid of such parties in violation of the section of the Constitution quoted.

It should be observed that chapter 18 of the Acts of the First Extra Session of 1913 provides that the bonds here in controversy shall be "the absolute and general obligations of the municipality."

It is conceded that improvement of its streets within its borders is a proper corporation purpose, and with legislative authority any municipality may issue its bonds for such a purpose. Where the credit of a city or a county is to be used for a proper county or corporation purpose, if due authority is given by the Legislature, bonds may be issued by the city or county for such purposes without a submission of the matter to a vote of the people. *Shelby County v. Exposition Co.*, 96 Tenn. 653, 36 S. W. 694, 33 L. R. A. 717; *State ex rel. v. Powers*, 124 Tenn. 553, 137 S. W. 1110, and cases cited.

Although the improvement of a particular street may confer a peculiar benefit upon the property owners along that street—so peculiar, indeed, as to justify a special assessment upon them—the improvement is none the less a public improvement. In this case the expenditure is to be made on the city's own easement, its street, of which it had, and retains, control, and of which all its citizens have the benefit.

If a municipality could be restrained in the execution of a proper corporation purpose because some of its citizens would de-

rive special advantage therefrom, many of its enterprises would fail. Parks, schools, bridges, and numerous other public works benefit chiefly the immediate section in which they are located. It cannot be said that a municipal improvement falls short of a corporate purpose because all its benefits are not, in fact, enjoyed by all the citizens in the same degree.

The improvement of a city's streets is an improvement of a public nature, an improvement of the city's own property, the enjoyment of which is not confined to adjacent property owners. That adjacent owners derive special advantage therefrom sufficient to justify the levy of a special assessment upon them does not alter the case. The work is still of a public character, and expenditures for the same are expenditures for a corporation purpose.

To deny the public character or the corporate purpose of work accomplished by local assessments would be to deny the power of a municipality to execute such an undertaking at all. Unless such work were for the public benefit or for a corporation purpose, citizens could not be required to submit to assessments on account thereof. The property of adjacent owners could not be so burdened against their will, however much it might be improved or enhanced in value.

So we must conclude that the prosecution of this improvement work on its streets by the city of Bristol is for the benefit of the public, and that the use of the credit of the city for such work is for a legitimate corporation purpose, notwithstanding the fact that some property owners will be specially benefited.

The case of *Colburn v. Railroad*, 94 Tenn. 43, 28 S. W. 298, in no sense conflicts with the views herein expressed. In that case the county undertook to use its credit, as the court pointed out, for the purpose of becoming a stockholder and joint owner with the railroad company in proposed improvements. In this case the city of Bristol proposes to use its credit for the improvement of its own streets, of which it has exclusive control.

The chancellor correctly sustained the city's demurrer, and his decree will be affirmed, with costs.

RIDENOUR et al. v. WOODWARD.

(Supreme Court of Tennessee. Oct. 9, 1915.)

1. BAILMENT — 12 — ACCOMMODATION BAILMENTS — DEGREE OF CARE.

A bailee for the accommodation of the bailor is answerable only for his gross negligence or bad faith, the degree of care being measured, however, with reference to the nature of the article bailed.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 37-41; Dec. Dig. § 12.]

2. BAILMENT — 12 — ACCOMMODATION BAILMENT — LIABILITY OF BAILER.

Plaintiffs delivered money and checks to defendant salesman to carry to another town and deposit to their credit. Being warned by the bookkeeper of the house for which the salesman traveled as to danger of carrying the money to his house, he made it his custom to deposit the funds in an iron safe of a drug company, because he arrived at the place of deposit after banking hours. A deposit against which the merchants notified him they had drawn was placed in the drug company's iron safe, and, when the salesman who had been otherwise engaged called for it two days later, it had disappeared. Held that, as every parting with an article bailed will not work a conversion, the salesman was not guilty of converting the fund, though he did not deposit it the earliest possible moment.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 37-41; Dec. Dig. § 12.]

Certiorari to Court of Civil Appeals.

Action by W. S. Ridenour and C. C. Ridenour, copartners, against William Woodward. On appeal to the Court of Civil Appeals, judgment was rendered for plaintiffs, and defendant brings certiorari. Decree of Court of Civil Appeals reversed, and cause dismissed.

Owens & Taylor, of La Follette, for plaintiffs. C. A. Templeton and John Jennings, both of Jellico, for defendant.

WILLIAMS, J. W. S. Ridenour and C. C. Ridenour, a firm doing a mercantile business, brought this suit to recover \$400 and interest, alleged to be due them because of the failure of Woodward, as bailee, to deposit in the First National Bank, of Jellico, checks and money intrusted to him for deposit to their credit.

Woodward was a traveling salesman in the employ of Hackney & Co., a wholesale grocery establishment doing business in Jellico, and on his trips through the trade territory he was accustomed to call on and make sales to the complainant firm, the store of which was located at a small railway station about 16 miles out from Jellico, which store was in charge of C. C. Ridenour.

Ridenour had from time to time, for a period of nine months preceding the incident that occasioned this litigation, sent money and checks by Woodward to Jellico to be deposited to the firm's credit in bank. Woodward made his trips from Jellico to the complainants' store by the railroad. The train's schedule for the return trip called for arrival at Jellico at 7:20 at night, which was after banking hours. At the first Woodward began taking the money of complainant so intrusted to him to his home in the suburbs of Jellico, about one-fourth mile beyond the city limits and about one-half mile beyond the district where the streets were lighted; and the next day take the same to the bank for deposit or carry it to the establishment of Hackney & Co., his employers, and intrust it to the bookkeeper to be deposited in bank. Woodward was cautioned

by this bookkeeper that there was danger of loss attending this method, and a change was made; Woodward taking the funds to some downtown store and depositing the same in an iron safe commonly used for the keeping of valuables. Several times he had used the safe of the Smith Drug Company for that purpose, and several times other safes. He testifies, without contradiction, that he had not uniformly delivered the money from the safe to the bank on the day next succeeding such lodgment, but that at times he delayed doing so for a day or two.

On the afternoon of July 22, 1912, which was Monday, C. C. Ridenour handed to Woodward for deposit the \$400 in question, which was placed that night in the safe of Smith & Co. His business called him from Jellico on Tuesday morning before banking hours. He returned in due course of the business of his employers on Tuesday night after banking hours. On Wednesday morning he again went to the store of Smith & Co. without making inquiry as to the money, thence out of town on an early train for a short business trip, but returned to the city at 10:45, after the bank was opened, called at the drug store, and asked for the money that he had left there on Monday night, when on search of the safe it was discovered that the funds had disappeared. The testimony does not disclose what became of it, though it is found by both of the lower courts that it was not purloined by Woodward.

C. C. Ridenour informed Woodward at the time the funds were intrusted to him that he had drawn or was drawing checks on the bank against the same. Other facts are set out in the discussion which follows.

The Court of Civil Appeals held that Woodward was liable to respond as for a conversion of the funds so lost. We have granted the writ of certiorari in order to a review of that decree.

[1] The rule is that a bailee for the accommodation of the bailor is only answerable for his gross negligence or bad faith, the care to be taken by him to be measured, however, with reference to the nature of the thing placed in his keeping. *Whitemore v. Haroldson*, 2 Lea (70 Tenn.) 312; *Hotel Co. v. Holohan*, 112 Tenn. 214, 79 S. W. 113, 105 Am. St. Rep. 930, 2 Ann. Cas. 345; *Marshall v. Railroad & Light Co.*, 118 Tenn. 254, 101 S. W. 419, 9 L. R. A. (N. S.) 1246, 12 Ann. Cas. 675.

The Court of Appeals was of opinion that the holding in the case of *Colyar v. Taylor*, 1 Cold. (41 Tenn.) 372, controls this case. In that case Taylor had received from a bank in Nashville money for Colyar to be delivered gratuitously at Winchester. After receiving the money, he took it to the public fair grounds in the vicinity of Nashville, where he met one Estill, who was prevailed upon to take charge of and make the delivery of the money. The money was count-

ed out in public view, within a few steps of the promiscuous crowd, before it was passed to Estill. Shortly after Estill got upon the train, not far distant from the fair grounds, and soon after taking his seat discovered that his pocket had been picked. The ruling was that such parting of possession to Estill was a conversion since it was unauthorized, and also that there was gross negligence shown by the circumstances.

Accordingly, the Court of Civil Appeals held that the placing of the intrusted funds in an iron safe of another person was without authority and constituted a conversion by Woodward.

[2] It may be truly said that the earlier decisions go along rigid lines and show but slight, if any, disposition of the courts to indulge in inferences in favor of the bailee.

Clearly, it is not every parting with the possession by the bailee of the thing bailed that will work a conversion; there may be a parting that is qualified and temporary, evincing no intention on the part of the bailee to exercise a dominion over the same inconsistent with the right of the owner, but consistent with a further or continued control as to the delivery designated to be made by the bailee. *Spooner v. Manchester*, 133 Mass. 270, 43 Am. Rep. 514; *Fouldes v. Willoughby*, 8 M. & W. 540.

In *Jenkins v. Bacon*, 111 Mass. 373, 15 Am. Rep. 33, where the conclusion was a hard ruling of liability on the part of the defendant bailee charged with a conversion, it was yet conceded that:

If "for * * * sufficient reason it should become inconvenient or unsafe that he should retain the manual possession of the bond, he would undoubtedly be at liberty to deposit it in any other place or mode, in which he * * * might deposit his own property of the like description. But, as between the original depositor and himself, he would continue to be the lawful and responsible custodian, and bound to practice that degree of care which the law requires of gratuitous bailees."

The Court of Civil Appeals erred in not taking note of and following the trend of the modern authorities, which is to break away from the stern rules which many of the courts of England and of this country were at one time disposed to apply to acts of a bailee claimed to be a deviation, and therefore to effect a conversion.

Mr. Freeman in his annotations of the case of *De Tollenere v. Fuller*, 1 Mill, Const. (S. C.) 117, at 12 Am. Dec. 616, 621, after citing with approval our case of *McNeill v. Brooks*, 9 Tenn. (1 Yerg.) 73, said:

"It is certainly a hard rule to hold that slight acts of misuser, by a bailee, of the thing bailed, are to be regarded as evidence of a permanent appropriation of the property to his own use. Perhaps a more reasonable doctrine is that of a majority of the court in *Harvey v. Epps*, 12 Grat. (Va.) 153, etc."

Schouler, in his work on *Bailments*, remarks on this point that:

"The leaven of common sense, which keeps our law in constant ferment, is here at work,

recalling the injustice of visiting blameworthy and blameless deviation with the same penalties of absolute or insurance accountability."

The same writer, contending for a reasonable construction of the contract or undertaking of bailment, said that the same ought not to be too literally construed against a bailee who may have found himself obliged to act while away from the bailor, and forced to act on his own judgment; and that "the good sense of the contract should interpret favorably, where restrictive use was not clearly specified." *Schouler, Bailments*, §§ 140, 141; *Weller v. Camp*, 169 Ala. 275, 52 South. 929, 28 L. R. A. (N. S.) 1106.

Particularly should this be true in cases of bailments for the accommodation of the bailor. The law should not be so technical and penalizing on the question of diversion or deviation as to discourage and check the doing of acts of accommodation by one person for another in the spirit of neighborly kindness.

In a case involving a claim of wrongful delivery to another person by a mandatary that amounted to a conversion (*Christian v. First Nat. Bank*, 155 Fed. 705, 84 C. C. A. 53), it was said by Van Devanter, Cir. J.:

"As is said by Schouler, in his work on Railments (3d Ed. §§ 58, 63), 'the courts are indisposed to extend by inference, the perils of an unprofitable trust,' and 'every bailee without reward ought to be given the least trouble consistent with his actual undertaking.' This is in keeping with the rule that, when a contract is fairly open to two constructions, it is legitimate to adopt the one which equity would favor."

This modern tendency was exemplified in the holding of this court in the case of *Cicalla v. Rossi*, 10 Helsk. (57 Tenn.) 67. In that case money was the subject-matter of bailment for accommodation, the contract of which was evidenced by a written and signed memorandum as follows:

"Received from Giovanni Rossi the sum of five hundred and fifty dollars for safe keeps until he call for it."

The bailee, Cicalla, instead of keeping the money in his immediate possession, deposited it in his own name in a bank in the city of Memphis that he considered safe but which later failed. The court, on the question of a conversion on the part of the bailee by reason of his making such a deposit, said:

"The material point of controversy, and the one on which the case should turn, is whether or not the defendant in depositing the money in bank in his own name acted in accordance with the consent of the plaintiff, either expressly given or fairly to be implied from the circumstances and conversation had at the time."

Applying these principles to the facts of the pending case: We think it manifest that Woodward acted with a fairly commensurate discretion when he placed the money and checks of the bailors in the iron safe for safe-keeping, and that by fair inference from all of the circumstances that action was in the interest of the bailors and consented to by them. They, themselves, in similar circumstances, had made like deposits in safes in Jellico overnight, which fact was known to Woodward at the time of the lodgment here in question. *Kirtland v. Montgomery*, 1 Swan (31 Tenn.) 452, 453.

The Court of Civil Appeals was of the opinion that there was no excuse for Woodward not having the bookkeeper of Hackney & Co. get the money on Tuesday morning and deliver it to the bank. But this quarrels with the very ground of liability of the bailee assumed by that court—that the mere act of parting with possession without authority to a third person for a consummation of the delivery would constitute a conversion. Moreover, Woodward explains that the bookkeeper was more than ordinarily busy with his own duties, it being near the close of the month when he was engrossed with his work as accountant.

Much stress is laid upon the fact that the funds were allowed to remain in the safe until up into the second day, especially in view of the fact that Ridenour had informed Woodward that he was drawing checks upon the deposit thus to be built up. If the fund was not one converted by the act of the placing of it in the safe of another, this later circumstance would seem to be one only to be looked to in ascertaining the degree of care taken by the bailee. Did he hold the funds so long as to reach to gross negligence on his part?

It seems to us that in fairness the bailors must be deemed to have known that Woodward's first duty, on the day succeeding the deposit in the safe, was to his own employers, and that his service for their accommodation must have been accepted with the tacit understanding that Woodward's time was not his own. Was it reasonable for them to demand or expect that Woodward should give over carrying out his employers' schedule, mapped out for him for Tuesday, in order that the deposit should reach the bank before Wednesday? We think not. Clear it is that a case of gross negligence is not made out.

The decree of the Court of Civil Appeals is reversed; decree here dismissing the bill of complaint at complainants' cost.

LUNSFORD v. JOHNSTON et al.

(Supreme Court of Tennessee. Oct. 9, 1915.)

PRISONS \S 10—LIABILITY OF SUPERINTENDENT—TORTS OF ASSISTANT.

The superintendent of a county workhouse, under Priv. Acts 1913, c. 264, creating the office of road commissioners, and providing that one of them should be superintendent of the workhouse and employ its guards with the approval of his associates, was acting in an official or governmental capacity in employing a guard, and, where he was not present when the guard, whom he had told not to shoot any prisoner, shot and wounded a prisoner, attempting to escape, he was not liable in damages.

[Ed. Note.—For other cases, see Prisons, Cent. Dig. \S 12; Dec. Dig. \S 10.]

Certiorari to Court of Civil Appeals.

Suit by James A. Lunsford, as next friend of M. E. Lunsford, a minor, against Andy Johnston, Sam Hall, and others. From a judgment of the Court of Civil Appeals, affirming a judgment against defendant Hall, and dismissing as to defendant Johnston and his surety, plaintiff brings certiorari. Affirmed.

Charles M. Roberts and W. B. Ford, both of Knoxville, for plaintiff. Maynard & Lee and Johnson & Cox, all of Knoxville, for defendants Andy Johnston and others.

FANCHER, J. This suit was brought by James A. Lunsford, as next friend for M. E. Lunsford, a minor, against Andy Johnston, superintendent of the workhouse for Knox county, Tenn., Sam Hall, a guard, and others, to recover damages for personal injuries inflicted upon M. E. Lunsford, a prisoner at the workhouse, caused by the said Sam Hall shooting him while attempting to make his escape. Judgment was rendered against Sam Hall, but the suit was dismissed as to Andy Johnston and the surety company on his bond. The case was determined by the Court of Civil Appeals upon an appeal to that court, where the judgment of the lower court was affirmed.

The case is before this court upon certiorari. The only error assigned is, in substance, that there is no evidence to support the judgment of the court.

The position of the plaintiff is that Andy Johnston, as superintendent of the workhouse, was not performing a governmental duty in the employment of Sam Hall as a guard, and that the relation of master and servant existed between them, and that therefore Johnston and his official bondsmen are liable in damages to M. E. Lunsford, because the law knows only the superior officer in such cases.

The proof shows that M. E. Lunsford was serving a workhouse sentence for a misdemeanor, and that he was shot by one Sam Hall, a guard at the Knox county workhouse, on June 19, 1914, while attempting to make his escape. Andy Johnston was superintend-

ent of the workhouse, and also a member of the Knox county road commission. These road commissioners consisted of three members, Andy Johnston being superintendent, as stated. The act of the Legislature creating the office of these commissioners, being chapter 264, Private Acts of 1913, provided that one of the commissioners should be known as the superintendent of the county workhouse, and that the guards for such workhouse should be employed by said superintendent, with the advice and approval of his associates.

The proof shows that Johnston was not present when the shooting was done, and that he knew nothing about it until afterward.

The defendant Sam Hall was employed by the road commission, or rather by the defendant Andy Johnston, with the advice and approval of his associates, pursuant to said act. These guards are paid for their services by the county, and are subject to the orders of the superintendent of the workhouse. Hall, therefore, was not a servant of the defendant Johnston at the time he did the shooting. Johnston was not acting in his individual capacity in selecting Hall as a guard, but in an official capacity and as an agent of the county in obedience to his statutory duty, and he was therefore performing a governmental duty. A public officer is not responsible for the wrongful act of a subordinate appointed by him under proper legal authority, unless he directed such wrongful act to be done, or is guilty of negligence in respect of same, which directly and proximately contributed to the injury. *Sherman & Redfield on Neg.* (6th Ed.) vol. 2, \S 319; *Casey v. Scott*, 82 Ark. 362, 101 S. W. 1152, 118 Am. St. Rep. 80, 12 Ann. Cas. 184; *Robertson v. Sichel*, 127 U. S. 507, 8 Sup. Ct. 1286, 32 L. Ed. 203; *McKanna v. Kimball et al.*, 145 Mass. 555, 14 N. E. 789; *Sawyer v. Corse*, 17 Grat. (Va.) 230, 94 Am. Dec. 445; *Walsh v. Trustees N. Y. & Brooklyn Bridge*, 96 N. Y. 427; *Bowden v. Derby*, 97 Me. 536, 55 Atl. 417, 63 L. R. A. 223, 94 Am. St. Rep. 516.

Many other cases and authorities might be cited.

We think clearly under the well-recognized authorities on the subject that a public officer is not liable for the acts or omissions of his subordinates employed by him or working under his direction, unless they are acting in his private service, but these subordinates themselves are considered as servants of the government. We do not mean to hold that there would be no personal liability in cases of negligence or want of reasonable care in the selection of subordinates, but that question does not arise, inasmuch as no facts are shown proving a dereliction upon the part of Johnston in this respect. The defendant Hall was acting without any authority to do this act, but on the contrary in

violation of instructions. He had been instructed by his superiors not to shoot any prisoner.

The rule upon which sheriffs are held to be liable for the acts of their deputies is based upon the fact that the deputy is acting in a personal capacity as the agent of his principal, and the act of the deputy is the act of the principal. In such case it is more nearly a personal employment by the sheriff than the selection of a public official. The relation of principal and agent can, in no sense, be found in the present case.

Affirmed.

CAUGHRON et al. v. STINESPRING et ux.

(Supreme Court of Tennessee. Oct. 13, 1915.)

1. VENDOR AND PURCHASER — 350 — ACTIONS FOR DEFICIENCY — EVIDENCE.

Evidence held to show that complainants purchased a farm by the acre and not in gross, and so could recover for deficiency in acreage.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1043-1046; Dec. Dig. — 350.]

2. BROKERS — 94 — LIABILITY OF PRINCIPAL FOR BROKER'S STATEMENTS.

A landowner who makes a sale through a duly authorized broker is bound by the broker's statements as to the quantity of the land.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 136; Dec. Dig. — 94.]

3. VENDOR AND PURCHASER — 334 — DEFICIENCY — LIABILITY FOR.

Though purchasers of land visited the property itself and looked over the boundaries, the fact that they did not discover a deficiency of 57 acres will not excuse the vendors, as the purchaser could hardly be expected to discover a shortage in a tract of 600 acres.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. — 334.]

4. VENDOR AND PURCHASER — 334 — DEFICIENCIES — RECOVERY.

Where a sale is in gross, no compensation will be granted for a deficiency, unless the deficiency is so great as to justify a conclusion of fraud or mistake equivalent to fraud, but if the sale is by the acre, the purchaser may recover for a deficiency at the agreed price per acre.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. — 334.]

5. VENDOR AND PURCHASER — 334 — DEFICIENCY — STATEMENTS IN DEED.

To recover for misrepresentation as to the quantity of land conveyed, it is not necessary that the acreage be stated in a deed, but this may be shown by extrinsic evidence.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. — 334.]

6. EVIDENCE — 419 — PAROL EVIDENCE — CONTRACT OF SALE — DEFICIENCY — RECOVERY.

In a suit to recover for a deficiency in a parcel of land, the price per acre may be shown by parol, though not stated in the deed, the real contract between the parties governing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. — 419.]

7. VENDOR AND PURCHASER — 341 — DEFICIENCY — ACTIONS — EVIDENCE.

In a suit to recover for a deficiency in a parcel of land, parol evidence, showing the terms of the contract as to the price and number of acres, must be clear and certain; those matters not being stated in the deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008-1017; Dec. Dig. — 341.]

8. CONSTITUTIONAL LAW — 83 — IMPRISONMENT FOR DEBT — WRIT OF NE EXEAT.

There was a deficiency in a parcel of land, which was sold by the acre. The vendor removed from the state and returned to collect notes for the purchase price. These were on his person. Shannon's Code, § 6246, authorizes the issuance of a writ of ne exeat. Held, that in such case, as the vendor might remove and negotiate the notes, thus depriving the purchaser of his remedies, the writ of ne exeat would issue; the issuance in such case not being equivalent to an imprisonment for debt prohibited by Const. art. 1, § 18.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 150-151½; Dec. Dig. — 83.]

9. NE EXEAT — 3 — ISSUANCE OF WRIT — RIGHT TO.

The writ of ne exeat will not issue for demands uncertain or contingent, and either the demand or its enforcement must be of an equitable nature.

[Ed. Note.—For other cases, see Ne Exeat, Cent. Dig. §§ 3-6; Dec. Dig. — 3.]

10. NE EXEAT — 6 — WRIT — PLEADING.

A bill, praying the issuance of a writ of ne exeat, must by positive allegations or by facts showing the intention, set forth defendants' intended departure from the state and the probability of loss of rights.

[Ed. Note.—For other cases, see Ne Exeat, Cent. Dig. § 8; Dec. Dig. — 6.]

Appeal from Chancery Court, McMinn County; V. C. Allen, Chancellor.

Suit by William Caughron and others against J. B. Stinespring and wife. From a decree for defendants, complainants appeal. Reversed and rendered.

Jones & Davis, of Athens, for appellants.
N. Q. Allen, of Athens, for appellees.

FANCHER, J. This suit was brought to recover damages for a deficiency in acreage in a tract of land conveyed by the defendants to complainants, upon the ground that the land was sold by the acre at an agreed price per acre. The original bill undertook a recovery, notwithstanding the fact that the deed of conveyance did not recite the sale by the acre, upon the ground that the original contract of sale entered into between the parties contemplated a sale by the acre, and that it is competent to look to the original contract; the deed being a mere evidence of the original agreement.

An amendment to the bill was filed later, seeking to reform the deed upon the ground that by mistake or fraud the instrument did not set forth the real contract of the purchase. The deed contained general warranties, covenants of seisin, etc. It contains a description of the land by metes and

bounds, except that on some of the lines the distance is not given; the calls being for lands of other owners or other objects.

[1] The property in question, belonged to Mrs. Lou Stinespring, and the deed was executed by her and her husband, J. B. Stinespring, to the complainants. The grantors were, at the time, living upon the land in question, located in McMinn county, Tenn., and complainants were residents of Blount county, Tenn. Most of the negotiations in regard to the sale were carried on between the complainants and one C. F. Keith, Jr., who was the agent of defendants, they having jointly authorized Keith to represent them in the sale of their farm and appointed him by written contract as their agent. In this contract the land was described as containing 600 acres, of which 400 acres was cleared and 200 acres in timber.

Defendant Stinespring denies that he had any understanding that the land was sold by the acre, but the agent Keith, and both of the complainants, grantees in the deed, testified positively that the understanding was that complainants were buying 600 acres of land at \$50 per acre.

The deed of conveyance does not set forth the amount of the purchase price, it appearing that Stinespring did not want to put on the face of the deed the consideration to be paid, and the purchasers probably did not want the deed to show the real consideration on account of a desire to keep the taxes as low as possible.

The contract of agency was signed by both Mrs. Stinespring and her husband, appointing Chas. F. Keith, Jr., their exclusive agent to procure a purchaser or sell the land. Keith testified that Stinespring told him that the farm contained over 600 acres and that before the deed was made to complainants, he, Keith, told Stinespring the terms upon which the land was sold; that it had been sold for \$30,000, based on 600 acres at \$50 per acre. He testified explicitly that he told the purchasers there were 600 acres in the farm listed to him by Stinespring. Complainants Caughran and Goins testified that they relied upon the statement that they were to get 600 acres of land, and that they would not have bought the farm if they had known that it contained less than 600 acres. Defendant Stinespring testified that after the sale had been made, Keith told him that he had sold the farm for \$30,000, and the terms upon which the sale was made. He and his wife thereupon executed the deed.

The county surveyor of McMinn county was employed by the complainants after their purchase of the farm to make a survey and calculation of acreage, which was done, and it was determined that the farm contained only 542.2 acres. The surveyor stated that it was impossible to follow the calls of the deed, because they were improperly given

and many of them were short of the distance called for. He was asked as to each call and each line given in the deed, and it was found that practically all of the calls were incorrectly given in the instrument. He testified that the lines were well established and the corners located.

[2, 3] From this testimony we are satisfied, and find as a fact, that the complainants purchased the Stinespring farm from the defendants through their regularly authorized agent at \$50 per acre, and paid therefor in money and notes the sum of \$30,000, upon the basis and the distinct understanding that the farm consisted of 600 acres; that complainants relied upon this representation of acreage, and that they would not have given \$30,000 for the farm if they had not believed that it contained 600 acres. The defendants were bound by the statement of their agent as to this representation of acreage. Complainants looked over the land prior to their purchase. While it is evident as a practical proposition that they could see the body of land they were to receive and form an estimate of its size and value, yet it is also apparent, that although the deficiency in acreage, being 57.7 acres, was sufficient in amount to be material in the contract, yet without an actual survey a purchaser could ordinarily be deceived as to the number of acres in so large a tract of land.

After the sale of the land the defendants moved to the state of Florida. At the time the bill in this case was filed defendant J. B. Stinespring was in McMinn county temporarily. One of the notes for purchase money had fallen due, and it was alleged in the bill that a certified check had been given to defendant Stinespring in part payment of this indebtedness, which payment had been made before they ascertained the shortage in acreage; that J. B. Stinespring had also taken the notes from the bank at Athens, and that he then had in his possession this note, upon which was then due \$2,188.88; that the note is payable to J. B. Stinespring or order, and there is nothing on the face thereof to put any purchaser of the same on notice as to any equity or right that the complainants might have therein in the way of a set-off or counterclaim for the shortage in acreage. They further averred that said defendant had no other property in Tennessee, and that he was fixing forthwith to leave McMinn county and go to his home in Florida and would not return, and was seeking to evade accounting to complainants for the shortage in said acreage, and unless restrained by proper fiat would do so, and thereby defeat the effort to obtain redress or relief against the defendants.

In addition to the prayer for ordinary process, complainants also prayed for an injunction to restrain J. B. Stinespring from disposing of said note or said cashier's check; that he be compelled and enjoined to deliver

said note and cashier's check to the court, to be held subject to the orders of the court, and that attachment issue, attaching the note and cashier's check. There was also a prayer that a writ of ne exeat republica issue to stay defendant J. B. Stinespring from departing from or leaving the state without the express permission of the court, and they sought to have the said note credited with the sum of \$2,890 for the shortage in acreage.

Fiat was obtained and writs issued for the injunction, attachment and writ of ne exeat prayed for, and all said writs were executed on the defendant Stinespring, except the writ of attachment; the return of this writ being search made and the property described therein not found. Later, by agreement and entry of order in the cause upon the application of said Stinespring, he executed a bond in the sum of \$5,780, payable to the state for the use of complainants, conditioned that he should appear in person before the chancery court at Athens, Tenn., and should abide by and perform the judgment of the court in this cause.

Complainants answered the bill, denying the material allegations therein. The chancellor upon final hearing dismissed the bill, and upon a motion for that purpose quashed and dismissed the writ of ne exeat. A reference was made to the master to report on the damages sustained by defendant for the wrongful issuance and execution of the writ of ne exeat. Complainants appealed upon the whole decree.

[4-7] Where the sale is in gross the rule is that no compensation will be granted for a deficiency, unless such deficiency is so great as to justify a conclusion of fraud, or mistake equivalent to fraud. If a sale is by the acre and there is a deficiency, then the purchaser can recover for such deficiency at the agreed price per acre. For where the price is by the acre, if there is a misrepresentation made by the vendor and relied on by the vendee as to acreage, producing a loss, such misrepresentation, whether intended so or not, has all the essential elements of legal fraud or mistake. It is not absolutely essential in order to recover for a misrepresentation as to the quantity of land conveyed that the acreage should be stated in the deed, but this may be shown by extrinsic evidence. Likewise, the amount of the consideration may be shown by parol testimony. The deed is only the execution of the contract, and the real contract and understanding between the parties in this respect will govern on the question. *Miller v. Bentley*, 5 Sneed, 671; *Seward v. Mitchell*, 1 Cold. 89; *Barnes v. Gregory*, 1 Head, 230; *Horn v. Denton*, 2 Sneed, 125; *Deakins v. Alley*, 9 Lea, 494; *Rich v. Scales*, 116 Tenn. 63, 91 S. W. 50.

The present case is one where there is a deficiency in acreage material in amount and affecting the contract; and, although the

deed does not disclose the real contract as to the number of acres nor the price per acre, yet under the authorities it is clear this may be shown by extrinsic testimony. Where a matter of this kind must be presented by parol testimony alone, a safe rule to lay down would be that the proof should be clear and unmistakable, because matters arising outside the written instrument should be clearly proven.

However, in this case we find no difficulty in coming to the conclusion that there was a clear understanding between the agent and the purchasers that the price was to be \$50 per acre, and that the body of land contained 600 acres. The grantors in their contract with the agent had represented the farm to contain 600 acres, and in addition one of the grantors had stated to the agent that he thought it would run out more than that.

It was not apparent from the face of the deed that there was less than 600 acres of the land, because some of the calls did not state the distance from one point to another in the lines. Moreover, it was found by the survey that there was a considerable deficiency in the calls for distance where the deed recited such distance from corner to corner.

We think therefore the chancellor was in error in dismissing the bill.

[8] Under the record the writ of ne exeat was properly issued. The defendant was a nonresident of the state and was only within the jurisdiction of the court temporarily. He had no property in the state except the items of personal property which were on his person. He was about to remove with this personal property beyond the jurisdiction of the court. It was very essential to have the defendant in the custody of the court so that its orders and decrees might be made to operate upon him. The injunction in such case would have been insufficient.

The writ of ne exeat is not frequently issued, because the occasion for its demand seldom arises. Nevertheless, it is directly recognized in our statute (*Shannon's Code*, § 6246) providing that injunctions, attachments, writs of ne exeat, and other extraordinary process shall be granted by the chancellor, circuit judges, and judges of criminal and special courts. It is within the power and jurisdiction of the chancery court in a proper case to grant the writ. *Gibson's Suits in Chancery*, § 864; *Smith v. Koontz*, 4 Hayw. 189.

In *Smith v. Koontz*, the writ was issued in apprehension, based upon the character of the defendant and information that there was danger of the removal of the negro slaves who were the subject of the controversy.

The issuance of the writ in this case is not equivalent to imprisonment for debt, which is prohibited by our Constitution (article 1, § 18). In any case where it would amount to such imprisonment it would necessarily have to be denied. In this case the

writ was not to compel the defendant to pay a debt, but in order to prevent him from removing personal property on his person or within his control from the jurisdiction of the court without first giving bond, the property held by him being a certified check and a note payable by complainants upon which they were entitled to a credit of \$2,880. The note was negotiable, and if defendant were allowed to carry it beyond the jurisdiction of the court and deliver it to an innocent purchaser, the remedy of complainants would have been lost. It was not therefore to compel him to pay a debt that he was arrested, but to prevent his removing the check and note in question out of the jurisdiction of the court, or in place thereof, giving bond to the court. The purpose of the writ was to secure the jurisdiction of the court over the person of the defendant so that he might be prevented from carrying the property in question beyond the jurisdiction of the court, or be compelled by process of contempt to perform the decree of the court.

It has been held in this state that a statute (Shannon's Code, §§ 6092, 6093) giving the chancery court jurisdiction upon bill filed by the complainant to compel a judgment debtor to discover any specific property, prevent its transfer, and to subject it to the satisfaction of complainants' judgment, which can only be accomplished by process of attachment for contempt, is not imprisonment for debt. Judge McFarland said:

"The court may imprison him, not because he is unfortunately unable to pay his debts, but because he willfully refuses to obey the lawful orders of the court. In all other cases, when the court, in the exercise of rightful jurisdiction, orders specific things to be done, such as the execution of a deed, or the surrender of property by a trustee, etc., the order may be enforced by imprisonment, and such imprisonment is not imprisonment for debt." *Cresswell et al. v. Smith*, 8 Lea, 699.

This practice is not unlike the remedy we are now enforcing under the ancient writ of ne exeat. The reasoning why the enforcement of the one is not imprisonment for debt applies equally to the other.

[9, 10] The writ will not issue for demands which are uncertain or contingent. It will be applied to private rights with caution. Either the demand or its enforcement must be of an equitable nature. The intended departure beyond the jurisdiction of the court must be by positive allegations or by facts, threats, or declarations evidencing such intention, and that the right or demand sought will be lost or recovery greatly endangered by the defendant's departure. It is not essential to allege an intent to avoid jurisdiction. *Gibson's Suits in Chancery*, §§ 864-867, and notes; 29 Cyc. 383-393, and cases cited.

The chancellor was therefore in error in dismissing this writ upon the motion. De-

cree will be entered in this court reversing the decree of the chancellor and rendering judgment against defendants for the sum of \$2,890, as prayed for in the bill, which will be credited on the unpaid notes for purchase money, and in case this cannot be done, then this amount may be recovered against defendants and their sureties on the bond which the defendants executed in the case.

CRIGGER v. COCA-COLA BOTTLING CO.
(Supreme Court of Tennessee. Oct. 1, 1915.)

1. FOOD — INJURIOUS SUBSTANCES.

The duty of one who prepares and puts on the market, in bottles or sealed packages, foods, drugs, beverages, medicines, or articles inherently dangerous, to exercise care to see that nothing unwholesome or injurious is contained in the bottle or package is not in the nature of an implied warranty, and is based upon negligence.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 18; Dec. Dig. —25.]

2. FOOD — SALES — INJURIOUS SUBSTANCES.

One who prepares and puts on the market, in bottles or sealed packages, foods, drugs, beverages, or articles inherently dangerous, is liable for breach of a duty to the public in the preparation thereof, regardless of the privity of contract to any one injured for a failure to properly safeguard and perform such duty.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 18; Dec. Dig. —25.]

3. FOOD — DELETERIOUS BEVERAGE — EVIDENCE.

In an action for damages for an illness caused by swallowing a decomposed mouse in a bottle of Coca-Cola purchased from a local dealer to whom it had been sold by a bottling company, evidence held to sustain a finding that the bottling company was not at fault.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 18; Dec. Dig. —25.]

Certiorari to Court of Civil Appeals.

Action by H. C. Crigger against the Coca-Cola Bottling Company. Judgment for defendant, which was affirmed in the Court of Civil Appeals, and plaintiff petitions for certiorari. Affirmed.

King & Lanier, of Memphis, for plaintiff.
Bell, Terry & Bell, and Caruthers Ewing, all of Memphis, for defendant.

FANCHER, Judge. The plaintiff drank a bottle of Coca-Cola, a beverage sold generally on the market as wholesome and harmless. In doing so he took into his mouth, and partially swallowed, a decomposed mouse, which caused him to become very sick, and he sues for damages. The defendant does not make the beverage, but buys it in barrels from the manufacturer and bottles it.

The bottle in question was sold by defendant to a local dealer and by him sold to plaintiff.

The question presented is, whether a bottling company engaged in bottling Coca-Cola,

a beverage made by another, warrants to the ultimate consumer that its bottle contains no injurious, harmful, or deleterious substance, or is the bottling company liable only for negligence, or the omission to use proper care in the work?

The proof shows that the method used at the bottling plant is fully equal to the best. The empty bottle is passed through vats of strong caustic soda solution and then rinsed under pressure with water as hot as the bottle will stand, then inspected by the use of a strong electric light, then brushed out with a rapidly revolving brush and again rinsed; the bottle is again inspected over a brilliant electric light, and then filled with Coca-Cola, using a fine strainer, when it is capped, and finally inspected.

The trial judge charged the jury on the theory that if the defendant was free from negligence in the bottling of the beverage there was no liability. The jury found in favor of the defendant, and judgment was accordingly entered. The Court of Civil Appeals affirmed on the ground that the declaration averred negligence and the jury had found against plaintiff on that question.

The case is briefed here in support of the petition for certiorari, and by the defendant, as to whether there is an implied warranty on the part of the Coca-Cola Bottling Company, which results in favor of the ultimate consumer, regardless of any question of negligence. The declaration, liberally treated, will admit the question, and the case must be determined upon that standard.

In the case recently determined by this Court of *Boyd v. Coca-Cola Bottling Works*, 177 S. W. 80, opinion by Mr. Justice Green, the defendant was held liable to the ultimate consumer for injuries from drinking a bottle of Cola-Cola in which was contained a cigar stub. The bottle in that case was bought from an intermediate dealer, to whom the defendant manufacturer had sold it, and it was held that want of contract or privity between defendant and the person injured constituted no defense. It was determined in that case that beverages fall within the class of articles such as foods and medicines, where a liability may exist upon the ground that one placing upon the market such products in sealed bottles assumes a duty to the general public of exercising care to see that nothing unwholesome or injurious is contained in the bottle. For a negligent breach of this duty the defendant was liable.

[1] In the present case, we are to inquire a step further. Does this duty exist regardless of negligence, and is it in the nature of an implied warranty? Some of the cases seem to so hold. The case of *Jackson Coca-Cola Bottling Co. v. Chapman* (Miss.) 64 South. 791, 7 Neg. & Com. Cas. Ann. 112, note, seems to go to this extent, citing *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 52 S. E. 152, 1 L. R. A. (N. S.) 1180, 110 Am. St. Rep. 157.

In the *Augusta Brewing Company Case*, the Supreme Court of Georgia stated the rule to be:

"When a manufacturer makes, bottles, and sells * * * a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage which, if taken into the human stomach, will be injurious."

It does not appear that the direct question was at issue in that case as to a warranty, regardless of negligence. Most of the cases on the question show some negligence or omission of duty or care, and are based upon that idea.

There are many authorities holding an implied warranty to exist, as between seller and buyer of articles to be used for a specific purpose, that such articles are proper and suitable for the use to which they are to be applied. But we see no reason or principle upon which a warranty might run with an article for consumption like a warranty of title running with land. We think the real ground of liability of the seller to an ultimate consumer is, more properly speaking, a duty one owes to the public not to put out articles to be sold upon the markets for use injurious in their nature, of which the general public have not means of inspection to protect themselves. This duty has been applied to manufacturers of drugs, foods, beverages, poisons, and other things inherently dangerous.

One of the leading cases on the subject is *Thomas v. Winchester*, 6 N. Y. (2 Selden) 397, 57 Am. Dec. 455. That case is referred to in many more recent opinions. A manufacturing druggist was held liable for negligently putting up, labeling, and selling as and for the extract of dandelion, a simple and harmless medicine, a jar of the extract of belladonna, which is a deadly poison, whereby the plaintiff was injured, on the ground of a breach of a public duty, and that this was the result whether the injured person is an immediate customer of defendant or not. Negligence was the basis of liability in that case, as it was in most cases of this nature. See notes 57 Am. Dec. (Extra Ann.) 568; *Salmon v. Libby*, 219 Ill. 421, 76 N. E. 573; *Tomlinson v. Armour*, 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923 (negligence in preparation of canned meat); note to *McQuaid v. Ross* (Wis.) 22 L. R. A. 195; *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715 (negligence in furnishing unwholesome meat); *Huset v. J. I. Case Threshing Mach. Co.*, 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64 (negligence by manufacturer in selling dangerous article he knew to be an explosive); *Van Bracklin v. Fonda*, 12 Johns (N. Y.) 468, 7 Am. Dec. 339 (negligence in sale of unwholesome provisions, but holding that vendor is bound to know that they are sound

and wholesome); *Craft v. Parker* (Mich.) 21 L. R. A. 139, note; *Brown v. Marshall*, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728 (opinion by Cooley, J., holding that a high degree of care is required of a druggist, but that actual negligence cannot be dispensed with as a necessary element in liability when mistake has occurred); *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.) 219, 56 Am. Dec. 563 (holding caveat venditor should apply to a druggist in seeing that his drugs are what they are pretended to be, and that he cannot escape liability on a pretext that it was an accidental or innocent mistake); *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 113, 5 L. R. A. 612, 20 Am. St. Rep. 324 (liability to ultimate consumer for wrong of proprietor of medicine in the prescription and direction as to dose); *Weiser v. Holzman*, 33 Wash. 87, 73 Pac. 797, 99 Am. St. Rep. 932 (liability without regard to privity of contract for knowingly selling and delivering to another, who is injured thereby, an article intrinsically dangerous, without notice to purchaser of intrinsic danger); *Peters v. Jackson*, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. Rep. 909 (druggist liable from incompetency or negligence in selling to one person wrong poisonous medicine, whereby third person is injured); *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436, 15 Ann. Cas. 1076 (reviewing established English cases that hold there is no implied condition or warranty that a food is fit to be eaten, unless sold by a dealer and the food is selected by him, and concluding that this is the true rule); *Orocker v. Baltimore Dairy Lunch Co.*, 214 Mass. 177, 100 N. E. 1073, Ann. Cas. 1914B, 884 (that finding for plaintiff for injuries from what might be ptomaine poisoning is not warranted without any evidence that the defendant was negligent in purchasing its food supplies).

From a careful consideration of the subject, and after mature thought, we are of opinion as follows:

[2] 1. That one who prepares and puts on

the market, in bottles or sealed packages, foods, drugs, beverages, medicines, or articles inherently dangerous owes a high duty to the public, in the care and preparation of such commodities, and that a liability will exist regardless of privity of contract to any one injured for a failure to properly safeguard and perform that duty.

2. This liability is based on an omission of duty or an act of negligence, and the way should be left open for the innocent to escape. However exacting the duty or high the degree of care to furnish pure foods, beverages, and medicines, we believe with Judge Cooley, as expressed in *Brown v. Marshall*, supra, that negligence is a necessary element in the right of action, and the better authorities have not gone so far as to dispense with actual negligence as a prerequisite to the liability. In fact, there is no logical basis of liability for personal injury without some negligent act or omission.

[3] In the present case, the mouse may have gotten into the bottle by some unavoidable accident, but proper inspection should have disclosed the fact, and if in the light of the finding by the jury it were fairly inferable that the mouse was bottled up at the Bottling Company plant, we would consider it our duty to reverse the case, because of the high duty resting on the defendant. But the jury was told to inquire whether the mouse was in the bottle when it left the hands of this company, and, if so, whether its presence there was due to the negligence of the company. The court suggested to the jury the theory of the defendant that there was opportunity for malevolent persons to open this bottle and put the mouse into it before or after it left the factory, and they should use their common sense as men in deciding the issue. In view of the extraordinary care shown to exist at the bottling plant and the verdict of the jury, it may be that this thing occurred without the fault of the defendant. There are sufficient inferences that may be drawn from the facts to sustain the finding.

Affirmed.

ANDERSON v. STATE. (No. 130.)

(Supreme Court of Arkansas. Sept. 27, 1915.)

LARCENY — 65 — CONVICTION — SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for grand larceny held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Larceny, Century Dig. § 160; Decennial Dig. 65.]

Appeal from Circuit Court, Pulaski County; Robert J. Lea, Judge.

B. Anderson was convicted of grand larceny, and he appeals. Affirmed.

On December 25, 1913, Miss Annie Wherry was a passenger on a train coming from Tillar to Little Rock. A Mr. King, at Tillar, intrusted her with a heavy gold watch, valued at \$150, and requested her to have the same cleaned for him when she arrived at Little Rock. She occupied a Pullman coach on the journey, and in company with her were a Mr. Henry and Miss Henry and Mr. Davidson. The only other persons in the coach were the appellant, who was the Pullman porter, and the trainmaster. Miss Wherry and Mr. Henry occupied the same seat, and during the journey Miss Wherry took the gold watch from her suit case, and she and Mr. Henry were examining it. The appellant was sitting in a seat across the aisle behind them. While they were examining the watch she looked towards the appellant and observed him looking in the direction where she and Henry were examining the watch. In making the examination they held the watch up, and it could have been seen from the position where appellant was located. While she and Henry were looking at the watch Henry told her she had better put the watch up or the porter might take it away from her. She placed the watch back in the box or small case and placed the box under her clothing in her suit case. There were two straps on the suit case, and she fastened one of these, and Henry the other. Henry got off the train at Sweet Home. The suit case that contained the watch was in front of them after they had looked at the watch and put it back in the case. From the time Miss Wherry exhibited the watch to Henry and after she had put the same back in the suit case the same was not out of her sight long enough for anyone to have opened it and taken the watch therefrom until after they reached Sweet Home. There Henry debarked from the coach, and at that place the appellant asked Miss Wherry whether she was going to get off at the Union or the Valley station. She told him that she was going to debark at the Union station, but later she concluded to get off at the Valley station. Appellant then took charge of her grip, and also the suit case of another lady who was on the same coach, and carried them out of the coach. Miss

Wherry did not notice the straps on her grip until she got to Main and Markham streets. There she discovered that one of the straps was unfastened and some of her clothing was sticking out. She then suspected that the watch had been taken, and on reaching her home discovered that it had been. When she opened the suit case after reaching home she found the clothing was thrown around and upset. When she put the watch in her suit case she put it under the clothing, and the clothing was folded, and there was then no clothing protruding, and both straps to the suit case were securely fastened. The porter (appellant) brought her the suit case or grip after reaching the Valley station, and he brought the same to her out of the buffet. The watch could not have been taken out of the suit case without unfastening the straps and lifting the clothing that was in the suit case.

Upon substantially the above facts, as shown by the testimony, appellant was convicted of the crime of grand larceny and sentenced to three years imprisonment in the state penitentiary.

The grounds of the motion for a new trial are: That the verdict is contrary to the law, and contrary to the evidence; that the court erred in its general charge to the jury and each paragraph thereof; that the court erred in overruling defendant's objection to the testimony of Miss Annie Wherry as to the conversation between her and Miss Henry. (The conversation above referred to is not set out in the motion itself nor is it contained in the bill of exceptions.) The court overruled the motion, and appellant duly prosecutes this appeal.

Wallace Davis, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

WOOD, J. (after stating the facts as above). It is unnecessary to set forth the instructions. They are correct declarations of law, and were applicable to the facts adduced in evidence. They conform to the principles announced in many previous decisions of this court.

The evidence was sufficient to sustain the verdict. It tended to show that Miss Wherry had a special ownership in the watch sufficient to sustain the allegations of ownership, and that the watch was stolen by appellant in Pulaski county, Ark., on the 25th day of December, 1913.

The jury were warranted in finding from the testimony of Miss Wherry that no one had an opportunity to take the watch from her suit case between Tillar and Sweet Home; that the watch must have been taken between Sweet Home and the Valley station at Little Rock, where Miss Wherry debarked; that the appellant took charge of the suit case when the train reached Sweet Home, and delivered the same to Miss Wherry.

ry at the Valley station; that she had possession of the suit case from that time until she arrived at home, and then discovered that the watch had been stolen.

The judgment is correct, and it is therefore affirmed.

NASH v. STATE. (No. 187.)

(Supreme Court of Arkansas. Sept. 27, 1915.)

1. CRIMINAL LAW § 369—EVIDENCE—PARTICIPATION IN OTHER OFFENSES.

In a prosecution for robbery, where defendant undertook to establish an alibi, evidence that other robberies committed at the same time and locality had been participated in by defendant, was admissible upon the issue of his presence at the time and his participation in the robbery charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.]

2. CRIMINAL LAW § 369—EVIDENCE—OTHER OFFENSES.

Guilt of one crime cannot be proved as a circumstance from which to infer guilt of another, where such proof is not offered to show motive, intent, or design, but is admissible where it tends in a material way to prove the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.]

Appeal from Circuit Court, Pulaski County; Robert J. Lea, Judge.

James Nash was convicted of robbery, and he appeals. Affirmed.

Wm. L. Moose, Atty. Gen., and John P. Streepey, Asst. Atty. Gen., for the State.

SMITH, J. Appellant was indicted for the crime of robbery, alleged to have been committed by taking \$20 from the person of one J. F. Williams. Upon his trial appellant was convicted and sentenced to a term of seven years in the state penitentiary.

Williams testified that the robbery was committed near the corner of Seventh and Arch Streets, in the city of Little Rock, on the night of March 3d; that he was held up by three men, who took two \$10 bills and some small change from his pocket and a bar check issued by one of the saloons in the city of Little Rock. After Williams had been robbed one of the robbers said to him, "Beat it; don't stop, turn around, or look back;" and Williams walked about 20 steps to an electric light post, and stopped behind it. He stood there and watched the robbers walk down Seventh street, and while standing there he saw three officers and told them that he had been robbed, and the officers replied that another man had been robbed only a minute before, and as Williams and the officers started down Seventh street they saw robbers holding up still another man. Upon the approach of the officers all of the robbers fled except one named Hilliard, who was commanded by the officers to throw up

his hands, and was shot and killed by the officers when he refused to do so. Williams recognized Hilliard as one of the men who had robbed him, and after appellant's arrest he also recognized him as one of the men who had held him up. The money taken from Williams was found in Hilliard's possession, together with the bar check.

A witness named Schuh testified that he was one of the men who had been held up, and that he was robbed at a point only 50 or 60 yards east of the place where Williams had been held up, but on the opposite side of the street. This witness saw Hilliard after his death, and recognized him as one of the men who had robbed him, and he also identified Nash as one of the robbers who held him up. He saw three men holding up Williams, but he did not say that he recognized appellant as one of them, although he did testify that he saw appellant in that vicinity that night.

A police officer named Whitlock testified that he was one of the officers who attempted to arrest the robbers, and while he was unable to identify appellant as one of the robbers who fled upon the approach of the officers, he did testify that appellant had the general size and resembled the man who was with Hilliard. There was other evidence tending to show that appellant and Hilliard were intimate associates, and had been seen together on the night of the robberies.

[1] Appellant saved numerous objections to the action of the court in admitting evidence tending to show that appellant had participated in the robberies other than the one charged in the indictment, and the admissibility of this evidence is the only question raised upon this appeal. Appellant undertook to establish an alibi. Various witnesses gave testimony, the effect of which was to show that appellant could not have been at the place of the robbery at the time of its commission.

In admitting proof of the other robberies the court stated to the jury that such proof could be considered only as bearing upon the question of defendant's presence at the time Williams was robbed and of appellant's participation in that crime.

The three robberies committed on the night of March 3d were committed within a few hundred yards of each other, and the last occurred not more than an hour after the commission of the first, and all were committed by three men, one of whom was Hilliard, whose participation in each instance is reasonably certain. Schuh identified Hilliard as one of the men who had robbed him, but could not positively identify appellant as another. Neither could the officers who killed Hilliard, while the third man was being robbed, positively identify appellant as one of the three robbers participating in that crime, although they did testify that his

general appearance resembled one of the robbers who fled on their approach.

We think this evidence was clearly competent for the purpose for which the court admitted it. While this evidence does show the commission of another crime than the one charged in the indictment it also tends to show that appellant participated in the commission of the crime charged in the indictment and refutes appellant's proof of an alibi.

[2] The rule is well established that guilt of one crime cannot be proved as a circumstance from which to infer guilt of another, where such proof is not offered to show motive, intent, or design; but proof is not to be excluded because it proves the commission of a different crime, if it also tends, in a material way, to prove the guilt of the crime charged. *Davis and Thomas v. State*, 174 S. W. 568.

The judgment of the court below is therefore affirmed.

WHITE v. STATE. (No. 127.)

(Supreme Court of Arkansas. Sept. 27, 1915.)

CRIMINAL LAW \hookrightarrow 511—LARCENY \hookrightarrow 65—EVIDENCE—POSSESSION OF PROPERTY STOLEN.

Unexplained possession of a portion of property recently stolen may be considered in corroboration of testimony of accomplices in a prosecution for grand larceny, although the value of the property so found does not exceed \$10.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128-1137; Dec. Dig. \hookrightarrow 511; Larceny, Cent. Dig. § 160; Dec. Dig. \hookrightarrow 65.]

Appeal from Circuit Court, Miller County; Geo. R. Haynie, Judge.

Anderson White was convicted of grand larceny, and he appeals. Affirmed.

Wm. L. Moose, Atty. Gen., and John P. Streepey, Asst. Atty. Gen., for the State.

MCCULLOCH, C. J. Appellant was convicted of the crime of grand larceny, under an indictment which charged the commission of the crime by stealing merchandise from freight cars in the possession of the St. Louis, Iron Mountain & Southern Railway Company. Two other men who were indicted for the same crime testified that they, together with appellant, burglarized the box cars and stole the property described in the indictment, of the value of more than \$10. The testimony of the accomplices was corroborated by proof on the part of other witnesses of unexplained possession of certain articles of the property by the appellant shortly after the crime was committed, as related by the accomplices. There was proof tending to show that the articles in possession of appellant constituted a portion of the merchandise taken from the cars.

Appellant's attorney asked the court to instruct the jury that unexplained possession of a portion of the recently stolen property could not be considered in corroboration "un-

less the value of the particular property found in his possession exceeds \$10." The only point raised on this appeal is an assignment of error which relates to the refusal of the court to give the instruction referred to above. The case is therefore ruled by the decision of this court in the recent case of *Witt v. State*, 177 S. W. 887, where we held directly contrary to the contention of appellant in this case.

Judgment affirmed.

BEATRICE CREAMERY CO. v. GARNER et al. (Nos. 93, 151.)

(Supreme Court of Arkansas. July 5, 1915.)

1. PRINCIPAL AND AGENT \hookrightarrow 145—LIABILITIES AS TO THIRD PERSONS—UNDISCLOSED AGENCY.

Where an agent makes a contract for an undisclosed principal, both the principal and the agent may be held liable at the election of the party who dealt with the agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 499, 513-520; Dec. Dig. \hookrightarrow 145.]

2. APPEAL AND ERROR \hookrightarrow 1009—REVIEW—FINDINGS OF FACT.

Findings of fact made by a chancellor will be upheld on appeal, unless they are against the clear preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. \hookrightarrow 1009.]

3. PRINCIPAL AND AGENT \hookrightarrow 140—RIGHTS AND LIABILITIES OF THIRD PERSONS—UNDISCLOSED AGENCY.

Where a commission company made a contract with a creamery company for the exclusive sale of butter shipped by it, the mere fact that an employé of the commission company subsequently agreed to take over all consignments of butter to it from the creamery company at actual cost did not make the employé an undisclosed principal of the commission company, although the creamery company had no knowledge of the transaction.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 496, 498; Dec. Dig. \hookrightarrow 140.]

4. ACTION \hookrightarrow 57—CONSOLIDATION—CLAIMS ARISING OUT OF THE SAME TRANSACTION.

The employé of a commission house filed a bill of interpleader seeking to join a creamery company, and the receiver of the commission house, as defendants, to determine title to money obtained by complainant from the sale of butter, sold to him by the commission house, and claimed by the creamery company. The creamery company filed an independent action against complainant to recover such amount, on the ground that plaintiff was an undisclosed principal of the commission house. Held, that the suits were properly consolidated, under the act of May 11, 1905, the object of which is to save repetition of evidence and unnecessary consumption of time and costs in actions depending on the same evidence, or arising out of the same transaction.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 632-675; Dec. Dig. \hookrightarrow 57.]

McCulloch, C. J., and Kirby, J., dissenting.

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit in interpleader by W. H. Garner and

another, seeking to join as defendants the Beatrice Creamery Company and J. S. Maloney, as receiver of the T. H. Bunch Commission Company, with which was consolidated an independent action by the Beatrice Creamery Company against W. H. Garner and another, for a sum deposited in the registry of the court. From an order directing the clerk of the court to pay the fund to the trustee in bankruptcy of the Bunch Commission Company, the Beatrice Creamery Company appeals. Affirmed.

L. E. Hinton and Comer & Clayton, all of Little Rock, for appellant. H. M. Trieber, of Little Rock, for appellees.

HART, J. On November 23, 1914, W. H. Garner and the German National Bank of Little Rock, Ark., as trustee, filed a bill of interpleader in the Pulaski chancery court in which the Beatrice Creamery Company, a corporation organized and doing business under the laws of the state of Oklahoma, and J. S. Maloney, as receiver of the T. H. Bunch Commission Company, a domestic corporation, were asked to be made parties defendant. The bill of interpleader alleges that during the months of September and October, 1914, the Beatrice Creamery Company shipped and consigned to the T. H. Bunch Commission Company, at Little Rock, Ark., butter of the value of \$1,707.75; that upon the arrival of said butter at Little Rock it was turned over by the Bunch Commission Company to W. H. Garner; that Garner sold said butter of the value of \$1,707.75 to retail merchants; that the proceeds were in his possession until October 16, 1914, when the same was paid over by him to the German National Bank of Little Rock, Ark., as trustee, to be held by it pending settlement of the ownership of said money; that both the Bunch Commission Company and the Beatrice Creamery Company were claiming said fund and demanding payment from the defendant Garner. The plaintiffs paid said money into the registry of the court and asked that the receiver of the Bunch Commission Company and the Beatrice Creamery Company be compelled to interplead for said fund. The receiver of the Bunch Commission Company entered his appearance to the suit, but no service of any kind was had upon the creamery company, and that company did not enter its appearance to the action.

The Beatrice Creamery Company filed an independent action in the chancery court against W. H. Garner and W. A. Hicks, cashier of the German National Bank. The plaintiff alleges that the T. H. Bunch Commission Company entered into a contract with it whereby the creamery company agreed to sell and deliver to said commission company its output of butter which was shipped and delivered at Little Rock, Ark., and that said commission company was to have the exclusive right to sell the butter of the cream-

ery company in the city of Little Rock; that subsequently the commission company assigned its contract with the creamery company to W. H. Garner, that thereafter Garner continued to act as exclusive seller of the butter of the creamery company in Little Rock; that the creamery company since then has shipped butter to Little Rock of the contract value of \$3,658.77, and that the same was accepted and received by the said Garner, but that he has failed and refused to pay for same. The complaint further alleges that Garner admitted liability for the purchase price of a part of said butter in the sum of \$1,707.75, and that that amount had been paid by him to W. A. Hicks, as trustee, with the understanding that the latter should hold the same for the parties held to be entitled to it.

The prayer of the complaint is that Hicks be enjoined from paying said sum of money so held by him to any one until the final hearing of this cause, and that said amount then be paid to said creamery company to be applied as a credit on the amount alleged to be due it by said Garner, and that it have judgment against Garner for the balance alleged to be due, namely, the sum of \$1,951.02. On motion of W. H. Garner, the court ordered that that portion of the action instituted by the Beatrice Creamery Company against W. H. Garner and W. A. Hicks for \$1,707.75 deposited in the registry of the court be consolidated with the interpleader suit. The court sustained a demurrer to the complaint of the creamery company asking a judgment against Garner for the sum of \$1,951.02 and dismissed his complaint in that respect without prejudice to his bringing an action at law.

At the hearing of the consolidated causes, the testimony of W. H. Garner and T. H. Bunch was taken before the court orally, and their testimony reduced to writing, and by order of the court filed as their depositions in the cause. It appears from their testimony that the T. H. Bunch Commission Company, before it became insolvent, did a large commission business in the city of Little Rock, that a part of its business was to sell butter, and that it had a contract with the Beatrice Creamery Company to take the entire output which is shipped to the city of Little Rock.

The commission company had a standing order with the creamery company for its butter, and payment was usually made once a week, though at times longer intervals between payments occurred. W. H. Garner was in the employ of the Bunch Commission Company and had charge of the sales of butter made by it to the retail merchants of Little Rock. Subsequently the Bunch Commission Company made an agreement with Garner, whereby the latter was to take off its hands the butter consigned to it by the creamery company at the price that it paid the latter

therefor; in other words, the commission company agreed with Garner to sell him the butter it received from the creamery company at the actual cost price, and Garner was thereafter to sell the butter to the retail trade of Little Rock at whatever price he desired. The Bunch Commission Company had a rating with the creamery company, but Garner was unknown to it. The commission company continued to receive consignments of butter from the creamery company under its contract with that company and made its remittances therefor about once a week as it had agreed to do. It turned the butter over to Garner at its actual cost, and Garner made settlements with the commission company once a week therefor. Prior to the institution of this action, the Bunch Commission Company became insolvent, and a receiver was appointed to take charge of its assets.

The court found that the T. H. Bunch Commission Company was not the agent of Garner in the purchase of the butter from the creamery company in the transaction involved in this suit, and that the transaction was one of sale on open account by the creamery company to the commission company and a resale on open account by the commission company to Garner, and Garner, having deposited the money in the registry of the court, was discharged from all liability to either the Bunch Commission Company or the Beatrice Creamery Company. The clerk of the court, with whom the money had been deposited, was directed to pay the same to the trustee in bankruptcy of the Bunch Commission Company. The Beatrice Creamery Company has appealed.

[1] It is the well-settled law of this state that, where an agent makes a contract for an undisclosed principal, both the principal and the agent may be held liable at the election of the party who dealt with the agent. *Mississippi Valley Construction Co. v. Chas. T. Abeles & Co.*, 87 Ark. 374, 112 S. W. 894; *Bryant Lumber Co. v. Crist*, 87 Ark. 434, 112 S. W. 965. This is conceded to be the law by both parties, and it is the contention of counsel for appellees that, where one is sought to hold one as undisclosed principal for goods bought, it is essential that the intermediate party through whom the goods were secured shall have been the agent of the principal sought to be held and not his vendor, and that, the court having found that the Bunch Commission Company was the vendor of the butter to Garner and not the agent of the latter in purchasing the same, its finding of fact in that respect should not be disturbed.

[2, 3] It is the settled rule of this court that the findings of fact made by a chancellor will be upheld on appeal unless they are against the clear preponderance of the evidence. Tested by this rule, we think the findings of the chancellor should be upheld. The Bunch Commission Company was a cor-

poration engaged in the general commission business. A part of its business was to sell butter, and it made a contract with the creamery company for the exclusive sale of the butter which it shipped to Little Rock. It was in the habit of receiving daily consignments of butter from the creamery on open account. The commission company had a credit with the creamery company, and nothing was said or known by the creamery company of any other party to the transaction. Garner had no credit with the creamery company and was not known by it. He made his payments direct to the Bunch Commission Company, and the commission company sent its own checks to the creamery company in payment for the butter. At the time the contract between the Bunch Commission Company and the Beatrice Creamery Company was made, Garner was an employé of the commission company. No other contract was made by any one with the creamery company. The butter was consigned by the creamery company to the commission company under the original contract. Garner could in no sense be deemed an undisclosed principal when the original contract was made between the commission company and the creamery company. The mere fact that he subsequently agreed with the commission company to take over all consignments of butter to it from the creamery company at actual cost did not have the effect of making him an undisclosed principal.

[4] The court did not err in the consolidation of the causes under the act of May 11, 1905. The object of this act providing for the consolidation of causes was to save a repetition of evidence and unnecessary consumption of time and costs in actions depending upon the same or substantially the same evidence or arising out of the same transaction. *St. L., I. M. & S. R. Co. v. Raines*, 90 Ark. 482, 119 S. W. 266; *Little Rock Gas & Fuel Co. et al. v. Coppedge*, 172 S. W. 885.

In the case of *St. L., I. M. & S. R. Co. v. Broomfield*, 83 Ark. 288, 104 S. W. 133, the court said that the act leaves to the discretion of the trial court the consolidation of actions of like nature relative to the same questions pending before the court without reference to the identity of the parties and without restriction as to the causes of action which may be joined in the same suit.

It follows that the decree will be affirmed.

MCCULLOCH, C. J. (dissenting). The undisputed evidence in this case is to the effect that Bunch Commission Company concluded to go out of the business of selling butter to retail men in Little Rock, and turned their contracts with the Beatrice Creamery Company over to Garner to receive the butter, to pay for it, and sell it. There is no conflict whatever in the evidence, and it is not sufficient to warrant the inference that there was a resale of the butter by Bunch Commission

Company to Garner. Garner testified that Bunch Commission Company decided to go out of the city business, and, as a matter of accommodation to him (Garner), turned the contract with the Beatrice Creamery Company over to him, and that he "ran the business, merely using Bunch's name for the purpose of getting the butter." The testimony of T. H. Bunch was to the same effect. His statement is as follows:

"It was simply a favor we were trying to extend Mr. Garner for past services; he had been faithful to us for many years. We turned the contract we had with the Creamery Company over to Mr. Garner and continued to let him order the butter in our name simply as a matter of accommodation to him."

They both testified that the sole reason for leaving the contract in the name of the Bunch Commission Company was that they were afraid that if they undertook to get a new contract in Garner's name some other dealer might secure the contract with the creamery company, and it was decided that the best way was to leave the contract in the name of the Bunch Commission Company. There is no doubt about the inference which can be drawn from the statements of those two witnesses, who were the only ones who testified on the subject.

The effect of the transaction was to make it an assignment of the contract by Bunch Commission Company to Garner, and the commission company became the agent of Garner in performing the contract for the purchase of the butter. The fact that no such relation existed at the time the original contract was made with the creamery company does not alter the law applicable to the facts of the case. The contract was executory, and the sales thereunder were consummated only when deliveries of butter were made in installments from time to time. No sale was complete until there was a delivery of the butter. Therefore, when the installments were delivered through Bunch Commission Company to Garner, the latter was an undisclosed principal in the transaction. The transaction between Bunch Commission Company and Garner contained none of the elements of a resale to the latter, for Bunch and Garner both testified that the contract was turned over to Garner, and that he was to receive the butter and pay for it in the name of Bunch Commission Company for his own benefit. Suppose that the contract had been, by formal written indorsement, transferred to Garner, and the subsequent delivery of butter made through Bunch Commission Company. Would not the commission company, under those circumstances, have been the agent of Garner? If that be true, it necessarily follows that under the facts of this case the doctrine of liability of an undisclosed agency applies, for, as before stated, the effect of the transaction was to assign the contract. Bunch

Commission Company, by permitting the continued use of its name in receiving deliveries of butter under the contract without disclosing Garner's connection with the transaction, rendered itself liable to the creamery company for the price of the butter so received, but Garner is liable too, for, according to the true import of the transaction, he was the real purchaser of the butter, and the debt for the price was in fact his debt, and not that of the commission company. Garner is willing to pay for the butter, and has in fact paid the amount into the registry of the court. Bunch Commission Company has no just claim to the amount so paid, and, according to settled principles of law, it should be recovered by the creamery company and not by the general creditors of the Bunch Commission Company.

The justice of that view is made plain by the statement in one of the text-books on the law of agency, giving a reason for the rule of liability of an undisclosed principal:

"Inasmuch as the principal must ordinarily settle with some one—being liable to the agent, perhaps upon an express contract of indemnity or reimbursement, or upon an implied one wherever the nondisclosure of the principal and the pledging of the agent's own credit do not constitute such a violation of duty as to disentitle the agent to such relief—it seems to be a convenient 'short-cut,' if nothing more, to give the third party a direct claim upon the principal instead of requiring him to pursue the agent who will then pursue the principal. Where this is attempted before the principal has paid or settled with agent—and this seems to have been the typical case in the first instance—nothing but more or less technical rules of procedure would seem to stand in the way of it." 2 Mechem on Agency (2d Ed.) § 1729.

KIRBY, J., concurs in the views here announced.

HUGHES et al. v. ROBUCK et al. (No. 101.) (Supreme Court of Arkansas. July 5, 1915.)

1. SCHOOLS AND SCHOOL DISTRICTS \S 44—DISSOLUTION OF DISTRICTS—STATUTORY PROVISIONS.

Act Feb. 4, 1899 (Laws 1898-99, pp. 27, 28) §§ 16 and 17 (Kirby's Dig. § 7695), provide relative to special school districts that the general school laws when not inapplicable, and so far as not inconsistent with and repugnant to that act, shall apply to districts organized thereunder. Act April 1, 1895, p. 82, § 1, provides that the county court shall have power to dissolve any school district and attach the territory thereof in whole or in part to an adjoining district or districts whenever a majority of the electors residing in such district shall petition the court so to do. *Held*, that the court has power to dissolve a special school district as well as a common school district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 88-91; Dec. Dig. \S 44.]

2. SCHOOLS AND SCHOOL DISTRICTS \S 44—DISSOLUTION OF DISTRICTS—STATUTORY PROVISIONS.

Under Act April 1, 1895, p. 82, § 1, the recital in a petition for the dissolution of a

school district of the districts to which the petitioners desire the territory of the dissolved district attached is not jurisdictional, as the statute requires no such designation, and this is one of the things to be taken into account by the court in exercising its discretion as to whether the district shall be dissolved.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 88-91; Dec. Dig. § 44.]

3. SCHOOLS AND SCHOOL DISTRICTS § 44—DISSOLUTION OF DISTRICTS — STATUTORY PROVISIONS.

Act April 1, 1895, p. 82, § 1, merely confers upon the county court discretionary authority to dissolve school districts, and does not require it to dissolve a district upon the filing of a proper petition.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 88-91; Dec. Dig. § 44.]

4. SCHOOLS AND SCHOOL DISTRICTS § 44—DISSOLUTION OF DISTRICTS — STATUTORY PROVISIONS.

Under Act April 1, 1895, p. 82, § 1, the county court has no authority to dissolve a school district except on the filing of a petition conforming to the requirements of the statute.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 88-91; Dec. Dig. § 44.]

5. SCHOOLS AND SCHOOL DISTRICTS § 44—DISSOLUTION OF DISTRICTS — STATUTORY PROVISIONS.

Under Act April 1, 1895, p. 82, § 1, authorizing county courts to dissolve school districts, and section 3, providing that whenever any district shall be abolished any indebtedness due by it shall be proportioned among the districts to which its territory has been attached according to the value of the territory each received, the discretion of the court in the assignment of the territory to other districts is limited only by the duty of adjudging against the territory so distributed its pro rata part of the indebtedness of the dissolved district.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 88-91; Dec. Dig. § 44.]

Kirby, J., dissenting.

Appeal from Circuit Court, Lee County; J. M. Jackson, Judge.

Certiorari proceeding by G. R. Robuck and others against W. S. Hughes and others. From a judgment quashing an order of the county court dissolving a school district, defendants appeal. Reversed and remanded, with directions.

H. F. Roleson, of Marianna, for appellants. Smith & McCulloch and Daggett & Daggett, all of Marianna, for appellees.

SMITH, J. This case involves the right of the county court to dissolve a special school district, and questions the sufficiency of a petition upon which that action was taken. The county court of Lee county had established a special school district known as special school district H, and this district was later dissolved upon the petition of a majority of the residents thereof praying its dissolution. The petition, however, did not specify the apportionment which the peti-

tioners desired made of the territory of the district.

[1] Prior to the Act of February 4, 1869 (Laws 1868-69, p. 20), all school districts were of the same class, that is, were common school districts; but this act authorized the creation of special school districts in cities and towns, and conferred upon those districts certain enlarged powers, which powers have been increased by subsequent legislation. Sections 16 and 17 of this act, which are now section 7695 of Kirby's Digest, provided that:

"The provisions of the general school laws of the state which are now or may hereafter be in force, when not inapplicable, and so far as the same are not inconsistent with and repugnant to the provisions of this act, shall apply to districts organized under this act. * * *

Until the passage of the act approved April 1, 1895, entitled "An act to empower county courts to dissolve school districts," there was not authority in the law for the dissolution of either special school districts or common school districts, although there was provision in the law for the enlargement of such special districts and for changes in the boundaries of common school districts. Section 1 of this act of 1895 provides that:

"The county courts of this state shall have power to dissolve any school district now established, or which may hereafter be established in its county and attach the territory thereof in whole or in part to an adjoining district or districts, whenever a majority of the electors residing in such district shall petition the court so to do."

It is urged that the section quoted applies only to common school districts. But we see nothing in the act which justifies this construction. Its language is that the court shall have power to dissolve any school district now established, and in the face of this language we cannot say that the Legislature intended this language to apply to districts of the one class and not to districts of the other. It is said in all the cases that the legislative control over the creation and boundaries of school districts is plenary, subject only, however, to the limitation that such action shall not impair the contracts or obligations of such districts. *Special School Dist. No. 2 v. Special School Dist. of Texarkana*, 111 Ark. 379, 163 S. W. 1164; *Womble Special School District v. Ellington*, 112 Ark. 607, 164 S. W. 1130.

Section 3 of the act of 1895 provides for the apportionment of the indebtedness of any district which may be dissolved. But no such question is presented by the record in this case.

[2-5] The judgment of the county court dissolving the special district was brought before the circuit court on certiorari, where it was asked that said judgment be quashed because of the failure of the petition upon which the judgment was pronounced to designate the districts to which the petitioners desired the territory of the dissolved district

to be apportioned. But we do not concur in the view that this recital in the petition is jurisdictional. The statute does not require the petition for the dissolution of a district to designate the districts to which the petitioners desire the territory attached. This act of 1895 does not require the county court to dissolve the district upon the filing of a proper petition therefor. It merely confers upon the county court the authority to do so. A discretion abides with the court in passing upon the petition, but the court has no authority to dissolve any particular district except upon the filing of a petition conforming to the requirements of the act above quoted. The assignment of the territory of the dissolved district is one of the things to be taken into account by the county court in determining how this discretion shall be exercised, and, if the prayer of the petition is granted, the discretion of the court in the assignment of this territory is limited only by the duty of adjudging against the territory so distributed its pro rata part of the indebtedness of the district of which it was originally a part.

In the recent case of School District No. 45 v. School District No. 8, 177 S. W. 892, a somewhat similar objection was made against the granting of the prayer of a petition for the change of the boundary line between two adjoining school districts transferring three sections of land from one district and attaching it to another. The decision of the case turned upon the construction of section 7544 of Kirby's Digest, which reads as follows:

"The county court shall have the right to form new school districts or change the boundaries thereof upon a petition of a majority of all the electors residing upon the territory of the districts to be divided."

It was there held that the electors of the district to be divided only were to be taken into account; that the electors of the district to which the territory was to be attached might have their hearing before the county court, where a discretion abided to grant, or to refuse, the petition even though it conformed to the statute.

It is urged that the opinion of this court in the case of Cox v. Road Improvement District No. 8, 176 S. W. 676, is authority for the position that the petition was void because of its failure to designate the desired distribution of the territory of the dissolved district. But we do not concur in this view. We were discussing there the jurisdictional requirements of the petition for the establishment of a road improvement district, and in that connection we said that there must be no uncertainty about the road or street to be improved; and there is no analogy between that case and this. The petition here specifies the district to be dissolved, and, as we have seen, the statute does not require the petition to state the disposition to be made of the territory of the dissolved district.

We think the court below erred in quashing the order of the county court dissolving the district, and its judgment will be reversed, and the cause remanded, with directions to set aside that order.

KIRBY, J., dissents.

VAUGHAN v. CHICAGO, R. I. & P. RY. CO. (No. 92.)

(Supreme Court of Arkansas. July 5, 1915.)

1. DEEDS \S 194—DELIVERY—PRESUMPTION AND BURDEN OF PROOF.

The plaintiff, in an action to set aside a deed to a railroad which had been delivered and filed for record, had the burden of showing that it had been wrongfully delivered; and its delivery to the agent of the railroad and its filing for record raised a presumption of delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 574-583, 623, 634; Dec. Dig. \S 194.]

2. DEEDS \S 208—SUFFICIENCY OF EVIDENCE—DELIVERY.

In an action to set aside a deed to a railroad on the ground of its nondelivery, evidence held to sustain a finding that it had been delivered, and that the title had vested in the railroad.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 625-632; Dec. Dig. \S 208.]

3. APPEAL AND ERROR \S 1009—REVIEW—FINDINGS—CONCLUSIVENESS.

A chancellor's findings of fact will not be disturbed on appeal unless against the clear preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3970-3978; Dec. Dig. \S 1009.]

Appeal from Prairie Chancery Court; Jno. M. Elliott, Chancellor.

Action in equity by Emmet Vaughan against the Chicago, Rock Island & Pacific Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

On November 19, 1908, Emmet Vaughan instituted this action in the chancery court against the Chicago, Rock Island & Pacific Railway Company, to annul and set aside a deed because of no delivery and on account of nonperformance of certain conditions alleged to be stated therein.

The Choctaw, Oklahoma & Gulf Railroad Company purchased the Searcy and Des Arc Railroad, and desired to extend that railroad to either Hazen or De Vall's Bluff on its main line. Finally it decided to extend the road from Des Arc to a point near De Vall's Bluff, and a contract was made with certain persons in Prairie county for the procurement of the right of way. The citizens of Des Arc wished the extension to be made along the banks of White river through the town of Des Arc and wished the depot moved from the northwestern part of the town, where it was then located, to the foot of Buena Vista street, near the banks of White river. In order to secure this the

citizens of Des Arc made certain donations of property to the railroad company for its right of way.

Emmet Vaughan testified that he was and for many years had been a citizen and resident of Des Arc; that on February 24, 1903, he executed a deed to W. L. Willeford, as trustee for the Choctaw, Oklahoma & Gulf Railroad Company, conveying six lots in the town of Des Arc, the consideration recited in the deed being, "one dollar and the further consideration that the Choctaw, Oklahoma & Gulf Railroad Company will extend the Searcy & Des Arc road from its main line through Des Arc along the river route as surveyed and to its main line, and will agree to build a depot near the east end of Buena Vista street in Des Arc"; that in February, 1905, Judge Willeford came to him and stated that he had been requested to procure a deed direct to the Chicago, Rock Island & Pacific Railway Company, the successor to the Choctaw, Oklahoma & Gulf Railroad Company; that at that time the railroad company had constructed its line of road along the river route, but had not moved its depot to the east end of Buena Vista street; that on this account he at first refused to execute a new deed, but upon the representation of Judge Willeford that the road and depot would be constructed at once he executed a deed in lieu of the former one, with the understanding that the same was to be in escrow upon the same conditions as the former deed; that the former deed had been placed in the hands of W. B. Frith, as cashier of a bank in Des Arc; that subsequently he notified one of the attorneys of the railroad company that, because it had failed to build the depot, he would draw down his deed, and did go to the cashier of the bank and procure the deed which he had executed on the 24th of February, 1903; that subsequently, on November 25, 1907, he conveyed the lots in question to the Hastings Industrial Company, and executed a warranty deed therefor; and that said company erected a canning factory on said lots.

Judge Willeford testified that he was the person to whom the deed of the 24th of February, 1903, was executed; that the deed after its execution was delivered by him to W. B. Frith, cashier of the Farmers' & Merchants' Bank in Des Arc, to be held in escrow and to be delivered to the railroad company upon the performance of the conditions named in the deed; that he did not remember precisely all that occurred in regard to the execution of the second deed in 1905, but that Judge Thweatt and he had several conversations about the matter; that he understood that this deed was to be in escrow just as the trustee's deed above referred to; that Mr. Vaughan never authorized him to deliver it to the Chicago, Rock Island & Pacific Railway Company; that he understood that neither the deed executed in 1903

or that executed in 1905 was to be delivered until the conditions above stated were complied with; that he had no recollection of being present when the second deed was executed, or of having seen it after it was executed; that he was satisfied he never had the deed in his possession; and that the citizens of Des Arc were making every effort to get the road constructed along the river route to De Vall's Bluff.

Judge Thweatt testified that he was a resident of De Vall's Bluff at the time the railroad was extended from Des Arc to a point near De Vall's Bluff; that the extension of the road from Des Arc to Hazen was first determined upon, but that the citizens of De Vall's Bluff induced the railroad company to change the line to a point near De Vall's Bluff, upon the agreement that they would furnish the right of way; that Mr. Vaughan and other citizens in the town of Des Arc had been anxious to have the road constructed along what was called the river route through Des Arc, and that the road was constructed along that route before 1905, but that the depot had not been changed from its location in the northwestern part of the town to the east end of Buena Vista street, near the river, as desired by the citizens of Des Arc; that the railroad company had contemplated moving the depot to that place, and had procured lots upon which to erect the new depot on August 8, 1907; that the depot was not erected on the new site until 1908 just after the filing of the present suit; that in February, 1905, the plaintiff Vaughan executed a deed to the lots in question and delivered the same to him as agent for the railroad company; that no conditions were written in the deed and no verbal conditions attached to the execution of it; that nothing was said about the location of the depot at the time of the execution of the deed; that the deed was delivered to him as agent of the railroad company, and filed for record pursuant to the directions of the officers of the company; and that there was no understanding that Vaughan's deed should be held in escrow, but that it was sent in to the company along with other deeds to property in the town of Des Arc.

The officers of the railway company in charge of its right of way testified that the deed in question was delivered to the railway company and was by it filed for record.

Other testimony will be referred to in the opinion.

The chancellor found the issues in favor of the defendant railway company. The plaintiff was given permission to remove all of the improvements on the lots in question, and was declared to be the owner of such improvements. The court further found that the deed executed by Emmet Vaughan to the railway company was for a valuable consideration and passed title to said lots to

said railway company. The plaintiff has appealed.

Emmet Vaughan, of Des Arc, and Trimble & Williams, of Lonoke, for appellant. Thos. S. Buzbee and Geo. B. Pugh, both of Little Rock, for appellee.

HART, J. (after stating the facts as above). It will be remembered that the first deed executed by Vaughan to the railway company was on the 24th day of February, 1903. This deed was in consideration that the railway company should extend its line of road along the river route as surveyed, and that it would build a depot near the east end of Buena Vista street. This deed was executed to Judge Willeford as trustee for the railroad company, and was placed in the hands of a bank at Des Arc, to be delivered to the railway company upon the performance of the conditions named in the deed. Vaughan testifies that the deed executed by him in 1905 was upon the same conditions, and that it was their intention that the deed should be held in escrow. It is the contention of counsel for the plaintiff that, although the deed was delivered to Judge Thweatt, who was the agent of the railway company, in procuring the deed Judge Thweatt was deemed to occupy the relation of a third party to the transaction, and that the deed was to be held in escrow.

Judge Willeford, to a certain extent, corroborates the testimony of the plaintiff, but stated that, owing to his advanced age and ill health, he does not remember the transaction very clearly, but states that his recollection is that the deed was executed upon the same conditions as the first deed, but that it was never delivered to him, and that he does not know what was done with it after it was executed.

Judge Thweatt acted as agent for the railroad company in procuring the deed in 1905. He says that the deed was delivered to him as agent for the railroad company; that no conditions were written into the deed, and that nothing was said at the time about the erection of a depot at the east end of Buena Vista street; that the railroad company had already extended its line along the river route; and that the deed was filed for record by the railroad company.

[1] This second deed does not appear in the record, but we think it may be taken as certain that no conditions were written in it as in the first deed, because if such had been the case the plaintiff, no doubt, would have introduced it in evidence; for, the deed having been delivered to the railway company and filed for record by it, the burden of proof was upon the plaintiff to show that it had been wrongfully delivered. The deed was signed, acknowledged, and delivered to the agent of the railway company, and by it filed for record. This raises a presump-

tion of delivery to the railway company. *Graham v. Suddeth*, 97 Ark. 283, 133 S. W. 1033.

[2] One of the principal conditions imposed by the first deed, namely, that the road should be extended along the river route, had already been performed by the railway company. When we consider this circumstance, in connection with the fact that no conditions were written in the deed, as was the case when the first deed was executed, and that the second deed was not delivered to a third party to be held until the conditions were performed, and the positive testimony of Judge Thweatt that no conditions were written in the deed, and that nothing was said about the location of the depot, we are of the opinion that it cannot be said that the finding of the chancellor that the deed was delivered to the railway company, and that the title to the property in question vested in it, is against the preponderance of the evidence.

[3] It is the settled rule of this court that findings of fact made by a chancellor will not be disturbed on appeal unless against the clear preponderance of the evidence. Tested by this rule, we are unwilling to say that the findings of fact made by the chancellor are against the clear preponderance of the evidence, and the decree will therefore, be affirmed.

TYRA v. STATE. (No. 138.)

(Supreme Court of Arkansas. Sept. 27, 1915.)

CRIMINAL LAW §814—INSTRUCTIONS—ABSTRACT INSTRUCTIONS.

In a prosecution for assault with intent to rape, it was not error to refuse to give instructions distinguishing between conduct which would merely constitute acts of preparation and acts which were the beginning of an attempt to have carnal knowledge of the prosecuting witness forcibly and against her will, where there was no issue of fact requiring such instruction, and which, if given, would have been abstract.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. §814.]

Appeal from Circuit Court, Pulaski County; Robt. J. Lea, Judge.

John Tyra was convicted of assault with intent to rape, and he appeals. Affirmed.

J. Bracey Gulley, of Little Rock, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

SMITH, J. Appellant was convicted of the crime of assault with intent to rape, alleged to have been committed upon the person of one Bessie Holt, and he prosecutes this appeal to secure a reversal of the judgment pronounced against him. He assigns, as error calling for the reversal of the case, the refusal of the court to give two instruc-

tions requested by him. These instructions were to the effect that appellant could not be convicted of the crime of assault with intent to commit rape if the proof only showed that he did some act or acts which were mere preparations for indulging in sexual intercourse with the prosecuting witness, and did no act which was the beginning of the attempt to have carnal knowledge of the prosecuting witness forcibly and against her will. It has been several times decided by this court that the crime of assault with intent to commit rape is not committed unless some act is done which is the beginning of the attempt to have sexual intercourse forcibly and against the will of the assaulted female. It is not sufficient that there may have been acts of preparation made without the consent of the female, nor is the crime committed by evidence of solicitation merely. The assailant must have done some act which is not merely one of preparation or solicitation, but is one which is intended to overcome the will of the female for the purpose of having sexual intercourse with her forcibly and against her will. It is not necessary, however, that this attempt be persisted in to the uttermost, but it is sufficient if it was actually begun, without reference to the reason which causes the assailant to desist. *Anderson v. State*, 77 Ark. 37, 90 S. W. 846; *Douglass v. State*, 105 Ark. 218, 150 S. W. 860, 42 L. R. A. (N. S.) 524; *Paul v. State*, 99 Ark. 558, 139 S. W. 287; *Williams v. State*, 88 Ark. 91, 113 S. W. 799.

Appellant now complains of the refusal of the trial court to give the instructions requested by him distinguishing between conduct which would merely constitute acts of preparation and acts on his part which were the beginning of an attempt to have carnal knowledge of the prosecuting witness forcibly and against her will. We think the trial court's action was proper under the evidence in this case. The evidence was sharply conflicting, and it is impossible to reconcile it. According to the evidence upon the part of the state appellant had induced the prosecuting witness to accompany him to Little Rock under the representation that he could and would assist her in suppressing and settling a criminal prosecution which he told her had been or would be instituted against her. They spent the day in Little Rock, and he attempted to induce the girl to spend the night with him, but she declined to do so. They left Little Rock on a train, departing at 7 o'clock, and walked from a flag station to the girl's home, arriving there some time after dark, and during a portion of this journey they traveled through the woods. The girl testified that appellant had a bottle of whisky, from which he drank freely, and that he invited her to have a drink, but she declined. She testified that he had a knife, which he exhibited after he had made demands upon her, and that he said,

"You have got to do just as I say, or I will kill you right here," and that she thought he was going to cut her with this knife. A knife was found on this road, but appellant disclaimed its ownership. The girl further testified that appellant caught her around the shoulders while her arms were by her side, and pulled up her dress and tore her underclothes and tried to throw her down on the ground, and that all of this was done forcibly and against her will; that she cried and told appellant that she was engaged to be married, and that she would accommodate him when she had married, whereupon he released her and told her that if she ever breathed a word of what had happened to any one he would kill her. On the contrary, appellant denied that he had even requested the girl to have sexual intercourse with him, and denied having placed his hands upon her, or having in any manner attempted to compel her to have intercourse with him. The state offered, in contradiction of appellant's evidence, proof of certain statements made by him in which he said he had asked the girl to have intercourse with him, but that when she declined nothing more was said about it, and that he made no attempt to coerce her. It appears, therefore, that the instructions were abstract. According to the evidence upon the part of the state appellant was guilty of the crime charged, while, according to his own evidence, he was not guilty, and there was no issue of fact which required the court to give the requested instructions. It is the purpose of the instructions on the part of the court to declare the law applicable to the issue of facts raised by the evidence, but the court should not give abstract instructions.

The judgment of the court below will be affirmed.

SHEPPARD v. STATE. (No. 135.)

(Supreme Court of Arkansas. Sept. 27, 1915.)

1. HOMICIDE \S 142—INSTRUCTIONS—INDICTMENT—VARIANCE.

An indictment for first degree murder was in the common-law form which charged premeditation, etc., but did not charge that the crime was perpetrated in the commission of a robbery. The court on the trial instructed the jury that if they should find that the defendant did the killing while in the act of committing a robbery, they should find him guilty as charged. *Held*, that the instruction was error, since there are two kinds of first degree murder, and an indictment upon one will not sustain an instruction upon the other.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 250-259; Dec. Dig. \S 142.]

2. CRIMINAL LAW \S 834—TRIAL—INSTRUCTIONS—MODIFICATION.

It is not error to omit parts of a requested instruction, where the instruction as given is in the language of the statute and full enough to cover the point.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2013, 2014; Dec. Dig. \S 834.]

8. CRIMINAL LAW ¶676—TRIAL—CUMULATIVE EVIDENCE—DISCRETION OF COURT.

Where the court admitted the testimony of 9 witnesses for defendant on the question of alibi, and excluded that of 10 other witnesses upon the same facts, there being nothing to show that the testimony of the 10 excluded was of special value or of greater weight than that of the 9, there was no abuse of the discretion of the court to determine the extent to which cumulative evidence shall go, even though the trial was upon a capital offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1608; Dec. Dig. ¶676.]

Appeal from Circuit Court, Ouachita County; Chas. W. Smith, Judge.

Bully Sheppard was convicted of murder in the first degree, and he appeals. Reversed and remanded.

Appellant was convicted of the crime of murder in the first degree for killing George Brian upon an indictment regularly charging the offense, and which did not charge it was committed in the perpetration or attempt to perpetrate robbery, and from the judgment imposing the death sentence brings this appeal.

It appears from the testimony that George Brian, a little, frail, old man, who lived alone in a small hut in a pine thicket in an old field near Camden, was murdered and his safe rifled of its contents on the night of Thanksgiving day, 1914. He was found on the next morning lying on the floor near the small safe in a pool of blood, with the top of his head chopped off and bruises and gashes upon it and a bloody ax and club were lying near him. The inner door of the little safe had been battered and torn off, and there was no money in it.

John Barnes, an accomplice, testified that he had suggested to appellant, who seemed greatly in need of money, that old man Brian had some money they could get, and that appellant said they would go down and take it away from him; that he would take the money if witness would go with him; that appellant asked him if he had a pistol and, upon being told he did not, requested him to get one, which he tried and failed to do. He stated they went from Camden down to the home of the deceased on Saturday night before the murder on Thanksgiving, and that Bully Shepard cut a club near the house and told him to stay outside while he went on down to get the money; that Sheppard went to the house, called the old man to the door, talked with him a minute, and lighted a match and returned, saying, he didn't see any safe, and they went on back to town; that on Thanksgiving night, while it was raining, they returned to the vicinity of Brian's house, and Sheppard cut another club, and he stood 80 or 40 yards away from the house while Sheppard went in; that he was inside four or five minutes and returned running, and said he had knocked the old man down with the club and finished him with the

ax; that he had the money in his pocket. This occurred between 7:30 and 8 o'clock. They ran away from the vicinity and divided the money, he taking eight \$10 bills, and Sheppard seven, of the money secured, and giving Sheppard \$5 of his own money to make the division equal. He said that they returned to Camden, six miles away, reaching there about 10 o'clock. This witness said he did not enter the house at all, nor see anything that was done there, and did not expect any violence would be necessary to secure the money, and thought that Bully would be able to scare the old man into giving it up with the club. The borrowed overcoat worn by him on the night of the murder had stains of blood spattered on the back of it, and the skirt was bloody. His share of the money was found hidden in a fence corner, where he told his father he had put it. No money was found upon appellant nor about his place. The jumper and pair of corduroy pants said to have been worn by him in the afternoon before the murder were found at his house wet and with wet blood upon them. The defense of an alibi was interposed, and appellant did not testify. His statement to some witnesses, after his arrest, that he had been at Brian's house on the Saturday night before the murder to assist two white men in robbing the old man, but that after he went to the door he looked around and discovered his allies had gone away, "their nerve having failed," as he said, and that he went away and never went back and was not there when the murder was committed, was in evidence. Nine witnesses were introduced, accounting for his whereabouts from about 6:30, when he ate supper at Peter Mayweather's till 10 o'clock of the night of the murder. These witnesses stated that he came to Mayweather's about dark, after the family had finished supper; that supper was prepared for him about 6:30; that he went with some members of the family to a neighbor's of the name of Pierce, and from there in company with several people to a party or entertainment at Andy Williams' house; that he remained at the party, which was three miles or more from the house of the murdered man, for an hour or two, and returned with the crowd to their homes as the 10:10 passenger train was passing.

The court refused to allow 10 other witnesses, who were present and would have testified that the appellant was at the party and remained there past the time the murder was committed, to testify.

The court instructed the jury, giving, among others, over appellant's objection, instruction No. 2, as follows:

"2. You are instructed that if you find from the evidence in this case, beyond a reasonable doubt, that the defendant entered the residence

of the deceased, George Brian, with intent to perpetrate the crime of burglary, robbery, or larceny, and while engaged in the perpetration of, or the attempt to perpetrate, either of said crimes, he struck and killed the deceased as charged in the indictment, it will be your duty to find him guilty of murder in the first degree."

It also amended his requested instructions, numbered 3 and 6, striking out certain parts thereof.

R. K. Mason and A. N. Meek, both of Camden, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

KIRBY, J. (after stating the facts as above). [1] It is contended that the court erred in giving said instruction numbered 2, and this contention must be sustained. The indictment did not charge the offense to have been committed in the perpetration of, or attempt to perpetrate, the crime of robbery, and the jury should not have been told to find the appellant guilty of murder in the first degree, if they found deceased was killed in the perpetration of the robbery. There are two classes of murder in the first degree, separate and distinct, in one of which it is necessary only to allege that the killing was done in the perpetration of, or attempt to perpetrate, one of the felonies named in the statute, while in the other it is essential that the usual technical words, showing the killing was done after premeditation and deliberation, be employed. *Cannon v. State*, 60 Ark. 564, 31 S. W. 150, 32 S. W. 128; *Rayburn v. State*, 69 Ark. 184, 63 S. W. 356; *Powell v. State*, 74 Ark. 355, 85 S. W. 781.

An instruction of like kind was held to be reversible error in *Rayburn v. State*, supra, where the offense was charged by the usual common-law indictment.

The accomplice upon whose testimony chiefly the conviction was had did not see the offense committed, if his statement be true, and was surprised that killing had been resorted to by appellant, whom he had expected only to scare and intimidate the old man into giving up his money.

The case is not like that of *Powell v. State*, supra, where the court held there was ample evidence outside of that tending to show an offense committed in the perpetration of one of the statutory felonies, and it was there also held that the remarks of the prosecuting attorney, objected to and not required withdrawn by the court, did not amount to the giving of an instruction by the court of the kind complained of herein.

[2] It is next contended that the court erred in striking out a portion of one of the instructions relating to the accomplice's testimony, but the instruction as given contained the language of the statute relative thereto, and was sufficiently full to cover the point. Neither was there error in striking

the clause out of the other instruction, relating to the credibility of witnesses which has been held to be erroneous when specifically objected to.

[3] It is next contended that the court erred in refusing to allow the 10 other witnesses produced to testify in support of the alibi. Their testimony would have been cumulative, and it is not disclosed that any of said witnesses had any special or peculiar knowledge that would have tended more strongly to convince the jury of the truth of their statements of the whereabouts of appellant than that already given by the numerous witnesses who had testified, nor that any of them were of such standing that their statements would have carried more weight than that of the others, and the court did not err in refusing to permit them to testify. It is within the sound, judicial discretion of the trial court to limit the number of witnesses permitted to testify about a particular fact, and to decide where and when the introduction of cumulative testimony shall stop; and, while in capital cases this discretion should be cautiously exercised, it will not be controlled unless it appears to have been manifestly abused. *Hall v. State*, 64 Ark. 121, 40 S. W. 578; *Jack Bayou Drainage District v. Railway*, 171 S. W. 867; *State v. Lamb*, 141 Mo. 298, 42 S. W. 827; *Note 8 Ann. Cas. 828*.

It is unnecessary to discuss the other matters complained of, which will not likely occur upon a new trial.

For the error in giving said instruction, the judgment is reversed, and the cause remanded for a new trial.

ST. LOUIS SOUTHWESTERN RY. CO. v. I. W. HAYNIE & CO. (No. 85.)

(Supreme Court of Arkansas. July 5, 1915.)

1. CARRIERS — LIVE STOCK — NOTICE OF CLAIM — TIME FOR BRINGING SUIT.

Where a carrier had established two rates for interstate stock shipments, one under an unrestricted contract as to the liability of the carrier, and the other, a lower rate, limiting liability in certain respects, but both containing the same stipulations as to whom notice of claim of damages should be given, and requiring suit therefor to be brought within six months, and the shipper accepted without inquiry the lower rate, although either was open to him, the stipulations as to notice and time of bringing suit were not rendered void because the shipper was not given, or expressly offered, the right to ship under an unrestricted contract.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. ¶¶ 218.]

2. CARRIERS — LIVE STOCK — NOTICE OF CLAIM OF DAMAGE — TIME FOR BRINGING SUIT.

Where a carrier had established two rates for interstate stock shipments, one under an unrestricted contract as to the liability of the carrier, and the other, a lower rate, limiting liability in certain respects, but both containing the same stipulations as to notice of claim of

damages and time for bringing suit, such stipulations were not invalid as not being based upon a consideration additional to that supporting the contract of shipment, since they did not constitute restrictions upon the carrier's liability, but were merely reasonable regulations for the performance of the contract.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.]

Appeal from Circuit Court, Ouachita County; Chas. W. Smith, Judge.

Action by I. W. Haynie & Co. against the St. Louis Southwestern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

Edw. A. Hald, of St. Louis, Mo., and Gaughan & Sifford, of Camden, for appellant. J. W. Warren, of Camden, for appellee.

McCULLOCH, C. J. This is an action against a common carrier to recover damages on certain shipments of cattle from Camden, Ark., to East St. Louis, Ill. There were three separate shipments, and a small amount of damage is claimed on account of each. The total sum claimed by the plaintiff was \$98.12, and on trial of the case the jury assessed damages in the sum of \$60 in favor of the plaintiff. The damage to the cattle arose principally from delay in the first shipment, which is shown to have resulted in a loss by reason of depreciation in the market and shrinkage in weight of the cattle. There is evidence sufficient to sustain the recovery for the amount awarded by the jury.

Each of the bills of lading contained a stipulation to the effect that, as a condition precedent to the collection of any damage for loss and injury covered by the contract, the shipper should "give notice in writing of the claim therefor to some general officer or to the nearest station agent of the carrier, or to the agent at destination, or to some general officer of the delivering line," and that no action against the carrier for the recovery of damages arising under the contract should be sustainable "unless such action or suit be commenced within six months next after the cause of action shall occur." It is undisputed that neither of these stipulations were complied with, and the only question presented on this appeal is whether or not the stipulations are valid and binding upon the parties. The shipments constituted interstate commerce, and the contract with reference thereto must be tested in the light of the federal laws on the subject.

"The validity of any stipulation in such a contract which involves the construction of the statute," said the Supreme Court of the United States in *M. & T. Ry. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 897, 57 L. Ed. 690, "and the validity of a limitation upon the liability thereby imposed is a federal question to be determined under the general common law, and, as such, is withdrawn from the field of state law or legislation."

In the same case the Supreme Court of the United States said:

"The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. That is a question of law for the determination of the court."

[1] It is not contended that either of the stipulations mentioned above are unreasonable, but the correctness of the court's ruling in rendering judgment against the carrier is defended on the ground that the plaintiff was not given the right to ship his live stock under an unrestricted contract. One of the plaintiffs testified that he accepted the contract that was offered to him by the railroad agent. The undisputed evidence in the case is that there were two rates established by the carrier—one (the higher rate) under an unrestricted contract as to the liability of the carrier; and the other (the lower) limiting the liability in certain respects. The contract under each of the rates, however, contains the same stipulation with reference to giving notice and the time within which an action may be brought.

So far as the failure of the agent of the carrier to offer the plaintiff the unrestricted contract under the higher rate is concerned, it is sufficient to say that the rate had been established by the carrier, and it was the duty of the plaintiff to take notice of it and to ask for the unrestricted contract if he desired to take advantage of it. In order to bind the plaintiff to the contract which he accepted, it was not necessary for the agent to call his attention to the other rate and to expressly offer it to him.

In *St. Louis & S. F. R. Co. v. Pearce*, 82 Ark. 353, 101 S. W. 760, 118 Am. St. Rep. 75, 12 Ann. Cas. 125, we said:

"It was improper to permit the plaintiffs to testify that they signed the contract without reading it, and that the agent did not inform them that there was another rate under a contract of unrestricted liability. The agent was not bound to so inform them unless requested to do so, as information was obtainable from other sources provided by law; and unless the agent refused, upon demand, to accept the shipment at another rate under a contract for unrestricted liability, there is no reason for holding the contract to be void, as this court has held that the contract is valid and binding where it is not forced upon the shipper."

[2] Nor does the fact that the special stipulations mentioned above were embraced in both contracts—in other words, the fact that the stipulations were not based on some additional consideration, such as a lower rate—affect the validity of the same. Those stipulations do not constitute restrictions upon the liability of the carrier, but are established merely as reasonable regulations for the government of the parties in performing the

contract and in enforcing their rights thereunder. *St. Louis & S. F. R. Co. v. Keller*, 90 Ark. 308, 119 S. W. 254; *M. & N. A. R. Co. v. Ward*, 111 Ark. 102, 163 S. W. 164. In that respect those stipulations are unlike one which contains a contract for a reduction of the amount to be recovered, or the degree of care, or one, in fact, which affects in any other particular the liability of the carrier; but, as we said in the *Keller Case*, supra, the validity of such regulations as this depends upon their reasonableness, and not upon the question whether or not there is a consideration therefor, inasmuch as the stipulations are founded upon the considerations of the contract of shipment.

Counsel for plaintiff rely upon the decision of this court in the case of *St. Louis & S. F. R. Co. v. Wells*, 81 Ark. 469, 99 S. W. 534, where we said that, the special contract being found to be invalid on account of having been forced upon the shipper without giving him an opportunity to ship under an unrestricted contract, "all question as to limitation as to value of the property and the time for bringing the action passed out of the case." In that case, however, the railroad company sought to defend under a contract which was void because it had been, in fact, forced upon the shipper, and no opportunity was given the shipper to take advantage of an unrestricted contract with respect to the liability of the carrier. It was shown that that particular writing was not enforceable for the reason that the shipper had been compelled to take it and surrender his substantial common law rights against the carrier. Therefore it was proper to say that, as the contract was found to be void on that account, all those provisions passed out of the case.

Such is not the present case, however, for it appears that the carrier had two rates, either of which the shipper might have taken advantage of; and since he accepted, without further inquiry, the contract for restricted liability, he is bound by it.

The judgment is therefore reversed, and the cause dismissed.

KANSAS CITY SOUTHERN RY. CO. v. BULL (No. 95.)

(Supreme Court of Arkansas. July 5, 1915.)

1. TRIAL §189—DIRECTING VERDICT.

In an action against a railroad company for an overcharge in freight on a shipment of live stock, it was error to direct a verdict against the company for the alleged overcharge, where there was evidence tending to prove the correctness of the amount charged.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.]

2. CARRIERS §160—BILL OF LADING—LIMITATION OF TIME TO SUE—VALIDITY.

A stipulation in a bill of lading, providing that suits upon claims arising from the ship-

ment shall be brought within six months, is valid and binding upon the parties.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 231, 673; Dec. Dig. § 160.]

3. CARRIERS §218—HOLDING SHIPMENT FOR CHARGES—STIPULATION IN BILL OF LADING LIMITING TIME OF ACTIONS—EFFECT.

Where live stock was damaged while being held by a railroad company at destination to compel payment of freight charges, the company had the right to insist that suit for such damages be brought within six months in accordance with a stipulation to that effect in the bill of lading, since it held the stock, whether rightfully or wrongfully, as a carrier and was answerable only in accordance with such stipulation.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.]

4. PLEADING §261—AMENDMENT—DISCRETION OF COURT.

In a suit against a railroad company for damages to live stock shipped under a bill of lading, providing that suits upon claims arising from the shipment should be brought within six months, it was not error to allow defendant to set up such defense by amendment after the case was called for trial, the court having a large discretion in permitting amendments, and no abuse of such discretion prejudicial to the substantial rights of the parties being shown.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 794-800; Dec. Dig. § 261.]

5. PLEADING §261—DEFENSE RAISED FIRST TIME—AMENDMENT OF ANSWER—WAIVER.

The fact that a defense was not set up in the original answer is no waiver of the right to insist upon it by subsequent amendment to the answer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 794-800; Dec. Dig. § 261.]

Smith, J., dissenting.

Appeal from Circuit Court, Sevier County; Jeff. T. Cowling, Judge.

Action by Charles Bull against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Charles Bull brought this suit against the railway company to recover damages for an alleged overcharge upon a shipment of freight from Cimarron, Kan., to De Queen, Ark., and for damages alleged to have been caused to his live stock kept by the company in muddy stock pens at the point of destination, pending the adjustment of the freight charge.

The complaint alleged that the plaintiff paid \$88, the full freight charged for the shipment, and that upon arrival at De Queen the carrier wrongfully demanded \$107.88, which he was finally compelled to pay in order to obtain possession of the shipment. It alleged further that the railroad company unloaded the cattle in muddy and uncovered stock pens and kept them therein three days, refusing to deliver them, and because of the exposure they contracted colds, which resulted in coughs and pneumonia and six of them finally died, to his damage in the sum of \$1,000; that the horses were likewise wrongfully kept in said stock pens and damaged in the sum of \$200. The answer denied

the allegations of the complaint, alleged that the rate charged was its published tariff rate on file with the Interstate Commerce Commission, and further pleaded that plaintiff was not entitled to recover, not having brought suit within six months, as provided in the bill of lading, the twelfth paragraph of which was specially pleaded, and provides:

"It is further agreed that no suit or action against the company for the recovery of any damages accruing or arising out of said shipment or of any contract pertaining to the same, or the furnishing of facilities for such shipment, shall be sustained in any court of law or equity unless such suit or action shall be commenced within six months next after the loss or damage shall have occurred. The failure to institute suit within said time shall be deemed conclusive evidence against the validity of such claim or cause of action, and shall be a complete bar to such suit."

It appears from the testimony that plaintiff shipped in April, 1912, a car of emigrant movables from Cimarron, Kan., to De Queen, Ark., the car being loaded on April 2d, and advised the agent of the initial carrier, the Atchison, Topeka & Santa Fé Railway Company, of the number of head of stock, and that he wished to prepay the freight. The agent accepted the \$88 "to be applied thereon," and put the calves on the bill to be paid for upon arrival at De Queen. The car arrived at De Queen the early morning of April 6th, and appellant refused to deliver the shipment until \$107.88 additional freight charges had been paid. This was paid by appellee on the 10th, under protest, and the shipment received. The additional charge was made upon a claim for excess weight and for the three calves. The horses upon arrival were taken to a stable, and the cattle were unloaded and put in the cattle pens near the depot. It was raining most of the time, and the pens were uncovered and muddy, being from 3 to 15 inches deep in mud, according to the various witnesses. They took cold, and six of them finally died from the exposure in the following June and July.

Appellee contended that the car load shipment weighed 19,525 pounds, that he weighed all of the animals and other stuff upon unloading same, and that that was the correct weight. He also said, however, that the car was weighed at Dodd City, Kan., and he supposed at the time that it weighed the amount contended for by the railway company 23,700 pounds; that he was present when it was weighed there, and heard the agent say that it weighed that amount, and objected to it, "claiming it was too much, and the railroad man then weighed it again and reported the second weight to be the same as the first." The bill of lading shows on its face that the car contained three calves over the limit, and also that the \$88 paid was "to be applied on the freight there," and the twelfth clause as set out in the answer and plaintiff's receipt shows the weight to be 23,700 pounds. Plaintiff traveled with the stock.

The tariff sheets introduced in evidence show the correct rate on the car of goods limited to 20,000 pounds to be 44 cents per hundredweight, which applied where the liability was limited, as in this case. It also shows the amount of excess above the 20,000 pounds limit was to be charged for as contended by the railroad, and that the weight of the three animals not charged were to be estimated 500 pounds each, and upon which the rate was \$1.92. The rate was shown to be 44 cents upon a car of 20,000 pounds minimum and upon the calves or yearlings, \$1.92. The railway company refused to deliver the shipment except upon the payment for the yearlings at the proper rate and of the excess over the minimum of 20,000 pounds as shown by the waybill, 2,700 pounds after deducting 1,000 pounds for the weight of the calves.

There was much testimony introduced relative to the condition of the stock pens and the cattle and their becoming sick and dying thereafter, the railway company objecting to the valuation of the cattle being shown to be more than the amount agreed upon in the bill of lading in case of loss, the bill of lading itself being in evidence.

The court instructed the jury that under the undisputed evidence plaintiff was entitled to recover \$11.88 overcharge of freight, and that there was no proof, excluding the three head of calves paid for at the proper rate, that the balance of the shipment was of more than 20,000 pounds weight. It declined appellant's request to direct a verdict for it on the first and second counts of the complaint, and refused all its other instructions. From the judgment against it, the railway company brings this appeal.

Read & McDonough, of Fort Smith, for appellant. Steel, Lake & Head, of Texarkana, for appellee.

KIRBY, J. (after stating the facts as above). [1] It is contended that the court erred in directing a verdict against appellant for the alleged \$11.88 overcharge and in refusing to direct a verdict in its favor on the second count of the complaint, claiming damages to the cattle, during the time of the refusal to deliver them because of appellee's failure to pay the freight charges demanded. There was testimony tending to show that the weight of the shipment was more than the 20,000 pounds minimum upon which the freight was charged. The waybill shows weight 23,700 and plaintiff stated he was present when the car was weighed, about 20 miles from the starting point, and that the railroad agent announced the weight as 23,700 as shown by the waybill; that he immediately objected, saying it was too much, and thereupon the agent again weighed it and announced that the weight was correct; that he himself did not notice whether it weighed that amount or not. His own testimony and

that of another witness that the shipment weighed piecemeal, upon being unloaded, less than 20,000 pounds was undisputed. It cannot be said, however, that the evidence was undisputed as to the correct weight of the shipment, and plaintiff's statement of the weight as announced by the weigher of the car at the time it was weighed, as well as the statement of the waybill, was evidence tending to prove the correctness of it, and the court erred in directing the verdict. *Williams v. St. L. & S. F. Rd. Co.*, 103 Ark. 401, 147 S. W. 93; *Hill v. St. L., I. M. & S. R. Co.*, 178 S. W. 369.

[2] 2. The court erred also in not directing a verdict for the railway company on the second cause of action, suit not having been brought therefor within the time stipulated in the bill of lading for the bringing of suit for damages. It was alleged in the complaint that the railway company arbitrarily and without right refused to deliver possession of the shipment upon its arrival at De Queen, and damages were caused from its retention and lack of care of the cattle, pending the payment of the additional freight demanded. The shipment was delivered on the 10th day of April, and the suit was not commenced until the 18th day of July, 1913, more than a year after the cause of action accrued. The amendment to the answer filed on the 27th day of January, 1915, alleged that the suit was not brought within six months after the damage occurred, and also said express stipulation in the bill of lading limiting plaintiff's right to recovery for damages to a suit brought within six months after the accrual thereof. Such a stipulation in a contract of carriage has been held reasonable and valid by this court and binding upon the parties thereto. *Hafer v. St. L. S. W. Ry. Co.*, 101 Ark. 310, 142 S. W. 176; *Mo. & N. Ark. Ry. Co. v. Ward*, 111 Ark. 102, 163 S. W. 164. See, also, *M., K. & T. Ry. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690.

[3] If the railroad company was entitled to charge the amount of freight demanded, it had the right to hold the shipment until it was paid, and the damage occurring while it was being so held was damages accruing or arising out of the shipment covered by the contract made, and if it demanded freight it was not entitled to receive, and wrongfully held the shipment to compel the payment thereof, it was still liable for such refusal to deliver as a common carrier (*Arkansas Southern Ry. Co. v. German National Bank*, 77 Ark. 487, 92 S. W. 522, 113 Am. St. Rep. 160), and answerable therefor only in accordance with this stipulation in the contract of carriage limiting the time in which suits should be brought for damages arising out of the shipment to six months after the damage occurred, or the cause of action accrued.

[4, 5] The undisputed testimony shows that

the suit was brought long after the six months allowed therefor, and the court erred in not directing a verdict for appellant on this cause of action. It can make no difference that this defense was not alleged in the answer filed and was put in by amendment after the case was called for trial. It was set up by permission of the court, which has large discretion in permitting amendments, and no abuse of discretion is shown herein prejudicial to the substantial rights of the complaining party. *St. L., I. M. & S. R. Co. v. Holmes*, 88 Ark. 181, 114 S. W. 221; sections 6145-6148, Kirby's Digest; *Kempner v. Dooley*, 60 Ark. 531, 31 S. W. 145. The fact that it was not set up in the first answer could not constitute a waiver of the right to insist upon it, and, having been properly pleaded and established by the undisputed testimony, it was conclusive of the rights of the parties.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

SMITH, J., dissents.

ERNEST v. STATE. (No. 128.)

(Supreme Court of Arkansas. Sept. 27, 1915.)

CRIMINAL LAW §511 — CORROBORATION OF ACCOMPLICE—SUFFICIENCY.

Testimony that defendant on the night of the burglary was seen to pass a railroad station twice, that when another was arrested for the crime defendant said he wanted to see him, and after such arrest defendant said some one was watching his house, and showed some anger at the insinuation thereby implied that he had something to do with the crime, there being nothing further in the record to connect these facts with the crime, is not sufficient corroboration of the testimony of an accomplice, within Kirby's Dig. § 2384, requiring that the corroborative evidence must tend to connect the defendant with the commission of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128-1137; Dec. Dig. § 511.]

Appeal from Circuit Court, Calhoun County; Chas. W. Smith, Judge.

Albert Ernest was convicted of burglary, and appeals. Reversed and remanded.

J. S. McKnight, of Hampton, H. S. Powell, of Camden, and J. R. Wilson, of Warren, for appellant. Wallace Davis, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

MCCULLOCH, C. J. The defendant, Albert Ernest, was convicted of the crime of burglary, and appeals to this court from the judgment of conviction.

The charge in the indictment is that he, together with one James Oliver, broke and entered the storehouse of D. R. Speer, in the town of Tinsman, Calhoun county, Ark., with intent to commit grand larceny, and did then and there commit the offense of grand lar-

cery, by stealing merchandise, consisting of three coats and six pairs of trousers, of the aggregate value of \$39. The proof shows that the articles alleged to have been stolen were found, shortly after the burglary, in a hollow log about a half mile from Tinsman. One Bruce Harper gave information to the deputy sheriff as to the place the stolen goods could be found, and confessed that he, together with Oliver and the defendant, had committed the burglary. Harper was introduced as a witness by the state, and testified that he and Oliver and the defendant burglarized the house and stole the goods. He stated, also, that in addition to the articles mentioned in the indictment some bolts of calico were stolen and taken away by the defendant, and that the defendant stated that he was going to secrete the same under a certain church house. The bolts of calico were not found.

It is insisted by counsel for the defendant that the testimony is not sufficient to support the verdict of conviction, in that the testimony of Harper, the alleged accomplice of the defendant, was not corroborated. That contention must be sustained, for, after a careful analysis of the testimony, we are unable to discover any of a substantial character which tends to corroborate the testimony of the accomplice. Our statute on the subject requires that the corroboration must tend to connect the defendant with the commission of the offense, and is not sufficient "if it merely shows that the offense was committed, and the circumstances thereof." Kirby's Digest, § 2384.

The Attorney General presents two features of the testimony which he argues afforded sufficient corroboration. One is the testimony of the railroad agent, named Brett, who stated that on the night of the burglary he saw defendant pass by the railroad station twice, between 9 and 10 o'clock. The testimony of Harper is to the effect that the burglary was committed between 1 and 2 o'clock during the night. Brett testified that he saw the defendant pass the station, and walk down towards the railroad section house, and return shortly afterwards, and that there was nothing unusual about that occurrence. He stated that the defendant was alone at the time, and that it was not unusual for persons to pass along about that hour. There is nothing whatever in the testimony of Brett, or in any other part of the record, which tends to make the presence of defendant at or near the railroad station a circumstance sufficient to warrant the inference that defendant was implicated with the burglary. The other circumstance relied on is that, a day or two after the burglary was committed, and after Harper had been arrested, the defendant remarked to one of the witnesses that some one had been watching his house, and showed some anger at the insinuation thereby im-

plied that he had something to do with the burglary. He also stated to the witness, when Harper was arrested and was about to be taken away, that he wanted to see Harper.

We do not think that these circumstances were sufficient to amount to substantial corroboration. They were entirely consistent with defendant's innocence. It was not unnatural for defendant to comment upon the fact that he was being watched in a way which cast an imputation as to his connection with the burglary. Nor was it any evidence of guilty participation in the crime that he showed anger or irritation at the implied suggestion of his connection with the crime. These circumstances are too weak, we think, to be treated as corroborative testimony of a substantial nature. We are therefore of the opinion that the verdict of the jury was not supported by sufficient testimony.

We are asked to enter a judgment of dismissal here; but we are unwilling to do that, for the reason that the prosecuting attorney may have discovered additional testimony in corroboration of the alleged accomplice.

The judgment is therefore reversed, and the cause is remanded for a new trial.

JOHNSON v. MANTOOTH. (No. 114.)

(Supreme Court of Arkansas. July 12, 1915.)
APPEAL AND ERROR \S 1015—REVIEW—NEW TRIAL ON CONFLICTING EVIDENCE.

Where there is a substantial conflict in the evidence, the action of the trial court, in granting new trial because the verdict is against the weight of the evidence, is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 8860-8876; Dec. Dig. \S 1015.]

Appeal from Circuit Court, Jackson County; R. B. Jeffery, Judge.

Action by Nettie Mantooth against B. F. Johnson. Verdict for defendant. From an order granting plaintiff a new trial, defendant appeals. Final judgment rendered for plaintiff under stipulation pursuant to statute.

The appellee sued appellant in the Jackson circuit court, alleging that she was the owner of a certain tract of land in that county through inheritance from her mother and deed from her sister; that appellant was in the unlawful possession of the land, and she prayed for recovery of possession and damages. The appellant answered, admitting that appellee was the owner of the land, but denied that he was in the unlawful possession, and set up that he was in possession of the land under an oral contract with T. E. Mantooth, the husband and agent of appellee, entered into on or about the 1st of August, 1911, having previously rented the same for that year by oral contract entered into with appellee, through her husband and agent, T. E. Mantooth; that by the terms of the contract of rental for the year 1912,

made, as alleged, between appellant and appellee, through the husband and agent of appellee, appellee agreed to furnish the appellant with teams, feed, and such tools as would be necessary to cultivate, gather, and market the crops, and to furnish half of the oil, wire, and ferriage necessary to gather and market the crops and hay grown on the land for the year 1912; that appellant was to pay appellee's agent one-half of the proceeds of the crops as rent for the land and for the use of the teams and tools for the year 1912. The appellant set up, by way of counterclaim, that he was in possession of the land, making preparations to cultivate the same under the terms of his contract, and that on or about the 1st day of February, 1912, the appellee evicted the appellant from the lands, by reason whereof he failed to raise the crops which he had contemplated (the kinds and value thereof being specified), all to his damage in the aggregate sum of \$2,500, for which he asked judgment.

Appellee testified that Judge Stuckey was her agent for the rental of the lands in controversy for the year 1912, and that her husband (Thornton Mantooth) was not her agent. Thornton Mantooth, her husband, had rented the land from her mother for the years 1910 and 1911, and appellant subrented it from Thornton Mantooth, and lived on and cultivated it for the year 1911. Witness claimed no interest in the land prior to her mother's death, which occurred May 22, 1911. Her husband tried to act as her agent, as she found out from deals he made with other parties; but he was not her agent. He had no authority to rent the land for the year 1912. In October, 1911, she rented the land for the year 1912 to Mantooth Bros. Her husband was not present at that time, and had no interest in it whatever. She gave the appellant written notice to get out, but he refused to do so until after she brought this suit. She denied that she had any agreement with appellant to furnish him anything, or to allow him to cultivate the farm for the year 1912. On cross-examination she stated that she had another place, which she got from her mother, which she allowed her husband to rent out when it was agreeable to her to do so. He made contracts for the rental of this place, on which they lived, when it was agreeable with her; but he talked with her first. From the year 1912 her husband did as she said when he made a contract. Her husband rented to Cherry and Campbell other lands of hers for the year 1912. It was agreeable to her, and she furnished these parties for the years of 1912 and 1913. Her husband was not her agent for furnishing them; she did that herself. The appellant knew that she had rented the land in controversy to the Mantooth Bros., in two days after she rented it. He came to see her about it. He said he would stay there and stand a lawsuit. This was before the written notice was given him

to vacate. She stated that after her husband had rented the land in controversy to appellant she heard about it; heard it in about two weeks after he had done so.

Other witnesses corroborated the appellee to the effect that she, in person, on or about the 28th of October, 1911, rented the land to the Mantooth Bros. for the year 1912. The witnesses stated that the Mantooth Bros. were brothers of Thornton Mantooth, the husband of appellee. They had talked with him a little about renting the land, as people would talk about such things. One of the witnesses stated that Thornton Mantooth had told him time and again that he had promised Johnson the place; did not tell the particulars about his trade. Another one stated that Thornton told him that he had rented the land to Johnson before Mantooth Bros. rented it from the appellee.

The appellant testified that he rented about 80 acres of the place in controversy from Thornton Mantooth for the year 1911, and about the 1st of August, 1911, he told Thornton Mantooth that he wanted the whole place for the year 1912. Thornton said:

"Well, I will let you know right away. I am satisfied I will make a deal, and let you have it. I am thinking of renting out my other place, too. I will let you know about it later on."

About two weeks afterwards witness entered into a contract with Thornton Mantooth, by which witness rented the place from him, with the understanding that witness was to cultivate it and Thornton Mantooth was to furnish the teams and tools and one-half of the ferriage, etc., to market the crop, and witness was to give him (Mantooth) one-half of the proceeds. Witness did not know anything about the appellee's renting the place to the Mantooth Bros. until a few days before New Year's. Appellee sent him notice to give possession. He did not give possession until the end of the suit, when the court gave judgment against him, and that he appealed the case. He went to see appellee about the notice to surrender possession which she had given the witness, and she said:

"Well, I told Thornton, when he rented, the day after he rented it to you, that I didn't see that there was much in it for us that way."

Witness' further testimony was in regard to the damages he claimed to have sustained, which, in the view we have taken of the case, it is not necessary to set forth.

The testimony of witnesses on behalf of appellant tended to corroborate the testimony of the appellee as to the contract between him and Thornton Mantooth for the rent of the land for the year 1912. One of these witnesses testified that he could not remember the details of the agreement, but, if he understood it right, Mrs. Mantooth owned the land. She was not present, and witness did not know whether she ever agreed to the contract or not. Other witnesses on behalf of the appellant testified to the effect that they rented land owned by appellee for the

years 1911 and 1912 from Thornton Mantooth. The land rented by these witnesses was not the land in controversy. Another witness testified that in the years 1911, 1912, and 1913 he bought timber from Thornton Mantooth on the land belonging to appellee. The timber came off of the land that appellant occupied.

In rebuttal, one of the witnesses testified that in August or September, while appellant was on the land in controversy, she had a conversation with him about the land, and heard Johnson say he had the land for the next year. Witness told Johnson that Mrs. Mantooth was not going to let him stay, and Johnson replied that he had made a contract with Mr. Mantooth, and it would have to stand; that he did not make any contract with Mrs. Mantooth.

M. M. Stuckey testified that, after the death of appellee's mother, Thornton Mantooth, her husband, did not have anything to do with the land, and was not the agent of the appellee. Witness was her agent to rent the land in controversy, and he rented the same for the year 1912. The papers and note evidencing the rent contract between Mantooth Bros. and the appellee were drawn in his office, and he collected the rents.

At the conclusion of the testimony, both parties presented prayers for instructions; but it is not necessary to set these out. The jury returned a verdict in favor of appellant for \$700. The appellee filed a motion for a judgment in her favor notwithstanding the verdict. The record recites that the court treated the motion as a motion for a new trial, and sustained the same, entering an order granting appellee a new trial. The appellant at the time excepted, and prayed an appeal to the Supreme Court, consenting that judgment absolute should be rendered against him in case the judgment of the trial court granting appellee a new trial be affirmed, as provided by statute.

Stuckey & Stuckey, of Newport, for appellant. Otis W. Scarborough and John W. & Jos. M. Stayton, all of Newport, for appellee.

WOOD, J. (after stating the facts as above). Appellant contends that the ruling of the court in granting the appellee a new trial was erroneous, because there was some substantial evidence tending to show that appellee rented the land to the appellant for the year 1912 through her husband and agent, Thornton Mantooth. Conceding, without deciding, that there was testimony from which the jury might have found that appellee rented the land to appellant for the year 1912, through her husband, Thornton Mantooth, acting as her agent, and that there was sub-

stantial evidence to sustain such verdict, still it does not follow that the court erred in granting the motion for a new trial. Counsel for appellant frankly say that:

"It may be admitted that the evidence of the authority of Thornton Mantooth to act as the agent of his wife is not strongly proven by direct testimony."

Certainly it cannot be said that there was no conflict in the testimony on this point. On the contrary, if there was any competent testimony to show that Thornton Mantooth was the agent of his wife to rent the land in controversy for the year 1912, and that as such agent he did rent the land to appellant for the year 1912, there was certainly direct and decided testimony conflicting with this, and to the effect that he was not her agent, and did not rent her lands to appellant for the year 1912. In *Blackwood v. Eads*, 98 Ark. 304, 135 S. W. 922, we quoted the following from the Supreme Court of Missouri:

"The Supreme Court will not, where there is substantial conflict in the evidence, review the action of the trial court in granting a new trial because the verdict is against the weight of the evidence."

See cases there cited.

In *McDonnell v. St. L. S. W. R. Co.*, 98 Ark. 334, 336, 135 S. W. 925, 926, we said:

"It is not invading the province of the jury for the trial judge to set aside its verdict, where there is a conflict in the evidence. On the contrary, it is the duty of the trial court to set aside a verdict that it believes to be against the clear preponderance of the evidence. But it should not, and the presumption is that it will not, set aside a verdict unless it is against the preponderance of evidence. This court will not reverse the ruling of the lower court in setting aside a verdict, where there is substantial conflict in the evidence upon which the verdict was rendered, but will leave the trial court to determine the question of preponderance."

And in *McIlroy v. Arkansas Valley Trust Co.*, 100 Ark. 596, 599, 141 S. W. 196, 197, after referring to the above cases, the court said:

"There was a decided conflict in the testimony, and we cannot say that the trial court erred in its conclusion that the verdict was against the preponderance of the evidence, or abused its discretion in setting it aside. * * * It is difficult to determine where the preponderance of the testimony lies, and we certainly are unable to say that the conclusion of the trial judge is against the preponderance."

See, also, *Taylor v. Grant Lumber Co.*, 94 Ark. 566, 127 S. W. 962.

Under the testimony in this record, there was no abuse of discretion on the part of the trial judge in setting aside the verdict and granting a new trial, and in accordance with the stipulation on the part of appellant, and in pursuance of the statute (Kirby's Digest, § 1188, subd. 2, and section 1238), final judgment will be rendered here in favor of the appellee.

STITH v. STATE. (No. 132.)

(Supreme Court of Arkansas. Sept. 27, 1915.)

1. FORGERY — 29—INDICTMENT—DESCRIPTION OF OFFENSE—PERSON TO WHOM INSTRUMENT WAS PASSED.

Where an indictment for forgery charged defendant with passing a forged order drawn upon an express agent, without alleging any person, firm, or corporation to or upon whom the same was uttered or passed, not stating that the person to or upon whom it was uttered or passed was to the grand jury unknown, such indictment was bad upon demurrer.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 77-81; Dec. Dig. § 29.]

2. FORGERY — 12—FORGERY OF EXPRESS ORDER — NECESSITY FOR ADDRESS TO PARTICULAR PERSON.

Where a forged order for an express package, not addressed to any particular person, was yet addressed to "Express Agt.," directing him to "let the bearer have my package," its uttering was forgery, since, if the order had been genuine, it was explicit and clear enough to warrant the agent in delivering the package to the bearer.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 23-47; Dec. Dig. § 12.]

Appeal from Circuit Court, Ouachita County; Chas. W. Smith, Judge.

George W. Stith was convicted of forgery, and he appeals. Reversed, and case remanded.

A. N. Meek and B. K. Mason, both of Camden, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

HART, J. The appellant, G. W. Stith, was convicted of the offense of forgery, and has duly prosecuted an appeal to this court.

[1] The indictment omitting the formal parts is as follows:

"The grand jury of Ouachita county, in the name and by the authority of the state of Arkansas, on oath accuse the defendant, George Stith, of the crime of forgery, committed as follows, to wit: The said defendant, George Stith, in the county and state aforesaid, on the 26th day of October, A. D. 1914, did then and there willfully, unlawfully, and feloniously, fraudulently and falsely make, forge, and counterfeit a certain paper writing, and sign thereto said paper writing the name of Sam Stith without his knowledge or consent; said writing purporting to be an order drawn upon the express agent to let the bearer have a package, which said false and forged order is in words and figures, to wit: 'Express Agt. Please let bearer have my package, oblige. Sam Stith.' And the false and fraudulent making, forging, and counterfeiting of said order and signing the name of the said Sam Stith was done with the felonious and fraudulent intent then and there to cheat and defraud the said express agent out of the said package aforesaid, to the great damage and injury of the said express agent, contrary to the statutes in such cases made and provided, against the peace and dignity of the state of Arkansas."

The appellant interposed a demurrer to the indictment, which was overruled by the court, and his counsel now assigns as error the action of the court in overruling his de-

murrer. The trial court should have sustained the demurrer to the indictment. This court has held that the name of the person to whom the forged instrument was passed is a material part of the description of the offense. *McClellan v. State*, 32 Ark. 609. The indictment in the case at bar attempts to charge the defendant with passing a forged order, but does not allege any person, firm, or corporation to or upon whom the same was uttered or passed. The indictment does not excuse this omission with any statement that the person to or upon whom it was uttered or passed was to the grand jury unknown. The object of naming the injured person in the indictment is not only that the defendant may properly prepare for his defense, but that in case of a second prosecution for the same offense he may accurately plead former conviction or acquittal as the case may be.

[2] Again, it is contended by counsel for defendant that the instrument alleged to be forged is not addressed to any particular person, and therefore is not the subject of forgery. We do not agree with counsel in this contention. It is true the instrument is not addressed to any particular person firm or corporation. It is apparent, however, that it was addressed to the agent of the express company which had charge of the package consigned to Sam Stith, and if the order had been genuine it was explicit and clear enough to warrant the express agent in delivering the package to the bearer. This being true, its uttering was forgery.

For the error of the trial court in overruling the demurrer of appellant to the indictment, the judgment must be reversed, and the case will be remanded for further proceedings according to law.

OGLESBY v. FT. SMITH DISTRICT OF SEBASTIAN COUNTY. (No. 94.)

(Supreme Court of Arkansas. July 5, 1915.)

COUNTIES — 114—COUNTY EXPENSES—ADMINISTRATION OF JUSTICE—CIVIL PROCEEDINGS—FEE OF SPECIAL COUNTY ATTORNEY.

Where a county judge let a contract for the construction of a new courthouse, and, upon suits in chancery brought to restrain the building thereof, employed special counsel to defend such suits, contracting, on behalf of the county, in the order appointing the counsel, that they should receive not less than \$1,000 each for their services, the claim of such attorneys for compensation based on such order must be dismissed. (Affirmed by divided court.)

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 175; Dec. Dig. § 114.]

McCulloch, C. J., and Wood, J., dissenting.

Appeal from Circuit Court, Sebastian County; Jno. H. Vaughan, Special Judge.

Claim by Ira D. Oglesby against the Fort Smith District of Sebastian County. The claim was disallowed, and claimant appeals. Affirmed.

Ira D. Oglesby, of Ft. Smith, for appellant. Thos. B. Pryor, of Ft. Smith, and Vincent M. Miles, of Little Rock, for appellee.

HART, J. Ira D. Oglesby, an attorney of Ft. Smith, presented a claim to the county court of Sebastian county for \$1,000 for legal services alleged to be due him by the Ft. Smith district of Sebastian county. His claim was disallowed by the county court, and he appealed to the circuit court. There his claim was again disallowed, and he has appealed to this court. The facts briefly stated, are as follows:

In 1911 an agitation was begun for the erection of a new courthouse for the Ft. Smith district of Sebastian county. The inhabitants of the district were sharply divided on the question, and mass meetings were held and numerous articles written, pro and con, in the newspapers about it. Those favoring the proposition thought that the old courthouse was unsafe and unsanitary, and that it should be torn down and a new one erected on its site. Those opposed believed that the old courthouse was adequate for its purposes, and that it was practicable to repair it at a reasonable cost so that it would last many years. The erection of a new courthouse on the site of the present one became the principal issue between the candidates for the Democratic nomination for county judge at the primaries to be held in March, 1912. Judge Harp, the then county judge, favored the erection of a new courthouse, and Ezra Hester, his opponent, opposed it. Judge Harp was defeated in the primary, and Judge Hester was elected county judge at the general election in September, 1912. Judge Harp determined upon the plan of letting a contract for the erection of a new courthouse before his term of office expired. In August, 1912, he let a contract for the construction of a new courthouse. The officers of the city of Ft. Smith had quarters in the courthouse, and several suits were instituted against the county judge, having for their object the prevention of the building of a new courthouse. One of the suits for that purpose was brought in the chancery court by the city of Ft. Smith against the county judge. Other suits having the same object in view were instituted by various citizens of the Ft. Smith district of Sebastian county.

On the 16th day of October, 1912, Judge Harp, who was still in office, made an order which was entered of record, reciting the pendency of these various suits and the necessity of employing counsel to represent the Ft. Smith district in them, because the prosecuting attorney had declined to do so, or to take any action to protect the interests of the said district in the litigation. The order appointed George W. Dodd and Ira D. Oglesby as attorneys for said district to represent it in all the matters referred to,

and provided that said attorneys should receive not less than \$1,000 each for their services. About the middle of July Col. Oglesby became ill and went to a hospital in the city of St. Louis, and remained there until about the middle of September. During the time he was there he received papers occasionally from Ft. Smith. It was shown on the part of Col. Oglesby that the county judge prior to his employment had attempted to get the prosecuting attorney to represent the interests of the Ft. Smith district, and that the prosecuting attorney had refused to do so. The county judge himself talked with the prosecuting attorney about it, and Mr. Dodd says that he also talked with him, and that the prosecuting attorney declined to represent the county on account of the political phase of the case. Mr. Dodd admitted that during all this time there was continuous discussion of the matter on the street, and that numerous articles written with reference to it were published in the Ft. Smith newspapers. The prosecuting attorney himself testified that the suits with reference to the matter had been brought before he knew anything about them, and that the cases were within a few days of trial before he was consulted by the county judge in regard to the matter, and that the county judge had already employed counsel prior to this time, and that for that reason he declined to represent the Ft. Smith district of the county.

On the 20th day of October, 1912, the suit of the city of Ft. Smith against the Ft. Smith district of Sebastian county was decided by the chancellor, and it was decreed that the county judge be enjoined from erecting a new courthouse. Judge Harp, the then county judge, directed Col. Oglesby to immediately prepare a transcript and take an appeal to the Supreme Court, and this was done. Judge Harp's term expired and Judge Hester became county judge on the 31st day of October, 1912, and he immediately set aside the order providing for a minimum fee of \$1,000 each for Col. Oglesby and Mr. Dodd. Col. Oglesby attempted to prosecute the appeal of the case from the chancery court, where Judge Harp had been enjoined from erecting a new courthouse, but Judge Hester moved the Supreme Court to dismiss the appeal, and this was done. Other testimony will be referred to later on.

Certain declarations of law were asked by Col. Oglesby which were refused by the circuit court, and a general finding was made in favor of the Ft. Smith district. Judgment was rendered accordingly.

A majority of the judges have voted to affirm the judgment in this case, but a majority of us have not agreed upon the reasons therefor.

It is the contention of Col. Oglesby that the county court, on the 16th day of October, 1912, made a legal and binding contract with

him to perform legal services in which the Ft. Smith district of Sebastian county was interested, and that the incoming county judge had no right to set aside such contract. He also contends that the object of the litigation above referred to was to settle the title of the Ft. Smith district to the site on which the present courthouse in the city of Ft. Smith is situated. On the other hand, it is the contention of counsel representing the Ft. Smith district of Sebastian county that Col. Oglesby was employed to represent the interests of the county judge in erecting the courthouse, and that the title to the ground on which the present courthouse stands was not involved in any of the litigation; that Col. Oglesby was the personal representative of the county judge; and that the county is not liable to him.

It is well settled in this state that the finding of a circuit judge sitting without a jury is as binding upon us upon appeal as the verdict of a jury. Such findings will not be disturbed on appeal if there is any substantial evidence to support them. In the application of this rule Judge Smith and the writer have reached the conclusion that when all the facts and surrounding circumstances and the inferences which might legitimately be drawn therefrom are considered, the circuit court was warranted in finding that Col. Oglesby had no cause of action against the county, and that the circuit court did not err in dismissing his complaint.

Section 6392 of Kirby's Digest provides that each prosecuting attorney shall commence and prosecute actions, both civil and criminal, in which the state or any county in his circuit may be concerned. Section 6393 of the Digest provides that he shall defend all suits brought against the state or any county in his circuit. In the construction of the latter section, in the case of *Graham v. Parham*, 32 Ark. 676, the court held that it is the official duty of the prosecuting attorney to defend suits brought in the federal court against the county embraced in his circuit. We think the county court has power to employ additional counsel when in his judgment the interests of the county are of sufficient importance to demand it, or, in cases where the prosecuting attorney neglects or refuses to perform the duties imposed upon him by statute, or where his other duties are of such character that he does not have time to properly represent the county. We are of the opinion, however, that the power of the court to employ additional counsel does not give the right, under the guise of such employment, to take the case out of the hands of the prosecuting attorney and confide its management to other attorneys without consultation with the prosecuting attorney, or for the purpose of furthering the private interests of the county judge.

It is true that evidence was adduced by the plaintiff tending to show that the prosecuting attorney had been consulted by the county judge in regard to contemplated litigation with reference to the building of the courthouse, and that he had failed and neglected to represent the county. On the other hand, the prosecuting attorney himself testified that the first information he had of the pending litigation was derived from reading the newspapers, and that the county judge had already employed other counsel without consulting him. According to his testimony the county judge superseded him with other counsel, and he was justified in considering himself as having no official connection with the cases. He stated that the county judge did not talk to him until a few days before the case above referred to, which was decided in the chancery court on the 21st day of October, 1912, was heard and determined. He admits that Col. Oglesby talked to him about the case, but says this was only a few days before the case was reached for trial.

It will be remembered that Col. Oglesby was not employed until the 16th day of October, 1912, and that the only case in which he appeared was heard by the chancellor on the 21st day of October, 1912. It also appears that Col. Oglesby had been in a hospital in St. Louis until the latter part of September, 1912. So, it is reasonable to presume that Col. Oglesby did not talk with the prosecuting attorney until a few days before the case was called for trial. At any rate, the circuit court was the sole judge of the credibility of the witnesses, and was justified in finding that the county judge employed additional counsel without any appearance of incompetency or neglect of duty on the part of the prosecuting attorney.

As we have already seen, the undisputed facts show that an agitation for the erection of the new courthouse was begun in 1911, and the citizens of the district were sharply divided on the question of the expediency of erecting it. The question was an issue in the primary campaign in the spring of 1912. Judge Harp, the then county judge, asked for re-election, and one of the reasons given therefor was that he favored the erection of a new courthouse. His opponent was Ezra Hester, who was opposed to the construction of a new courthouse. That the erection of a new courthouse was one of the principal issues of the primary campaign is fairly inferable from all the circumstances. Hester was at the time county clerk. The agitation for the erection of a new courthouse was begun the year before. Col. Oglesby testified that the people were very much divided on the question. Geo. W. Dodd, who was also employed as an attorney in the matter by Judge Harp, testified that there was friction between Judge Harp and Ezra Hester in regard to the erection of a new courthouse, and that Hester had challenged the power of the

county judge in certain instances; that it was generally known that Ezra Hester was opposed to the erection of a new courthouse. Judge Harp was defeated in the primary by Judge Hester, and the latter was elected as county judge at the general election in the following September. Judge Harp then determined to get the construction of the new courthouse under such headway before his term of office expired that it would not be practical to prevent the courthouse from being erected. In carrying out his plan he made an order for the erection of a new courthouse on the site occupied by the old one. Certain citizens of Ft. Smith instituted suits against him for the purpose of preventing the erection of a new courthouse. To accomplish the same purpose the city of Ft. Smith, which under a contract with the county occupied rooms in the present courthouse, also instituted an action in the chancery court against the county judge. To defend these suits Col. Oglesby was employed on the 16th of October, 1912, and appeared as counsel for the county judge when the cause, set for October 21, 1912, was heard and determined. The chancellor rendered an exhaustive opinion in the cause and memorialized the facts by spreading them on the record. He expressed the view that the present courthouse was safe and large enough for the needs of the district for years to come. He further held that there was no cloud upon the title of the district to the grounds upon which the courthouse is situated, and that the city only claimed the right to occupy a part of the building under a contract it had made with the Ft. Smith district of Sebastian county. As soon as the case was decided by the chancellor the county judge ordered Col. Oglesby to take an appeal at once. This Col. Oglesby proceeded to do. He caused the transcript to be prepared and the appeal to be lodged in the Supreme Court at once. When Judge Hester became county judge on the 31st day of October, 1912, he at once made an order, setting aside the former order made at the same term of the court employing Col. Oglesby. He also moved the Supreme Court to dismiss the appeal in the case above referred to, and this was done. Col. Oglesby never consulted him about the matter at all, but throughout the litigation acted under the direction of Judge Harp, who had made the order employing him during his term of office. Col. Oglesby was a prominent lawyer and citizen of Ft. Smith, and must have known of the controversy that had been waged for a year or more regarding the erection of a new courthouse. Under all these circumstances, we think the circuit court was justified in finding that Col. Oglesby was acting in the interest of Judge Harp, and was not entitled to a claim for his services against Sebastian county. For these reasons we have voted to affirm the judgment of the circuit court disallowing his claim.

Judge Kirby is of the opinion that under section 6393 of Kirby's Digest and the record of this cause, it was beyond the power of the county judge to employ counsel to perform the duties which had been imposed by statute upon the prosecuting attorney, and that its contract with Col. Oglesby was ultra vires and void. For that reason he has voted to affirm the judgment. It follows that the judgment is affirmed; and it is so ordered.

The CHIEF JUSTICE and Mr. Justice WOOD are of the opinion that the judgment should be reversed. See 179 S. W. 1199.

STATE v. MCKINLEY. (No. 133.)

(Supreme Court of Arkansas. Sept. 27, 1915.)

STATUTES ~~6393~~ 141—CONSTITUTIONAL REQUIREMENTS—AMENDMENT—SEPARATE ACT.

Kirby's Dig. § 5433, provides that all municipal elections shall be held as prescribed by law for holding state and county elections so far as the same may be applicable. Const. art. 5, § 23, provides that no law shall be amended or extended by reference, but must be re-enacted and published in full. Defendant, indicted under section 5433, demurred to the indictment for unconstitutionality in extending a law by reference. *Held*, that it was not within the prohibition, being complete in itself, though requiring reference to other acts to ascertain its meaning.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 198, 209; Dec. Dig. ~~6393~~ 141.]

Appeal from Circuit Court, Greene County; J. F. Gautney, Judge.

E. L. McKinley was indicted for violating election laws, and demurred to the indictment. The demurrer was sustained, and the State appeals. Reversed and remanded.

Wm. L. Moose, Atty. Gen., John P. Streepey, Asst. Atty. Gen., and M. P. Huddleston, of Paragould, for the State. R. P. Taylor, of Paragould, for appellee.

HART, J. Appellee and others were indicted for an alleged violation of the election laws while acting as judges of an election for city officers in the city of Paragould, in Greene county, Ark. The court sustained a demurrer to the indictment, and the state has appealed to this court. It is conceded that the act of January 23, 1875 (Laws 1874-75, p. 92), providing a general election law, in terms applies only to general elections of state, county, and township officers, and to special elections held to fill vacancies in said offices.

Section 5433 of Kirby's Digest provides for the holding of elections in municipal corporations, and the concluding sentence reads as follows:

"All elections shall be held and conducted in the manner prescribed by law for holding state and county elections, so far as the same may be applicable."

The only objection made to the indictment is that the general election laws do

not apply to municipal elections, and that section 5433 of Kirby's Digest is in violation of section 23, art. 5, of our Constitution, which reads as follows:

"No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."

The purpose of the clause of the Constitution was to protect the members of the Legislature and the public against fraud and deception.

Where the new act is not complete, but refers to a prior statute which is changed so that the legislative intent on the subject can only be ascertained by reading both statutes, uncertainty and confusion will exist, and this constitutes the vice sought to be prohibited by this clause of the Constitution. In the case before us the act is very broad and comprehensive. It is complete in itself, and in no manner attempts to amend or change the existing election laws. On the contrary, the general election laws are undisturbed and are in no wise affected by section 5433, pertaining to municipal elections. It is no objection to the statute that, in order to ascertain how elections in cities and towns shall be held, it becomes necessary to refer to existing laws relative to holding general elections for state and county officers. This rule was recognized and applied by this court in the cases of *Watkins v. Eureka Springs*, 49 Ark. 131, 4 S. W. 384, and *Common School Dist. v. Oak Grove Special School Dist.*, 102 Ark. 411, 144 S. W. 224. In the former case the court said:

"We are not, however, prepared to assert that when a new right is conferred or cause of action given the provision of the Constitution quoted requires the whole law governing the remedy to be re-enacted in order to enable the courts to effect its enforcement."

In the latter case the court quoted with approval from the Supreme Court of Montana as follows:

"If an act is original in form, and by its own language grants some power, confers some right or creates some burden or obligation, it is not in conflict with the Constitution, although it may refer to some other existing statute for the purpose of pointing out the procedure in executing the power, enforcing the right, or discharging the burden."

In construing a similar constitutional provision, in *Savage v. Wallace*, 185 Ala. 572, 51 So. 605, the Supreme Court of Alabama said:

"There is a class of statutes, known as 'reference statutes,' which impinge upon no constitutional limitation. They are statutes in

original form, and in themselves intelligible and complete—'statutes which refer to, and by reference adopt, wholly or partially, pre-existing statutes.'" In the construction of such statutes, "the statute referred to is treated and considered as if it were incorporated into and formed a part of that which makes the reference. The two statutes coexist as separate and distinct legislative enactments, each having its appointed sphere of action; and the alteration, change, or repeal of the one does not operate upon or affect the other." *Phoenix Assurance Co. v. Fire Department*, 117 Ala. 631, 23 So. 843, 42 L. R. A. 468. Such statutes are not strictly amendatory or revisory in character, and are not obnoxious to the constitutional provision which forbids a law to be revised, amended, or the provisions thereof to be extended or conferred by reference to its title only. That prohibition is directed against the practice of amending or revising laws by additions to, or other alterations, which without the presence of the original act are usually unintelligible."

In *People v. Mahaney*, 13 Mich. 481, Judge Cooley, with reference to a similar provision, said:

"This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another, in an act or section which was only referred to, but not published, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the Constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent."

From the principles above announced it will be seen that the constitutional provision quoted above was intended to enable the meaning of statutes directly amending prior statutes to be ascertained by an examination of the new statute, without the necessity of examining the prior statutes on the subject to ascertain the effect of the amendment. As we have already seen, section 5433 of Kirby's Digest is complete in itself and does not purport in any manner to amend or change the existing election laws. It follows that the constitutional requirement was not violated in the enactment of section 5433 of Kirby's Digest, and the court erred in sustaining the demurrer to the indictment.

For this error the judgment must be reversed, and the cause will be remanded for a new trial.

CARMEN v. STATE. (No. 136.)

(Supreme Court of Arkansas. Sept. 27, 1915.)

1. INCEST \Leftrightarrow 10—INDICTMENT—SUFFICIENCY.

An indictment stating in technical language that adultery was committed by defendant, a married man, with his niece, sufficiently alleged the offense of incest.

[Ed. Note.—For other cases, see Incest, Cent. Dig. § 9; Dec. Dig. \Leftrightarrow 10.]

2. INCEST \Leftrightarrow 10—INDICTMENT—SUFFICIENCY.

An indictment for incest which failed to allege that defendant was a married man when he committed the adultery with his niece was insufficient to sustain a conviction.

[Ed. Note.—For other cases, see Incest, Cent. Dig. § 9; Dec. Dig. \Leftrightarrow 10.]

3. CRIMINAL LAW \Leftrightarrow 185—FORMER JEOPARDY—TRIAL UNDER BAD INDICTMENT.

Under Kirby's Dig. § 2396, providing that if, after being kept together such a length of time as the court deems proper, the jury do not agree on a verdict, and it satisfactorily appears that there is no probability they can agree, the court may discharge them, where a trial under an indictment which was insufficient to support a conviction because of the omission of an essential allegation resulted in the discharge of the jury because of their failure to agree, such trial did not bar a new trial under a proper indictment, as nothing short of an actual acquittal or conviction under such an indictment will confer immunity from further prosecution for the same offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 344; Dec. Dig. \Leftrightarrow 185.]

4. CRIMINAL LAW \Leftrightarrow 586, 1151 — CONTINUANCE—DISCRETION—REVIEW.

The trial court has a large discretion in granting or refusing continuances, and unless there appears to have been a manifest abuse of its discretion in the denial of a continuance, its action will not be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 3045-3049; Dec. Dig. \Leftrightarrow 586, 1151.]

5. INCEST \Leftrightarrow 13—EVIDENCE—OTHER ACTS.

On a trial for incest with defendant's niece, evidence of his conduct with her and acts of intercourse occurring at a time when the offenses thereby committed would be barred by limitations was admissible as tending to shed light on the relations between them at a time within the statutory period, and to show the probability of the commission of the offense charged, when properly limited to this purpose.

[Ed. Note.—For other cases, see Incest, Cent. Dig. §§ 29-35; Dec. Dig. \Leftrightarrow 13.]

6. INCEST \Leftrightarrow 13—EVIDENCE—ADMISSIONS.

On a trial for incest, where it appeared that in a bastardy proceeding defendant voluntarily admitted that he was the father of the child, and made the required bond without any warrant having been issued and without a trial, the bond and orders in such proceeding were admissible, the jury's consideration thereof having been limited to a voluntary admission by defendant, and the jury having been told that, if defendant did not understand that he was charged with being the father, they should not consider the matter even as an admission.

[Ed. Note.—For other cases, see Incest, Cent. Dig. § 11; Dec. Dig. \Leftrightarrow 13.]

7. INCEST \Leftrightarrow 14—EVIDENCE—SUFFICIENCY.

On a trial for incest, evidence held sufficient to support a verdict of guilty.

[Ed. Note.—For other cases, see Incest, Cent. Dig. § 12; Dec. Dig. \Leftrightarrow 14.]

Appeal from Circuit Court, Clay County; J. F. Gautney, Judge.

J. F. Carmen was convicted of incest, and he appeals. Affirmed.

J. F. Carmen was indicted, charged with the crime of incest, committed by having carnal knowledge of his niece, Ona Burns; the indictment not alleging that he was a married man. A demurrer was interposed to the indictment and overruled, and he was placed upon trial, and the jury, having failed to agree, were discharged by the court after they had reported the second time their failure to arrive at a verdict.

On the 8th of May, before the cause was again reached for trial, the grand jury in session returned another indictment against the defendant, charging him with incest committed with his niece, Ona Burns, and also that he was a married man. After its return the court upon its own motion sustained the demurrer to the first indictment, which it had previously overruled. Upon the case being called for trial the defendant moved for a continuance because of the serious illness of his wife, which was denied. A demurrer to the second indictment was overruled, and the defendant interposed a plea of former jeopardy, alleging that he had been put in jeopardy of his liberty for this offense by the former trial. The testimony was introduced on this issue showing the mistrial on the first indictment, and the court directed the verdict for the state upon this plea. The testimony shows that Ona Burns, the niece of the defendant (who "was not bright," as one of the witnesses said) lived at defendant's house with him and his wife, who was in poor health and about 70 years of age. Several witnesses testified to an apparent undue intimacy between the defendant and his niece, Ona Burns, a half-witted girl about 21 years of age, and one stated positively that he had seen defendant in the act of having sexual intercourse with said niece in the corner of the barn. She was delivered of a child about the usual time after these acts of sexual intercourse were alleged to have occurred; and the county judge, upon a complaint made in a bastardy proceeding, sent for the defendant and told him of the complaint, and he said he was not the father of the child, but that he was willing to give the bond required for its support. The judge informed him that it was necessary for him to admit that he was the father of the child or submit to a trial of that question, and he said that it would be all right, that he would make the bond, which he did do, and returned and filed it with the judge. He admitted having made the bond, did not deny that the judge explained the circumstances and his rights in the matter fully, as he claimed to have done, but said he only understood that he was giving the bond to support the child in order that his

niece and it should not be taken from his house to the poor farm. The bond in regular form was introduced in evidence over defendant's objection, and upon the back of it was endorsed the following:

"On this day comes before me J. P. Carmen, accused of bastardy, and, the charge being stated, he enters a plea of guilty, and offers as sureties on his bond for the maintenance of said child J. W. Wickham and S. H. Smart, and said bond so tendered being conditioned as provided by law, and, the said Ona Burns waiving her claim to a judgment against the said J. P. Carmen, said bond is by the court ordered filed and approved, and a judgment thereon entered.

"This ——— day of April, 1914.

"B. B. Hollifield, Judge."

The defendant denied ever having had intercourse with the girl, but admitted that he had asked her to have intercourse with him, as two witnesses testified he had told them, but said that he had done so, as he told said witnesses, only for the purpose of teaching the girl a lesson, and that he had so explained it satisfactorily to his wife upon the girl having told her of his conduct. There was other testimony tending to show that some other persons could have been the father of the child, and the girl herself stated definitely that one of them "had had a chance to be." The defendant's prior good reputation was established, and there was testimony tending to some extent to discredit the statement of the witness who had seen the parties in the sexual embrace; certain witnesses stating that he could not have seen them leaving the barn where the act was said to have occurred after he had ridden away from the gate to where he said he was at the time they left the barn.

R. H. Dudley, of Piggott, for appellant.
Wm. L. Moose, Atty. Gen., and John P. Streepey, Asst. Atty. Gen., for the State.

KIRBY, J. (after stating the facts as above). [1] The allegations of the indictment under which the defendant was convicted sufficiently alleged the offense, and no error was committed in overruling the demurrer thereto. *Martin v. State*, 58 Ark. 8, 22 S. W. 840. It stated in technical language that the adultery was committed by defendant, a married man, with Ona Burns, his niece, and, as said in *Gaston v. State*, 95 Ark. 233, 128 S. W. 1033:

"The gravamen of the crime of incest is the unlawful carnal knowledge, and it is unlawful because of consanguinity. The object of the statute is to prohibit by punishment the sexual intercourse of those who are related within the prescribed degrees."

[2, 3] Neither did the court err in denying defendant's plea of former jeopardy. The indictment under which he was first tried was not sufficient to sustain a judgment of conviction, not having alleged that the defendant was a married man at the time it was alleged he committed the adultery with his niece, which constituted the crime of incest. *Martin v. State*, *supra*. And nothing

short of an actual acquittal or conviction under such an indictment will confer immunity from further prosecution for the same offense upon the accused. *State v. Ward*, 48 Ark. 38, 2 S. W. 191, 3 Am. St. Rep. 213. Moreover, there was no verdict or judgment upon the trial, but a mistrial, the court having discharged the jury, as it had the right to do, after they failed to agree upon a verdict and it satisfactorily appeared to him that there was no probability of one being reached. Sections 2336, 2397, Kirby's Digest.

[4] Neither was error committed in denying the motion for a continuance. The court has large discretion in the granting or refusing of motions for continuance, and, unless there appears to have been a manifest abuse of its discretion in the denial of such motion, its action will not be reversed, and there is no such condition shown here as would indicate any such abuse of discretion.

[5] The proof of conduct of defendant with his niece and acts of intercourse occurring at a time when the offense thereby committed would be barred by the statute of limitations was competent and admissible as tending to shed light upon the relations existing between the parties at a time within the statutory period, and shows the probability of the commission of the offense charged, and the court by proper instructions limited the jury's consideration of it to this purpose. *Adams v. State*, 78 Ark. 16, 92 S. W. 1123; *Taylor v. State*, 110 Ga. 150, 35 S. E. 161; *Com. v. Bell*, 166 Pa. 405, 31 Atl. 123.

[6] It is strenuously urged that the court erred in permitting the bond given by the defendant in the bastardy proceedings or any of the entries or judgments relating thereto to be introduced in evidence. This question has given us serious concern, but there was no adjudication by the county court in the bastardy proceeding that defendant was the father of the child of his niece with whom he is alleged to have committed incest, after a trial of the question, but it was shown that he voluntarily admitted that such was the fact upon being told by the county judge that a charge of the kind had been lodged against him, and agreed to and did make the bond required by the statute in such cases without any warrant having been issued or any trial thereof. The court, by appropriate instructions, limited the consideration of this matter by the jury to a voluntary admission on the part of the defendant, and instructed them that, if they should find he did not understand the purpose or effect of the bond, or did not understand enough about the transaction to know that he was charged with being the father of the child, they should not consider it as an admission even, and we do not think any error was committed in this respect.

The case is unlike that of *Ireland v. State*, 99 Ark. 32, 136 S. W. 947, in which there was a judgment against the county treasurer by

the county court, determining finally the amount he had failed to account for and pay over as treasurer, which also recited he was short in his accounts with the county in said sum. That judgment, being final, could not be disputed or explained, and it was held error to permit its introduction upon the trial of the criminal charge against the treasurer for embezzlement of the county's fund.

[7] The evidence is amply sufficient to support the verdict, and, no prejudicial error having occurred in the trial, the judgment is affirmed.

LOUIS WERNER SAWMILL CO. et al. v. SESSOMS et al. (No. 116.)

(Supreme Court of Arkansas. July 12, 1915.)

1. LOGS AND LOGGING — SUFFICIENCY OF EVIDENCE — TIME FOR REMOVAL — FORFEITURE.

Under the provisions of deeds conveying timber requiring the grantee to cut and remove as expeditiously as possible, and providing that unless the timber was removed within 15 years the grantee should pay the taxes assessed until the timber was removed and possession returned, the grantee did not have 15 years absolutely in which to remove the timber, but was required to remove it as expeditiously as possible.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.]

2. REFORMATION OF INSTRUMENTS — MISTAKE IN GENERAL.

To reform a deed and then enforce it calls for a much greater exercise of the powers of equity than to set aside a transaction, and to justify a decree for reformation on the ground of mistake it is necessary that the mistake should have been mutual.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 74-78; Dec. Dig. § 19.]

3. REFORMATION OF INSTRUMENTS — MISTAKE OF LAW.

Equity does not reform contracts or deeds for a pure mistake of law.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 72, 73; Dec. Dig. § 18.]

4. REFORMATION OF INSTRUMENTS — RELIANCE — LACHES.

Where plaintiff mill company in 1907 obtained option contracts allowing 15 years for the removal of timber, and, after accepting them, prepared deeds containing a provision that it should cut and remove the timber as expeditiously as possible, and that unless removed within 15 years it would thereafter pay the taxes, and represented to the grantors that it proposed to remove the timber as expeditiously as possible, and all within 5 years, and then had spur tracks constructed to the timber, and might have removed it within 5 years, and made no effort to correct the deed on the ground of mistake in the provision for removal, its suit to reform the deeds on such ground, not brought for six years, was barred by laches.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 119-121; Dec. Dig. § 32.]

5. LOGS AND LOGGING — TIME FOR REMOVAL — RIGHTS OF SUBSEQUENT GRANTEE — "EXPEDITIOUSLY AS POSSIBLE."

A logging company required by its deeds to remove timber as expeditiously as possible could grant to another company no greater rights than it possessed, and the limitation "as

expeditiously as possible" in its conveyances to another was measured by its own capacity, and not by the capacity of its grantee.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.]

6. LOGS AND LOGGING — SUFFICIENCY OF EVIDENCE — TIME FOR REMOVAL — FORFEITURE.

Evidence, in a suit by the grantee of timber required to remove it as expeditiously as possible to reform the deeds so as to give it 15 years absolutely, with a cross-bill asserting a forfeiture of the right of removal and seeking a cancellation of the deeds as a cloud upon the title, held to sustain the chancellor's finding that the complainant had forfeited its right of removal and that the deeds should be canceled.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.]

7. APPEAL AND ERROR — FINDINGS — CONCLUSIVENESS.

The chancellor's finding of facts will not be disturbed on appeal unless against the clear preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.]

Appeal from Union Chancery Court; J. M. Barker, Chancellor.

Suit by the Louis Werner Sawmill Company and others against A. B. Sessoms and others, with cross-bills by defendants. Decree for cross-complainants, and plaintiffs appeal. Affirmed.

Gaughan & Sifford, of Camden, and Aylmer Flenniken and Neill C. Marsh, both of El Dorado, for appellants. H. S. Powell, of Camden, for appellees.

HART, J. On the 20th of February, 1913, appellants instituted 17 suits in the chancery court against certain landowners, in which they sought a reformation of timber deeds executed by appellees to the Louis Werner Sawmill Company between the 8th and 15th of July, 1907. The defendants answered and denied the material allegations of the complaints and filed cross-bills in which they asserted that appellants had forfeited their right to cut and remove any of the timber involved in the suits and asked that the timber deeds be canceled as a cloud upon their title. All of the suits were consolidated for the purpose of trial, and the court rendered judgment against appellants, denying the relief sought, and granted appellees the relief prayed for in their cross-complaints. The cases are here on appeal.

The record in the cases is long, and to set out in substance the testimony of each witness would extend the limits of this opinion beyond what is practicable. We have read carefully and patiently the record in the case and have concluded that a statement of the facts pertinent to the issues raised by the appeal may be summarized as follows:

For several years prior to the year 1907, and since that time, the Louis Werner Sawmill Company, a corporation, had a plant at Griffin in the northern part of Union county,

on the St. Louis, Iron Mountain & Southern Railway Company's road, where it manufactured lumber. The Edgar Lumber Company, a corporation, had a sawmill plant at Wesson, in the southwest part of Union county. Prior to the year 1907, the Louis Werner Sawmill Company had purchased from the appellees the timber which is the subject-matter of this action. There is a ridge which runs practically east and west through Union county, and near its crest runs the El Dorado and Marysville public road. The timber in question lies in irregular strips and segregated tracts covering a territory about five miles long and, approximately, a mile wide at its widest point. The timber is south of the El Dorado and Marysville road and is about 15 miles from Griffin, where the mill plant of the Louis Werner Sawmill Company is situated. The sawmill plant of the Edgar Lumber Company is about 12 miles south-east from the timber in controversy.

A local railroad was incorporated and extended in a westerly and southwesterly direction from Griffin for the purpose of logging the timber owned by the Louis Werner Sawmill Company. It ran about $3\frac{1}{2}$ miles north of the timber in question. The Louis Werner Sawmill Company and the Edgar Lumber Company both owned timber in the same locality. On account of the topography of the country, it was impracticable and expensive for the Louis Werner Sawmill Company to get its timber on the south side of the El Dorado and Marysville public road; and it was equally impracticable and expensive for the Edgar Lumber Company to get its timber on the north side of said public road. Therefore they entered into negotiations for the purpose of exchanging timber so that each company would have its timber more nearly in a body. The Edgar Lumber Company was unwilling to make the exchange unless the Louis Werner Sawmill Company would execute a deed to it giving it 15 years within which to remove the timber. That company had deeds from the appellees to the timber in question, but did not have that length of time within which to remove the timber. They sent an agent to appellees and to other persons to ascertain whether they could secure new deeds with a time limit of 15 years. They first made contracts with the appellees reciting a consideration of \$5 cash and a certain other designated sum in case the option to purchase should be consummated. These contracts gave the Louis Werner Sawmill Company the right of removal of the timber for a period of 15 years from June, 1907. Pursuant to these contracts, the additional consideration was paid and timber deeds were executed by the defendants to the Louis Werner Sawmill Company. The deed granted to the sawmill company timber of certain dimensions named therein, and, in regard to the time of the removal of the timber, contained the following clause:

"The party of the second part shall cut and remove said timber as expeditiously as possible, and it is agreed that unless it shall have removed the same within a period of fifteen years from the date hereof, that it shall be responsible for and pay to the first party, the full amount of taxes assessed against said lands after the expiration of said period of fifteen years from this date until such time as said timber is removed and said possession returned to the said first party."

The timber deeds were prepared by an agent of the sawmill company and on printed blanks furnished him by the company for that purpose. After the Louis Werner Sawmill Company secured these deeds from the defendants, it made an exchange of the timber with the Edgar Lumber Company and granted to that company the timber in controversy, with a time limit of 15 years within which to remove the timber. Prior to the execution of these deeds in 1907, the Louis Werner Sawmill Company had extended a spur to the immediate vicinity of the timber in question and was cutting the timber there. This spur was known as the Williams spur. Several months thereafter it took up that spur and extended another spur from its main line at a point five miles nearer Griffin, which also extended right up to the timber in question. This spur was known as the Ballard spur. The Louis Werner Sawmill Company cut a great deal of the timber it got from the Edgar Lumber Company and hauled it over this spur.

Prior to June, 1907, the Louis Werner Sawmill Company had a mill with an average capacity of 40,000 feet. At that time it shut down its mill to overhaul its plant and increased its daily capacity to 60,000 feet. It has run at full capacity since that time. The Edgar Lumber Company in 1907 operated a double-band sawmill with a daily capacity of 100,000 feet. It has operated regularly and to its full capacity since that time. At the time the two companies made the exchange of timber, the Edgar Lumber Company was operating in Columbia county, Ark., about 15 miles from the timber in controversy. After the exchange of the timber, the Edgar Lumber Company moved its logging operations back to Union county and worked from its mill out in the direction of the timber in question. It had its main line of logging road within 6 miles of this timber, average distance, and a spur within a mile of one of the tracts, when, in the early part of 1912, it moved its logging operations to Claiborne parish, La. It did this because it had a large amount of timber there on which the time for removal was about to expire. It was imperative that it cut that timber at once or lose it. As soon as the timber in Louisiana was cut, it returned to Union county, Ark., prepared to cut timber in that county, including the timber in question. It learned that appellees claimed that it had forfeited its right to the timber in question, and, in order that its logging operations might not be entirely stopped pending

the outcome of the present suit, an agreement was entered into between the parties as to the value of the timber to be cut by the Edgar Lumber Company.

Other facts will be referred to later in the discussion of the issues raised by the appeal.

[1] In the case of *Earl v. Harris*, 99 Ark. 112, 137 S. W. 806, the contract for the sale of timber stipulated that the vendee should cut and remove said timber as expeditiously as possible, and that unless he should have removed all of the timber within five years he should pay the taxes thereafter assessed against the land until the timber should be removed. In construing that contract, the court held that it was not contemplated that the vendee should have five years absolutely in which to cut and remove the timber, but that he should remove the timber as expeditiously as possible, and that if it required more than five years to do so he should pay the taxes thereafter assessed against the land. To the same effect, see *Yelvington v. Short*, 111 Ark. 253, 163 S. W. 522; *Newton v. Warren Vehicle Stock Co.*, 173 S. W. 819; and *Burbridge v. Arkansas Lumber Co.*, 178 S. W. 304. The clause in the deeds in question providing for a time limit for the removal of the timber is in all essential respects similar to the clauses construed in the cases just cited, and the construction placed upon those clauses controls here. This is conceded by counsel for appellants, but the object of their suit is to reform the timber deeds executed to them by appellees.

[2, 3] To reform a contract or deed, and then enforce it in its new form, calls for a much greater exercise of the powers of equity than to set aside a transaction. Therefore, to justify a decree for reformation on the ground of mistake, it is necessary that the mistake should have been mutual, and it is equally well settled that as a general rule equity does not reform contracts or deeds for a pure mistake of law. But counsel for appellants insist that, under the facts as they appear in the record before us, the alleged mistake sought to be corrected is in a measure a mistake of fact.

It will be remembered that, when the Louis Werner Sawmill Company entered into negotiations with the Edgar Lumber Company for the exchange of timber, the latter company required the former to execute to it a deed giving it 15 years within which to remove the timber. The Werner Company already had deeds to the timber, but not for that length of time. It then went among the defendants with an option contract providing for 15 years from June, 1907, within which to remove the timber. Five dollars was paid to obtain this extension contract, as they term it, and, when it was ascertained that they could procure such extensions from all of appellees, new deeds, which became the subject-matter of these suits, were executed.

The new deeds, instead of containing the clause giving appellants 15 years absolutely within which to remove the timber, contained a clause now commonly known as "the expeditious clause," which has been set out above. These deeds were prepared by an agent of the Louis Werner Sawmill Company and on printed blanks furnished by that company.

The company, however, contends that it did not intend to insert the so-called expeditious clause in the deeds under consideration, and that the clause was inserted by its agent by mistake; that the mistake was mutual; that the deeds as executed failed to effectuate the intention of the parties; that both parties made an honest mistake of law as to the effect of the contract; that the construction placed upon the deeds by law produced results different from those the parties intended; that in such cases courts will interfere to prevent the enforcement of the contract and to relieve parties from the unexpected consequences of it; and that to refuse relief would be to permit one party to take an unconscionable advantage of another and to derive a benefit from the contract which neither of them intended.

In support of their contention, they cite *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 303; *Knight v. Glasscock*, 51 Ark. 390, 11 S. W. 580; and the case note to 28 L. R. A. (N. S.) 785. On the other hand, it is contended by counsel for appellees that the deed executed by the parties was the final embodiment in writing of their agreement, and that the clause in question was not inserted by mutual mistake. They insist that the deed should be construed in accordance with the rule laid down in the cases above cited construing similar clauses in timber deeds.

[4] We do not deem it necessary to decide this question, for, if the contention of counsel for appellants be assumed to be correct, we think they are barred of relief under the facts in this record by laches. The doctrine of laches is applicable to suits of this kind. *Pomeroy's Equity Jurisprudence*, vol. 6, § 680; 24 Amer. & Eng. Enc. of Law, 656.

The jurisdiction to relief in cases like this is purely equitable and must be exercised upon equitable principles. It is true that in the so-called extension contract an absolute time limit of 15 years was given. But all of appellees were witnesses in the case and testified that the agent of the Louis Werner Sawmill Company represented to them that, though a limit of 15 years was placed in the contract, the company purposed to remove the timber as expeditiously as possible, and that most of it would be removed in 2 or 3 years, and that all of it would be removed in 5 years. The agent pointed to the fact that the main line of the logging road of the Louis Werner Sawmill Company had already been constructed practically to the timber in question, and that one spur had already been constructed to the edge of the timber; that

it was well known by all parties interested that the land could not be cultivated until the timber should be removed; and that the landowners were greatly concerned as to the time in which the timber could be removed.

The timber deeds were secured from appellees in the early part of July, 1907. Appellant Louis Werner Sawmill Company exchanged the timber secured from appellees to the Edgar Lumber Company for timber owned by it soon after this time. It then took up its spur, and no effort was made by it to correct the deed until just about the time the present suits were instituted. It suffered six years or more to elapse before anything was said or done by it in regard to the alleged mistake. During all this time the deeds were in the custody of the lumber company, and it had agents whose duty it was to examine the deeds and see that they were in proper form. The agents of the sawmill company knew that the so-called expeditious clause was written in the deeds, and no objection was ever raised thereto until after a similar clause had been construed by this court in the case of *Earl v. Harris*, supra. Therefore we are of the opinion that it would be inequitable now to grant appellants the relief prayed for by them.

[5-7] This brings us to the question of whether the time granted in the deeds for cutting the timber had expired at the time of filing the present suit. It will be remembered that the timber deeds in question were executed in July, 1907; and that soon afterwards the Louis Werner Sawmill Company granted to the Edgar Lumber Company the timber in question. It is true the Werner Company by its deed gave the Edgar Lumber Company 15 years within which to cut and remove the timber, but the Werner Company could grant to the Edgar Company no greater rights than it possessed. *Hearin v. Union Sawmill Co.*, 105 Ark. 455, 151 S. W. 1007.

Appellees granted the timber to the Werner Company with a proviso that the timber should be removed as expeditiously as possible. This clause of the contract had reference to the means and ability of the Louis Werner Sawmill Company to remove the timber, and not to that of any subsequent grantee of that company. Appellees, when they made the deeds to the Werner Company, knew its capacity, knew that it had a main line of logging road within six miles of the timber, and that a spur had already been built to the immediate vicinity of the timber. After the Louis Werner Sawmill Company exchanged the timber with the Edgar Lumber Company for timber owned by it, it tore up the spur which had been constructed by it in the vicinity of the timber and constructed another spur which extended nearly to the timber, in order to cut other timber owned by it.

It appears from the evidence that the Louis Werner Sawmill Company could have

easily removed the timber within five years from the time the deeds were executed. Evidence was adduced tending to show that, owing to the topography of the country, it would be very expensive to log a part of the timber; but it will be noted that the topography of the country would not be changed by time. Moreover, it is not shown but that the ridges referred to could not be cut down at a reasonable cost.

Soon after the Edgar Lumber Company secured the timber in question, it extended its logging road to within a few miles of the timber, but in 1912 it tore up its road and proceeded to construct one from its mill to its timber in the state of Louisiana.

It is obvious that the time limit within which to remove the timber must be tested by the language used in the deeds of appellees to the Louis Werner Sawmill Company. The deed provided that the sawmill company should cut and remove the timber as expeditiously as possible. The sawmill company had the right to convey the timber thus purchased by it to the Edgar Lumber Company, but the latter company, in regard to its right to remove the timber, must be governed by the limit in the deed to the Louis Werner Sawmill Company, and not by the time limit in the deed from that company to it.

Then, too, in determining what would be an expeditious removal of the timber, we must be governed by the facilities of the Werner Company. To hold otherwise might have the effect of extending the time limit far beyond what was contemplated by the parties. To illustrate: If the Louis Werner Sawmill Company should sell the timber to a small concern, the latter might work ever so expeditiously and not be able to remove the timber within a period of more than 30 years; on the other hand, it might sell to a company with a much greater capacity than its own, and that company might be able to remove the timber within a very much shorter space of time if it proceeded to remove it as expeditiously as possible. In cases like this, the words "as expeditiously as possible" would not refer to the facilities and capacities of subsequent grantees, but would refer to the facilities and capacities of the original grantee.

Tested by this rule, the question is: Within what time should the Louis Werner Sawmill Company have removed the timber so that it might be said to have removed it as expeditiously as possible? It will be remembered that this company had a logging road parallel with the timber in question and within an average distance of six miles of it. It extended at different times two spurs to the immediate vicinity of the timber. According to the testimony of appellees, the company could have removed the timber in any event within five years, and probably within half that time. The agent of the Louis Werner Sawmill Company represented that it could be removed within that time. It is the set-

ted rule of this court that the finding of fact made by a chancellor will not be disturbed on appeal unless against the clear preponderance of the evidence, and, from a careful consideration of the evidence pertaining to this branch of the case, we are not able to say that the finding of the chancellor is against the weight of the evidence.

It follows that the decree will be affirmed.

ST. LOUIS, I. M. & S. R. CO. v. LASER GRAIN CO. (No. 119.)

(Supreme Court of Arkansas. July 12, 1915.)

1. CARRIERS ⇐159 — CARRIAGE OF GOODS — BILLS OF LADING.

A provision in a bill of lading requiring the shipper to make claims in writing within a specified time as a condition precedent to recovering for injuries to the property transported is valid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 668-671, 699-703½, 711-714, 718, 718½; Dec. Dig. ⇐159.]

2. CARRIERS ⇐163 — CARRIAGE OF GOODS — ACTIONS—BURDEN OF PROOF.

In an action for damages to shipments of peaches, where the carrier set up the shipper's noncompliance with the requirement of the bill of lading that complaint be made in specified time, the shipper has the burden of proving compliance.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 722-725; Dec. Dig. ⇐163.]

3. CARRIERS ⇐159 — CARRIAGE OF GOODS — DEFENSES—WAIVER.

Where a shipper notified the carrier's general freight agent of damages to the goods, and negotiations were had between the parties without the carrier objecting that the shipper had lost its right because the claims were not made, as required by bill of lading, to the agents either at the point of embarkation or destination, the carrier waived its right to object to the manner of presentation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 668-671, 699-703½, 711-714, 718, 718½; Dec. Dig. ⇐159.]

4. EVIDENCE ⇐323 — OPINION EVIDENCE — MARKET VALUE.

Without producing the market reports, a witness may testify as to market value of fruits at a given time, and, though his information be based on such reports, that fact not rendering his testimony hearsay and going only to its weight.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1214-1217; Dec. Dig. ⇐323.]

5. CARRIERS ⇐133 — CARRIAGE OF GOODS — DAMAGES.

In an action for injury or destruction of a shipment of goods, evidence of the market value of the property at the place of destination is admissible; the rule for computation of damages being the difference between the market price of goods at the time and place when and where they should have been delivered and their value when and in the condition in which they were delivered.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 583-587, 606; Dec. Dig. ⇐133.]

6. CARRIERS ⇐136 — CARRIAGE OF GOODS — ACTIONS—EVIDENCE.

In an action for damages for carrier's failure to supply refrigerator cars for the shipment

of fruits, the question of its negligence, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 478, 596-598; Dec. Dig. ⇐136.]

7. CARRIERS ⇐39 — CARRIAGE OF GOODS — DUTY OF.

While a common carrier should furnish reasonable facilities to all shippers at each station, he is not required to prepare in advance for an unprecedented rush of business, and will be excused for delay in transporting goods in such case until the emergency can be removed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 98; Dec. Dig. ⇐39.]

8. APPEAL AND ERROR ⇐667—REVIEW—ABSTRACT.

Where appellee's own counsel found it impracticable to point out the deficiencies in the abstract, the court will not go into the matter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2862, 2863; Dec. Dig. ⇐667.]

Appeal from Circuit Court, Johnson County; Hugh Basham, Judge.

Action by the Laser Grain Company against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

This suit was brought by the Laser Grain Company to recover damages alleged to have arisen from the negligence of the railway company in the shipment of 27 car loads of peaches from designated points in this state to various points in other states. Some of the peaches were loaded in cars used for shipment of meat; the railway company furnishing them for the use. It was alleged that the peaches were damaged, occasioning the loss on account of unreasonable delay in transportation, failure to furnish proper cars, and failure to properly ice the shipments in transit. Each of the 27 counts of the complaint specified the damage of the shipment of a particular car, designating the different amounts claimed therefor.

The railway company answered, denying the allegations of the complaint, and pleaded specially two of the provisions of the contract of shipment, stipulating that the amount of any loss or damage for which it was liable "shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading," etc., and that claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin of the shipment, within four months after delivery of the property, etc., and, unless so made, the carriers shall not be liable.

The cases were tried before the court without a jury, and judgment rendered upon each count of the complaint in appellee's favor, except No. 23.

It appears from the testimony that the peaches were loaded into the cars in good condition, some of them were delayed in ship-

ment, and all arrived at destination more or less damaged, as a result of the unusual delay in transit and the failure to properly refrigerate. The testimony also tended to show the amount of such damage. Laser stated that the peaches in the different cars had been sold f. o. b. the point of shipment at a certain price per bushel or crate, except certain cars designated by him to be sold on commission, the amount that was realized on the sale of the shipment at the point of destination, the amount of the freight, icing, and other charges claimed as damages. There was other testimony relative to some of these amounts. He was allowed to state, over appellant's objection, that he knew the market price of the peaches in Boston, the destination to which three of the shipments were consigned, on the date of the sale there, from having read the market quotations and price lists, although he had no such lists from which to testify.

The court refused to declare the law to be that the burden of proof was upon plaintiff to show that a written notice of claim for damages was given within four months to the agent of the defendant at the point of origin of shipment, and also that such a provision requiring written notice of the claim for damages was valid, and, unless given, would defeat a recovery.

The court also refused to find, as a fact, that the railroad had exercised all necessary diligence in supplying refrigerator cars for the shipment of peaches from the state in the year 1912; that on account of the unusual demand for such cars during the peach shipping season it was forced to substitute what it called "meat cars," as they were the only ones available, to supply the demand; and that the damage to the peaches shipped therein were caused from the bunkers not being sufficiently large to hold enough ice to keep them properly refrigerated.

The court found in favor of plaintiff on 26 of the 27 counts of the complaint for damages to that number of cars of peaches, designating the amount on each count, and rendered judgment accordingly, from which this appeal is prosecuted.

Thos. B. Pryor, of Ft. Smith, for appellant.
W. Covington, of Ft. Smith, and Sellers & Sellers, of Morrilton, for appellee.

KIRBY, J. (after stating the facts as above). [1, 2] Appellant's first contention is that the court erred in not finding in its favor because no claim in writing for damages was made to the carrier within four months after the delivery of the shipment, as required by the bills of lading. A stipulation of like kind in a bill of lading or contract of carriage has been held reasonable and valid, and the failure of the shipper to present his claim in writing within the time specified conclusive of his right to recover. See *C. R. I. & P. Ry. Co. v. Williams*, 101

Ark. 436, 142 S. W. 826; *C. R. I. & P. Ry. Co. v. Foster*, 176 S. W. 682. Failure to give notice in accordance with this provision of the contract of carriage, having been specially pleaded and relied upon as a defense, cast the burden of proof upon the shipper to show either a compliance with it or a waiver of the requirement by the carrier in order to a recovery. *St. L. & S. F. R. Co. v. Keller*, 90 Ark. 313, 119 S. W. 254; *St. L. & S. F. R. Co. v. Pearce*, 82 Ark. 357, 101 S. W. 760, 118 Am. St. Rep. 75, 12 Ann. Cas. 125; *Cumby v. St. L., I. M. & S. R. Co.*, 105 Ark. 406 and 415, 151 S. W. 240. Such a stipulation has been held to be one for the protection of the carrier, compliance with which can be waived by it. 6 Cyc. 509; *St. L. S. W. Ry. Co. v. Grayson*, 89 Ark. 154, 115 S. W. 933; *St. L., I. M. & S. R. Co. v. Shepard*, 168 S. W. 137.

[3] It is true that no claim in writing was made to the carrier either at the point of origin or delivery of shipment within the time specified. But it is also true that a written claim for damages upon each of the shipments made, except three cars, was presented to the general freight agent of the railway company in St. Louis by appellee company, whose manager talked with the agent upon the adjustment and settlement of the claim for damages upon each of said cars, and also with the agent, Mr. Wyler, of the American Refrigerator Transit Company, to whom he was referred by appellant's agent relative thereto. This witness stated the claims for each of the said cars, except three, were made out in writing and mailed to Mr. Walton, the general freight claim agent of the railway company at St. Louis, and that the receipt of claims had been acknowledged by said agent upon postal cards, introduced in evidence by the witness, and he also stated that he had personally discussed with and negotiated for the settlement of each of the claims with said general freight claim agent in St. Louis, having all of them in writing with him and presenting them for the purpose of settlement; that neither of the agents at any time objected to the investigation or settlement of any of the claims because they were not presented in different form or to the agent at the point of shipment or destination.

The freight claim agent of appellant company did not testify, and Mr. Wyler, the agent of the American Refrigerator Transit Company stated that the claims in writing for damages upon 21 of the cars shipped had been presented to him by the direction of appellant company for investigation and adjustment. Thus the claims were presented in writing to the general freight agent of appellant company, and also by his direction to the agent of the American Refrigerator Transit Company for investigation, and negotiations between appellee and such agents looking to an adjustment, and settlement of

these claims for damages were pending for some time thereafter without any objection made upon the part of appellant that such claims were defective or made out of time, and appellant company waived its right to insist upon compliance with the terms of the stipulation relating thereto upon all the cars for which such claims for damages were made within the four months allowed therefor.

[4] Second. The court declared the law, as requested by appellant, that the amount of damage or loss for which it was liable should be computed on the basis of the value of the property shipped at the time and place of shipment upon the bona fide invoice price to consignee, including the freight charges, if prepaid, in accordance with the terms of the bill of lading. And the manager of appellee company stated that his estimate of damages was made upon the basis of the invoice price on the peaches shipped f. o. b. cars at the point of shipment, except the cars sold on consignment. He also testified relative thereto, and there was other testimony tending to show the various other items of expense claimed as damages.

It is next contended that the court erred in permitting the manager of the appellee company to testify to the market price of peaches in Boston at the time the three cars in question should have been delivered there from his knowledge based upon market reports and quotations not produced in evidence. This witness stated that he kept informed of the market price of peaches in Boston during the time the shipment should have arrived, from the market quotations and reports published in the newspapers and otherwise, and that such value was as stated by him.

In *St. L. & S. F. Ry. Co. v. Pearce*, 82 Ark. 353, 101 S. W. 760, 118 Am. St. Rep. 75, 12 Ann. Cas. 125, the court said:

"Standard price lists and market reports, shown to be in general circulation and relied on by the commercial world and by those engaged in the trade, are admissible as evidence of market values of articles of trade."

The witness here did not produce the papers and journals containing the published market quotations and reports, but he testified that he kept up with the market, that he examined and was familiar with the reports and knew the market value to be as stated, because of the information derived from such published reports. We do not think this testimony was incompetent as being hearsay, for the market value is indicated by the prices received and paid for articles of commerce, by those dealing therein, and a witness who was present and saw the general public sales made at the prices offered and accepted could testify thereto in establishing the market value of that article or commodity at the time and place without producing the bids and acceptances or having published copies thereof, and we think it was com-

petent for him to testify to the market value of the article in a particular market, as he did, without producing the published reports and quotations in support of his statement; the fact that his statement was based upon such knowledge without producing the reports, price lists, and quotations going rather to the credibility of the testimony than to its competency.

[5] This testimony related only to damages claimed upon the cars shipped to Boston to be sold upon commission there, and, of course, it was competent to prove the damages upon all such shipments as had not been made upon orders and an agreed invoice price; the rule for computation of damages for delay and injury in transportation of goods being the difference between the market price of the goods at the time and place when and where they should have been delivered and their value when and in the condition in which they were delivered. *St. L., I. M. & S. R. Co. v. Tilby*, 174 S. W. 1167.

[6] It is next insisted that the court erred in not finding, as a fact, that the railway company was not able to furnish proper cars for the shipment of peaches on account of the unusual and unprecedented demand for refrigerator cars for the crop of 1912. There was testimony tending to show that only 472 cars of peaches were shipped from the state in the year 1907, the largest shipment in any one year until 1912, during which year there were shipped 3,194 cars, or an increase of almost 600 per cent.

Two witnesses testified that every possible effort was made by the American Refrigerator Transit Company, which owned 3,700 cars, to furnish and provide refrigerator cars for carrying the peach crop of 1912 to market. They used all the cars they had and all they could procure from other companies in furnishing the carriers of the state cars for transportation of the peaches. One of these witnesses stated that they began preparations early in 1912 for estimating the probable crop and supplying cars for the transportation of it, and that it was impossible to have refrigerator cars manufactured in time to remove the crop of 1912 after its magnitude was indicated in the early spring. One witness testified, however, that there was no such shortage of refrigerator cars as prevented the supply of the requisite number for carrying to market the peach crop of the state of Arkansas, and it was shown that the crops of Texas requiring refrigerator cars for transportation had been moved before it had been necessary to begin the shipment of the Arkansas peaches, and that sufficient cars could have been had for the purpose upon reasonable and proper effort made to secure them.

[7] Appellant's requested declaration of the law was erroneous, even if the testimony had warranted the finding of fact requested. Although a common carrier is bound to provide

reasonable facilities of transportation to all shippers at every station who in the regular and expected course of business offer their goods for transportation, it is not required to prepare in advance for an unprecedented and unexpected rush of business, and therefore will be excused for delay in shipping or even in receiving goods for shipment until such emergency can in the usual and regular course of business be removed. *St. L. S. W. Ry. Co. v. Clay County Gin Co.*, 77 Ark. 362, 92 S. W. 531.

There is a mass of testimony in the record relating to the claims for damages upon 27 different cars of peaches shipped, and appellant claims to have made a fair and as full an abstract as practicable of the testimony relating to the claim of damages upon each car.

[8] Appellee claims generally that the abstract is not full and complete, but only challenges it specifically relative to count No. 9 of the complaint, saying in its brief:

"We take the testimony as to this car at random, it not being practical, as counsel says, to go into analysis of the testimony as applied to each car. * * * We not only call attention to the testimony relating to this particular car as a sample of the testimony with reference to other cars, but also to the manner in which the testimony has been abstracted by counsel for appellant."

Necessarily the court cannot be expected to explore the record to ascertain whether appellant's abstract of the testimony relating to the claim of damages for each car under each count of the complaint is fair and sufficient when appellee's counsel have not found it practicable to do so, and do not object to such abstract specially except as to count

No. 9. It will suffice to say that the testimony has been carefully read and considered. It is sufficient to support the court's findings as to the amount of damages for which judgment was rendered under counts Nos. 3, 4, 6, 7, 8, 9, 10, 12, 13, and 17; on counts Nos. 1 for \$371.45; 2, \$363.01; 14, \$270.98; 15, \$346.34; 18, \$190.17; 19, \$225.45; and 26, \$198.95. The testimony is not sufficient to support a recovery under counts Nos. 5, 11, 16, and 22. There was no acknowledgment of receipt of a claim for damages upon the cars set out in counts Nos. 20, 21, 24, 25, and 27 within the time required, and the testimony does not definitely show that a claim for damages was made in any manner upon these cars and negotiations entered into for their settlement before the expiration of the four months stipulated in the bill of lading in which the claim was required to be made. It is true the manager of appellee company or his father for him claimed to have talked with the railroad claim agents relative to the claims for damages on these cars, but the testimony does not show that such conversations occurred before the expiration of the time, and the burden of proof to show waiver, being upon appellant, was not sustained.

The judgment must therefore be modified, and, after deducting the amounts from the trial court's findings under the different counts of the complaint, as indicated, and the amounts not allowed under the other counts, as stated, will be entered here for the sum of \$4,281.87, with interest as allowed by the judgment of the court below, with the costs of appeal adjudged against appellee.

It is so ordered.

HOLTZCLAW et al. v. WELLS.

(Court of Appeals of Kentucky. Oct. 22, 1915.)

1. TRUSTS \S 110—AGREEMENT TO PURCHASE FOR ANOTHER — "PAROL CONSTRUCTIVE TRUST"—SUFFICIENCY OF EVIDENCE.

In an action for the recovery of land, on the ground that defendant agreed to buy it for plaintiff's ancestor and had fraudulently taken title in his own name and refused to convey evidence held insufficient to establish a "parol constructive trust," which arises when one obtains the legal title to property in violation of some express or implied duty to the one who is equitably entitled thereto, and holds it in hostility to the other's beneficial rights.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. \S 160; Dec. Dig. \S 110.]

2. TRUSTS \S 110 — PAROL CONSTRUCTIVE TRUST—WEIGHT OF EVIDENCE.

To establish a parol constructive trust, the proof must be such as to leave no rational doubt as to the truth of the necessary facts, and evidence must be strong and convincing against documents showing the legal title to be in some one else.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. \S 160; Dec. Dig. \S 110.]

Appeal from Circuit Court, Lincoln County.

Suit by B. D. Holtzclaw, administrator, and others, against J. T. Wells. Judgment for defendant, dismissing the petition, and plaintiffs appeal. Affirmed.

See, also, 153 Ky. 768; 156 S. W. 407.

R. H. Tomlinson, of Lancaster, for appellants. Geo. D. Florence and P. M. McRoberts, both of Stanford, for appellee.

HURT, J. Overton Adams, an unmarried man, resided in Lincoln county, Ky., on a farm of 102½ acres, of which he was the owner of an undivided one-third interest. A sister resided with him, and previous to his death, which occurred on the 23d day of December, 1905, his sister died. The appellee, J. T. Wells, for several years previous to the death of Adams, also resided with him, but exactly upon what terms is not shown. In 1904, Ann Gover, who was the owner of an undivided one-third interest in the farm upon which Adams lived, instituted a suit against Adams and Charles Singleton, the other joint owner, for a sale of the land and a division of its proceeds. The court adjudged that Adams, Singleton, and Gover were each an owner of an undivided one-third of the land and adjudged that it be sold. The sale was made on the 8th day of August, 1904, when the appellee, J. T. Wells, became the purchaser, at the price of \$300, and executed bond for the purchase price with J. M. Singleton as his surety. The sale was duly reported, when Ann Gover filed exceptions to the sale, and thereafter additional exceptions, which the court finally heard and overruled on the 8th day of March, 1906. On the same day the appellee gave his check to the master commissioner, on a banking institution at Crab Orchard, for the amount of \$310, which was the

purchase price of the land and its interest, and on the same day the court directed that after the payment of the costs, one-third of the purchase money should be paid to each of the joint owners of the land. On the following day, the 9th of March, Overton Adams filed an affidavit, signed and sworn to by himself, in which he recited the fact that the land had been sold and the sale confirmed, and the purchase price had been paid to the commissioner of the court, and that the court had directed one-third of the proceeds of the sale of the land to be paid to Charles Singleton, and that he had previous thereto bought Singleton's interest in the land for the sum of \$20, and was entitled to Singleton's portion of the proceeds of the sale, and asked that the order of the court for distribution of the funds be set aside, to the extent that it ordered the payment of one-third of it to Singleton, and in place thereof that the court order it to be paid to him. On the same day Adams executed an order upon the master commissioner of the court, directing him to pay to M. O. Saufley, who seems to have been his attorney, \$7.50, out of any fund in the hands of the master commissioner coming to Adams, which had arisen from a sale of the land, and this order was accepted by the master commissioner and the money paid. The court sustained his motion to the extent of setting aside the order directing the payment of one-third of the proceeds of the sale to Singleton, and ordered payment of it withheld for the further adjudication of the court. Thereafter, on the 30th day of June, 1905, Adams filed an answer and cross-petition in the case, in which he set up the same facts as in his affidavit, showing his right to Singleton's portion of the proceeds of the sale of the land, and asked that it be paid to him.

Adams died intestate, and thereafter, on the 11th day of May, 1911, his administrator and 32 of his collateral heirs instituted this suit against the appellee, Wells. The allegations of the pleadings in this case are fully set out in the opinion upon a former appeal of this case, which may be found in 153 Ky. 768, 156 S. W. 407. Suffice it to say, however, that the plaintiffs below, who are the appellants here, alleged in substance that Overton Adams, their ancestor, was the owner of an undivided two-thirds interest, and in addition one-sixth of the land which was sold in the action of Gover v. Adams et al., and that he desired to become the purchaser of it at the decretal sale, but, upon the day upon which the sale was made, that he was sick and unable to attend the sale, but, for the purpose of purchasing the land at the sale, he made the appellee, Wells, his agent to attend the sale and buy the land for him, and also procured a surety in the bond which would have to be executed for the sale price,

and that Wells fraudulently purchased the land for himself, and caused himself to be reported as the purchaser, and procured a confirmation of the sale and execution to him of a deed, all of which facts were unknown to Adams, who was relying upon Wells to take care of his interest in the matter, as directed, and who did not learn until after the sale was confirmed, the real truth as to the actions of Wells, and that he had offered to pay to Wells the amount that he had paid upon the bond for the purchase price of the land, which Adams was then able to do, and demanded of Wells that he convey the land to him, but that Wells had fraudulently refused to do so, and had continued to hold the land and its title in fraud of the rights of Adams until his death, and since that time in fraud of the rights of the appellants, who were his legal heirs and succeeded to their ancestor's rights pertaining to the land, and prayed that the court adjudge that the transactions amounted to a constructive trust, and that Wells was holding the land as trustee for appellants, and that he be required to convey the land to them.

The appellee, by answer and amended answers, controverted all the allegations of the petition, and in addition pleaded that his purchase of the land and his procuring a deed, and the payment of the purchase money by him were facts well known to the decedent at all times, and that decedent approved of same and filed no exceptions to the report of sale, and also set out the fact of the decedent filing the affidavit and motion on the 9th day of March, after the confirmation of the sale and the payment of the purchase money, and the filing of his answer and cross-petition on the 30th day of June, thereafter, and relied upon same as an estoppel to the plaintiffs' cause of action set up in their petition, and further pleaded that since the death of the decedent the appellants had, by an order of court, procured the payment to their attorney, as a portion of his fee in the case, the sum of \$100, which he alleged was a part of the proceeds of the sale of the land which belonged to the decedent, and relied upon such fact as a further estoppel to the appellants' cause of action.

The affirmative allegations in the answer and amended answers were duly controverted by replies, and the cause coming on to be heard upon the pleadings and proof, the court adjudged that the petition of the appellants be dismissed, to which they excepted, and prayed an appeal to this court.

Proof was offered by the appellants tending to prove that the land was worth from \$700 to \$1,000; that Adams was a man of good sense, able to read and write, and was near 70 years of age; that Wells had lived in the same house with him for several years previous to the sale, and that Adams seemed to have a great affection for him, and sometimes, in referring to him, would

call him "My Boy"; that, two or three days previous to the decretal sale, Adams, accompanied by Wells, went to a neighbor, to whom Adams said that the land was to be sold in order to get Ann Gover's interest out of it, and that he was unwell and could not go to the sale, and he wanted the neighbor to go and assist Wells in buying in the land. The neighbor inquired how much he should pay for it. Adams answered that Tommy (meaning Wells) would attend to that, and that he just wanted the neighbor to go on the bond for the purchase money, which the neighbor promised to do and did go and attend the sale, where Wells was the only bidder, at the sum of \$300, and the land was sold to him, and that the witness became Wells' surety upon the bond. It was proven by another witness that on the day of the sale, but after it had taken place, that Wells jokingly said that he had bought the land, and that he was going home and tell Adams that he had bought it for himself. By another witness it was proven that, some time after the sale, Adams requested him to see Wells, and see if any arrangements could be made about the land. Wells and the witness went to Adams, and Adams and Wells agreed that they would survey off a part of the land, and that Adams could live there and keep his property there, as long as he lived, but at his death that portion of the land should revert to Wells. Another witness testified that, about the middle of the summer of 1905, he went with Adams to Lancaster, to which place Adams went for the purpose of consulting a lawyer about bringing a suit for the land.

For the appellee it was proven that he resided in the same house with Adams at the time of the sale and continued to live in the same house until April or May, 1905, when he married, and thereafter lived in another house upon the same land; that shortly after the sale Wells went to work upon the land, clearing it up of its brush, erecting new fencing, cutting down trees, which he caused to be sawed into lumber, and which he brought to the land and used in improvements upon it. By another witness it was proven that in January, 1905, she went to Adams for the purpose of renting a house which was on the land; that Adams said to her that he had given the land to Wells, and that she would have to see him. She did so, and rented the house from Wells, and the rent was paid to Wells by work on the farm. Another witness stated that in March or April, 1905, he accompanied Adams to Stanford, and while there that Adams said that he had gone to the clerk's office to see about a deed between him and Wells, and that he had found it, and that it was all right. By four different witnesses it was proven that he said to one of them, in February, 1905, that Wells was to have everything that he had, and that he did not want any kinfolds to have anything. In April,

1905, he said to another that he had taken a liking to Tommy Wells, and was going to give him all that he had. In the spring of 1905 he said to another that he intended for Wells to have everything that he had, and that, when he got his land out of controversy in the courts, he meant to fix it so that Wells would get it, and to this same witness he made this statement, in connection with telling him that he had sent Wells to buy the place—that he was sick and could not go.

[1] The above was, in substance, all of the evidence offered in the case on either side, in addition to the affidavit and motion made by Adams on the 9th day of March, 1905, and his cross-petition in the case on the 30th day of June, 1905, and the facts recited in the affidavit and cross-petition. It will be observed that there is no evidence to support the allegation that Adams sent Wells to buy the land for himself; neither is there any evidence which shows that Adams ever desired to buy the land for himself, nor is there any evidence tending to show that he ever expressed any dissatisfaction in regard to the sale of the land and the purchase of it by Wells, except the statement of the witness, who testified that he went with Adams to consult a lawyer about bringing suit to recover the land; but it does not appear that his claim at that time was based upon anything growing out of the purchase of the land by Wells, and the witness who testified about the agreement between Adams and Wells that Adams should live upon a portion of the land during his lifetime, and then the portion was to revert to Wells. The latter statement, however, falls short of showing that there was any dissatisfaction on the part of Adams about the purchase of the land by Wells. The statement made by Adams to the neighbor, who went upon Wells' bond, does not show whether he intended that Wells should buy the land for him, or whether he intended that Wells should buy the land for himself, and that he was merely assisting the young man in arranging the purchase of the land. When Adams filed the affidavit on the 9th day of March, six months after the decretal sale, and after the exceptions to the sale had been overruled, and the order made to distribute the proceeds of the sale, and in which affidavit he stated that the sale had been confirmed and the purchase money paid, and asked that Singleton's portion of it should be paid to him in place of Singleton, it is difficult to believe that Adams was laboring under any difficulty or want of knowledge in regard to the whole transaction. He was obliged to know that the purchase money had not been furnished or paid by him, and his order given upon the same day to pay to his attorney a portion of the proceeds of the sale, and thereafter when he, on the 30th day of June, filed his cross-petition, stating in effect the same as the statements of his

affidavit previously filed, his conduct is very inconsistent with the contention that he thought that he was the purchaser of the land through Wells, or that he had any agreement with Wells to purchase the land for him. All of the circumstances of the case conduce to show that Adams' desire was that Wells should have the land, and, while the evidence is not altogether satisfactory that Wells' hands are clean in the transaction, it falls far short of establishing a parol constructive trust. A parol constructive trust arises when a party obtains the legal title to property in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to the beneficial rights of the one equitably entitled to it. 2 Pomeroy, § 1044.

[2] This court has uniformly upheld the doctrine of parol constructive trusts, and has maintained them where the facts which go to establish them are proven by certain and undoubted testimony, and such as to leave in the mind of the court no rational doubt as to the truth of the facts necessary to establish the trust. *Roche et al. v. George's Ex'r*, 93 Ky. 609, 20 S. W. 1039, 14 Ky. Law Rep. 584; *Northcutt v. Hogan*, 4 Ky. Law Rep. 364; *Taylor v. Fox's Ex'r*, 162 Ky. 804, 173 S. W. 154; *Warden v. O'Brien*, 142 Ky. 633, 136 S. W. 635. It has, furthermore, been held that the evidence to create a parol trust must be strong and convincing, where its establishment is contradictory to written documents showing the legal title to the property in some one else. We cannot say that in the case at bar the facts sought to be established, which are necessary to the creation of the trust alleged, are proven by such certain and undoubted testimony that no rational doubt is left in the mind of the court as to the transaction between appellee and decedent, and for these reasons there is not any sufficient reason to disturb the judgment of the chancellor, which seems to be in accordance with the principles above enunciated.

The judgment is affirmed.

LOUISVILLE & N. R. CO. v. CONN.

(Court of Appeals of Kentucky. Oct. 21, 1915.)

1. WATERS AND WATER COURSES ¶179—OBSTRUCTIONS — ACTIONS FOR DAMAGES — EVIDENCE.

In an action against a railroad company for flooding plaintiff's premises by means of a railroad bridge, claimed to obstruct a stream, evidence held to show that the rains and flood at the time plaintiff's premises were flooded were extraordinary and of such unusual occurrence in the vicinity that they could not have been anticipated by persons of ordinary experience and prudence.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. ¶179.]

2. WATERS AND WATER COURSES ⇐171—ONSTRUCTIONS—LIABILITY.

One who constructs a bridge over a stream is liable only in the event that the bridge obstructs the passage of water that accumulates from such ordinary and usual rainfalls in the vicinity as might have been anticipated by persons of ordinary prudence and experience, and he is not liable for damages growing out of overflows caused by extraordinary rains or floods, such as are of such unusual occurrence that they could not have been anticipated by persons of ordinary experience and prudence.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 216-222; Dec. Dig. ⇐171; *Bridges*, Cent. Dig. § 61.]

Appeal from Circuit Court, Garrard County.

Action by George W. Conn against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Fred P. Caldwell, of Louisville, Shelby, Northcutt & Shelby, of Lexington, Benjamin D. Warfield, of Louisville, and Lewis L. Walker, of Lancaster, for appellant. Robert Harding, of Danville, J. I. Hamilton and R. H. Tomlinson, both of Lancaster, and E. V. Puryear, of Danville, for appellee.

CLAY, C. In this suit against the Louisville & Nashville Railroad Company to recover damages to his property, alleged to have been caused by the diversion of the waters of Paint Lick creek, plaintiff, George W. Conn, recovered a verdict and judgment for \$2,000. The railroad company appeals.

[1] Plaintiff's property lies in the town of Paint Lick. At this point Paint Lick creek runs between the counties of Garrard and Madison. Defendant's railroad runs from Richmond to Lancaster in a southwestern direction. The creek runs in a northwestern direction. The village of Paint Lick is located principally between the railroad track and the creek. The principal street of Paint Lick, which is the Richmond and Lancaster turnpike, crosses the railroad track about 800 or 900 feet from the railroad bridge on the Garrard side. From this crossing it is about 300 feet from the pike bridge over the creek. Plaintiff's residence faces this street near the railroad track. Back of plaintiff's residence is his shop, and further back is Rucker's barn. The land back of these buildings is bottom land, and is about 10 feet lower than the railroad track and the street.

In July, 1909, the railroad company reconstructed its bridge at Paint Lick. At that point the channel proper of the creek is about 160 feet wide. On each side of the channel proper the bank ascends, and from the top of one of these banks to the other the distance is 448 feet. In reconstructing the bridge the company placed two additional stone piers thereunder. These piers were 17 feet high and 6 feet wide. According to the testimony for plaintiff, the stone abutments were lowered 18 inches, by taking out

two stones, and the bridge was let down 18 inches lower than the old bridge. At the top of the bridge the iron plate girders were 4 feet deep and the rails and cross-ties 12 inches deep. The dirt fill on the Madison side was 20 feet high and about 150 feet long. On the Garrard side it was 50 feet long and 20 feet high. Estimating the channel of the creek as extending, not from the banks proper, but from the ascending bank on each side, about 74 per cent. of the channel, as a whole, was obstructed. One of the engineers who testified for plaintiff stated that the effect of this was to set the waters back about 6,000 feet east of the bridge. Another engineer, named Tinsley, testified that the new bridge was about 2½ feet below the "old high-water mark" of 96.7. He ascertained this fact by consulting a number of men.

Plaintiff's proof tends to show that on the occasion of the flood the waters of the creek broke and overflowed the fill, and washed away the railroad track for a distance of about 420 feet. Two or three witnesses say that they had seen it rain as hard before. Plaintiff further showed that, while the bridge was under construction, W. G. Kemper wrote the superintendent a letter, in which he expressed the opinion that the construction of two more pillars under the bridge would likely cause an overflow of the creek and cause damage to Paint Lick. According to plaintiff's testimony, the water rose in his house for several feet and injured it, and damaged or practically destroyed certain articles of personal property. The water remained in his house for about an hour. It was 3 hours before the water returned to the channel of the creek. Other witnesses say that the waters went down in from 15 minutes to an hour. Plaintiff further testified that the water that entered his house came from over the railroad. In the opinion of the witnesses, the value of plaintiff's property was depreciated from 40 to 50 per cent. by reason of the reconstruction of the bridge.

According to the evidence for the defendant, the two stones that were removed from the abutments were replaced with creosote timbers, and the bottom of the present girder is 2 or 3 inches higher in elevation than the old span. On being apprised of the fear on the part of the residents of Paint Lick that the bridge might cause an overflow, A. F. Frendburg, the company's engineer, made a careful investigation and estimated the Paint Lick watershed as containing 50 square miles. As a matter of fact, the government map showed it to be 46 square miles. To permit the passage of this water required 387 cubic feet per second per square mile. The bridge provided for 478 cubic feet. The high-water mark of March, 1913, was 7 feet and 1 inch higher than the old high-water mark.

The old highwater mark was 6.9 feet below the top of the bridge and 2.3 feet below the bottom of the girder. He further stated that the fills on each side of the bridge were not in the natural channel of the stream. In his opinion, the opening under the bridge was fully adequate, not only to allow the water to pass from usual and ordinary rainfalls and floods, but was sufficient for all previous rainfalls and floods in that vicinity, whether ordinary or extraordinary. Other witnesses testified that the old high-water mark was something like $1\frac{1}{2}$ feet below the girder of the present bridge. It was also shown that the pressure above the fill was not sufficient to push out the fill. It would have taken 10 or 12 times the amount of pressure to have done so. The fill was washed out by the water overflowing the fill. Defendant further showed that the bench mark, or the point from which the high-water elevations were taken prior to 1909, was 3 feet and 2 inches lower than the bench mark used in 1913. It also appears that the pike bridge some distance below the railroad bridge was washed away.

As to the character of the flood and the height of the waters on the occasion complained of, defendant introduced several witnesses. Dan Bodkins, who lived at Wallaceton, which is 5 miles above Paint Lick, and who had known Paint Lick creek for 12 years, testified that the creek was 2 or 3 feet higher than he had ever known it before. The tide was a great deal larger and higher than on any previous occasion. Across the bottom the creek was 200 yards wider than he had ever seen it before. There was a hard downpour of rain, and bridges, culverts, fences, and things which had never been washed out since he had been there were carried away. William Asher, who lived on Paint Lick creek about 2 miles below Wallaceton, stated that Walnut Meadow creek intersected Paint Lick creek, and lower down White Lick creek ran into it. He had lived on the Wallaceton prong of Paint Lick creek for 15 years, and in the Wallaceton neighborhood for over 20 years. He had also lived at Paint Lick for 12 years. In his judgment, the creek was 3 or 4 feet higher than it had ever been before. Fences and buildings that had never been carried away were washed away. The creek was 100 yards wider than he had ever seen it on any prior occasion. J. B. Gynn, who lived on Paint Lick creek about 2 miles above Paint Lick depot for about 54 years, said that at his place the water was from 4 to $4\frac{1}{2}$ feet higher during the March, 1913, flood than he had ever seen it before. At his home place further down the creek the water was $4\frac{1}{2}$ feet higher than on any previous occasion. This was about a mile above Paint Lick. The water came into his yard, and had never been there before during his knowledge of the creek. James Todd, who lived on Paint Lick creek and had known it for 40 years, says that the

creek was from 4 to 6 feet higher than he had ever seen it before. It was 100 feet wider on the Garrard side. Fences which had never been injured before were washed away. T. J. Todd, who was 32 years of age and had known the creek practically all of his life, testified that the water on Walnut Meadow during the March, 1913, flood was 3 or 4 feet higher than he had seen it before. Paint Lick creek, after Walnut Meadow flowed into it, was 5 or 6 feet higher. Twice as much fencing was washed away as on any previous occasion. Walker Gynn, who was raised and lives on Paint Lick creek about a mile above the railroad bridge, says that the March flood was about 5 feet higher at his house than it ever was before. The water was 92 feet further up in his yard than on any previous occasion. W. C. Wynn, who lives on White Lick creek about a mile above the point where it empties into Paint Lick creek, says that White Lick creek was from 2 to 3 feet higher than he ever saw it before. Stone fences and wire fences were all pulled down. This never happened to the same extent before. J. T. Thompson, who has lived on White Lick creek since 1881, about 2 miles from its junction with Paint Lick creek, says that White Lick Creek was $1\frac{1}{2}$ feet higher at his house than ever before, and that the creek rose rapidly and washed away fences that had never been washed away before. He further says that it was the hardest rain that he had ever heard fall. C. S. Ballew, who had known Paint Lick creek for 50 years and who saw the creek about 3 miles below Paint Lick on the occasion of the flood, says that it was 6 or 7 feet higher at this point than he had ever seen it before. O. J. Hendren, who lived near the turnpike bridge and had known the creek for 50 years, states that the water during the flood of 1913 was 6 feet higher than he had ever seen it before. J. D. Burchell, who lives on the Madison side, states that the water there was 6 feet higher in 1913 than he ever had known it before. Will Ross, who lived about a quarter of a mile up Francis branch from Paint Lick creek, says that the backwater from Paint Lick creek rose in his house about 2 feet. W. L. Todd, who lives at the junction of Walnut Meadow and Paint Lick creek, and who had known Paint Lick creek for about 50 years, says that never in his recollection was there another flood like the flood of March, 1913. It was the highest water he had ever known in Paint Lick creek. It must have been 4 feet higher at his place than ever before. Eliza Ann Todd, his wife, says that the flood was the highest in her recollection, and that it did more damage than any previous floods. James G. Champ, who had lived for 31 or 32 years on the Wallaceton pike, about 2 miles above the railroad bridge, says that the creek in March, 1913, was 4 or 5 feet higher than he had ever seen it before, and that fences and things were washed away which had

never been carried away before. In dry times the creek was so low that you could walk across it.

By way of rebuttal, plaintiff testified that he had seen it rain as hard as it rained that night in Paint Lick. G. M. Treadway testified as follows:

"Q. Mr. Treadway, had you ever seen rain fall as hard in that vicinity before the flood as you saw it the night of the flood and for as long a time? A. Yes, sir; I have seen it rain as hard."

[2] It is the well-settled rule in this state that one who constructs a bridge over a stream is liable only in the event that the bridge obstructs the passage of water that accumulates from such ordinary and usual rainfalls in the vicinity as might have been anticipated by persons of ordinary prudence and experience. He is not liable for damages growing out of overflows which were caused by extraordinary rains or floods; i. e., such floods or rains as are of such unusual occurrence in the vicinity that they could not have been anticipated by persons of ordinary experience and prudence. *C., St. L. & N. O. R. Co. v. Hoover*, 147 Ky. 37, 143 S. W. 770; *Southern Ry. Co. v. A. M. E. Church's Trustee of Harrodsburg*, 121 S. W. 972; *Wallingford v. Maysville & B. S. R. Co.*, 107 S. W. 781. There is no evidence in this case that the waters of Paint Lick creek were ever obstructed or diverted by either the old bridge or the new bridge, so as to injure the property of the residents of Paint Lick. There is no evidence that the openings in the new bridge were not sufficient to carry off the water that accumulated from such ordinary and usual rainfalls in that vicinity as might have been anticipated by persons of ordinary experience and prudence. On the contrary, defendant's evidence conclusively shows that the flood of March, 1913, was unprecedented. This is brought out, not by one or two witnesses living at Paint Lick, but by a number of witnesses who saw the conditions, not merely at Paint Lick, but above and below it, and throughout the entire watershed of Paint Lick creek. It is clear from their testimony that the waters of Paint Lick creek and its tributaries were not only higher, but wider and more violent, than they had ever been known in the memory of the oldest inhabitants. The testimony of plaintiff and Treadway to the effect that they had seen it rain as hard in no way contradicts the testimony of defendant's witnesses. Both witnesses are silent as to the length of time it rained and as to the effect of the rain on the waters of the creek. Where it is shown, as in this instance, by the evidence of uncontradicted witnesses, that the waters of a creek and its tributaries, both above and below the injured property, were higher and wider than they had ever been known to be before, and were so violent as to reach and carry away fences and other things that had never on any previ-

ous occasion been washed away, it must be regarded as conclusively established that the rains and flood were extraordinary and of such unusual occurrence in that vicinity that they could not have been anticipated by persons of ordinary experience and prudence. Indeed, if the flood in question be not of this character, it would be difficult to imagine a case where the doctrine of extraordinary floods would apply.

It being conclusively established that the flood was of such unusual occurrence that it could not have been anticipated by persons of ordinary experience and prudence, it follows that the trial court should have directed a verdict in favor of the defendant. No other questions are passed on.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

CARRIGAN v. GRAHAM.

(Court of Appeals of Kentucky. Oct. 21, 1915.)

1. MALICIOUS PROSECUTION \S 21—ACTIONS—DEFENSES.

Advice of counsel, where there is a complete disclosure to the attorney, is a defense to an action of malicious prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 40-44; Dec. Dig. \S 21.]

2. MALICIOUS PROSECUTION \S 64—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for malicious prosecution, evidence held to show that defendant made full and complete disclosure to counsel and acted upon his advice.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 151-153; Dec. Dig. \S 64.]

Appeal from Circuit Court, McCracken County.

Action by Myrtle Carrigan against Jake Graham. From judgment for defendant, plaintiff appeals. Affirmed.

Berry & Grassham and W. A. Middleton, all of Paducah, for appellant. John G. Lovett, of Benton, and Wheeler & Hughes, of Paducah, for appellee.

HANNAH, J. Mrs. Myrtle Carrigan was arrested upon a warrant issued by a magistrate of McCracken county, procured by Jake Graham and wife, charging her with the offense of petty larceny. The grand jury being in session, she was held to await its action; and the prosecution, having been referred to and considered by the grand jury, was dismissed, and she was thereupon discharged. She then instituted this action against Graham to recover damages for alleged malicious prosecution, and upon a trial the court directed a verdict for the defendant at the close of all the evidence, and dismissed the petition. The plaintiff appeals.

[1, 2] The facts in the case, as shown by the evidence for the plaintiff, are that she and the defendant lived in the country, about

half a mile apart; that in October or November, 1912, a goose disappeared from the premises of the plaintiff; that in April, 1913, plaintiff went over to Graham's and inquired of Mrs. Graham whether she had seen a stray goose; that Mrs. Graham replied that she had not, that there was no stray goose about their premises, unless it had come there that day; that she thereupon went to look at some geese Mrs. Graham had there, and that she took one of them home with her. The magistrate testified that Graham and his wife applied to him for a warrant against Mrs. Carrigan, and that he referred them to the county attorney; that they came back later with a warrant drawn up by the county attorney, and that he issued it on the sworn testimony of Mrs. Graham, charging Mrs. Carrigan with petty larceny.

The defendant proved by the county attorney that the Grahams came to his office and told him they had been sent there by the magistrate; that Mrs. Graham told him that Mrs. Carrigan had come to her house, and asked for the goose; that she (Mrs. Graham) informed Mrs. Carrigan that the goose was not there; that Mrs. Carrigan's goose had been missing about three months; that she told Mrs. Carrigan there was no stray goose about the premises unless it had come there that morning; that thereupon Mrs. Carrigan went down the road to where Mrs. Graham's geese were in a field, and got over the fence, seized a goose, and took it home with her; that he thereupon advised them that Mrs. Carrigan was guilty of the offense of petty larceny, and wrote a warrant accordingly, which he gave to them to take back to the magistrate for issual.

Under this evidence, it is insisted by appellant that the trial court erred in directing a verdict for the defendant. Appellant concedes that advice of counsel is a complete defense in an action for malicious prosecution, but contends (1) that all due diligence must be exercised by the prosecutor in obtaining all the facts relating to the offense, and (2) that the prosecutor must make a full and fair statement of such facts to the attorney upon whose advice the prosecution is commenced; that, if these things have been done, they constitute probable cause and therefore a complete defense, but that it is for the jury to say whether these things have been done. In other words, it seems to be appellant's contention that a peremptory instruction is never justified upon the ground of acting under advice of counsel. The rule in this respect was laid down in *Schott v. Indiana National Life Insurance Company*, 160 Ky. 533, 169 S. W. 1023, as follows:

"What facts and circumstances amount to probable cause is a question of law. Whether they exist or not, in any particular case where the evidence is conflicting, is a question of fact to be determined by the jury. But where there is no conflict in the evidence, whether the facts

shown amount to probable cause is ordinarily a question of law for the court."

See, also, *Moser v. Fable*, 164 Ky. 517, 175 S. W. 997; *Dyer v. Singer Sewing Machine Company*, 164 Ky. 538, 175 S. W. 1037; *National Life & Accident Ins. Co. v. Gibson*, 101 S. W. 895, 31 Ky. Law Rep. 101, 12 L. R. A. (N. S.) 717; *O'Daniel v. Smith*, 66 S. W. 284, 23 Ky. Law Rep. 1822.

In the instant case, the proof shows without contradiction or dispute that the Grahams made a full and fair statement of all the facts to the attorney upon whose advice the prosecution was instituted, and acted upon his advice. Under these circumstances, the trial court properly directed a verdict for the defendant.

Judgment affirmed.

PACIFIC MUT. LIFE INS. CO. v. TAYLOR. (Court of Appeals of Kentucky. Oct. 20, 1915.)

1. APPEAL AND ERROR ⇐671, 907—REVIEW—PRESUMPTIONS.

In the absence of a transcript of the evidence, it will be presumed that the evidence supported the judgment, and the only matter which can be reviewed is the sufficiency of the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2916, 3673, 3674, 3676, 3678; Dec. Dig. ⇐671, 907.]

2. APPEAL AND ERROR ⇐906—REVIEW—PRESUMPTIONS.

Where the evidence is not in the record, it will be presumed in an action on an insurance policy that the premiums were paid; judgment going for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675; Dec. Dig. ⇐909.]

3. PLEADING ⇐433 — SUFFICIENCY — AIDED BY VERDICT.

In an action on a life policy, where verdict went for plaintiff, an averment that the policy was alive and in full force since the date of its execution and delivery must be held sufficient, though not specifically averring payment of premiums.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. ⇐433.]

Appeal from Circuit Court, Knox County.

Action by Sarah J. Taylor against the Pacific Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. M. Robsion, of Barbourville, for appellant. Golden & Lay, of Barbourville, for appellee.

CLAY, C. On October 8, 1912, the Pacific Mutual Life Insurance Company of California issued to George F. Taylor a contract of accident insurance, in which his wife, Sarah J. Taylor, was named as beneficiary. George F. Taylor died on May 1, 1913. Mrs. Taylor brought this suit to recover on the policy. The petition charges, in substance, that on October 8, 1912, the defendant signed, executed, and delivered to George F. Taylor a con-

tract of insurance, in which plaintiff was made and named as beneficiary; that by said contract it agreed and promised to pay to her, as such beneficiary, the sum of \$600, in case of the death of George F. Taylor caused solely by external, violent, and accidental means, excluding suicide or any attempt thereat; that George F. Taylor died on May 1, 1913; that his death was caused solely by external, violent, and accidental means, and not from suicide, or any attempt thereat; and that said contract of insurance was alive and in full force and had been so kept and maintained since the date of its execution and delivery. A trial before a jury resulted in a verdict and judgment in favor of plaintiff for \$600. The company appeals.

[1] On motion of the plaintiff below, the transcript of evidence has been stricken from the record. The policy of insurance is not made a part of the record, but appears only in the transcript of the evidence, which has been stricken from the record. In the absence of the transcript of the evidence, it will be presumed that the omitted portions of the record will support the judgment, and the only question to be determined is whether or not the pleadings support the judgment. *Jones v. Jackson*, 16 S. W. 458, 13 Ky. Law Rep. 253; *Hackney v. Hoover*, 67 S. W. 48, 23 Ky. Law Rep. 2061; *Sanson v. Connolly*, 141 Ky. 120, 132 S. W. 159; *McKee v. Stein*, 91 Ky. 240, 16 S. W. 583, 13 Ky. Law Rep. 49; *Bradford v. Jones*, 150 Ky. 355, 150 S. W. 387; *Duker's Adm'r v. Kaelin*, 90 S. W. 959, 28 Ky. Law Rep. 900; *Anheuser-Busch Brewing Co. v. Seelbach*, 40 S. W. 671, 19 Ky. Law Rep. 375; *Louisville Bridge Co. v. Neafus*, 110 Ky. 571, 62 S. W. 2, 63 S. W. 600, 23 Ky. Law Rep. 185; *Myers v. Saltry*, 163 Ky. 481, 173 S. W. 1138.

[2, 3] In the absence of the policy of insurance, we are unable to say that it contradicts the averments of the petition or the amended petition. It is insisted that the petition is defective because it does not allege that the premiums on the policy were paid, but merely that the policy "was alive and in full force and had been so kept and maintained since the date of its execution and delivery." It is argued that this allegation is a mere conclusion, and therefore insufficient. In the absence of the transcript of evidence, it will be presumed that the premiums necessary to keep the policy in force were paid. It is the rule that after verdict and judgment pleadings are liberally construed to sustain the judgment, and that any formal defect in the pleadings is deemed to be cured by a verdict and judgment. *Winstead v. Hicks*, 135 Ky. 154, 121 S. W. 1018, 135 Am. St. Rep. 446; *Hill v. Ragland*, 114 Ky. 209, 70 S. W. 634, 24 Ky. Law Rep. 1053; *Dunekake v. Beyes*, 79 S. W. 209, 25 Ky. Law Rep. 2002; *Ashland, etc., R. Co. v. Lee*, 82 S. W. 368, 26 Ky. Law Rep. 700;

Harmon v. Thompson, 119 Ky. 528, 84 S. W. 569, 27 Ky. Law Rep. 186; *Myers v. Saltry*, supra. Though the petition in this instance may have been technically defective, yet we conclude that, under the above rule, its allegations are sufficient after verdict and judgment to support the judgment.

Judgment affirmed.

RICE v. RICE.

(Court of Appeals of Kentucky. Oct. 19, 1915.)

DIVORCE \S 130—CRUEL TREATMENT—SUFFICIENCY OF EVIDENCE—ALIMONY.

Evidence in a husband's action for divorce on the statutory ground of abandonment, in which the wife counterclaimed on the ground of cruel and inhuman treatment and danger of great bodily harm and asked a divorce, as allowed by the statute in such case, and alimony, held not to establish cruelty or danger of bodily harm so as to entitle her to alimony.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 442-445; Dec. Dig. \S 130.]

Appeal from Circuit Court, Johnson County.

Action for divorce by J. P. Rice against Sarah A. Rice, with counterclaim for divorce and alimony. From so much of the judgment as denied her right to alimony, defendant appeals. Affirmed.

D. J. Wheeler and John W. Wheeler, both of Paintsville, for appellant. Fogg & Kirk, of Paintsville, for appellee.

NUNN, J. The court granted the husband a divorce on his petition. The wife appeals from so much of the judgment as denied her right to alimony. The husband brought the action, seeking a divorce on the statutory ground of abandonment. By her answer and counterclaim she admitted the abandonment, but undertook to justify it by the plea that:

"He was eccentric and seemed not to care for her; that he absolutely refused to provide for her girl, Mamie, by her former marriage, and refused to furnish her clothing."

On these grounds she asked for divorce and alimony in the sum of \$1,500. By an amendment she restates her grievances; that is, paraphrases them in words of the statute. Thus she makes it appear that for more than six months prior to her abandonment of him he habitually behaved toward her in such inhuman and cruel manner as to indicate a settled aversion to her and destroy permanently her peace and happiness, and such cruel attempt to injure her as indicated an outrageous temper in him and probable danger to her life or great bodily injury if she longer remained with him. The testimony given in her behalf tends to establish the allegations of her original pleading, rather than the amendment.

They were beyond middle age when they married, and each had a daughter by a former marriage who became a member of the family. No children were born to them. He

had property worth about \$4,000. Her property was considerable, although not worth quite so much. It consisted of one house and lot and a two-thirds interest in another, and some personal property. Her daughter had more than \$900 in cash, and drew a pension from the United States government because her deceased father served in the Union Army. The marriage occurred in 1904. She left him in about a year. They lived apart for several months. Then they were reconciled, and lived together until September, 1911. The husband and wife testified concerning the alleged "cruel and inhuman treatment." Whatever errors may have been in the admission of testimony, they were participated in by both parties. These questions are not pressed in the briefs, and are not passed upon. They admitted numerous quarrels and disagreements, but they must have been of little consequence, as measured by the statute, for, except the first separation, even their next-door neighbors knew nothing of discord between them; in fact, all the neighbors testified that, so far as they knew, Mr. and Mrs. Rice were kind and affectionate toward each other. The chief cause of difference between them was his persistent refusal to pay for her daughter's wearing apparel. But it is undenied that when they were reconciled after the first separation, Mrs. Rice, who was her guardian, agreed that such expense should be paid by the daughter. It is claimed that he was rude in his conduct toward her daughter's beaux; that he objected to young men keeping company with her at his home. Mr. Rice testified that he never objected to young men coming to see her. He did object, however, to the late hours they kept. He said that 9 or 10 o'clock was his bedtime, and they disturbed him by remaining longer, and he told them so.

The only evidence that his unkindness preponderated came from Mrs. Rice and her daughter, but the testimony of Mr. Rice, his daughter, and five neighbors tipped the scales the other way. Mrs. Rice admits that she, too, "quarreled to beat the band sometimes," and she has convinced us that she never was in danger. The only threat in the case is where she says at one time they were fussing about how best to make the cow stand for milking and whether her feed meal should be sifted. Finally, as she relates:

"He drew a chair on me. He didn't strike me. I told him I dared him to, and he didn't hit me."

When she abandoned him, and repeatedly up to the bringing of the suit, Mr. Rice made efforts, in person and by friends, to persuade Mrs. Rice to return and live with him and bring her daughter.

The statute allows a divorce to the wife on the grounds alleged in her amendment, but this relief is conditioned upon her not

being in like fault. Accepting her theory of the case, it only appears that he was petulant and rude, with occasional shows of temper. If it could be said that Mrs. Rice was herself free of these faults, still, in our opinion, she has not shown such danger of bodily harm or cruelty in him as the statute contemplates relief against.

On the whole case we concur with the lower court in rejecting her claim for alimony, and the judgment is therefore affirmed.

SLATER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 19, 1915.)

TAXATION \S 169—EXEMPTIONS—CORPORATE STOCK—STATUTES.

Ky. St. \S 4085, provides that the property of all corporations shall be assessed in the name of the corporation in the same manner as that of a natural person, and that so long as the corporation pays taxes on all its property of every kind, individual stockholders should not be required to list their shares in the corporation. Foreign corporations in which defendant owned stock purchased small lots in the state, at the instigation of defendant stockholder, on which they paid taxes. These lots were not used for any corporate purpose. Held, that defendant, the shareholder, could not claim the benefit of the exemption so as to avoid taxation on the stock owned by her; the attempt being a mere colorable one on the part of the corporations to bring defendant within the statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 292; Dec. Dig. \S 169.]

Appeal from Circuit Court, Shelby County.

Action by the Commonwealth of Kentucky against Mollie P. Slater. From a judgment for plaintiff, defendant appeals. Affirmed.

Willis, Todd & Bond, of Shelbyville, for appellant. Matt J. Holt, of Louisville, and E. H. Davis, Co. Atty., of Shelbyville, for the Commonwealth.

MILLER, C. J. The appellant, Mrs. Mollie P. Slater, resides in Shelbyville, Ky. She owns 123 shares of the capital stock of the Long-Bell Lumber Company, a Missouri corporation, with its principal office in Kansas City, of the par value of \$500 per share, and 24 shares of the Minnetonka Lumber Company, likewise a Missouri corporation, of the par value of \$100 per share. This action was instituted by the commonwealth, through its revenue agent, seeking to subject to taxation the shares of stock above mentioned for the years 1913 and 1914, and cash in bank amounting to \$1,715 for the year 1913, and \$150 for the year 1914. The judgment of the lower court was for the commonwealth, and Mrs. Slater appeals.

There is no complaint of that part of the judgment which taxed the cash in bank for the two years, it being conceded that Mrs. Slater did then have that much money on hand. The answer admits that the fair cash value of Mrs. Slater's stock in the Long-Bell Lumber Company, at the assessing pe-

roids, was its par value of \$500 per share, aggregating \$61,600, and that the fair cash value of the 24 shares of stock in the Minnetonka Lumber Company was its par value of \$2,400. In August, 1912, the Long-Bell Lumber Company and the Minnetonka Lumber Company each bought a lot in Catalpa Court addition adjoining Shelbyville on the west, paying \$250 for each lot. These lots are in a new, desirable residence portion of the town, and the deeds therefor contain the following building restrictions:

"No outbuildings of any kind shall be erected on the property hereby conveyed nearer than 35 feet to the pavement line of any street running in front of or on the side of same, nor shall said property or any part thereof be sold, or leased, or conveyed to colored persons. It is further agreed that no residence shall be erected on the lot hereby conveyed to cost less than \$1,500.00, nor shall any residence be erected thereon nearer than 25 feet to the pavement line of the street running in front thereof."

Appellant had compromised a suit against her similar to the one now before us, prior to the purchase of the lots by the two Missouri corporations.

The authority to assess these shares of stock is claimed under section 4085 of the Kentucky Statutes, which reads as follows:

"The property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that, when legally called on, the chief officer shall report a full statement of the property of such corporation for taxation, and, for a failure, shall be subject to the penalties in this article provided; and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation."

Considerable confusion had resulted from the application of this statute, and the constructions that had been given to it, particularly in *Commonwealth v. C. & O. Ry. Co.*, 116 Ky. 951, 77 S. W. 186, 25 Ky. Law Rep. 1126; *Commonwealth v. Lovell*, 125 Ky. 491, 101 S. W. 970, 31 Ky. Law Rep. 105; *Commonwealth v. Harris*, 118 S. W. 294; *Commonwealth v. Steele*, 126 Ky. 670, 104 S. W. 687, 31 Ky. Law Rep. 1033; *Commonwealth v. Ledman*, 127 Ky. 603, 106 S. W. 247, 32 Ky. Law Rep. 452; and *Commonwealth v. Walsh, Trustee*, 133 Ky. 103, 117 S. W. 398. These cases were carefully reviewed by this court in *Commonwealth v. Fidelity Trust Co.*, 147 Ky. 77, 143 S. W. 1037, decided February 21, 1912, with the view of reconciling them, if possible, and laying down a certain rule for future guidance. In closing that opinion, we said:

"We have endeavored to so state the authorities and their relation to this case as to avoid future confusion upon the subject. It is just to the rights of established property that the whole involved subject should be understood once for all. The conclusions reached are easily understood; i. e., that the holders of shares of stock in domestic or foreign corporations, whether franchise or nonfranchise in nature, need not list nor pay taxes upon their shares of stock when the corporation in which the

stock is held has paid all taxes due from it, and assessable against it, upon its property located in the state of Kentucky, whether that property be realty, personalty, tangible or intangible, or franchise, in nature."

In the case at bar appellant answered that each of the Missouri corporations in which she owned the stock, as above recited, owned a lot in Catalpa Court addition to Shelbyville during the years 1913 and 1914, and that they had paid all the taxes due thereon or demanded by the commonwealth, thus bringing appellant within the protection of the rule announced in *Commonwealth v. Fidelity Trust Co.*, supra. The commonwealth insists that these two insignificant lots were bought by the two Missouri corporations at the suggestion of appellant, and for the purpose of relieving her from taxation upon her stock in said two corporations; and it is evident from the proof that this was the purpose of the purchases. Appellant insists, however, that the lumber companies had the right to buy these lots, and, having bought and paid for them, the purpose or motive of the purchase cannot affect the case; that a bad motive may make a bad case worse, but it cannot make that wrong which, in its essence, is lawful. In support of this contention, appellant cites *Chambers & Marshall v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 12 Ky. Law Rep. 699, 11 L. R. A. 545, 34 Am. St. Rep. 165, and *Bourlier Bros. v. Mocauley*, 91 Ky. 134, 15 S. W. 60, 12 Ky. Law Rep. 737, 11 L. R. A. 550, 34 Am. St. Rep. 171, which hold, in effect, that an act legal itself, and which violates no right, cannot be made actionable on account of the motive which induced it, and that the amount and nature of the property owned by the respective lumber companies is immaterial.

The language quoted from the opinion in *Commonwealth v. Fidelity Trust Co.*, supra, is very broad and sweeping. It is, indeed, broad enough in its scope, when taken literally, to include this case, and exempt appellant's stock from taxation. Appellee insists, however, that the statute refers to property held by the corporation for corporate purposes, in pursuance of the corporate business, and not to property subject to escheat for nonuser and incapable of corporate use, and that the language quoted above from *Commonwealth v. Fidelity Trust Co.* should be qualified so as to limit the rule to that extent. None of the cases reviewed and criticized in *Commonwealth v. Fidelity Trust Co.* present the precise question we now have before us. In all of those cases the property of the company upon which the payment of taxes by the corporation operated to relieve the stockholder from taxation upon his shares was property used by the corporation in its business in this state. The court was not called upon, in any of those cases, to consider the case where a corporation owned property in this state which it did not use in its business; and, in our opinion, it is evi-

dent from the discussion, and the scope of the opinion in *Commonwealth v. Fidelity Trust Co.*, supra, that the rule above quoted therefrom was intended to apply only to cases where the property of the corporation within the state was used in the corporate business. Under that rule, wherever the corporation owns property within this state, and uses it bona fide in its business, be it ever so little or insignificant a proportion of its entire property, the payment of taxes thereon by the corporation exempts the stockholders from taxation upon his stock. But the property must be acquired in good faith, and for the corporate use and purposes, and not for the sole purpose of rendering the stock in the hands of a resident stockholder exempt from taxation. We believe this to be the full meaning of the opinion in *Commonwealth v. Fidelity Trust Co.*, supra, when applied to the facts of this case, and that the judgment of the trial court was correct.

Judgment affirmed.

CHAPPELL et ux. v. FRICK CO.*

(Court of Appeals of Kentucky. Oct. 20, 1915.)

1. MORTGAGES ⇨559—FORECLOSURE—PERSONAL JUDGMENT.

In an action against a husband and wife to recover on notes secured by a mortgage and to foreclose the mortgage, it was error to render a personal judgment against the wife for the amount of the notes where she was not a party to the notes and never subscribed them, though she was a party to the mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1592, 1600-1603; Dec. Dig. ⇨559.]

2. DEEDS ⇨124—ESTATES CONVEYED—FEE SIMPLE.

A deed conveying to the grantees the property therein described to have and to hold the land, together with all appurtenances, unto them, their heirs and assigns forever, and containing a covenant by the grantors to warrant the title unto the grantees, their heirs and assigns forever, vested a fee-simple title in the grantees.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 345-355, 416-423, 434, 435, 439, 452; Dec. Dig. ⇨124.]

3. PERPETUITIES ⇨6—RESTRAINT OF ALIENATION.

It is the rule in this jurisdiction that a reasonable restraint on alienation by the grantee or devisee may be imposed by a deed or will, though the instrument passes a fee-simple title.

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. §§ 4-47, 49-53, 56; Dec. Dig. ⇨6.]

4. PERPETUITIES ⇨6—RESTRAINT OF ALIENATION.

A provision of a deed passing a fee-simple title that the grantee was not to sell or convey the land to any one except the heirs of the grantor was void as imposing an unreasonable restraint on alienation; the grantor being still alive and having six children living when the question as to the validity of such provision arose.

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. §§ 4-47, 49-53, 56; Dec. Dig. ⇨6.]

Appeal from Circuit Court, Leslie County.

Action by the Frick Company against Wilson Chappell and wife. From a judgment for plaintiff, defendants appeal. Reversed in part and affirmed in part.

J. M. Muncy, of Hyden, for appellants. Lewis & Lewis, of Hyden, and Miller & Wheeler, of Hazard, for appellee.

HURT, J. Wilson Chappell, of Leslie county, executed to the Frick Company six promissory notes, and to secure the payment of these notes he and his wife, Martha Chappell, executed, acknowledged, and delivered a mortgage to the Frick Company upon some personal property, and, in addition, upon a tract of land containing about 250 acres. The Frick Company instituted this action in the Leslie circuit court against the appellants, Wilson and Martha Chappell, and sought a recovery of a personal judgment against them for the amount of the notes and an enforcement of the lien created by the mortgage, and a sale of the personal property and land to satisfy the personal judgment. The appellants filed an answer, in which they controverted the right of appellee to have or to enforce any lien upon the land by reason of the mortgage to satisfy the debt. A demurrer was filed to the answer, which was sustained, and a judgment rendered according to the prayer of the petition of the plaintiffs, to which the appellants excepted, and prayed an appeal to this court.

[1] The appellant Martha Chappell was not a party to the notes sued on and never subscribed same, and was in no way personally bound upon the notes, and it was error in the trial court to render a personal judgment against her for the amounts of the notes.

The defense presented by the answer to the enforcement of the lien upon the land and for a sale of it to satisfy the debts was that the land was conveyed to the appellants, Wilson Chappell and Martha Chappell, by one Reuben Chappell, and that the power of alienation, by the terms of the deed, was withheld from the appellants, except they should convey it to some of the heirs of Reuben Chappell. The answer set out the fact that Reuben Chappell was still alive, and that he had six living children, and that they were his only children and future heirs at law. It is contended that the mortgage, so far as it attempted to create a lien upon the land, was something which appellants were without power to create and was void.

[2] The deed from Reuben Chappell to the appellants, under which they held title to the lands embraced in the mortgage, was executed on the 7th day of December, 1901. The granting clause of the deed recited that, in consideration of \$500 in hand paid, the parties of the first part "do hereby sell and

convey to the party of the second part" the property described in the deed. The habendum clause of the deed was to the effect that the parties of the second part were "to have and to hold the land, together with all the appurtenances thereunto belonging, unto the party of the second part, their heirs and assigns forever," and was followed by the covenant of the grantors to warrant the title to the land conveyed "unto the parties of the second part, their heirs and assigns forever." This deed, upon its delivery, vested the appellants with a fee-simple title to the property. Following the habendum clause of the deed, was the one relied upon by the appellants, and is as follows:

"The party of the second part is not to sell nor convey this land to any one, except the heirs of the party of the first part."

[3, 4] If the latter clause is valid, the appellants had no power to convey it by a mortgage or to create a lien upon it, but, the deed first having vested them with a fee-simple title, if the clause in question constituted an unreasonable restraint upon the appellants' power of alienation of the land, it was void, and the fee-simple title, with full power of alienation, vested in appellants from delivery of the deed. The question presented is not whether or not, by the terms of the deed, a perpetuity was created, as is prohibited by section 2360, Kentucky Statutes 1915, but is the restraint placed upon the grantee's power of alienation inconsistent and repugnant to the terms of their deed and title and an unreasonable limitation upon their right of disposition of the property vested in them by the deed, and therefore void? The general rule prevailing in most jurisdictions is that, where the fee-simple title to real estate passed under a deed or will, any restraint attempted to be imposed by the deed or will upon the right of the grantee or devisee to alien it is to be treated as void. In 13 Cyc. 669, the rule is thus stated:

"Where an estate in fee simple is granted to a person by proper and sufficient words, a clause in the deed which is in restraint of alienation is void and will be rejected."

The rule prevailing in this jurisdiction, however, is that a reasonable restraint may be imposed, and that such a provision in a deed or will will be upheld. *Lawson v. Lightfoot*, 84 S. W. 739, 27 Ky. Law Rep. 217; *Stewart v. Brady*, 3 Bush, 623; *Wallace v. Smith*, 113 Ky. 263, 68 S. W. 131, 24 Ky. Law Rep. 139; *Stewart v. Barrow*, 7 Bush, 368; *Rice v. Hall*, 42 S. W. 99, 19 Ky. Law Rep. 814; *Kean v. Kean*, 18 S. W. 1032, 19 S. W. 184, 13 Ky. Law Rep. 956; *Best v. Conn*, 10 Bush, 36; *Page v. Frazer*, 14 Bush, 205; *Ernst v. Shinkle*, 95 Ky. 608, 26 S. W. 813; *Johnson v. Dumeyer*, 66 S. W. 1025, 23 Ky. Law Rep. 2243; *Morton v. Morton*, 120 Ky. 257, 85 S. W. 1188. There has been no general rule laid down, however, by which it may be determined what restraints are rea-

sonable and which ones are unreasonable, and each particular case must be considered upon the particular circumstances of it. In the case at bar the grantees, although holding under a fee-simple title, which carries with it, as one of the essential qualities of such an estate, an unlimited power of disposition, are attempted to be restrained by the clause of the deed supra from making any disposition of their lands, not for a limited time and a limited number of persons, but for so long as they may live, unless they can sell it to one of Reuben Chappell's heirs. Reuben Chappell is still alive, and has six children now living. Whether Reuben Chappell may have any children living at the time of his death cannot be known, or whether he may have one or more heirs cannot be known. Whether any heirs of Reuben Chappell may ever desire to buy the land or whether any of his heirs may ever be financially able to buy the land cannot be known. If one of such persons should be willing to purchase it, the appellants, if they sold, would be compelled to submit to receiving such a price and upon such terms as such person would dictate. The heirs of Reuben Chappell might not, in all probability, ever be able financially to purchase the land, or, if so, they might not desire to buy, or, if they desired to buy, they might be willing to become purchasers only at a price which would be ruinous to appellants. If compelled to make a sale, it is very apparent that appellants would be entirely at the mercy of a half dozen or less number of people, if the clause in the deed limiting their power of disposition is valid. The circumstances would, in effect, withhold from appellants the power of alienation of the lands for their entire lives, if they are bound by the limiting clause of the deed. Deeds which have imposed upon the grantees a restraint of the power of alienation to certain specified persons or a person of certain designated class have been held valid and the restraint a reasonable one, but in the case at bar the restraint is upon alienation to the entire world, except a half dozen or less persons. To uphold a restraint upon the power of alienation of a fee-simple estate, except to a certain designated person, would put it into the power of a grantor to limit the grantee's right of disposition to one who will never be able or willing to purchase, and thus take the absolute power of alienation from the grantee for an unreasonable length of time. The rule making void the restraints attempted to be imposed upon the power of alienation of vested fee-simple estates is founded upon reasons of public policy, as being restraints upon the commercial and social advancements of a community. In *Chappel v. Chappel*, 119 S. W. 218, this court, having under consideration a clause in a deed similar to the one in the case at bar, said:

"Neither is the clause in the deed providing that John Chappel 'is not to sell or convey the above land to any one except the heirs of Reuben Chappel' binding upon him. It is entirely inconsistent with the deed, and an unreasonable limitation upon the right of disposition vested in him by the deed subject to the estate retained by the grantors."

For the reasons stated, we conclude that the clause in the deed under which appellants hold which attempts to restrain their power of alienation of the land is an unreasonable restraint and limitation, and is void.

The judgment appealed from, so far as it is a personal judgment against Martha Chappel for the amounts of the notes sued on, is reversed. The judgment otherwise is affirmed.

SMITH v. SOUTHERN FOUNDRY CO.

(Court of Appeals of Kentucky. Oct. 14, 1915.)

1. CORPORATIONS §170 — CONSTRUCTION WITH REFERENCE TO LAW.

The charter of a corporation and the recitals of a certificate of preferred stock must be construed in connection with the statutory law upon the point to determine whether the holder was a creditor of the corporation or a stockholder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 624-632; Dec. Dig. §170.]

2. CORPORATIONS §178 — STOCKHOLDERS — RELATIVE RIGHTS OF COMMON AND PREFERRED STOCKHOLDERS.

Except as to preference in the payment of dividends and distribution of the assets, as when provided by a certificate of preferred stock and the corporation's charter, and authorized by statute, the holders of common and preferred stock have the same rights and are subject to the same liabilities.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 658-662; Dec. Dig. §178.]

3. CORPORATIONS §170—STOCK—PREFERRED STOCK—HOLDER AS CREDITOR.

Where a corporation was organized, the charter and preferred certificates providing that the preferred stock should constitute a prior and preferred lien on the plant and stock and all property of the corporation, and should be entitled, at the end of each fiscal year, to a dividend of 7 per cent., and no more, and that at the end of the third fiscal year 10 per cent. of the preferred stock should be redeemed and retired, and 10 per cent. thereafter at the end of each year until the entire amount should have been redeemed and retired, a holder of a certificate of such preferred stock did not become, by virtue of his ownership, a creditor of the corporation, entitled to enforce payment to him at all events, since, unless the holder of the certificate were a stockholder, and not a creditor, the provision for 7 per cent. dividends would be usurious, and his contract with the corporation void, while it is only in cases where the corporation is solvent and the rights of creditors will not be injuriously affected that agreements as to preferences among stockholders, as between the holders of common and preferred stock, can be enforced, since the entire capital of a corporation, without regard to arrangement between common and preferred stockholders, is at all times subject to and liable for the debts of the corporation, and no part of the capital can be withdrawn from the business until discharge of the debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 624-632; Dec. Dig. §170.]

4. CORPORATIONS §156—DIVIDENDS—STATUS AS DEBT.

Where the directors of a corporation declare a dividend, or where the company has earned profits, and yet the directors wrongfully refuse to declare a dividend, a preferred stockholder occupies the position of a corporate creditor to the extent of the accumulated profits due him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 581-583, 593-603; Dec. Dig. §156.]

5. CORPORATIONS §95 — CONSTRUCTION OF PARTIES—"INTEREST"—"DIVIDEND."

Where a certificate of preferred stock in a corporation provided that it bore interest at the rate of 7 per cent. per annum, payable annually in the way of dividends, such use of the word "interest" did not require that the certificate be construed as a certificate of indebtedness, rather than a certificate of stock, since a further provision of the certificate, that "the said annual dividends shall be paid before any dividends shall be declared or paid on the common stock," showed that the words "interest" and "dividends" were used interchangeably.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 436; Dec. Dig. §95.]

For other definitions, see Words and Phrases, First and Second Series, Dividend; Interest.]

6. CORPORATIONS §152 — DIVIDENDS — DISCRETION OF DIRECTORS.

Dividends are payable from the profits and surplus funds of a corporation as the directors, in the exercise of a sound discretion, declare, with which discretion the courts will not interfere except for the directors' bad faith or willful abuse.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 564-567; Dec. Dig. §152.]

Appeal from Circuit Court, Daviess County.

Action by Robert W. Smith against the Southern Foundry Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Dean & Dean, of Owensboro, for appellant. Miller, Sandidge & Malin, of Owensboro, for appellee.

NUNN, J. The question here is whether ownership of a certificate of preferred stock made appellant a corporate creditor or stockholder. The Southern Foundry Company is a Kentucky corporation organized March 9, 1901. By provision of its charter its capital stock is fixed at \$40,000, consisting of 800 shares of \$50 each. These shares are divided into two classes, viz., common and preferred. The corporation was authorized to issue \$25,000 of its capital as common stock, and \$15,000 of it as preferred. We quote clause 6 of the charter:

"(6) The preferred stock shall constitute a prior and preferred lien on the plant and stock and all property of the corporation. And it shall be entitled at the end of each fiscal year to a dividend of 7 per cent., and no more. At the end of the third fiscal year 10 per cent. of said preferred stock shall be redeemed and retired, and at the end of each fiscal year thereafter 10 per cent. of said preferred stock shall be redeemed and retired until the entire amount shall have been redeemed and retired. However, it is provided that at the end of second fiscal year the board of directors of said corporation shall have the option of redeeming and retiring all or any part of said preferred stock, provided that said part shall be equal to 10 per cent. of said stock."

The charter fixes \$20,000 as the maximum indebtedness of the corporation, and exempts the private property of the stockholders from the payment of corporate indebtedness otherwise than as provided by section 547 of the statute as it then existed; that is, no more than double liability.

Appellant was not one of the original incorporators. His interest in the corporation began five years later, the 1st of June 1903, when the corporation issued to him a certificate for "40 shares of \$50 each of preferred capital stock of the Southern Foundry Company, fully paid and nonassessable." The following provision is contained in the certificate:

"The stock is preferred stock and constitutes a prior and preferred lien on the plant and stock and all the property of the corporation, and bears interest at the rate of 7 per cent. per annum payable annually in the way of dividends, and the holder shall be entitled to receive said interest in the way of annual dividends, on the 9th day of March in each year, and the payment of said annual interest or dividend and the payment of the par value of said stock (when same shall be payable) shall have preference over the common stock issued by said corporation, as provided in the articles of incorporation of the company. The said annual dividends shall be paid before any dividends shall be declared or paid on the common stock of said company. And at the end of the third year after organization 10 per cent. of said preferred stock shall be redeemed and retired, and each year thereafter 10 per cent. of said stock shall be redeemed and retired. After two years from the date of its organization said corporation shall have the right and option to redeem and retire any part or all of said preferred stock, provided said part shall be equal to 10 per cent. of said stock. This stock shall not be entitled to participate in the profits or earnings of the said company, or to receive any dividend on said stock in excess of the annual 7 per cent. dividend as aforesaid."

Appellant brought this suit in equity on the certificate referred to, claiming that thereby the corporation promised and agreed to pay to him the sum of \$2,000, with 7 per cent. interest thereon annually from its date until paid, and also "promised to pay him one-tenth of said principal sum at the end of the third year after the organization of said corporation, and one-tenth at the end of each year thereafter until all of said principal sum was paid." This allegation was made in the face of the fact that the certificate was not issued to him until five years after the corporation was organized. Except the interest up to March 9, 1908, he alleged that no part of the principal or interest was ever paid. He alleged further that by the certificate the corporation gave to him a prior lien on the plant and all its other property. After describing the corporate property, he alleged that on January 15, 1909, the corporation executed a mortgage thereon to H. B. Eagles, as trustee, to secure a bonded indebtedness aggregating \$50,000. Availing that he does not know to what extent the bonds have been negotiated or sold, if at all, nor to whom, he asks that the corporation be required to answer and make such disclosures,

whereupon he will amend and make the holders parties in order that they may set up their claims. He prays judgment against the corporation for \$2,000, and accrued interest at 7 per cent., and that he be adjudged a prior lien on all the corporate property, and that the lien be enforced. The court sustained demurrer to this petition, and, appellant refusing to plead further, it was dismissed. The appeal is prosecuted from that judgment.

Waiving the question as to whether his debt, if such it may be called, was due at the time the action was instituted, we take up the real question in the case, and the one passed upon below, and that is whether the appellant, by virtue of the certificate, became a stockholder or a creditor of the corporation. His petition is framed upon the idea that he was not a stockholder, and that the writing upon which the action was founded, although styled a "stock certificate," was, in fact, a certificate of indebtedness to him on the part of the corporation. The question is one of interpretation, and in this case depends upon the certificate, charter, and statutes of the state. Section 564, Ky. St., authorizes a corporation to classify its capital stock into common and preferred shares, and it may give to each of the several classes such priority of right in the payment of the dividends and in redemption of the shares as may be prescribed in the rules and regulations adopted by the shareholders; and on the voluntary or other dissolution of the company the holders of preferred stock are entitled to have their shares redeemed at par before any distribution of the assets is made among the holders of common stock. This section was not intended to, and must not be construed to, give a stockholder of either class a preference over creditors as to the corporate assets. The charter itself recognized the holders of preferred shares as stockholders in the corporation, for such shares are included within the total capitalization of the company. To construe the charter otherwise would mean to limit the authorized indebtedness of the corporation to \$5,000; for, if the \$15,000 preferred stock be held to be corporate indebtedness, it would practically nullify the provision for \$20,000 indebtedness elsewhere authorized by the charter. Such an interpretation of the charter would be unreasonable and one which would not be given by any person considering an extension of credit to the company. The authorized \$20,000 indebtedness was certainly not intended to embrace any of the capitalization.

[1] Priority as to dividends, liens, and redemptions relate to stockholders, and they are rights which the preferred stockholder has over the common. The charter and certificate must be construed in connection with the statute, and in this state there is no statute giving to the holders of pre-

ferred stock a lien upon the property of the company to the prejudice of creditors. By the charter the preferred stock is a part of the \$40,000 capitalization, and by the certificate in question it is stipulated to be a part of the capitalization. The organization tax was paid thereon. Unless that was the purpose of the certificate, and unless the holder thereof be considered a stockholder, and not a creditor, then the provision for 7 per cent. dividends would be usurious—in conflict with the statutes.

[2] Except as to preference in the payment of dividends and distribution of the assets, as provided by the certificate and charter, and when authorized by statute, the holders of common and preferred stock have the same rights and are subject to the same liabilities.

"As against creditors a preferred stockholder has no greater rights than a common stockholder, and the corporation cannot give them greater rights in the assets of the corporation as against the creditors, unless by virtue of an express statutory provision." 2 Clarke & Marshall on Private Corporations, § 413.

This text was approved in the case of Fryer v. Wiedemann, 148 Ky. 379, 146 S. W. 732, 39 L. R. A. (N. S.) 1011, and, reasoning therefrom, the court concluded that:

"As preferred stock is a part of the capital stock of a corporation, holders of such stock are not preferred to the creditors of the corporation in the distribution of its assets. Consequently, the preferred stockholders cannot be reimbursed before the corporate debts are paid."

[3] The Fryer Case, supra, followed the rule laid down in Rider v. John G. Delker & Sons Co., 145 Ky. 634, 140 S. W. 1011, 39 L. R. A. (N. S.) 1007, where a holder of preferred stock sued a corporation, as in this case, and insisted that he be treated as a creditor, rather than a stockholder. The court said:

"The capital of a corporation is the sum total of its stock, whether common or preferred. Certificates of stock are mere evidences that the holders thereof have invested the sums called for in the certificates in the enterprise. They run the risk of losing their stock if the business is not a success. As between themselves and third persons who deal with the corporation and give it credit, their stock is equally liable. It is only in cases where the corporation is solvent and the rights of creditors will not be injuriously affected thereby that agreements as to preferences among themselves may be enforced. The entire capital, without regard to any arrangement which may exist between common and preferred stockholders, is at all times subject to and liable for the debts of the corporation, and no part of the capital can be withdrawn from the business until the debts of the corporation are satisfied."

[4] But appellant says that this rule does not apply because there is nothing in the case to show that the corporation is insolvent, and therefore, he argues, we cannot infer that the rights of any creditor will be prejudiced. This argument is inconsistent because it is based upon the theory that appellant is a stockholder and entitled to have his stock contract enforced with the corpora-

tion. As we have already noted, the petition shows that some of the dividend payments are past due. He might be treated as a corporate creditor to that extent, if it had appeared that the directors had declared a dividend or that profits had been earned and the directors had wrongfully refused to declare a dividend.

[5] The use of the word "interest" in the certificate does not require that it be construed as a certificate of indebtedness rather than stock. The provision is that:

"It bears interest at the rate of 7 per cent. per annum, payable annually in the way of dividends, and the holder shall be entitled to receive said interest in the way of annual dividends," etc.

That is, the interest is payable in the way or manner of dividend payments; in other words, the payments are due and payable at such times and in the way dividends are paid—out of the net profits, 7 per cent., and no more. That the words interest and dividends are used interchangeably is shown by the following quotation from the certificate:

"The said annual dividends shall be paid before any dividends shall be declared or paid on the common stock of said company."

[6] Dividends are payable out of the profits and surplus funds of the corporation as the directors may, in the exercise of a sound discretion, declare. Unless the directors are guilty of bad faith or a willful abuse of discretion, the courts will not interfere. There being no allegation of profits or of bad faith or abuse of discretion on the part of the directors, the presumption follows that there are no profits out of which to pay dividends.

We are of opinion that the petition and exhibits show that appellant is a stockholder and not a creditor. It follows, therefore, that he is not entitled to a judgment against the corporation for any investment he made in the corporate stock.

The judgment of the lower court, sustaining demurrer to the petition, is therefore affirmed.

RAMEY et al. v. IRONTON LUMBER CO.
et al.

(Court of Appeals of Kentucky. Oct. 20, 1915.)

1. LOGS AND LOGGING — ACTION FOR ADVANCES—SUFFICIENCY OF EVIDENCE.

In an action to recover the balance of money advanced on a timber contract, in which defendants admitted an indebtedness and alleged its overpayment by an order on the cross-defendants, and in which plaintiff by an amended petition sought to recover against the cross-defendants, and in which the measurement of logs sold by defendants to the cross-defendants was the issuable fact, evidence held sufficient to sustain a judgment for defendants against the cross-defendants.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.]

2. APPEAL AND ERROR ⇐877—RIGHT TO ALLEGE ERROR—INSTRUCTIONS—ESTOPPEL.

In such action the cross-defendants were estopped to complain of instructions with reference to a branch of the case affecting only the plaintiff and the defendants and authorizing a verdict for cross-defendants against plaintiff, since neither had any bearing on the verdict upon which the judgment for defendants against cross-defendants was entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. ⇐877.]

3. LOGS AND LOGGING ⇐3 — ACTION FOR ADVANCES—INSTRUCTIONS AND ISSUES.

In such action and cross-actions an instruction that the jury would find for the defendants against the cross-defendants the value of all timber delivered by defendants to the cross-defendants under a contract with them, after deducting the amount paid by the cross-defendants when the contract was made and a certain other payment, and find for defendants the amount admitted by cross-defendants to be due, was proper.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. ⇐8.]

4. APPEAL AND ERROR ⇐216—REVIEW—INSTRUCTIONS.

The contention on appeal that an additional instruction should have been given in the terms indicated by appellants' brief would not be considered, where no such instruction was offered or asked by appellants.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⇐216; Trial, Cent. Dig. § 627.]

Appeal from Circuit Court, Pike County.

Action by the Ironton Lumber Company against W. M. Greer, Franklin Greer, and M. M. Burke, with cross-complaint by defendants against J. B. Ramey and others, composing the partnership of the Breaks Lumber Company, and amended petition making Ramey and others defendants. Verdict for plaintiff against defendants, for cross-defendants against plaintiff, and for defendants Greer against cross-defendants, and the cross-defendants appeal. Affirmed.

J. S. Cline, of Pikeville, for appellants.
J. F. Butler, Roscoe Vanover, E. J. Picklesimer, and J. J. Moore, all of Pikeville, for appellees.

SETTLE, J. The appellee Ironton Lumber Company sued in the court below to recover of the appellees W. M. Greer, Franklin Greer, and M. Burke \$1,530.70, alleged balance due it for money advanced them on a timber contract. The answer of Greer and Burke, which was made a cross-petition against the appellants, J. B. Ramey, Grant Thornberry, and L. R. Thornberry, composing the partnership known as the Breaks Lumber Company, admitted an indebtedness to the Ironton Lumber Company of \$1,254.78, and alleged its overpayment by an order for \$1,379.72 they gave it upon the Breaks Lumber Company; it being alleged that the latter company was then owing them in excess of that amount. Judgment was asked in the cross-petition of the Greers and Burke against the members of the partnership of the Breaks Lumber

Company for the difference between \$1,379.72, for which the order had been given the Ironton Lumber Company on them, and \$1,254.78, the amount they (Greers and Burke) admitted owing the Ironton Lumber Company. The Ironton Lumber Company filed an amended petition making J. B. Ramey, Grant Thornberry, and L. R. Thornberry, partners composing the Breaks Lumber Company, defendants to the action, setting up the order on them received from Greers and Burke, their acceptance of same, and asking judgment against them for the amount thereof, to wit, \$1,379.72. The acceptance of the order in question was in the following language:

"We hereby accept the above order to the amount that we will owe Greer under timber contract."

The acceptance was signed by Ramey and the two Thornberrys. It was further alleged in the amended petition of the Ironton Lumber Company that after their acceptance of the order appellants became indebted to Greer under the timber contract to the full amount of the order accepted by them.

After being served with summons upon the amended petition of the Ironton Lumber Company and the cross-petition of Greers and Burke, the appellants filed, as applicable to both, a pleading styled an answer, counterclaim, and cross-petition, much of which was properly stricken out by the circuit court. Included, however, in the parts not stricken out were allegations to the effect that they had, by a written contract made in March, 1911, with W. M. Greer, bought of him what he falsely represented to be 300 logs in Shelby creek, Pike county, for which they agreed to pay him certain prices set forth in the contract, \$2,000 of which was paid when the contract was made, the remainder to be paid when the logs were rafted and measured. The writing evidencing the contract was filed with and made a part of the answer, counterclaim, and cross-petition. It was also alleged in the answer, counterclaim, and cross-petition that there were, in fact, only about 200 logs in the lot purchased by them of Greer, that when delivered and measured the price of the 200 logs amounted to only \$2,297, \$2,000 of which had previously been paid, and that out of the \$297 remaining they paid one Sol Tackitt the sum of \$168 for assisting them in, and other expenses growing out of, the running of the logs to the mouth of Shelby creek, which left them owing Greer only \$99.80. They denied, however, that the \$99.80 should be paid to the Ironton Lumber Company on the order given on them by Greer, and alleged that the Ironton Lumber Company was indebted to them in the sum of \$119 for some of their timber which that company had wrongfully converted to its use, for which sum they prayed judgment against that company.

Following the filing of the above pleading, Greers and Burke filed an amended answer, reply, and cross-petition containing a traverse of the averments of the answer, counterclaim, and cross-petition of appellants, and alleging that W. M. and Franklin Greer delivered to the latter in Sandy river at the mouth of Shelby creek, under their contract with them, 337 logs, the contract price of which amounted to \$4,004, and, after deducting therefrom the \$2,000 which they were paid by appellants when the contract with respect to the logs was made, and the \$168 which the latter paid to Tackitt, there was left due them from appellants \$1,836, for the difference between which and the order of \$1,379.70 they had given the Ironton Lumber Company they asked judgment against appellants. The Ironton Lumber Company, by reply to the pleading last mentioned, waived all of its claim against Greer and Burke, except \$1,254.78.

After the filing of the voluminous pleadings referred to the case went to trial, and the jury returned a verdict in favor of the Ironton Lumber Company against Greer and Burke for \$1,254.78, of which the latter do not complain. They also returned a verdict in favor of appellants against the Ironton Lumber Company for the sum of \$119, of which the latter company makes no complaint; and, finally, a verdict in favor of W. M. and Franklin Greer against appellants, J. B. Ramey and Grant and L. R. Thornberry, for \$1,200. Judgment was entered in conformity to the above findings, and the court, on its own motion, credited the judgment of the Ironton Lumber Company of \$1,254.78 against Greer and Burke with the \$1,200 for which W. M. and Franklin Greer were given a verdict by the jury against appellants. Appellants complain of the verdict of \$1,200 returned against them in favor of the Greers, and by this appeal seek the reversal of the judgment entered thereon. The grounds urged by appellants for the reversal of the judgment are: (1) That the trial court erred in refusing their request for a peremptory instruction directing a verdict in their behalf as against the Greers; (2) that the verdict is flagrantly against the evidence; (3) error of the trial court in instructing the jury.

[1] The first and second grounds will be considered together. In our view of the evidence neither of them can be sustained. The written contract between W. M. Greer and appellants, properly interpreted, simply means that appellants purchased of Greer, at the prices therein stipulated, what they and Greer estimated to be 300 logs then in Shelby creek; that \$2,000 of the purchase money was then paid Greer by the appellants; that these logs were to be delivered by Greer at the boom or the mouth of Shelby creek, and, when delivered, were to be rafted by appellants, and by them then measured to ascertain the purchase price of

the whole, which, after deducting the \$2,000 previously received by Greer, they were to immediately pay.

Such being the meaning of the contract, the question that next arises is: Did Greer deliver in the river a sufficient number of logs to amount at the contract prices to a sum that would equal the \$2,000 paid him at the making of the contract, plus \$168 which appellants admittedly paid Tackitt, plus \$1,200, the amount of the verdict and judgment recovered by the Greers. If this proposition has been established by the evidence, the right of the Greers to recover of appellants the \$1,200 awarded them by the verdict of the jury and judgment of the court cannot be doubted.

It is not to be overlooked that the logs which were sold under the contract were in Shelby creek at the time of the sale, and that appellants, or some of them, then saw the logs and joined with Greer in making the estimate as to the number. If there were then less than 300 of the logs, they would hardly have agreed with Greer that such was their number. It was also their estimate, as well as his, that the \$2,000 they then willingly paid him did not exceed half the estimated value of the logs then in the creek. Otherwise it is not reasonable to suppose that they would then have paid him \$2,000 as the estimated half of the value of the logs. There is no contrariety of evidence as to the fact that at the time of the institution of this action all the logs which Greer had in Shelby creek he had delivered at the boom or in the river, and that they had been measured after their delivery both by W. M. Greer and his brother, Franklin, and also measured by the appellants when rafted by them.

According to the evidence of the Greers there were 337 logs delivered. W. M. Greer testified, in which he was corroborated by his brother, Franklin Greer, that he and his brother measured all of these logs, and that by actual measurement there were 13,360 cubes, which, at the contract price, amounted to \$4,004, and that, after giving appellants credit by the \$2,000 paid before the delivery and the \$168 paid Tackitt, there was still left a balance in his (Greer's) favor of \$1,836. The measurements thus made were also corroborated by the original tally sheets containing the entries which were made by W. M. Greer and Franklin Greer. The measurement of the logs made by appellants at a different time was not shown by the introduction of original tally sheets, but only by the ledger, purporting to have been copied from the original entries, without showing the details contained in the Greer tally sheets.

The evidence introduced for appellants tended to prove that there were between 200 and 240 logs. In addition to the measurement shown by their ledger, the appellants

Ramey and Grant Thornberry testified that all the logs purchased of Greer were sold and delivered by them to the appellee Iron-ton Lumber Company, which gave that company an opportunity of ascertaining whether they had underestimated the Greer logs in the measurement made by them. Other evidence in the record, however, contradicted their testimony in this particular, as it shows that the Iron-ton Lumber Company did not get all the logs appellants received of W. M. Greer. One of the witnesses so testifying, M. B. Collinworth, said he bought from appellants a very fine raft of poplar logs for the Dawkins Lumber Com-pany which had been obtained by them from Greer; this, as he further said, being shown by the red painted marks on them peculiar to the Greer logs, as well as by the state-ments of the appellants Ramey and Grant Thornberry that the logs were a part of the Greer timber.

We do not understand it to have been se-riously denied by appellants or any of their witnesses that all the Greer logs that were in Shelby creek went into the river. Indeed, both J. B. Ramey and Grant Thornberry seemed to admit that they did. Therefore the only conflict in the evidence was as to the quantity of material contained in them and the respective measurements made of them by the parties to the contract. Without further discussing the evidence or indicating, as we might do, particular statements of cer-tain witnesses, we think it sufficient to say that, in our opinion, the weight of it conduces to establish the claim of the appellees that there were 337 logs delivered appellants by W. M. Greer, sufficient in quantity to amount in value to approximately \$4,000, which, if true, entitled the Greers to the verdict and judgment of \$1,200 recovered by them against appellants. At any rate, the entire evidence went to and was considered by the jury, whose province it was to weigh and deter-mine its weight and effect.

It follows from what has been said that the record furnishes no support either for appellants' complaint of the refusal by the trial court of the peremptory instruction asked by them or their further contention that the verdict is flagrantly against the evi-dence.

[2] Equally groundless is the appellants' complaint of the instructions. Indeed, they are estopped to complain of instructions A and C as neither has any bearing on the verdict upon which the judgment appealed from was entered. Instruction A is with reference to a branch of the case affecting only the Iron-ton Lumber Company and the Greers, with which appellants were not con-cerned; and instruction C authorized the verdict for \$119 which the jury returned for appellants against the Iron-ton Lumber Com-pany, and from the judgment entered on which the latter did not and could not appeal.

[3] Appellants do, however, object to in-struction B, which is as follows:

"The jury will find for the defendants W. M. Greer and Franklin Greer against the defend-ants Grant Thornberry, L. R. Thornberry, and J. B. Ramey the value of all timber delivered by said Greers to said Thornberrys and Ramey at the mouth of Shelby creek under the contract in evidence between the said parties, after de-ducting the \$2,000 paid at the time the contract was entered into, and after deducting the \$168 paid Sol Tackitt, if they shall find anything is due; but at all events they will find for de-fendants Greer and Greer the sum of \$99.90 admitted by Thornberrys and Ramey to be due said Greer and Greer."

This instruction in simple language sub-mitted to the decision of the jury the only issue to be determined in the case. Instead of being open to criticism, it is to be com-mended for its clearness and brevity. In-deed, this is so manifest that further discus-sion of it is deemed unnecessary.

[4] Appellants contend that an additional instruction should have been given in the terms indicated by their brief. This conten-tion will not be considered, in view of the fact that such an instruction, nor any other, was offered or asked by appellants.

Judgment affirmed.

GORDON v. CHESAPEAKE & O. RY. CO.

(Court of Appeals of Kentucky. Oct. 21, 1915.)

1. MASTER AND SERVANT — 107 — DEGREE OF CARE — INJURY TO SERVANT — LIABILITY.

Where plaintiff, an employé of defendant railway company, was injured by the explosion of a signal torpedo placed on the track, when it was run over by a hand car, defendant is not liable for failing to exercise the greatest de-gree of care in handling explosives, since the rule requiring such care does not apply to sig-nal torpedoes, placed on the track for signaling purposes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. — 107.]

2. MASTER AND SERVANT — 112 — INJURY TO SERVANT — CARE — PLACE OF WORK — RAIL-WAY TRACK.

Where plaintiff, an employé of defendant railway company, was injured by the explo-sion of a signal torpedo, placed on the track, when run over by a hand car, defendant is not liable for failure to exercise ordinary care in providing a reasonably safe place to work, for there was no negligence in placing the signal torpedo on the track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 212, 213, 218-223; Dec. Dig. — 112.]

3. MASTER AND SERVANT — 190 — FELLOW SERVANT — FOREMAN — NEGLIGENCE.

Where plaintiff, an employé of defendant railway company, was injured by the explo-sion of a signal torpedo, placed on the track, when run over by a hand car, the negligence of the foreman in charge of the hand car in failing to observe the torpedo, if gross, will render the company liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. — 190.]

4. MASTER AND SERVANT \Leftrightarrow 210—ASSUMPTION OF RISK—RAILWAY TRACKS—SIGNAL TORPEDOES.

Injury by the explosion of a signal torpedo on the track is a risk assumed by section hands employed by a railway company, in the absence of gross negligence of the section foreman in failing to discover it before running over it with the hand car.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 554-556; Dec. Dig. \Leftrightarrow 210.]

Appeal from Circuit Court, Greenup County.

Action by W. H. Gordon against the Chesapeake & Ohio Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

S. S. Willis and R. D. Davis, both of Ashland, for appellant. Worthington, Cochran & Browning, of Maysville, for appellee.

HANNAH, J. W. H. Gordon sued the Chesapeake & Ohio Railway Company in the Greenup circuit court to recover damages for injuries said to have been sustained as the result of the explosion of a railroad signal torpedo. Upon the trial, the jury returned a verdict for the defendant, and the plaintiff appeals.

Gordon was a section man in the employment of appellee railroad company. His foreman was William Ratcliff. Ratcliff and his section crew, and another section foreman, Burt Burns, and his crew, were working together. They were transporting rails, one end of the rails being on Burns' car, which was in front, and the other end being on Ratcliff's car. The hand car in front ran over a railroad signal torpedo, causing it to explode; and it was claimed by appellant that a fragment of the torpedo struck and injured his leg. The section foreman and all of the crew who were asked the question testified that Gordon made no complaint of having been injured at the time; but some days thereafter he ceased work. He had been affected for some time prior to the date of this alleged injury with a chronic disease of the leg, the after effects of an attack of typhoid fever.

There were four grounds of negligence charged in the petition: (1) Failure to exercise the utmost care in the handling of dangerous explosives; (2) failure to warn and instruct plaintiff of the presence of the torpedo on the track, and the danger therefrom; (3) failure to exercise ordinary care to provide and maintain a reasonably safe place in which to work; and (4) negligent running of the hand car over the torpedo and exploding it.

[1] Appellant offered an instruction covering all the grounds of negligence so charged, but the court declined to give it, and in submitting the case to the jury told them that if they believed, from the evidence, that the section foreman in charge of the front hand

car by gross negligence failed to discover the torpedo on the track, and plaintiff was thereby injured, they should find for him. The trial court was right in declining to give the instruction offered by plaintiff. The rules applicable to the storage, handling, and care of explosives do not apply to railroad signal torpedoes, when placed on the track for signaling purposes. Nor is the rule that it is the duty of the master to warn and instruct the servant here applicable, for the servant's injuries did not result because of the master's failure so to do.

[2] Nor is there involved any breach of the duty to exercise ordinary care to provide a reasonably safe place in which to work. The place where the servant was at work was unsafe, if at all, only because of the presence of the torpedo on the track, and under the rule of *Mize v. L. & N. R. R.*, 127 Ky. 496, 105 S. W. 908, 32 Ky. Law Rep. 415, 16 L. R. A. (N. S.) 1084, there was no negligence in placing the torpedo there. But there may have been negligence in running over and exploding the torpedo.

[3] The act of running a train over its track by a railroad company is not negligence; but it may be negligence for a section foreman, proceeding over the track with his crew on a hand car, not to observe the approach of the train. *Long's Adm'r v. I. C. R. R.*, 68 S. W. 1095, 24 Ky. Law Rep. 567, 58 L. R. A. 237; *I. C. R. R. v. McIntosh*, 18 Ky. 145, 80 S. W. 496, 81 S. W. 270, 26 Ky. Law Rep. 14. So, although it was not negligence on the part of the railroad company to place the torpedo on its track, yet, inasmuch as such torpedoes explode with considerable violence, it might be negligence for a section foreman, proceeding over the track with his crew on a hand car, to fail to observe the presence of the torpedo thereon; and if that negligence be gross, a sectionman thereby injured may recover from the master. The instruction complained of was correct.

[4] 2. Appellant also complains of the instruction on assumed risk, whereby the jury were informed that the railroad company was not negligent in placing the torpedo on the track, that the danger therefrom was one of the risks ordinarily incident to plaintiff's employment, that he assumed all the risks ordinarily incident thereto, and that, unless the section foreman was guilty of gross negligence in failing to observe the torpedo, the plaintiff could not recover. This instruction was likewise correct. It was held in the *Mize Case*, supra, that the danger from torpedoes was a risk ordinarily incident to the servant's employment. The plaintiff assumed all the risks ordinarily incident to his employment, including a want of ordinary care upon the part of the section foreman, but not the risk incidental to gross negligence on his part. *I. C. R. R. v. McIntosh*, supra. He did not assume, of course, risks arising from

a breach of duty upon the part of the master to furnish a reasonably safe place in which to work; but, as we have heretofore explained, there is no breach of such duty here involved.

The only ground of negligence upon which plaintiff could have recovered was submitted to the jury under instructions that were free from meritorious criticism, and the jury has found against him. He has, therefore, no valid cause for complaint.

Judgment affirmed.

JEWELL et al. v. WHITE.

(Court of Appeals of Kentucky. Oct. 21, 1915.)

WILLS — 545 — CONSTRUCTION — "DYING WITHOUT LAWFUL HEIRS."

Where a will devises an estate for life, with remainder in fee to testator's grandson conditioned upon his dying without lawful heirs of his own body, and that in such event the estate shall revert and descend to testator's stepdaughters, the words "dying without lawful heirs" are to be restricted to the death of the remainderman before the termination of the particular estate; and hence, where the life tenant died during the lifetime of the remainderman, he was invested with a fee-simple title.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1171-1176, 1310-1318; Dec. Dig. — 545.

For other definitions, see Words and Phrases, First and Second Series, Die Without Heirs.]

Appeal from Circuit Court, Jessamine County.

Action between A. H. Jewell and others and Joel White. From a judgment for Joel White, the adverse parties appeal. Affirmed.

Bailey D. Berry, of Lexington, for appellants. John H. Welch, of Nicholasville, for appellee.

NUNN, J. The question for decision is: What estate did Joel White, Jr., take under the will of his grandfather, Joel White, Sr. The controversy involves the construction of the first clause in the will, which is as follows:

"Having heretofore given and conveyed to my daughter Kate C. Robards and her husband Lewis S. Robards by deed of date May 8th, 1879, 125 acres of my land, I now devise, will and bequeath in fee simple to my grandson Joel White, Jr., son of my deceased son John White, my tract of land lying in said county and state and containing about 110 or 112 acres be the same more or less, with its appurtenances and known as the Messick Farm, subject however to the life estate of my wife Minerva J. White, who is to have the use, control and proceeds of the same during her natural life, and if my said grandson shall die without lawful heirs of his own body, then said lands and the title thereto are to revert and descend to my daughter, said Kate C. Robards, and my stepdaughters Sarah Frakes and Mary Frank Jewell, equally if then living or to their descendants if dead."

Testator's wife is dead, and the stepdaughters of Kate C. Robards are claiming a contingent interest in the land devised upon the theory that Joel White, Jr., has only a de-

feasible fee, liable to be defeated by his death without issue. Appellee contends that his title has ripened into a fee, since he survived the life tenant, Minerva J. White. This was the view of the lower court, and of its correctness we think there can be no doubt.

In the case of *Harvey v. Bell*, 118 Ky. 521, 81 S. W. 674, 26 Ky. Law Rep. 381, the court set forth four rules for determining questions of this character. This case comes within the first rule, and, in our opinion, is concluded by it. The rule is as follows:

"Where an estate is devised to one for life, with remainder to another, and, if the remainderman die without children or issue, then to a third person, the rule is that the words 'dying without * * * issue' are restricted to the death of the remainderman before the termination of the particular estate."

The will in question devised the estate to Minerva J. White for life, with remainder in fee to his grandson, Joel White, Jr., conditioned, however, upon his dying "without lawful heirs of his own body," then in that event the estate, or a portion thereof, shall "revert and descend" to the appellants. The words "die without lawful heirs" are, in the language of the rule, supra, "restricted to the death of the remainderman before the termination of the particular estate." The particular estate having terminated during his lifetime, he was invested then with the fee simple title.

A more recent case of *Cassity v. Riley*, 158 Ky. 507, 165 S. W. 679, had under consideration a will with similar provisions, and, in applying the rule in the *Harvey Case*, the court said that the purpose of the clause with reference to death of Joel White, Jr., without issue was not to qualify the fee-simple estate, but to provide who should take the estate in case the devisee died before time of distribution; that is, before the life tenant died. Kentucky Statutes, § 2342; *Bradshaw v. Butler*, 110 S. W. 422, 33 Ky. Law Rep. 531; *Moore's Adm'r v. Sleet*, 113 Ky. 600, 68 S. W. 642, 24 Ky. Law Rep. 426.

The judgment of the lower court is affirmed.

EDGE v. ALLEN.

(Court of Appeals of Kentucky. Oct. 20, 1915.)

ELECTIONS — 280 — NOTICE OF CONTEST — TIME — "JURISDICTIONAL DEFECT" — STATUTES.

Under Primary Election Law (Laws 1912, c. 7) § 23 (Ky. St. 1915, § 1550, subsec. 23), providing that any candidate contesting the nomination of another candidate must give the nominee a written notice of such contest within five days from the award of the certificate of nomination, and that the notice shall be served in the same manner as a summons from the circuit court, a notice of contest placed in the hands of the sheriff four days after the award of the certificate of nomination, without instructions as to how it should be served, and during the contestee's absence from the jurisdiction on account of sickness, a copy of which was posted on the front door of the contestee's residence, according to Civ. Code Prac. § 623,

on the ninth day was served too late, and was a jurisdictional defect, so that the contest would be dismissed.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 264; Dec. Dig. ¶ 280.

For other definitions, see Words and Phrases, Second Series, Jurisdictional Defect.]

Appeal from Circuit Court, Fayette County.

Election contest by J. A. Edge against John R. Allen. From a judgment dismissing the contest, contestant appeals. Affirmed.

S. Jewell Rice, of Lexington, for appellant. Henry T. Duncan, Sam M. Wilson, and J. R. Bush, all of Lexington, for appellee.

MILLER, C. J. The appellant, J. A. Edge, and the appellee, John R. Allen, were candidates for the Democratic nomination for the office of commonwealth's attorney of the Twenty-Second judicial district (Fayette county), at the primary election held on August 7, 1915. The board of election commissioners canvassed the election returns, and, having certified that Allen had received 2,898 votes, and that Edge had received 1,468 votes, it awarded its certificate of nomination to Allen, on August 10th. On Saturday, August 14th, Edge placed a notice of contest in the hands of the sheriff, but gave no instructions as to how it should be served. Early in the following week the sheriff advised Edge that Allen was absent from Fayette county, and asked for instructions concerning the service of the notice. Edge directed him to wait for further instructions. On Thursday, August 19th, Edge directed the sheriff to post a copy of the notice on the front door of Allen's residence, which was done, and the sheriff made his return upon the notice accordingly. At the trial held on August 23d counsel for contestee filed a special demurrer to the jurisdiction of the court, and at the same time entered a motion to dismiss the contest, admitting the return on the notice to be good in form, but claiming it was served too late under the statute to give the court jurisdiction of the contest. The chancellor dismissed the contest, and Edge appeals.

Section 28 of the primary election law of 1912 (Carroll's Statutes 1915, § 1550, subsec. 28) provides that any candidate wishing to contest the nomination of another candidate who was voted for at any primary election held under the act must give notice in writing to the person whose nomination he intends to contest, stating the grounds of such contest, within five days from the time the election commissioners shall have awarded the certificate of nomination to such candidate whose nomination is contested. The statute further provides that the notice shall be served in the same manner as a summons from the circuit court, and shall warn the contestee of the time and place he is required to answer the contest, etc. It will be remembered that the certificate of nomination was

awarded to Allen on August 10th, and that the notice of contest was served by tacking a copy thereof upon the front door of Allen's residence on August 19th, nine days after the certificate had been awarded. It is claimed by counsel for contestant that, inasmuch as the contest was instituted within the prescribed five days, by placing the notice in the sheriff's hands, that was the limit of his capacity and opportunity to perfect the contest, and a failure on the part of the sheriff to post the notice on Allen's door within five days ought not to prejudice his right of contest. This statute has been construed by this court upon more than one occasion, and its meaning is not in doubt.

In Price v. Russell, 154 Ky. 824, 159 S. W. 573, the primary election had been held on August 2, 1913, and the certificate of nomination awarded to Russell on August 5th. On August 9th notice of contest was placed in the hands of the sheriff, but was not served until Monday, August 11th, six days after the certificate of nomination had been awarded to Russell. At the same time this court heard the appeal of Coleman v. Morgan, which arose out of the contest for the nomination for sheriff at the same election. The certificate of nomination had been awarded to Morgan on August 11th, and the notice of contest had been placed in the hands of the sheriff for service on August 15th, which was within the five days, but it was not served until August 16th. It will thus be observed that in Price v. Russell the notice of contest was served two days after the expiration of the five days, and in Coleman v. Morgan it was served one day after the expiration of the five days. In deciding that the contests in those cases must fail for the reason that the notice had not been served upon either contestee within five days after the awarding of the certificate of nomination, this court said:

"It is also insisted that the contestant should not be prejudiced by the failure of the sheriff to execute the notice on the day he received it; that when he prepared his notice and gave it to the sheriff to execute he had done all he could do. It is pointed out that when a petition is filed, and summons issued in good faith, an action is begun, and that the failure of the sheriff to serve the summons promptly does not affect the plaintiff. But the right to contest a primary election comes entirely from the statute, and the Legislature, in conferring the right, could confer it upon such terms as it saw fit. It has seen fit to make the service of notice in five days a condition precedent to a contest; for notice in writing of the contest is not given to the person whose nomination is contested until the notice is served on him. The statute is unambiguous. The giving of the notice in writing to the person whose nomination is contested within five days is a condition precedent to the right of contest. If the notice is not given, the right fails. The Legislature might have provided for the filing of a petition in five days, and the service of a summons issuing on it, but it did not do so, and we are powerless to add to the words of the statute. 15 Cyc. 402."

Later, in *McKay v. Grundy*, 155 Ky. 115, 159 S. W. 655, it was held that, although the statute *supra* provided that the notice should be served in the same manner as a summons from the circuit court, it could be served in the manner provided by section 625 of the Civil Code, by delivering a copy thereof to some person over sixteen years of age residing in the family, or by affixing a copy thereof to the front door of the contestee's residence, in case the contestee was fraudulently secreting himself so that a summons could not be served upon him. And the same rule applies where the contestee remains beyond the jurisdiction of the court, as here, for a good reason. But in any state of case the notice must be served in some way within the five days prescribed by the statute.

It is proper to say that there is no question made in this case of any attempt upon the part of the contestee to secrete himself, or to prevent the service of the notice upon him, since his absence from Lexington had been prolonged and necessary from ill health. The proof shows without contradiction or question that the contestee had been stricken with a severe and prolonged attack of typhoid fever in the autumn of 1914, and that upon the adjournment of court in the last week of June, 1915, being still weak and unfit for work, he had, by the express orders of his physician, gone to White Sulphur Springs, W. Va., to recuperate. At the trial of this case in August he was still at White Sulphur Springs, unwell and unfit for work, although he was recuperating slowly. His absence from Lexington, and the cause of it, were generally known and regretted.

But, under the authorities above quoted, the service of the notice in some way, either by delivering a copy thereof to the contestee, or by posting a copy of the notice upon his residence, as required by section 625 of the Code, was jurisdictional; and, as it was not served in this case until four days after that period had expired, the circuit court properly dismissed the contest.

Judgment affirmed.

CINCINNATI, N. O. & T. P. RY. CO. v. SWEENEY.

(Court of Appeals of Kentucky. Oct. 22, 1915.)

1. DAMAGES — 113 — MEASURE — INJURIES TO AUTOMOBILE.

In an action against a railroad company for injuries to an automobile, an instruction that the measure of damages was the "difference in value of the automobile before and after it was injured, at the time of said injury," was erroneous, since the true measure of damages is the market value before and after the injury where the property is not totally destroyed, and the market value before the injury where the property is destroyed.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 90, 91, 279, 280; Dec. Dig. § 113.]

2. DAMAGES — 188 — MEASURE OF DAMAGES — INJURIES TO PERSONAL PROPERTY.

In an action for injuries to an automobile at a railroad crossing, it was not error for the court to fix the maximum amount which might be recovered at the greatest, which any evidence conducted to show was the difference between the market value of the machine immediately before and immediately after the injury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 511; Dec. Dig. § 188.]

Appeal from Circuit Court, Boyle County.

Action by E. B. Sweeney against the Cincinnati, New Orleans & Texas Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Nelson D. Rodes and Charles H. Rodes, both of Danville, and John Galvin, of Cincinnati, Ohio, for appellant. Emmet Puryear, John W. Rawlings, and Robt. Harding, all of Danville, for appellee.

HURT, J. This was a suit by the appellee, E. B. Sweeney, against the appellant, to recover damages on account of injuries to an automobile. The appellee claims that a certain crossing of the appellant's track across a pike was greatly out of repair, defective, and not reasonably safe for travel over it, and that these conditions arose from the gross negligence of the appellant in failing to properly maintain the crossing in a reasonably safe condition for travel over it, and that by reason of its condition his automobile, although he was exercising ordinary care for its safety, in passing over the crossing, was caused to turn from its course, and to run off the crossing, with one of the rails of the railroad track between the wheels of the automobile, when immediately and before he had time in which to extricate the automobile from its position, one of appellant's trains, without warning to him, approached at a dangerous rate of speed, and struck the automobile with such force that it was knocked to a distance of several feet and greatly injured and damaged. The appellee laid the damages to his automobile at \$750. The trial resulted in a verdict by the jury in favor of appellee, in which it fixed the damages, which the appellee sustained by reason of the matters complained of, at the sum of \$650, and the court rendered a verdict in favor of appellee accordingly. The appellant filed grounds and moved the court to set aside the verdict and judgment and to grant it a new trial, but the court overruled the motion, to which appellant excepted, and prayed an appeal to this court.

[1] The appellant insists that the trial court erred to its prejudice in giving instruction No. 2 to the jury, and in refusing it a new trial because of its claim that the damages awarded were excessive and indicated that the jury was actuated by passion and prejudice in fixing the amount of the recovery. Instruction No. 2 was given by the

court upon the motion of appellee and over the objection of the appellant, and is the instruction given which fixed the measure of damages by which the jury was to be guided in making its verdict, if it should find for appellee, and is as follows:

"If your finding be for the plaintiff, you will find for the plaintiff the difference in value of said automobile before and after it was injured, at the time of said injury of same, not to exceed, however, the sum of \$650."

The contention of appellant is that the measure of damages was the difference in the market value of the automobile just before it received the injuries and just after it received the injuries, while the appellee complains of the action of the court in limiting the amount of his recovery to \$650, when the amount sought by him in his petition was \$750. The argument is advanced that the measure of damages fixed by the instruction is correct, because a secondhand automobile has no market value, although it has a real value for use. It becomes necessary to recite the evidence given upon the trial as to the value of the automobile and its injuries. The appellee gave evidence to the effect that the machine and its attachments cost him the sum of \$750 nine months before the injuries complained of; that he had used it, since he had owned it, in traveling about 1,600 miles; that he had certain repairs made upon it, a short time before the injuries occurred, had tested the machine fully; that it had by reason of its use become "limbered up," and was really a better machine than when he purchased it. All of this was competent evidence as tending to establish its market value. Other evidence was given tending to prove that the market value of the machine, at the time of the injuries to it, was \$500; that the market price of a new machine of the kind and make of the appellee's, at the time of the injuries to it, was \$650; that the use of a machine of the kind and make of appellee's, for the length of time his had been used, in a proper and reasonable way, reduced the value of such a machine from one-third to one-half of its original value; that the machine in its injured condition was of the value of \$150; and that it was susceptible of being repaired. The appellee, after the injury, seems to have abandoned the machine, and the appellant caused it to be removed into one of its depots, where it has remained ever since. The appellee insists that he ought to recover the full value of the machine, immediately before its injury, because the appellant had converted the machine to its own use. The petition does not allege any conversion of it by appellant, and does not rely upon such a cause of action, but is simply an action to recover for the damages it suffered. Appellee has never made any demand for its possession, and, so far as the record shows, there has been no conversion of it, and no refusal by appellant to give the possession,

and appellee has only to go and possess himself of it. The title to the property has not changed. The appellee did not attempt to do anything to minimize his loss by having the machine repaired or otherwise.

To say that a secondhand automobile has not a market value would be the same as to hold that wagons and carriages, after a period of use, have not a market value, because no two of them would be in exactly the same condition, as to use, "wear, and tear." If an action was pending for destruction of or injury to a wagon or carriage, after a period of use, the owner would certainly be limited in his recovery to the reasonable market value of the article immediately before its destruction, if the injury suffered by it was irreparable, or the difference between its reasonable market value immediately before the injury and immediately thereafter if it was susceptible of being repaired. We see no reason why the same rule should not apply to injuries to an automobile. It is a matter of common knowledge that automobiles in all stages of use and repair are being daily exchanged in barter and sales. If an automobile is totally destroyed, or if an automobile suffers injuries, the damages to the owner from the destruction or injury of the machine, alone, cannot be more than his loss, which in the first instance is its value immediately before its destruction, and, in the second instance, is the difference between its value in its injured condition and its value before the injuries. To fix these values, the law refuses to leave it to the imagination of the owner of the injured property, or to the opinion which a jury may set up as the criterion of value, and which may vary in different cases and with each jury, but has adopted the market value, as the one most tangible and the one which can be most easily and certainly laid hold of. This question has been definitely settled by this court in former adjudications, and is now beyond the sphere of controversy. In the case of *Weil v. Hagan*, 161 Ky. 292, 170 S. W. 618, the rule was laid down as follows:

"In the case of injury to personal property, the measure of damages is the difference between its market value before, and its market value after, the injury."

In the recent case of *Southern Ry. Co. in Ky. v. Kentucky Grocery Co.*, 166 Ky. 94, 178 S. W. 1162, the following was declared to be the rule in the cases of destruction or injury to personal property:

"Where an injury to personal property does not effect its destruction—that is, where it is susceptible of repair—the measure of damages is the difference between the reasonable market value of the property immediately before the injury at the place thereof, and its reasonable market value immediately after the injury at the place thereof."

If the destruction of personal property is so complete that it is not susceptible of repair, the measure of damages is its reason-

able market value immediately before its destruction.

[2] With regard to the fact of the court fixing the maximum amount which appellee could be allowed to recover at \$850, instead of \$750, the amount sued for, it was not error for the court to fix the maximum amount at the greatest, which any evidence conduced to show was the difference between the market value of the machine immediately before the injuries to it and its market value immediately thereafter.

For the error embraced in the instruction, supra, the judgment will have to be reversed, and it will not be necessary to discuss the other grounds of reversal relied upon, as upon another trial other facts may be in evidence which the present record fails to show.

The judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

TAYLOR et al. v. DEDMAN.

(Court of Appeals of Kentucky. Oct. 22, 1915.)

DEEDS \Leftrightarrow 129—CONSTRUCTION—ESTATE CONVEYED.

Where it appeared from the terms of a deed that the intention of the parties thereto was that the grantees should each have a life estate which should not be subject to their debts or to the control of their husbands, and which was not to be incumbered, and that upon the death of both the grantees the property should go to the children of one of them, if she had any, the grantees took a life estate merely, and not the fee-simple title, although the granting part of the deed conveyed the property to the grantees jointly without limitation.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 351, 360-365, 416-430, 434, 435; Dec. Dig. \Leftrightarrow 129.]

Appeal from Circuit Court, Mercer County.

Suit by Missie Taylor and her husband against J. O. Dedman for specific performance. Judgment for defendant, and plaintiffs appeal. Affirmed.

R. W. Keenon, of Harrodsburg, for appellants. C. E. Rankin, of Harrodsburg, for appellee.

CLAY, C. On November 24, 1914, Missie Taylor and her husband, James N. Taylor, entered into a written contract with J. O. Dedman, whereby, in consideration of the sum of \$450 to be paid upon execution and delivery of the deed, they agreed to convey to him the fee-simple title to certain property located in Mercer county. On November 25, 1914, the Taylors tendered to Dedman a deed to the property and demanded payment of the purchase price. Dedman refused to accept the deed on the ground that Missie Taylor owned only a life estate in the property. Thereupon this suit was brought to enforce the contract. The contention of Dedman was sustained by the chancellor,

and specific performance denied. The Taylors appeal.

The case turns on the proper construction of a deed dated March 28, 1892, and executed and delivered by Phil B. Thompson and wife to Mollie Young and Missie Passmore, which, omitting the description of the property conveyed, is as follows:

"This indenture made and entered into this 26th day of March, 1892, between Phil B. Thompson, Sr., and Mat. A. Thompson, his wife, parties of the first part, and Mollie Young and Missie Passmore, daughter of Mollie Young, of the second part. Witnesseth: That parties of the first part, in consideration of three hundred and thirty-six dollars and eighteen cents (\$336.18), payable one day after date, for which sum the said Mollie Young has this day executed her note, and for the payment of which said note a lien is hereby retained on the house and lot hereby conveyed, have this day by their presents do bargain, sell, and convey unto the party of the second part, the following described property, situated in the town of Harrodsburg, county of Mercer, and state of Kentucky, and bounded as follows: [Here follows description.] To have and to hold to the parties of the second part, their heirs and assigns forever, with clause of general warranty, provided that the property hereby conveyed shall not be subject to the debts now owing or that may be hereafter contracted by said parties of either. The right of the said Mollie to use and occupy the same as a home shall not be liable in law or equity to be sold or rented out. * * * The right of said Missie Passmore to occupy the same as a home shall not be liable in law or equity to be sold or rented out. The said property on the death of said Mollie Young shall be the absolute property of Missie Passmore, provided Missie Passmore should outlive the said Mollie Young.

"Should said Mollie Young outlive the said Missie Passmore, then the property to be the absolute property of Mollie Young. Should the said Missie Passmore have any child or children, upon the death of Mollie Young and said Missie Passmore, the property to be the property absolutely of said child or children, nor shall the right of said child or children to use and occupy the same be held liable in law or equity for any debts of said Mollie Young or Missie Passmore, or child or children. The right of said Mollie Young or Missie Passmore to use and occupy said property as a home not to be subject to the control of any husband said Mollie Young or Missie Passmore has or may have. Nor shall the husband of either of them have any right or title to said property as to use or possession of the same. The property in no event to be subject to the debts of said Mollie Young or Missie Passmore, or both. Nor shall the said Mollie Young or Missie Passmore, or either or both of them, incumber said property by any lien of any kind."

In construing deeds it was formerly held that, in case of clear repugnance between the nature of the estate granted and that limited in the habendum, the latter yields to the former. *Ratliffe, etc., v. Marrs, etc.*, 87 Ky. 26, 7 S. W. 395, 8 S. W. 876, 10 Ky. Law Rep. 134. But in the more recent decisions of this court the tendency has been to relax the strictness of the technical rule of construction above announced, and to construe a deed according to the intention of the grantor as gathered from the whole instrument. Thus in *Dinger v. Lucken et al.*, 143 Ky. 850, 137 S. W. 776, the court said:

"The rule is that where by a deed a fee is granted, and the deed as a whole shows an intention to vest the grantee with a fee, an attempted limitation upon the fee will be disregarded. But in all cases the effect of the deed turns upon its proper construction when read as a whole; and if upon the whole instrument it appears that the grantor's intention was to vest a less estate than a fee in the grantee, that intention will be carried into effect; for deeds, like other instruments, must be construed according to the intention of the parties where that intention is sufficiently expressed in the instrument."

So it is held that technical words in the granting or habendum clause importing a fee must yield to subsequent clauses limiting the interest of the grantee to a life estate. *Atkins v. Baker*, 112 Ky. 877, 66 S. W. 1023, 23 Ky. Law Rep. 2224; *Lawson, etc., v. Todd*, etc., 129 Ky. 133, 110 S. W. 412, 33 Ky. Law Rep. 557; *Wilson v. Moore*, 146 Ky. 679, 143 S. W. 431.

With these rules of construction in mind, let us examine the provisions of the deed in question. The parties of the second part are Mollie Young and Missie Passmore. By the granting clause the property is conveyed to them jointly without limitation. The first part of the habendum clause imports a fee, as evidenced by the use of the words "their heirs and assigns forever." Then follow certain provisions protecting both the right of Mollie Young and Missie Passmore to occupy the premises as a home. It is further provided that, if Missie Passmore outlive Mollie Young, the property shall be the "absolute property of Missie Passmore." On the other hand, if Mollie Young survived Missie Passmore, the property was to be the "absolute property of Mollie Young." If the deed concluded here, there would be no question as to the estate which Missie Passmore would take, but the deed further provides that, should the said Missie Passmore have any child or children, upon the death of Mollie Young and said Missie Passmore the property should be the property absolutely of said child or children. Then follow certain provisions for the protection of the right of the children to use and occupy the premises. There also follow additional provisions protecting Mollie Young and Missie Passmore against their husbands and providing that neither Mollie Young nor Missie Passmore should incur the property by any lien of any kind. With the validity of all these restrictions we are not now concerned. We mention them merely for the purpose of showing how carefully the parties were looking after the interest of Missie Passmore's children by not only providing that upon the death of both Mollie Young and Missie Passmore the property would be theirs, but by further providing that it should not be liable in their hands for any debts incurred by either Mollie Young or Missie Passmore. Considering the instrument as a whole, the conclusion cannot be escaped that the parties to the instrument

clearly intended that Mollie Young and Missie Passmore should each have a life estate in the property, which would not be subject to their debts or the control of their husbands, and which should not be incumbered in any manner whatsoever, and upon the death of both Mollie Young and Missie Passmore the property should go to Missie Passmore's children, if she had any. That being true, Missie Passmore and her husband are unable to convey the fee-simple title to the property to Dedman, and the chancellor properly so adjudged.

Judgment affirmed.

GNAU et al. v. ACKERMAN.*

(Court of Appeals of Kentucky. Oct. 19, 1915.)

1. MUNICIPAL CORPORATIONS — OBSTRUCTIONS OF STREETS—LIABILITY OF CITY — NOTICE.

A city which authorized a part of its street to be obstructed by building material was bound to take notice of the nature and character of the obstruction, and notice that a bed of slaking lime had been placed in the street was not necessary to render it liable for injuries to a child who fell in the lime.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1641-1643, 1646, 1652; Dec. Dig. ¶ 788.]

2. EVIDENCE — JUDICIAL NOTICE—MUNICIPAL ORDINANCES.

Under Ky. St. § 2775, providing, relative to the city of Louisville, that the court shall take judicial cognizance of the ordinances of such city, it was not necessary to offer an ordinance of such city in evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 42; Dec. Dig. ¶ 32.]

3. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—LIABILITY OF CITY.

A city is under the duty of exercising ordinary care to keep its streets in a reasonably safe condition for public travel by children as well as adults, and does not perform its duty by maintaining its streets in a reasonably safe condition for the use of adults, but leaving them in an unsafe condition for use by children.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1612-1615; Dec. Dig. ¶ 763.]

4. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—LIABILITY OF CITY.

If a higher degree of care is required to keep streets safe for use by children than to keep them safe for use by adults, the city must exercise such degree of care, since, while it is not obliged to do more than to exercise ordinary care, it must exercise ordinary care in respect to all who have the right to use the streets, and this measure of care may impose upon it the necessity of taking greater precautions as to one class than would be required as to another class.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1612-1615; Dec. Dig. ¶ 763.]

5. NEGLIGENCE — THINGS ATTRACTIVE TO CHILDREN — STREETS — OBSTRUCTIONS — LIABILITY.

If a city places in its streets an attractive nuisance dangerous to children of immature years and thoughtless habits, it will be answerable for any injury they sustain in consequence of its failure to exercise ordinary care to keep

its streets in reasonably safe condition for their use.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. ¶23.]

6. MUNICIPAL CORPORATIONS ¶762 — STREETS—OBSTRUCTIONS—LIABILITY.

A city granting permission to a property owner to place an obstruction or nuisance attractive to children in the streets occupied precisely the same attitude as if it had placed the obstruction in the street itself, and was bound to see that the obstruction did not make the street unsafe for use by the public, as it could not delegate to others the duty of keeping its streets safe and thereby excuse itself.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1605-1611; Dec. Dig. ¶762.]

7. MUNICIPAL CORPORATIONS ¶808 — STREETS—OBSTRUCTIONS—LIABILITY.

That a property owner who placed a bed of slaking lime in the street had secured from the city the right to do so did not excuse him from the duty of not leaving the street in such condition as to be unsafe for street purposes.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1684-1687, 1690-1694; Dec. Dig. ¶808.]

8. MUNICIPAL CORPORATIONS ¶762, 808 — STREETS—OBSTRUCTIONS—LIABILITY.

Where an obstruction placed in a street by a property owner with the permission of the city made the street unsafe, the city and the property owner were jointly and severally liable for resulting injuries.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1605-1611, 1684-1687, 1690-1694; Dec. Dig. ¶762, 808.]

9. MUNICIPAL CORPORATIONS ¶808—LIABILITY FOR NEGLIGENCE OF CONTRACTOR.

A property owner granted permission by the city to place building material in the street was responsible for any negligence on the part of the contractors employed by him, as he could not excuse himself from his duty or liability by employing other persons to do what he had been granted permission to do.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1684-1687, 1690-1694; Dec. Dig. ¶808.]

10. DAMAGES ¶132—PERSONAL INJURIES—EXCESSIVENESS.

A boy between two and three years old fell into a bed of slaking lime, and was so badly burned as to be made a cripple for life. His left hand and arm were dreadfully disfigured and their use totally destroyed, and his right hand, as well as other parts of his body, were also badly burned. Held, that a verdict for \$10,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. ¶132.]

11. APPEAL AND ERROR ¶1004—REVIEW—AMOUNT OF DAMAGES.

The damages allowable in personal injury cases cannot be carefully measured or computed, but must be left to the judgment and discretion of the jury, with which the court is not authorized to, and will not, interfere, unless it appears that their assessment of damages was influenced by passion or prejudice, or is so unreasonable as to appear at first blush entirely disproportionate to the injuries.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. ¶1004.]

12. NEW TRIAL ¶75 — GROUNDS — INADEQUACY OF DAMAGES.

While, under Civ. Code Prac. § 341, providing that a new trial shall not be granted on

account of smallness of the damages in an action for injury to the person, the trial court is not authorized to grant a new trial in personal injury cases on the sole ground that the recovery is inadequate, if the inadequacy of the verdict is attributable to errors committed during the trial, or if a new trial is granted for other errors, the mere fact that the damages are inadequate or that this may be one of the causes for granting a new trial does not affect the right of the court to set aside the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 151, 152; Dec. Dig. ¶75.]

13. APPEAL AND ERROR ¶933—REVIEW—PRESUMPTIONS.

Where grounds other than the inadequacy of the verdict are relied on to obtain a new trial of a personal injury action, and are sufficient to justify the trial court in directing a new trial, and the record does not show what reasons influenced the trial court in ordering a new trial, it will not be assumed that the new trial was granted solely because the recovery was inadequate contrary to Civ. Code Prac. § 341.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3772-3776; Dec. Dig. ¶933.]

14. APPEAL AND ERROR ¶977 — REVIEW — GRANTING OF NEW TRIAL.

The discretion of the trial court in granting a new trial will not be interfered with unless it appears to have been abused, or unless it appears that the court transcended its authority under the Code.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. ¶977.]

15. EVIDENCE ¶5—JUDICIAL NOTICE—MATTERS OF COMMON KNOWLEDGE.

In an action for injuries to a boy two or three years old who fell into a bed of slaking lime in the center of a bed of sand in the street, where there was evidence that other children had been playing in the sand pile for several days, direct evidence that the injured boy was attracted to the sand pile or that it was an attractive nuisance was not required, as it is a matter of such common knowledge that courts and juries may take notice of it without evidence that a sand pile is attractive to children.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. ¶5.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by John L. Ackerman, by next friend, against P. J. Gnau and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Pendleton Beckley and W. J. O'Connor, both of Louisville, for appellant city. O'Doherty & Yonts, of Louisville, for appellant P. J. Gnau. Arthur H. Mann and Kohn, Bingham, Sloss & Spindle, all of Louisville, for appellee.

CARROLL, J. In August, 1911, John Ackerman, a little boy between two and three years of age, sustained severe, painful, and permanent personal injuries by falling into a bed of slaking lime, commonly known as a mortar bed, which had been placed in the carriageway of Magnolia avenue, one of the streets of the city of Louisville. To recover damages for the injuries so sustain-

ed, he brought this suit by his father, as next friend, against P. J. Gnau, the owner of the adjacent building in which it was intended to use the mortar that was being prepared for use, T. F. House, who had the contract for building the house, and the city of Louisville. The petition, after making the usual averments in cases of this kind, further set out:

"That the mortar bed was in a depression made in the center of a pile of sand, and had the appearance to children of an ordinary sand pile, and in its nature was attractive and alluring to, and did attract, children of tender years, including the infant plaintiff, all of which was or could, by the exercise of ordinary care, have been known by the defendants and each of them, but nevertheless they failed to guard or barricade the mortar bed so as to exclude children therefrom."

On the first trial of the case there was a verdict in favor of appellee for \$1,000, which was subsequently on motion of appellee set aside by the trial court, and on the second trial of the case there was a judgment in favor of appellee for \$10,000 against Gnau, the city, and House, one-third, as found by the jury, to be paid by each of them. It appears that House is insolvent, and so no appeal is prosecuted from the judgment against him.

The facts are substantially as follows: The defendant Gnau, who was the owner of a lot on Magnolia avenue, obtained a permit from the city to erect a house thereon, which permit carried with it the right to make use of the adjacent street in accordance with the city ordinance on the subject. This ordinance provided that when a building permit was issued the applicant therefor might use a designated portion of the street in front of the premises being improved for the purpose of placing thereon building material; and in accordance with this permit and the ordinances of the city, the mortar bed in question was placed in the carriageway of Magnolia avenue. The pile of sand had been placed in the street some days before the lime bed was made, and the children of the neighborhood had been playing in this sand from the time it was placed in the street until a few hours before the plaintiff fell into it. The lime bed, however, was not made in the sand nor had the lime commenced to be slaked until late in the afternoon of the day on which the plaintiff was injured. The parents of the plaintiff lived in a house about 100 feet from this mortar bed, which consisted of a bed of sand probably 12 inches deep and about 9 feet long and 12 feet wide, with a bed of slaking lime in the center. Between 7 and 8 o'clock at night the plaintiff ran out of his mother's house into the street and went immediately, as any child would, to this bed of sand, and in a moment afterwards his screams were heard by Jacob Loeb, who was passing, and he at once went to the bed, took the child out, and carried him to his mother. The little boy was horribly burned. His left hand was totally de-

stroyed, and his right hand was badly burned, as were other parts of his body.

The only substantial dispute in the evidence grows out of the widely differing testimony as to whether this sand pile was barricaded or protected in any manner after the lime bed had been made. Witnesses for the plaintiff said that there were no boards or other barriers around the pile, or any covering on top of it, and that the sand pile, the center of which had been hollowed out for the purpose of containing the lime to be slaked, was about 18 inches high around the edges; while witnesses for the defendants said that the sand pile with the lime in the center was inclosed by boards and also covered by boards.

If the precautions described by witnesses for appellants had been taken, it seems very improbable that the child could have gotten in the bed of slaking lime, and the weight of the evidence tends to support the view that there was no barrier of any kind placed around the sand pile or any covering placed on top of it. There was an electric street light near by, and some of the witnesses say a red lantern had been put up at the sand pile, but, whether the lantern was there or not, the electric light was sufficient to plainly disclose to any adult person using the street the presence of the mortar bed; but, of course, this little boy gave no heed to either the red light, if there was one, or the electric light. He only knew, in his childish way, that there was a sand pile there, and into that sand pile he wanted to and did go, totally ignorant of the burning lime in the middle of the sand and unconscious of the danger of playing in or about it.

[1] The city moved the court to direct a verdict in its favor because the evidence showed that it did not have any notice of the fact that lime had been put in the sand bed for the purpose of slaking between the time it was placed there and the time of the accident, a few hours afterwards. There would be much force in this position if it were necessary to bring notice home to the city in order to charge it with liability for the accident. But it is well settled in this state that, where a city authorizes work to be done and a part of its street to be obstructed by material while the work is in progress, it must take notice of the nature and character of the obstruction which it has authorized. *City of Louisville v. Keher*, 117 Ky. 841, 79 S. W. 270, 25 Ky. Law Rep. 2003; *Blocher v. Dieco*, 99 S. W. 606, 30 Ky. Law Rep. 689; *De Garmo v. Vogt*, 151 Ky. 847, 152 S. W. 969; *Town of Bellevue v. Rentz*, 152 Ky. 426, 153 S. W. 732.

[2] The further argument is made for the city that, although the plaintiff introduced in evidence a permit issued by the city to Gnau, the ordinance of the city granting to persons having permits to build the right to use portions of the street for the purpose of placing building material thereon was not

offered in evidence, and therefore the plaintiff failed to prove that the city had authorized Gnau to use the street.

Under section 2775 of the Kentucky Statutes, the courts are required to take judicial notice of the ordinances of the city of Louisville, and this statute dispenses with the necessity of introducing these ordinances in evidence. It was no more necessary to introduce the ordinance of the city relied on than it would have been to introduce a section of the Kentucky Statutes under which an action was brought. *Weiss v. Commissioners of Sewerage*, 152 Ky. 552, 153 S. W. 967.

In the instructions the court, after reciting that Gnau had obtained permission to make improvements upon his property, and that this gave him the right to use a part of Magnolia avenue for the purpose of placing his building material therein, further instructed the jury that:

It was the duty of Gnau and House to "so place and guard said lime bed as to render the street reasonably safe for persons lawfully using same; and if you believe from the evidence that said lime bed was attractive or inviting to children, and it was dangerous for them to go upon it, and that the said Gnau and House knew, or by the exercise of ordinary care could have known, that the said lime bed was attractive or inviting to children, and that it was dangerous for them to go upon it, if it was so attractive or inviting and dangerous for them to go upon it, then it was their duty to exercise ordinary care to prevent injury to children using the street by adopting and enforcing such precautions as were reasonably sufficient for that purpose; and if you shall believe from the evidence that Magnolia street at the time and place mentioned was not reasonably safe for use by the public by reason of the lime bed referred to in the evidence, and if you shall further believe from the evidence that Gnau and House negligently failed to adopt and use such precautions in guarding said lime bed as were reasonably necessary to protect children using said street from injury, and that by reason of such failure upon their part, or of either of them, or any of their employees, if they or any of them did so fail, the plaintiff received the injuries of which he complains, the law is for the plaintiff as against the defendants Gnau and House, and the jury should so find."

"But, unless you shall so believe from the evidence, the law is for the defendants Gnau and House, and the jury should so find."

In the second instruction the jury were told that:

"It was the duty of the defendant city of Louisville to keep its streets and highways, including Magnolia avenue, at the place indicated in the evidence, in a reasonably safe condition for use by persons lawfully using the same, and to exercise ordinary care to cause the precautions referred to in the first instruction to be taken by the defendants Gnau and House while the lime bed referred to in the evidence remained in the street for the construction of said building under said permit; and if the jury shall believe from the evidence that Magnolia street, at the time and place mentioned, was not reasonably safe for use by the public by reason of the lime bed referred to in the evidence, and if the jury shall further believe from the evidence that the defendant city of Louisville failed to exercise ordinary care to cause the precautions referred to in the first instruction to be taken by Gnau and House, and that by reason of its negligence in that regard, if it was negli-

gent, the plaintiff received the injuries of which he complains, then the law is for the plaintiff as against the city of Louisville, as well as Gnau and House, and the jury should so find."

"But, unless you shall so believe from the evidence, the law is for the defendant the city of Louisville, and the jury should so find."

These instructions are criticized both by the city and Gnau, but we think they fairly submitted the law of the case as to both of these defendants. It will be noticed that the first instruction told the jury that it was the duty of Gnau and House to so protect the lime bed as to render the street reasonably safe for persons lawfully using the same, and that, if the lime bed was attractive or inviting to children, as well as dangerous for them to go about, and Gnau and House knew, or by the exercise of ordinary care could have known, this fact, it was their duty to exercise ordinary care to adopt such means of protecting the bed as were reasonably sufficient to guard it against use by children, and if they failed to adopt such precautions as were reasonably sufficient, they were guilty of negligence.

[3-5] The second instruction charged the city with the duty of keeping the street in reasonably safe condition, and with the further duty of exercising the care with respect to children that was imposed upon Gnau and House, and that if it failed to exercise the care indicated, it was guilty of negligence. The city was under a duty to exercise ordinary care to keep its streets in reasonably safe condition for public travel, and this duty imposed upon it the necessity of keeping them in such condition, not only for adults, but for all others who had the right to use them. Children have as much right to use the streets as grown persons, and the city has not performed its duty when it maintains its streets in reasonably safe condition for the use of adults, but leaves them in an unsafe condition for use by children. If it requires a higher degree of care to keep the streets safe for use by children than it does to keep them safe for use by adults, then the city must exercise this degree of care, as the ordinary care exacted of the city in the maintenance of its streets means ordinary care in respect to all who have the right to use the streets. It cannot excuse itself from liability, as attempted in this case, by saying that this lime bed was in a well-lighted street and so conspicuous as that no adult, in the exercise of reasonable care, would walk or go into it, and so, having exercised this measure of care, it was not required to keep the place reasonably safe for children. The city must take notice of the use of its streets by children, and if it places, or permits to be placed, in the streets, an attractive nuisance that is dangerous to children of immature years and thoughtless habits, it will be answerable for any injury they sustain in consequence of its failure to exercise ordinary care to keep its streets in reasonably safe condition for use by children. The measure

of care required of a city and its duty in respect to its streets extends alike to all classes using the streets, the old and young, the strong and the weak, and it owes to each of them precisely the same degree of care, although this measure of care may impose upon it the necessity of taking greater precautions as to one class than would be required as to another class. This does not mean that under any circumstances the city is obliged to do more than exercise ordinary care to keep its streets in reasonably safe condition for use. It only means that it must take notice of the different classes of people that use its streets, and must maintain them in order for use by these several classes, although this may demand more care than would be necessary if only one class of people used the streets.

[6] The city granted permission to Gnau to place this obstruction or attractive nuisance to children in the street, and therefore it occupies precisely the same attitude as if it had placed this obstruction in the street. The city could not, by granting this permission, relieve itself of the duty it owed to keep its streets in reasonably safe condition for use. The duty of keeping its streets in condition for use is an absolute duty that the city cannot delegate to others and thereby excuse itself. When it grants permission to another party to place an obstruction in its streets, it must take notice of the nature and character of obstruction so placed and the manner in which it is maintained, and see to it that it does not make the street unsafe for use by the public. If this were not so, the city could, by granting permits to occupy its streets, relieve itself entirely of the duty it owes the public; and we do not know of any authority that would countenance a doctrine like this.

[7] In the case we have the property owner, Gnau, secured from the city the right to place this lime bed in the street, but this did not have the effect of excusing the city from the care imposed upon it, or have the effect of excusing Gnau from the duty he owed not to leave the street in such condition as to be unsafe for the uses to which it was set apart and dedicated. If Gnau, without obtaining permission from the city had placed a dangerous obstruction in the street, there could be, of course, no question about his liability in damages to any person injured by the obstruction, if it developed that it rendered the street unsafe for public travel, and in such a state of case the city would be jointly and equally liable with Gnau if it had notice of the obstruction in time to take such measures as might be necessary to remove or protect it. Now, this duty and corresponding liability of Gnau was not diminished by the fact that he obtained permission to place the obstruction in the street. The city did not give him the right to unreasonably obstruct the street or to make

it unsafe for public use, and when the city granted this permission to Gnau it undertook, as between it and persons using the street, that Gnau would not place any dangerous obstructions in the public way, and Gnau undertook that he would not do anything that would make the street unsafe for public use.

[8] If, then, the use that Gnau made of the street made it unsafe for public use, both the city and Gnau became jointly and severally liable for injuries suffered in consequence thereof. Their measure of duty and liability was precisely the same.

[9] It is scarcely necessary to add that Gnau was responsible, not only to the city, but to the public, for any negligence on the part of contractors employed by him to do the work. He could not excuse himself from either his duty or his liability by employing other persons to do what he had been granted permission by the city to do. The city gave permission to Gnau to place material in the street, and if he, under that grant, permitted or authorized others to do what he had the right to do, he, of course, assumed responsibility for their conduct, although they might also be liable, in connection with Gnau and the city, to any person injured by reason of their negligence: The principles we have set forth as governing in this case are fully supported by the following authorities: *Bransom's Adm'r v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *U. S. Natural Gas Co. v. Hicks*, 134 Ky. 12, 119 S. W. 166, 23 L. R. A. (N. S.) 249, 135 Am. St. Rep. 407; *Sydnor v. Arnold*, 122 Ky. 557, 92 S. W. 289, 28 Ky. Law Rep. 1250; *Louisville R. Co. v. Esselman*, 93 S. W. 50, 29 Ky. Law Rep. 333; *Snare & Triest Co. v. Friedman*, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367.

There is some complaint made of the action of the trial court with respect to argument of counsel, but we find no objection to the course pursued by the trial court.

[10, 11] It is next contended on the part of both appellants that the verdict is excessive. We do not think so. This little boy has been made a cripple for life. Aside from the other burns upon his body, his left hand and arm are not only dreadfully disfigured, but their use is totally destroyed. Just what ought to be or should be reasonable compensation for an injury like this it is not possible to determine with mathematical accuracy, or, indeed, with even reasonable accuracy. No rule has ever been or ever can be laid down by which the damages allowable in personal injury cases may be carefully measured or computed. The best that can be done under these circumstances is to leave what is fair and right to the judgment and discretion of the 12 men who compose the jury, and their judgment and discretion we are not authorized to, and will not, interfere with, unless it appears that their assessment was influenced by passion or prejudice or is so unreason-

able as to appear at first blush entirely disproportionate to the injuries sustained. Neither of these conditions appear in this case, and therefore we will not disturb the judgment on the ground that it is excessive. *L. & N. R. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706, 10 Ky. Law Rep. 211; *Louisville R. Co. v. Bryant*, 142 Ky. 163, 134 S. W. 182; *L. & N. R. R. Co. v. Pedigo*, 129 Ky. 664, 113 S. W. 116.

[12] Another ground urged for reversal is that the court erred in setting aside the first verdict for \$1,000. The Code provides, in section 341, that:

"A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation. * * *"

Under this section the trial court is not authorized to grant a new trial in personal injury cases on the sole ground that the recovery is inadequate, independent of a recovery for special damages, if such damages are claimed. But if the inadequacy of the verdict is attributable to errors committed during the trial of the case, or if a new trial should be granted for other errors than the smallness of the damages, the mere circumstance that the damages are inadequate, or that this may be one of the causes for granting a new trial, does not interfere with the right of the court to set aside the verdict. *Pendley v. I. C. Railroad*, 92 S. W. 1, 28 Ky. Law Rep. 1324; *Gaines v. Madisonville, Hartford & Eastern R. R. Co.*, 143 Ky. 250, 136 S. W. 230.

[13] Of course, if it appeared that the trial court set aside the first verdict solely on account of the smallness of damages, we would have a case coming directly within the provision of the Code denying to the trial court the right to set aside the verdict on this ground. But where grounds other than the inadequacy of the verdict are relied on to obtain a new trial, and these grounds, or some of them, are sufficient to justify the trial court in directing a new trial, we will not assume that the new trial was granted solely because the recovery was inadequate, when the record, as in this case, does not show the reasons that influenced the trial court in ordering a new trial. *Norvell v. Paducah Box & Basket Co.*, 157 Ky. 703, 163 S. W. 1106; *Greenberg v. Hyman & Oppenheim*, 159 Ky. 618, 167 S. W. 914; *McLemore v. Evansville & Bowling Green Packet Co.*, 160 Ky. 568, 169 S. W. 1006.

[14] It has been frequently announced by this court that the discretion of the trial court in granting a new trial will not be interfered with unless it appears to have been abused, or it appears that in granting it the court transcended its authority under the Code. *Wilhelm v. Louisville Ry. Co.*, 147 Ky. 196, 143 S. W. 1013; *Conley v. Central Kentucky Traction Co.*, 152 Ky. 764, 154 S. W. 41.

In this case it appears that the plain-

tiff asked for a new trial on other grounds than the smallness of the verdict, and we think the court, in the exercise of a sound discretion, may have granted the new trial on other grounds than the smallness of the verdict.

[15] Another reason assigned for reversal is that there was no evidence to show that the little boy had been attracted to the sand pile, or that it was what may be called an attractive nuisance. There was evidence that other children had been playing in this sand pile for several days, and no direct evidence was needed to show that the little boy who was injured had been attracted to the sand pile or that it was what may be called an attractive nuisance. That a sand pile is attractive to children and a place where they delight to play is a matter of such common knowledge in the everyday affairs of life that courts and juries may take notice of it without direct evidence on the subject. 4 *Wigmore on Evidence*, § 2570; *Craig v. Durrett*, 1 J. J. Marsh. 365, 19 Am. Dec. 103; *Baum v. Winston*, 3 Metc. 127. Every person who ever saw a pile of sand in an accessible place where young children play knows its attractiveness for them. Everybody further knows that an ordinary sand pile is perfectly safe for children to play in at all times and under all circumstances, and when an ordinary sand pile, located in a place accessible to children, is converted into a place of great danger, as, for example, when a bed of slaking lime is put in the middle of it, the person who converts this place of perfect safety into a place of extreme danger needs to be careful how he protects it.

The judgment is affirmed.

MASON & HURST CO. et al. v. FELTNER.
(Court of Appeals of Kentucky. Oct. 19, 1915.)

1. PLEADING — 403 — DEFECTIVE PETITION — CURE BY ANSWER.

Whether or not the petition in a servant's action for injury was defective in not negating his contributory negligence, it was cured by answers affirmatively alleging that plaintiff was guilty of contributory negligence, which was denied by reply, so that issue was joined, and the case submitted thereon.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.]

2. MASTER AND SERVANT — 264 — PLEADINGS AND ISSUES — INDEPENDENT CONTRACTOR.

In a servant's action for injury wherein the petition alleged that it occurred on the defendant railroad's property, that the railroad had employed a contractor, and that both had employed plaintiff to work there, and where the railroad and the contractor admitted that the contractor was employed by the railroad to move all the stone and other material out of the tunnel by the yard, according to specifications, and the reply to the answer of the railroad controverted its allegations as to the contractor's doing the work by the yard or according to specifications, but did not join issue on the con-

tractor's answer in such regard, the issue raised was whether the work was done by an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. ☞ 264.]

3. MASTER AND SERVANT ☞ 265—ACTION FOR INJURY—BURDEN OF PROOF—INDEPENDENT CONTRACTOR.

Under such pleadings, the burden was on the railroad to establish the fact that the work was done by an independent contractor.

[Ed. Note.—For other cases, see Master & Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. ☞ 265.]

4. MASTER AND SERVANT ☞ 101, 102, 265—BOILER EXPLOSION—PRESUMPTION—NEGLIGENCE.

A master operating a boiler is required to exercise ordinary care to prevent injury, and an explosion does not give rise to a presumption of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192, 877-908, 955; Dec. Dig. ☞ 101, 102, 265.]

5. APPEAL AND ERROR ☞ 172 — QUESTIONS NOT RAISED BELOW.

In a servant's action for injury from a boiler explosion, where the petition only showed that he was under 21 years of age, and only charged negligence with respect to defendant's operation of the boiler, his recovery was limited to the negligence alleged, and he could not for the first time on appeal raise the issue that he was only 13 years of age, and was employed in violation of Ky. St. § 331a, subsec. 9, making it unlawful to employ a child under 16 in work dangerous to life, and under which the doctrines of assumed risk, fellow servant, and contributory negligence do not apply.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1070-1078; Dec. Dig. ☞ 172.]

Appeal from Circuit Court, Perry County.

Action by Bert Feltner, by his next friend, against the Mason & Hurst Company and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded for new trial.

Wootton & Morgan, of Hazard, Samuel M. Wilson, of Lexington, and Benjamin D. Warfield and Chas. H. Moorman, both of Louisville, for appellants. F. J. Eversole, and Hogg & Johnson, all of Hazard, for appellee.

NUNN, J. Appellee, an infant under 21 years of age, brought this action by his father, as next friend, against the Mason & Hurst Company and the Lexington & Eastern Railway Company to recover damages for injuries received in a boiler explosion, and obtained a verdict and judgment against them jointly for \$2,500. There was proof that he was badly scalded about the head and face, and one eye and one ear permanently injured.

[1] The appellants seek a reversal upon several grounds. The first is that the petition does not negative contributory negligence. The appellants, by separate answers, affirmatively set up that the plaintiff was guilty of contributory negligence, and but for which he would not have been injured.

Whether or not the petition was defective in this regard, the answers cured it. This was denied by reply, so that issue was joined and the case submitted upon these propositions.

[2] The appellant Lexington & Eastern Railway Company contends that the court erred in failing to direct the jury peremptorily to find for it, because, as it says, there is no proof to sustain the allegation that the plaintiff was employed by the railroad. The injury occurred while he was employed and at work on its property where it was having a tunnel driven. The petition charged that the railroad had "employed" the Mason & Hurst Company to do this work, and that both companies had "employed" the boy to work there.

Appellants find separate answers, and each admits "that Mason & Hurst Company were employed to and did build for the railroad company the tunnel in question, and that the Mason & Hurst Company" contracted with it (the railroad) to move all the stone and other material out of the tunnel at so much per cubic yard, and that they were to do said work according to plans and specifications furnished by it. A reply was filed to the answer of the railroad which controverted the allegations with reference to Mason & Hurst Company doing the work under contract or by the yard, or according to plans and specifications. It is immaterial that issue was not joined on the Mason & Hurst answer in this regard. The issue raised by the pleadings was whether the work was done by an independent contractor.

[3] Under the pleadings, the burden was upon the railroad to establish that fact, because its answer affirmed it. Although there is an absence of proof on the question, still it can only operate to the disadvantage of the railroad and not to the appellee.

A more serious question is whether there was evidence to sustain the charge of negligence in the operation of the boiler which exploded. The boiler was located about 175 yards from the mouth of the tunnel, and steam was piped from it to the tunnel to operate drills. The plaintiff was employed as a water boy, but it was his duty also to run errands. At the time in question there was a failure of steam supply at the drills in the tunnel, and the drill men sent the boy to the boiler to notify the fireman of the fact and request him to turn on the steam. When he got nearly to the boiler and had just spoken to the fireman the explosion occurred. Nothing more is known or told about the circumstance, except that the boy saw two Austrians packing water for the boiler. One of them was near by, and the other was going down the river bank with two buckets. Several days later the Mason & Hurst Company sent a man named Gambrel to repair the boiler. Describing the boiler as he found it, he says:

"The stay bolts had given way that holds the crown sheet up to the outside of the boiler. The tensile of the boiler was weak."

Without a show of further facts upon which to base an opinion he was asked to venture one upon the "cause of the bolts coming loose and the crown sheet falling." He answered:

"The water gets off the top of the crown sheet and you've got a high pressure, and that causes the tensile strength of the boiler to give way, and that pulls out the stay bolts that bolts it up. Q. That is turning the water on? A. Yes."

Manifestly if the water is permitted to get too low in any boiler, and cold water is turned in upon high steam pressure, an explosion will result, but the witness Gambrel was not there at the time of the explosion, and does not intimate that such conditions existed in this case. There is no proof about the stage of water in the boiler, or the amount of steam pressure, or of any attempt to turn water into the boiler.

The petition charges that:

"The injuries were caused by the negligence and carelessness of defendants in the operation of said boiler and by the negligence and carelessness of the servants of defendants who operated and managed said boiler at the time."

We have made reference to the only evidence on the proposition. It does not show that the appellants or their servants were negligent or careless in the operation or management of the boiler. The only thing established is the fact of the explosion and the condition of the stay bolts and crown sheet afterwards—a condition common to most boiler explosions, negligent or not.

[4] The case resolves itself down to whether a boiler explosion gives rise to the presumption of negligence; that is, whether the doctrine of *res ipsa loquitur* applies. This was answered in the negative in the recent case of *Branham's Adm'r v. Buckley*, 158 Ky. 848, 166 S. W. 618, where in a case like this the duty of the defendants was the exercise of ordinary care to prevent injury:

"The fact of an explosion of a steam boiler creates no presumption of negligence."

In addition to the cases there cited, *Louisville Gas Co. v. Kaufman, Straus & Co.*, 105 Ky. 131, 48 S. W. 434, 20 Ky. Law Rep. 1069, is to the same effect.

A leading case on the subject is *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613. We quote:

"Instances are not infrequent of steam boiler explosions where there has been no want of ordinary care and skill in their management, and even where there has been the greatest care; and explosions of steam boilers have happened of so mysterious a character that they could not, with confidence, be assigned to any known cause."

[8] In reply to this appellee calls attention to the fact that the evidence shows the boy was only 13 years old at the time of his injury, and that he was employed in violation of section 331a, subsec. 9, Kentucky

Statutes. By that section it is made unlawful to employ a child under 16 years of age to work in any occupation dangerous to life, limb, or health. In such cases the doctrine of assumed risk, fellow servant, and contributory negligence have no application. Had the petition been framed and the case practiced on that theory, the sole question for submission to the jury, under the proof as we now have it, would have been whether the occupation of the boy at the time was dangerous to life or limb. *L. & St. L. Ry. Co. v. Lyons*, 155 Ky. 396, 150 S. W. 971, 48 L. R. A. (N. S.) 667; *Stearns Coal & Lumber Co. v. Tuggle*, by, etc., 156 Ky. 714, 161 S. W. 1112. The appellee's difficulty is that he is seeking to raise these issues for the first time on appeal. From the petition it is merely made to appear that the boy is under 21 years of age, and even that statement is made to justify the suit by his next friend. The only negligence charged had reference to the operation and management of the boiler. Appellee for recovery is confined to the negligence alleged.

As the record stands on this appeal, we are compelled to reverse the judgment, because there is no evidence of the negligence alleged.

The case is reversed and remanded for a new trial consistent herewith.

DWIGGINS WIRE FENCE CO. v. PATTERSON.

(Court of Appeals of Kentucky. Oct. 19, 1915.)

1. CONSTITUTIONAL LAW — 48 — CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY.

The courts will not declare an act unconstitutional unless it is plainly so, and, in case of doubt, will resolve the doubt in favor of its validity.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 40; Dec. Dig. — 48; Statutes, Cent. Dig. § 56.]

2. CONSTITUTIONAL LAW — 87 — POLICE POWER — SCOPE — FRAUD.

The state has power to regulate the acquisition, enjoyment, and disposition of property, and to prevent fraud and protect its citizens against the consequences of fraud. Police regulations are not rendered invalid because they may incidentally affect the exercise of some right guaranteed by the Constitution, and it is only where they are unreasonable or constitute an unjustifiable impairment or abridgment of the right that the courts will declare them invalid.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 156-171; Dec. Dig. — 87.]

3. CONSTITUTIONAL LAW — 87 — FRAUDULENT CONVEYANCES — 3 — DEPRIVATION OF PROPERTY — BULK SALES ACT.

The Sales in Bulk Act (Laws 1904, c. 22) §§ 1-4 (Ky. St. 1915, § 2651a), enacted to prevent fraudulent sales, and providing by section 1 that sales by a merchant of any part of his stock other than in the ordinary course of trade, or a sale of his entire stock in bulk, shall be fraudulent and void as against the seller's creditors unless the purchaser shall inquire of the seller as to the names and residences of each of the seller's creditors in the

course of such business, and at least five days before the consummation of the sale notify them either personally or by registered letter of the intended sale, and declaring a purchaser not responsible to any creditor not mentioned in the seller's statement, is not invalid as being an unreasonable interference with the right of property.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 156-171; Dec. Dig. ¶ 87; Fraudulent Conveyances, Cent. Dig. § 5; Dec. Dig. ¶ 3.]

4. CONSTITUTIONAL LAW ¶240—EQUAL PROTECTION OF LAWS—CLASSIFICATION—BULK SALES ACT.

Such act is not discriminatory within the fourteenth amendment to the federal Constitution or any provision of the Kentucky Constitution, in that it applies only to merchants, since that classification is not an arbitrary one, but is based on a well-grounded distinction, and is altogether reasonable.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688, 692, 693, 697-699; Dec. Dig. ¶ 240.]

5. FRAUDULENT CONVEYANCES ¶314—SALES IN BULK ACT — ACTION BY CREDITOR—AMOUNT OF RECOVERY.

Such act, declaring a sale of a merchant's stock in bulk void as against his creditors arising out of such stock, and providing that a purchaser failing to comply therewith shall hold the merchandise so purchased for the use and benefit of the creditors of the seller, and shall be responsible to them for the fair market value of such part thereof as he may have transferred to others, and providing by section 4 that nothing therein should be construed so as to give any manufacturer, etc., any lien on any part of the stock except upon goods sold and delivered by him, embraces all creditors who during the continuance of the particular business sold the seller any part of the stock, whether on hand at the time of the bulk sale or not, and a purchaser who had received of the goods sold by a creditor for \$1,000 only \$213 worth, and had disposed of \$168 worth, and had on hand goods valued at \$45, was liable to the extent of the entire stock to the satisfaction of the creditor's claim.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 972; Dec. Dig. ¶ 314.]

Appeal from Circuit Court, Nelson County.

Action by the Dwiggin Wire Fence Company against G. S. Patterson. Judgment for defendant in part and action in part dismissed, and plaintiff appeals, and defendant prosecutes a cross-appeal. Affirmed on cross-appeal, and reversed on original appeal.

J. A. Fulton, Osso W. Stanley, and E. N. Fulton, all of Bardstown, for appellant. J. F. Combs, of Shepherdsville, for appellee.

CLAY, C. This appeal involves both the constitutionality and proper construction of section 2651a, Kentucky Statutes 1915, known as the "Sales in Bulk Statute." The statute is as follows:

"1. A sale by a merchant engaged in business in this state, of any portion of a stock of merchandise, otherwise than in the ordinary course of his trade, and in the regular and usual prosecution of his business, or a sale of an entire stock of merchandise in bulk by such merchant, shall be fraudulent and void, as against the creditors of the seller arising out of said stock of merchandise, unless the purchaser shall, at

least five days before the consummation of the sale, in good faith, for the purpose of giving the notice herein required, make inquiry of the seller as to the names and places of residence, or places of business of each and all of the creditors of the seller, arising out of said business, and unless the purchaser, at least five days before the consummation of the sale, shall notify, or use reasonable diligence to cause to be notified, personally, each of the seller's said creditors, or shall deposit in the mail a registered letter of notice, postage prepaid, addressed to each of the seller's said creditors at his post office address, according to the information furnished by the seller of said proposed sale. Said information shall be by written statement by the seller, and the purchaser shall not be responsible to any creditor not mentioned in said written statement. If the purchaser fail to give such notice as herein required, he shall hold the merchandise so purchased for the use and benefit of all the creditors of the seller, and shall be responsible to them for the fair value of such part thereof as he, the purchaser, may have transferred or conveyed to others. Nothing in this act shall be deemed or construed in anywise to authorize or validate any sale made with intent to delay, hinder or defraud creditors, purchasers or other persons, but such sales made with such intent shall be governed and controlled as provided by an act of the General Assembly, approved December 20, 1892, entitled, 'An act in relation to fraudulent and preferential conveyances, and entitled 'Fraudulent and Preferential Conveyances,' and the amendments thereto.'

"2. * * * All civil actions brought under this act shall be instituted within ninety days of the consummation of the sale.

"3. * * * The seller shall make full and truthful answer to each and all of the inquiries made of him by the purchaser, as required in section 1, and if such seller shall knowingly and willfully make or deliver, or cause to be made or delivered, to said purchaser any false answer to such inquiries, or shall induce a sale by refusing to make answer to such inquiries, or by fraudulently claiming or pretending ignorance of the matters called for by such inquiries, then in each of said cases said seller shall be deemed guilty of a misdemeanor, and upon indictment and conviction thereof in the county where said acts are done, he shall be punished, in the discretion of the jury, by a fine of not less than one hundred nor more than five hundred dollars, or by confinement in the county jail not less than thirty days nor more than six months, or both so fined and imprisoned.

"4. * * * Nothing contained in this act shall apply to sales made under any order of a court, or to any sales made by executors, assignees, administrators, receivers, or any public officer in his official capacity, or by any officer of a court:

"Provided, that nothing in this act shall be so construed as to give any manufacturer, wholesale merchant or jobber any right to or lien on any merchandise or article in any stock of goods, except goods sold and delivered by such manufacturer, wholesale merchant or jobber."

The controversy arose in the following manner: J. W. Edwards owned and conducted a general merchandise store in the town of Boston, in Nelson county. The Dwiggin Wire Fence Company sold to Edwards certain merchandise, for which Edwards, on January 2, 1914, executed to the company five promissory notes, amounting to \$200 each, payable in four, five, six, seven, and eight months from date, with 6 per cent. interest. Each of the notes provided that in

case of default on any one of the notes all should become due. In the month of April, 1914, Edwards sold and transferred his entire stock of merchandise to G. S. Patterson. Neither Patterson nor Edwards complied with the provisions of the above statute. On May 20, 1914, this action was brought by the Dwiggins Wire Fence Company against G. S. Patterson to recover of Patterson and subject the stock of goods to payment of plaintiff's debt. On the trial it appeared that of the wire fence sold by plaintiff to Edwards, the purchaser, Patterson, received only \$213.17 worth. Of this he had disposed of \$168.28 worth, and still had on hand wire fence of the value of \$44.89. It was stipulated that the value of the entire stock of merchandise exceeded \$1,000. The trial court adjudged that plaintiff recover of Patterson the sum of \$168.28, with interest, and further adjudged the plaintiff was entitled to recover in kind the remainder of the wire fence of the value of \$44.89. So much of the petition as sought to subject the entire stock of goods or the value thereof to the satisfaction of plaintiff's claim, and so much of the petition as sought to have the merchandise, with the exception of the wire on hand at the time of the sale, held in trust for the benefit of plaintiff and the other creditors of Edwards, was dismissed. From a judgment so entered, plaintiff appeals, and defendant Patterson prosecutes a cross-appeal.

The first question to be considered is the constitutionality of the statute. If resort be had to authority, it will be found that there is an irreconcilable conflict in the opinions of the courts. Similar statutes have been enacted in a number of states. In New York, Ohio, Indiana, Illinois, and Utah they have been declared unconstitutional. *Wright v. Hart*, 182 N. Y. 350, 75 N. E. 404, 2 L. R. A. (N. S.) 338, 3 Ann. Cas. 263; *Miller v. Crawford*, 70 Ohio St. 207, 71 N. E. 631, 1 Ann. Cas. 558; *McKinster v. Sager*, 163 Ind. 671, 72 N. E. 854, 68 L. R. A. 273, 106 Am. St. Rep. 268; *Off v. Morehead*, 235 Ill. 40, 85 N. E. 264, 20 L. R. A. (N. S.) 167, 126 Am. St. Rep. 184, 14 Ann. Cas. 434; *Block v. Schwartz*, 27 Utah, 387, 76 Pac. 22, 65 L. R. A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550. On the other hand, statutes of like import have been held valid in Mississippi, Massachusetts, Connecticut, Tennessee, Washington, Georgia, Michigan, Minnesota, Pennsylvania, and Oklahoma. *Moore Dry Goods Co. v. Jas. H. Rowe et al.*, 97 Miss. 775, 58 South. 626; *John P. Squire & Co. v. Tellier*, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322; *Young v. Lemieux*, 79 Conn. 434, 85 Atl. 436, 600, 20 L. R. A. (N. S.) 160, 129 Am. St. Rep. 193, 8 Ann. Cas. 452; *Walp v. Mooar*, 76 Conn. 515, 57 Atl. 277; *Neas v. Borches*, 109 Tenn. 398, 71 S. W. 50, 97 Am. St. Rep. 851; *McDaniels v. J. J. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947, 94 Am. St. Rep. 889; *Jac-*

ques & T. Co. v. Carstarphen Warehouse Co., 131 Ga. 1, 62 S. E. 82; *Spurr v. Travis*, 145 Mich. 721, 108 N. W. 1090, 116 Am. St. Rep. 330, 9 Ann. Cas. 250; *Thorpe v. Pen-nock Mercantile Co.*, 99 Minn. 22, 108 N. W. 940, 9 Ann. Cas. 229; *Wilson v. Edwards*, 32 Pa. Super. Ct. 295; *Feingold v. Steinberg*, 33 Pa. Super. Ct. 39; *Williams v. Fourt Nat. Bank*, 15 Okl. 477, 82 Pac. 496, 2 L. R. A. (N. S.) 334, 6 Ann. Cas. 970; *Noble v. Fort Smith Wholesale Grocery Co.*, 34 Okl. 662, 127 Pac. 14, 46 L. R. A. (N. S.) 455. In Wisconsin and Maryland the courts did not consider the question of constitutionality, but assumed the acts to be valid. *Fisher v. Herrmann*, 118 Wis. 424, 95 N. W. 392; *Hart v. Roney*, 93 Md. 432, 49 Atl. 661. Those courts holding such acts unconstitutional proceed on the theory that they unduly restrict the right of property and constitute class legislation of the most vicious kind. To sustain their contention, the burdens imposed by the acts are set out at great length, and a long record is given of the classes of business men to which they do not apply. With all due respect for their views, it seems to us that the objections which they raise to the constitutionality of such acts are matters relating to questions of expediency rather than of power.

[1] If there be one question of constitutional law well settled, it is that the courts will not declare an act unconstitutional unless plainly so, and, in case of doubt, will resolve the doubt in favor of its validity. *Eubank v. Richmond*, 226 U. S. 137, 33 Sup. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192; *Johnson v. Higgins*, 3 Metc. 566; *Henderson v. State*, 137 Ind. 552, 36 N. E. 257, 24 L. R. A. 469, 6 R. C. L. 73.

[2] From time out of mind the state has had power to regulate the acquisition, enjoyment, and disposition of property. *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620. The prevention of fraud is equally within the power of the state. *People v. Freeman*, 242 Ill. 373, 90 N. E. 366, 17 Ann. Cas. 1098; *People v. Wagner*, 86 Mich. 594, 49 N. W. 609, 13 L. R. A. 286, 24 Am. St. Rep. 141. And the state may protect the people against the consequences of fraud. *Hawker v. People of New York*, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002. Police regulations are not rendered invalid by the fact that they may incidentally affect the exercise of some right guaranteed by the Constitution. *State v. Gurry*, 121 Md. 534, 88 Atl. 546, 47 L. R. A. (N. S.) 1087, Ann. Cas. 1915B, 957. It is only where such regulations are unreasonable or constitute an unjustifiable impairment or abridgment of the right that the courts will declare them invalid. *Henderson v. New York*, 92 U. S. 259, 23 L. Ed. 543; *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460.

[3] The plain purpose of the enactment was to prevent fraudulent sales. The necessity for such legislation grew out of the fact that many merchants in failing circumstances would dispose of their entire stock of goods, pocket the money, and leave their creditors without remedy. To avoid such consequences, the statute provides that sales in bulk shall be fraudulent and void, unless certain things are done. In order that the purchaser may escape the consequences of the statute, all that he has to do is to make inquiry of the seller as to the names and places of residence or places of business of each and all of the creditors of the seller arising out of said business, and at least five days before the consummation of the sale notify them, either personally or by registered letter, of the intended sale. The seller must furnish the information in writing, and the purchaser is not responsible to any creditor not mentioned in the written statement. All that the seller is required to do is to make true answers to the inquiries of the purchaser under the penalty of fine and imprisonment, if he knowingly and willfully make false answers, or induce the sale by refusing to answer, or by fraudulently claiming or pretending ignorance of the matters inquired about; in other words, the only effect of the statute is to postpone the consummation of the sale for at least five days and to require of the seller and purchaser certain duties which would, perhaps, not consume more than two or three hours' time. From a practical standpoint, there is no ground for distinction between the statutes declaring prohibited sales void and fraudulent and those making them presumptively fraudulent. The effect is the same. A sale is merely voidable at the option of the creditor, who pursues his remedy within the statutory period. Manifestly, a seller without debts can make a valid sale. A seller who is indebted can make a valid sale after the required notice, or he may validate a sale made without notice by paying or otherwise satisfying his creditors. Considering these privileges in connection with the requirements of the statute, it seems to us that the restrictions imposed fall far short of constituting an unreasonable interference with the right of property.

[4] But it is argued that the act is discriminatory, in that it applies only to merchants, and excludes from its operation all other sellers. As a matter of fact, however, the offending class is composed principally of merchants. The classification, therefore, is not an arbitrary one, but, being based on a well-grounded distinction, is altogether reasonable, and does not violate the provisions of the fourteenth amendment to the federal Constitution or any provision of our own

Constitution. We may further add that the Supreme Court of the United States has held that similar statutes were not violative of the fourteenth amendment to the federal Constitution. *Kidd, Dater & Price Co. v. Musselman Grocer Co.*, 217 U. S. 461, 30 Sup. Ct. 606, 54 L. Ed. 839; *Lemieux v. Young*, 211 U. S. 489, 29 Sup. Ct. 174, 53 L. Ed. 295.

[5] The next question concerns the propriety of the trial court holding that plaintiff was confined in its recovery to the amount of its property which passed into the hands of Patterson by virtue of the sale. It is insisted that this is the correct construction of the statute, because the word "creditors" is qualified by the clause "arising out of said stock of merchandise," and that this position is further fortified by the following language of the last section of the act:

"Provided, that nothing in this act shall be so construed as to give any manufacturer, wholesale merchant or jobber any right to or lien on any merchandise or article in any stock of goods, except goods sold and delivered by such manufacturer, wholesale merchant or jobber."

In our opinion, this view of the statute is entirely too narrow. It expressly provides that the purchaser who fails to comply with the statute shall hold the merchandise so purchased "for the use and benefit of all the creditors of the seller," and shall be responsible to them for the fair value of such part thereof as he, the purchaser, may have transferred or conveyed to others. It is clear, we think, that the qualifying words "arising out of said stock of merchandise" are used synonymously with the words "arising out of said business," and that the statute embraces all creditors who, during the continuance of the particular business, sold the seller any part of his stock of merchandise, whether on hand at the time of the sale to the purchaser or not; the liability of the purchaser in no event to exceed the value of the merchandise purchased. The manifest purpose of the act was to provide that the entire stock of merchandise so purchased should be held in trust for all such creditors of the seller, to be distributed in proportion to their respective claims. In case the purchaser disposed of any part of the stock, he was to be personally liable. The effect of the proviso at the end of the fourth section of the act is merely to provide that no creditor should have any superior right to or lien on any merchandise or article in any stock of goods sold, unless such merchandise or articles of goods were sold by the creditor to the seller, and were embraced in the stock of goods or merchandise disposed of by the seller.

Judgment affirmed on cross-appeal and reversed on original appeal for proceedings consistent with this opinion.

ROBERTS et al. v. SANDY VALLEY & ELKHORN RY. CO.

(Court of Appeals of Kentucky. Oct. 21, 1915.)

1. APPEAL AND ERROR — 1058 — REVIEW — HARMLESS ERROR.

The exclusion of evidence which was supplied by the testimony of later witnesses is harmless, though erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. —1058.]

2. RAILROADS — 114 — CONSTRUCTION — ACTIONS—EVIDENCE.

In an action for damages sustained to plaintiffs' lands by the improper construction of defendant's roadbed, which caused a creek to cut the lands, evidence held to warrant a finding that the damage was only temporary.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 365-371; Dec. Dig. —114.]

3. RAILROADS — 113 — CONSTRUCTION — DAMAGES.

Where a railroad company builds its line on the right of way purchased from a landowner, it is liable to the landowner for damages to his remaining land only when guilty of negligence in construction.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 230, 351-357, 359-361, 363, 364; Dec. Dig. —113.]

Appeal from Circuit Court, Pike County.

Action by W. J. Roberts and wife against the Sandy Valley & Elkhorn Railway Company. There was a judgment for plaintiffs, and plaintiffs, deeming damages inadequate, appeal. Affirmed.

J. S. Cline, of Pikeville, for appellants. Auxier, Harman & Francis, of Pikeville, and Hager & Stewart, of Ashland, for appellee.

CARROLL, J. The appellants, Roberts and his wife, brought this suit, to recover damages in the sum of \$1,000, against the appellee railway company, growing out of damages alleged to have been sustained to the lands of the appellants by the construction of the roadbed of the railway company. On a trial before a jury there was a verdict in favor of the appellants for \$50, and, deeming this assessment of damages inadequate, they have appealed.

The petition charged that the railway company, in the construction of its line of road, placed on each side of Shelby creek the piers of a bridge, and by the erection of these piers and embankments connecting therewith caused the channel of Shelby creek to leave its natural bed and flow over and against the land of appellants, thereby washing away and otherwise injuring their land. The answer was a traverse of the averments of the petition.

On the trial of this case the witnesses used a diagram in explaining to the court and the jury the course of the creek and the location of the bridge piers and the land over which the water, as alleged, was diverted. This diagram, which would be equally, if not more, useful to us than to the court and jury in

describing the locality, is not in the record, although we have time and again, in other opinions requested counsel to make a part of the record in cases like this diagrams and maps used on the trial of the case. If, however, counsel see proper not to furnish us this material aid, they should not complain if the opinion does not describe accurately the situation. As aptly illustrating the difficulty we labor under in getting at the facts of a case like this, in the absence of the diagram used on the trial, we quote from the testimony of Roberts the following. Asked if he had a diagram of the premises, he said yes, and then, using the diagram before the jury, he said:

"Now right here is what we are talking about now. Here is Mr. Osborne's line running off there. That is a straight line. Here is the bend I spoke to you about. Here is the center line of the Sandy Valley & Elkhorn Railroad. This heavy line here is the fill. Here is where they put the water over on me on that corner there and cut the land and fence away. Then they come on down here to the old meadow bottom, and they put a bridge in there. And when there was any water in the creek it divided there and part went around one side of the island and part on the other, and they filled it up there and put it all in one channel. The water here strikes an abutment on the right-hand side of the creek as you go down and shoots it across on the rye field bottom. Here on the dark line is the county road. It crosses the creek above my house, and right there that little square represents my house. Here is the county road going between my house and the coal house that I had, and here across the creek they made the fill in there and filled nearly one-third of the channel in the creek opposite my house and orchard."

All of the evidence of the witness along this line was made very plain to the jury and the court by the diagram on which he pointed out the various objects and places; but, in the absence of the diagram, it is impossible for us to get an accurate idea of the situation. It, however, appears from the evidence that the strip of land which was washed away by the diversion of the water from the natural bed of the creek was about 140 feet long and 20 feet wide, and that about 60 panels of fence were washed away. It also appears that the railway was constructed on land purchased from the appellants. Osborne, a witness for appellants said that he thought it would take \$50 to protect the ground against further overflow. Other witnesses place the cost of protecting the land against further overflows at from \$100 to \$300. In the instructions the court told the jury that, in view of the fact that the railway company had purchased its right of way from the appellants, there could be no recovery in their behalf unless they believed from the evidence that in constructing the road it negligently diverted the water course of the creek in such a way as to cause the injury complained of. They were further instructed that if they found for the plaintiffs, to say whether they awarded damages for tempo-

rary or permanent injury. The appellants did not offer any instructions, and the jury in their verdict said that the damages assessed were for temporary injury.

[1] It is complained that the court erred in refusing to permit the appellant to testify that the railway company, in the construction of this road, threw a large rock in the creek near the land of the appellant, which diverted the water of the creek. Other witnesses, however, were permitted to say that they noticed large rocks that had been thrown in the bed of the creek, and we think this evidence cured whatever error there might have been in the refusal to let appellant answer the question indicated.

[2] It is also contended that the verdict of the jury, finding that the diversion of the water was caused by a temporary condition, was erroneous. We do not think so, as several witnesses were asked what it would cost to protect the land against further overflow, and these witnesses gave evidence as to what, in their opinion, it would cost, the estimates varying from \$50 to \$200 and \$300, and it also appears from the evidence of these witnesses that the condition that caused the damage could be easily remedied.

[3] It is also urged that the court erred in instructing the jury that they could not find for the plaintiffs unless they believed that the road was negligently constructed and this negligent construction caused the overflow complained of. We think that when a right of way is purchased by a railway company, and on this right of way it builds its line of road, it is only liable to the party from whom it purchased the right of way for negligence in the construction or operation of the road. *Madisonville R. Co. v. Renfro*, 127 S. W. 508.

The failure of the court to instruct the jury as to the measure of damages is also pointed out as an error, but a careful examination of the evidence satisfies us that the jury were fully authorized to find for a temporary injury; and, while they might have assessed the damages in a larger sum than they did, the damages are not so inadequate as to justify us in reversing the case on this ground.

Wherefore the judgment is affirmed.

ROSE, Judge, v. NOLEN et al.*

(Court of Appeals of Kentucky. Oct. 21, 1915.)

1. HIGHWAYS \Leftrightarrow 6—COUNTY ROADS—PUBLIC USE.

The peaceable, continuous, and open public use of a fenced way for a period of 15 years will constitute the way a public highway.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 8, 9; Dec. Dig. \Leftrightarrow 6.]

2. HIGHWAYS \Leftrightarrow 99½—COUNTY ROADS—IMPROVEMENT.

Ky. St. § 4287, declares that all public roads heretofore established by the county

courts which have not been vacated are public roads, without regard to any informality in the order of establishment, while section 4295 declares that every public road established and opened pursuant to law which has not been vacated and every road used and occupied as a public highway shall be deemed a public road whenever the establishment may come in question. A way used by the public for over 15 years was not ordered worked by the county court. Held that, such way not having been accepted, the county court was not bound to order it worked.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 174, 229, 323, 326; Dec. Dig. \Leftrightarrow 99½.]

Appeal from Circuit Court, Whitley County.

Petition by James Nolen and others for a writ of mandamus against B. F. Rose, Judge. From a judgment issuing the writ, respondent appeals. Reversed.

Tye, Siler & Gatliff, of Williamsburg, for appellant. Bryant & Lawson, of Williamsburg, for appellees.

CARROLL, J. The appellee Nolen, for himself and other citizens of Whitley county, brought this action for a mandamus against the appellant, Rose, as judge of the Whitley county court. The petition alleged, in substance, that the fiscal court of Whitley county had, by order of court, directed the public roads of the county to be worked by citizens in accordance with the statute; that the judge of the county court had divided Whitley county into road precincts, fixing the boundaries for the same, allotting the citizens subject to roadwork to work in their respective precincts, also appointing overseers for the roads; that there was a public road in Whitley county about two miles in length leading from the Jane Lay crossing to the mining camps of the Proctor Coal Company; that the judge, in dividing the county into road precincts, fixing the boundaries thereof, and allotting hands and appointing overseers thereon, did not include this road in any of the road precincts or appoint an overseer therefor or allot hands thereto, and refused to do any of these things. A writ of mandamus was prayed against the judge directing him, as county judge, to assign the road to a precinct, appoint an overseer therefor, and allot hands thereto. The answer of the judge was merely a traverse of the averments of the petition.

There was an agreed stipulation of facts showing that this road, which, it appears, had never been accepted by the county as a road, was fenced on both sides for nearly all of its entire distance, and had been used peaceably, continuously, and openly by the public generally for more than 15 years next before the commencement of this suit; that in fixing road precincts, appointing road overseers for each precinct, and allotting hands

to work on each road, the judge did not put this road in any road precinct, or appoint an overseer therefor, or allot hands thereto.

The circuit judge directed a writ of mandamus to issue compelling the county judge to set apart this road in a road precinct and appoint an overseer therefor and allot hands thereto. From this order, the county judge appeals.

[1, 2] The road in question had been used by the public for a sufficient period of time to constitute it a highway, with the right of free travel thereon as between the public and the owners of the soil over which the road runs. But this use by the public did not impose on the county the duty of keeping the road in repair as a part of the system of public roads under the control of the county.

Section 4287 of the Kentucky Statutes provides in part that:

"All public roads heretofore established by the several county courts, which have not been vacated according to law, are hereby declared to be public roads, without regard to any informality in the order of the county court by which they were established."

And section 4295 reads in part:

"Every public road * * * heretofore established and opened pursuant to law and which has not been lawfully discontinued or vacated shall continue as such, until properly discontinued, and every road * * * used and occupied as a public road * * * shall in all courts and places be taken and deemed to be a public road, * * * whenever the establishment thereof as such may come in question."

Under these statutes, before the county is charged with the duty of maintaining a road used by the public, it must be established or accepted as a road by the county. The mere fact that the public use a road and have used it for such a period of time as to give them the right to its use does not impose on the county the duty of maintaining it as a county road. It is with the county to say what roads it will assume the control and maintenance of, and until it does assume such control and maintenance by regular action of its authorities a road, although used by the public, does not become a part of the system of the roads of the county in the sense that the county may be compelled by mandatory process to impair or improve it or recognize it as a part of its road system.

The Acts of 1914 (chapter 80), sections of which we have set out, changed the rule laid down in *Riley v. Buchanan*, 116 Ky. 625, 76 S. W. 527, 25 Ky. Law Rep. 863, 63 L. R. A. 642, 3 Ann. Cas. 788, and other like cases, as to what acts of the county will be sufficient to constitute the acceptance of a public road as a part of the recognized system of roads in the county. It will be noticed that section 4287, *supra*, declares that:

"All public roads heretofore established by the several county courts, which have not been vacated according to law, are hereby declared to be public roads, without regard to any informality in the order of the county court by which they were established."

This section contemplates that before a road opened to the public shall be recognized as a county road, entitled to its share of improvements and repair, it must have been established by order of court. So that, although a road may have existed for many years and have been used continuously by the public, this does not constitute it a public road in the meaning of the statute. The Legislature evidently intended by this statute to change the manner in which roads might be treated as having been accepted by the county as public roads, and to make it a prerequisite to their recognition as county roads that they should be established as such by an order of court, and, it appearing that this road had never been established by the county court, it follows that the county judge could not be compelled by mandamus to allot hands or appoint overseers to work it. The failure, however, of the county to establish a road used by the public as a county road does not deprive the public of its use as a highway if, independent of the statute, the conditions surrounding its use are such as to create in the public a right to the use. The statute was not designed to interfere with the settled law of the state as announced in numerous decisions of this court respecting the right of the public to the use of roads. It was only intended to make appropriate action by the county necessary to the establishment of the road as a part of the road system of the county.

Wherefore the judgment is reversed, with directions to dismiss the petition.

OHIO VALLEY BANKING & TRUST CO. v. WATHEN'S EX'RS.

(Court of Appeals of Kentucky. Oct. 19, 1915.)

1. TROVER AND CONVERSION §9 — CONVERSION OF BANK STOCK—WHAT CONSTITUTES.

Where, in an action against a bank for the value of stock issued by it to plaintiff's decedent and alleged to have been converted by the bank, it appears that the certificate was never delivered to decedent; that upon sale of the stock after her death delivery to the purchaser was prevented because the certificate could not be found; that upon finding the certificate 10 days afterward the president of the bank requested plaintiff to come and get it, which plaintiff refused to do because of the refusal of the purchaser to then accept it—the bank was not guilty of a conversion, since it offered to deliver the stock at a time when the purchaser was legally bound to accept.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 58-83; Dec. Dig. § 9.]

2. EXECUTORS AND ADMINISTRATORS §164—SALE OF PROPERTY—RELEASE OF BUYER.

The fact that the executors could not deliver the certificate to the purchaser for 10 days after the sale did not release him from liability on his bid, as time was not an essential part of the contract.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 641; Dec. Dig. § 164.]

**3. EXECUTORS AND ADMINISTRATORS §167—
SALE OF STOCK—RIGHTS OF PURCHASER.**

The purchaser of stock at an executor's sale has the right to demand the identical shares purchased.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 644; Dec. Dig. §167.]

**4. EXECUTORS AND ADMINISTRATORS §164—
SALE—DELIVERY.**

In the absence of injury to the purchaser, a delay of 10 days does not affect the tender of a certificate of stock sold at an executor's sale, since the executor has a reasonable time after the sale within which to deliver.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 641; Dec. Dig. §164.]

5. BANKS AND BANKING §123—STOCK CERTIFICATE—ISSUE—CUSTODY OF BANK—LIABILITY.

Where a stock certificate of a bank is left in its custody by the owner, it is the bank's duty to deliver it within a reasonable time after demand, and upon a failure so to do the bank is liable for any damage thereby resulting to the owner or his representatives.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 303, 308, 311; Dec. Dig. §123.]

Appeal from Circuit Court, Henderson County.

Action by A. J. Wathen's Executors against the Ohio Valley Banking & Trust Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Montgomery Merritt and Yeaman & Yeaman, all of Henderson, Ky., for appellant. N. Powell Taylor and S. V. Dixon, both of Henderson, for appellees.

CARROLL, J. This suit was brought by the executors of Mrs. A. J. Wathen to recover from the appellant bank \$1,780, the alleged value of a certificate for 10 shares of stock in the bank that it was charged the bank had converted to its own use, and for this reason the executors could not deliver it to J. M. Baskett, to whom they had sold it for \$1,780. After the issues had been made up, the case was tried before a jury under an instruction telling the jury that they should find for the—

"plaintiff such an amount in damages as they believed from the evidence was the reasonable market value of the 10 shares of stock in question at the time the plaintiffs demanded possession of the same."

Under this instruction the jury found a verdict in favor of the plaintiffs for \$1,780, and judgment went accordingly, and the bank appeals.

In 1907 Mrs. Wathen bought from the Planters' State Bank 10 shares of its capital stock of the par value of \$100 per share. There was issued to her one certificate, serial No. 275, for these shares of stock. Mrs. Wathen, as it appears, never had in her possession this certificate. It remained with the bank from the time of her purchase until her death in 1913, although during this time

she received the usual dividends on the stock. In March, 1914, her executors had a sale of her personal effects, and offered for sale this stock, and it was bought by J. M. Baskett for \$178 per share, or \$1,780. On the day Baskett purchased the stock it was agreed between him and one of the executors that they should meet the next day at a designated place, when the certificate would be delivered. On the next day, before the appointed time for the delivery of the stock, the executor applied to the bank for the certificate, and was informed by the acting cashier that he did not know where it was, and he told the executor to see Mr. Merritt, the president of the bank. The executor went to see Mr. Merritt, and, some time afterwards, but on the same day, Mr. Merritt told him he could not find the certificate. Thereupon the executor notified Baskett what had happened, and said to him he would have to wait a while until he could get the certificate. It further appears that about 10 days afterwards the certificate was found in the bank in the original certificate book. It had never been torn out of the book; and there was indorsed across the face of it in pencil the word "Canceled." A book in the bank also showed that these 10 shares of stock had been transferred to Ingram Crockett, the cashier of the bank, on October 3, 1913, and on the same day another entry showed that Crockett had sold 10 shares of bank stock to Amos Becker. When the certificate was found the executor was requested by the president to come and get it, but he said that Baskett would not take it, and therefore declined to accept it. The executor further testified that two or three days after the stock had been sold, Baskett told him to get this certificate, and he would pay for it.

It might here be noticed that shortly before this sale the affairs of the bank were in an involved condition on account of some misconduct of the cashier, Ingram Crockett, and it is apparent that the condition of the bank had become pretty well known, although perhaps at that time it was not known to what extent the capital of the bank had been impaired and the value of the stock depreciated. But a few days after the sale it was known that the affairs of the bank were in a bad condition, and that the stock was not worth near so much as Baskett bid for it. Baskett testified that he bid on the stock for himself and a Mr. Nichols, and that it was knocked off to him at \$178 a share; that he knew at the time the stock could not be delivered. Asked to state for what purpose he bid \$178, he said he had reason to believe that the stock could not be delivered, and bid on it to boost the stock of the bank. He further said that shortly after the sale, but on the same day, he told the executor he was ready to take the stock, and that if he could not get the identical stock he bought would not take

any. He further said that he knew on the day of the sale, but before the sale, that the executor could not deliver to him the stock he bought, and that he bid on the stock because he believed it could not be delivered to him. Mr. Merritt, the president of the bank, said that a few days after the executor asked him about this certificate he went to the bank and found it in the stock book with the word "Canceled" written in pencil across the face of it; that upon discovering that the certificate had been improperly canceled, he erased, or had erased, the word "Canceled" written in pencil and told the executor that the stock was there subject to his order, but that the executor declined to take it because Baskett would not have it.

[1] Under this evidence it is not disputed that if the certificate could have been delivered to Baskett on the day of the sale, or the following day, he would have taken it, or else could have been compelled to take it or pay such sum in damages as the estate suffered by reason of his failure to execute his bid. This being so, the remaining question is, did the delay of about 10 days that elapsed between the day of the sale and the date when the bank offered to deliver to the executor the certificate for the 10 shares issued to Mrs. Wathen have the effect of releasing Baskett from liability on his bid, and the further effect of charging the bank with the value of the stock as though it had converted it?

[2] Baskett is not a party to this appeal, and therefore what may be said as to him for the purpose of illustrating our view of this case is not to be taken in any manner as prejudicial to his rights in the event there should be litigation between him and the executors. But it seems to us, on the record we have, that the executors should have brought this suit against Baskett in place of the bank. The fact that the executors could not deliver the certificate of stock to Baskett for about 10 days after the sale did not release Baskett from his obligation, created by the bid, to take the stock, as it does not appear that time was an essential part of the contract of purchase.

[3] Baskett had the right to insist that there should be delivered to him the identical shares of stock that he bought; that is, the shares of stock owned by Mrs. Wathen and which were represented by certificate No. 275. But within 10 days after the sale the executors, as shown by the record, could have delivered to him this identical certificate. The pencil memorandum of the cashier showing that it had been canceled did not, so far as this record discloses, present any reason why the bank officers should not have erased, as they did, the word "Canceled," or prevent them from tendering, as they did, the certificate representing the identical shares of stock that was sold.

[4] There is no claim that the executors suffered any damage by the failure of the bank to promptly deliver this certificate except such as it is alleged arose from the refusal of Baskett to accept the stock under the circumstances stated, and the refusal of Baskett to take the stock under these circumstances did not make the bank liable for the value of the stock. It does not appear that Baskett sustained any damage by reason of the delay, and the executors had a right to tender the stock to Baskett within a reasonable time after the sale, and this it appears they could have done.

If, however, it should develop that the bank could not and did not offer to deliver to the executor the certificate owned by Mrs. Wathen, and which Baskett bought, we would have another question. But there is no showing in the record that it did not and could not have delivered this certificate. The meager evidence as to the entries on the books and other circumstances throw little or no light on the question here involved, which is simply this: Did the bank, within 10 days or 2 weeks after the sale, tender to the executor the certificate owned by Mrs. Wathen, and was the bank in a position to tender and deliver this certificate representing the 10 shares of stock owned by her? If it did this, there should be a verdict for the bank.

[5] On the other hand, this certificate had apparently been left by Mrs. Wathen in the care of the bank, and it was the duty of the bank to deliver it to her, or her representative, within a reasonable time after demand, and if the bank did not and could not deliver, within the time mentioned, the certificate owned by Mrs. Wathen representing the number of shares owned by her, then the executors should have damages for the loss they sustained on account of the failure of the bank to do this. The real issue in the case as we have outlined it, was not submitted to the jury.

On the record before us, the plaintiffs wholly failed to make out a case, and the judgment is reversed, with directions for a new trial in conformity with this opinion.

LOUISVILLE GAS & ELECTRIC CO. v. WULF.*

(Court of Appeals of Kentucky. Oct. 19, 1915.)

1. LIBEL AND SLANDER ~~§~~123—QUESTION FOR COURT—MEANING.

Where the language of letters is apparently innocent on its face, the question whether, under the facts disclosed by the inducement and colloquium, it is fairly susceptible of the defamatory meaning sought to be impressed by the innuendo is one of law.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. ~~§~~123.]

2. LIBEL AND SLANDER \Leftrightarrow 7—LETTERS—EMBEZZLEMENT.

Plaintiff, who conducted a drug store, arranged with a gas and electric company, whereby its patrons might pay their bills at his store, adding a fee for his collection, and was held out by the company's bills as its agent to receive payment. After the company's bills for December, 1913, were paid to and receipted by him and turned over to the company's collector, who receipted therefor, the company, which had participated in a merger of gas companies and, in the press of business, had transferred a clerk to its credit department, sent out notices to patrons who had paid plaintiff, to the effect that their bills were still unpaid, and requesting payment. Other letters, requesting payment and stating that the service would be discontinued if remittance was not made within three days, were also sent out. *Held*, that the letters were not libelous in charging plaintiff with the offense of embezzling the money received from the company's patrons.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 17-18; Dec. Dig. \Leftrightarrow 7.]

Nunn, J., dissenting.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Fourth Division.

Action by John H. Wulf against the Louisville Gas & Electric Company. Judgment for plaintiff, and defendant appeals. Reversed.

O'Doherty & Yonts, of Louisville, for appellant. Elmer C. Underwood, Robt. G. Wulf, and O'Neal & O'Neal, all of Louisville, for appellee.

HANNAH, J. During a period of 28 years prior to May, 1913, John H. Wulf was engaged in the retail drug business, first as salesman and later as proprietor, at Preston and St. Catherine streets in Louisville. In May, 1913, he completed the construction of a modern business building at the corner of Barrett avenue and Kentucky street in Louisville, a point said to be about two miles distant from his former location, and he thereupon removed to, and embarked in, the retail drug business at this latter location, his total investment, including an equipment of handsome fixtures and a large stock of merchandise, being about \$20,000. In June, 1913, he entered into an arrangement with the Louisville Gas & Electric Company, whereby patrons of that company were authorized to pay their bills for gas and electricity at Wulf's drug store, by paying to him, in addition to the face of the bill, a fee of two cents, which was his compensation for making the collection. Under this arrangement, bills were made out by the company and mailed to its patrons in the district wherein Wulf was authorized to receive payment thereof, in the latter part of each month. These bills advised the customers that Wulf was the agent of the company authorized to receive payment thereof. They were presented and paid to Wulf, receipted by him, and returned to the customer. About nine days after mailing out the

bills—at the expiration of the discount period—the company would send its collector to Wulf's place of business to receive the amounts so collected by him. For a number of years prior to his removal from Preston and Catherine streets, Wulf had collected for the Gas & Electric Company and companies afterwards merged into it, under an arrangement of the same nature. Wulf collected and paid over to the company the amounts due to it from its patrons in his district for the month of June, 1913, and thereafter up to and including the month of December, 1913. In the latter month bills were sent out by the company to its patrons in his district, the discount period expiring December 31, 1913. These bills were paid to him, and on January 2, 1914, the amounts so collected were, by him, paid over to the company's collector, who receipted therefor in itemized form on a book or record furnished to Wulf by the company for that purpose; the book being kept by Wulf at his store. On January 9, 1914, the company, through a misunderstanding or mistake upon the part of the clerical force in charge of delinquent collections, sent to a number of its patrons who had paid their bills for December, to Wulf, a letter which read as follows:

"According to our records, the above bill still remains unpaid. I presume that our failure to receive your remittance is simply due to an oversight and not from any disposition on your part to neglect this payment. Will you kindly let us have your check by return mail, and oblige."

To other patrons, who had previously paid their bills to Wulf, there was sent a letter which read as follows:

"According to our records, the above bill still remains unpaid. Failure to receive your remittance for the same within three days from date of this letter will be considered as a notice that the service is no longer desired, and we shall have same discontinued at that time. For your information, we wish to say that if the service is discontinued for nonpayment, a charge of \$1.00 will be collected before reconnection is made."

And, later, the following letter was sent by the company to some of its patrons who had paid their bills to Wulf:

"We have not received a reply to the letter mailed to you a few days ago in reference to the above account. As this account is considerably past due, we would appreciate if you would call at this office and make settlement for same."

Asserting that the letters mentioned charged him with the offense of embezzling the money so paid to him by the company's patrons who received such letters, and were so understood by such patrons, Wulf brought this action against the Louisville Gas & Electric Company, in the Jefferson circuit court, to recover damages for the alleged libel. He recovered a verdict and judgment in the sum of \$5,000, and the defendant appeals.

[1] The language of the letters is apparently innocent on its face; but it is contended by appellee that under the facts disclosed by the inducement and colloquium, the letters are fairly susceptible of the defamatory meaning with which they are sought to be impressed by the innuendo. This is a question of law.

"If the words are not reasonably susceptible of any defamatory meaning, the judge at the trial will direct a nonsuit. * * * Where the words of an alleged libelous publication are not reasonably susceptible of any defamatory meaning, the court is justified in sustaining a demurrer to the declaration. * * * Or, in other words, it is for the court to decide whether a publication is capable of the meaning ascribed to it by an innuendo, and for the jury to determine whether such meaning is truly ascribed." *Newell on Slander & Libel* (3d Ed.) §§ 341, 345.

"It is the duty of the court to say whether a publication is capable of the meaning ascribed to it by the innuendo. But when the court is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it." 25 Cyc. 545.

[2] In determining this question, in a case like this, where the language used is entirely innocent and harmless on its face, but is such that it might possibly, in connection with certain extrinsic facts, convey a covert meaning wholly at variance from its ordinary interpretation, the inquiry is not whether the language was understood in its covert sense by those who received the letters, for that would be to substitute the irresponsible, hasty opinions of perhaps prejudiced minds for the calm and careful judgment of the court, and to place the defendant at the mercy of the misconception or morbid imaginations of the witnesses, permitting them to usurp the functions of court and jury. The real inquiry is rather whether, under all the circumstances, the language of the letters mentioned was fairly and reasonably calculated to produce upon the minds of the recipients thereof, assuming them to be persons of average intelligence and free from bias for or against the plaintiff, the impression that the company was charging plaintiff with the offense of embezzlement or wrongdoing in connection with the money collected by him from its patrons. *Thompson v. Lewiston Daily Pub. Co.*, 91 Me. 203, 39 Atl. 556.

If there be a publication of matter which, though apparently innocent and harmless on its face, is sought to be shown to be defamatory by reference to extrinsic facts, and such publication is made without the existence of any seeming occasion therefor, this is a factor of considerable weight in determining whether the language was reasonably calculated to convey to the recipients of the communication the defamatory meaning sought to be impressed thereupon. The recipient of

such a communication, being unable to account for its publication in any other reasonable manner, might be justified in assuming that the communication is an attempt to libel by indirection.

But, in the instant case, there is shown by uncontradicted evidence, indeed by the conceded facts, a reasonable explanation of and occasion for, the writing and sending of the letters mentioned. A short time before this, there had been effected a merger of several heating and light companies in Louisville, and in the press of business occasioned by the work of bringing the whole into one system, and on account of a change in the accounting methods, a clerk, who had been transferred to the credit department to assist in sending out the notices to delinquent patrons, acting under the impression that the cashier had noted on the list of delinquents all those who had paid their bills after the closure of the books on a former day, sent out the letters here involved; the names of such persons not having been so checked off of the list. The sums were small, and each bill had printed upon it a notice to the effect that Wulf was the agent of the company, authorized to receive payment thereof, and each bill so paid had been receipted by Wulf and returned to and was then in the possession of the patrons mentioned. Wulf was living in the immediate vicinity, was the owner of considerable property, permanently located, and doing a prosperous business; and it is unreasonable to presume that any person of average intelligence would conclude from the letters in question that Wulf had embezzled the money. It seems to us that any person of average intelligence would know that the receipted bills in the possession of the company's customers would completely exonerate them from having to pay the items a second time, and that there could be no inducement on the part of the company to lay before its customers a charge that Wulf had retained this money, or to attempt to collect bills which had already been paid to its authorized agent.

Under these circumstances, the only impression that these letters were fairly and reasonably calculated to produce upon the mind of a person of average intelligence and free from bias was that an error had been made somewhere in the records of the company which would be corrected upon the presentation of the receipted bill. We are therefore of the opinion that the innuendo asserted by the plaintiff is not justified; and the trial court should have directed a verdict for the defendant.

The judgment is reversed.

NUNN, J., dissenting.

COMMONWEALTH v. HOLLIDAY et al.
SAME v. HOLLIDAY.

(Court of Appeals of Kentucky. Oct. 22, 1915.)

1. INDICTMENT AND INFORMATION \S 125—
DUPLICITY.

The accusative part of an indictment unmistakably describing the offense denounced by Ky. St. \S 1358a, the conversion to one's use of the property of another without the owner's consent, the fact that there is in the descriptive part certain surplusage which might have reference to the crime denounced by section 1202, the fraudulent conversion to his own use by the agent of a corporation of its property, does not make it duplicitous; it being fairly apparent, taking the indictment as a whole and considering all its allegations, that the former offense is charged.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. $\S\S$ 334-400; Dec. Dig. \S 125.]

2. EMBEZZLEMENT \S 28—INDICTMENT—DESCRIPTION—THING CONVERTED.

An indictment charging that defendant, without the consent of the owner, converted to his own use a note, by giving it to G. for a horse, and then selling the horse and converting the proceeds of the sale to his own use, amounts, in the final analysis, only to a charge of converting to his own use the money of another, setting forth in a descriptive way the source from which the money came.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. $\S\S$ 41, 42; Dec. Dig. \S 28.]

3. INDICTMENT AND INFORMATION \S 121, 147—BILL OF PARTICULARS.

If the charge in an indictment that defendants converted to their own use buggies, wagons, and solvent notes to the value of more than \$2,000 is too general, and not sufficiently descriptive of the property, the remedy is by application for bill of particulars, and not by demurrer.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. $\S\S$ 316-320, 490-494; Dec. Dig. \S 121, 147.]

Appeal from Circuit Court, Washington County.

Demurrers to two indictments, one against Erastus Holliday, the other against him and another, were sustained, and the Commonwealth appeals. Reversed, with directions.

James Garnett, Atty. Gen., and C. S. Hill, Commonwealth's Atty., of Lebanon, for the Commonwealth. W. C. McChord, of Springfield, for appellees.

TURNER, J. These two appeals present the same question, and will be disposed of together.

The indictment against Holliday alone charges him with—

"the crime of unlawfully, fraudulently, and feloniously converting to his own use property of value, the property of another, without the consent of the owner thereof, he then and there being the agent, servant, and collector of and for said owner of said property, committed as follows, viz.: The said Erastus Holliday, on the — day of June, 1913, and before the finding of this indictment, in the county and commonwealth aforesaid, he then and there being the agent, servant, and collector of and for the George Bohon Company, a corporation duly incorporated under the laws of the state of Kentucky and doing business at Harrodsburg,

Ky., did unlawfully, fraudulently, and feloniously, and without the consent of said George Bohon Company, convert to his own use one note for and of the value of \$100 executed by Arthur Graham to said company, by giving said note to said Graham for one horse and then selling said horse and converting the proceeds of sale to his own use, amounting to more than \$20 and as much as \$100, with the fraudulent and felonious intent then and there to permanently deprive the said owner of its property therein, a further description of which is to the grand jurors unknown, the personal property of said George Bohon Company, which said note had then and there been intrusted to the care and custody of said Holliday for collection by reason of and virtue of said relationship of agency, service, and collectorship existing as aforesaid."

The indictment against Holliday and Masters charges them, while doing business as a firm, with—

"the crime of unlawfully, fraudulently, and feloniously converting to their own use property of value, the property of another, without the consent of the owner thereof, they then and there being joint agents, servants, and collectors of and for said owner of said property, committed as follows, viz.: The said Erastus Holliday and Proctor Masters, doing business under the firm name of Holliday & Masters, on the — day of June, 1913, and within 12 months before the finding of this indictment, in the county and commonwealth aforesaid, they then and there being the joint agents, servants, and collectors of and for the George Bohon Company, a corporation duly incorporated under the laws of the state of Kentucky, and doing business at Harrodsburg, Ky., did unlawfully, fraudulently and feloniously, and without the consent of said George Bohon Company, convert to their own use buggies, wagons, and good and solvent notes of the value of more than \$2,000, with the fraudulent and felonious intent then and there to permanently deprive the said owner of its property therein, a further description of which property is to the grand jurors unknown, the personal property of the said George Bohon Company, which said buggies, wagons, and notes had then and there been intrusted to the care and custody of said Holliday and Masters by reason and virtue of said relationship of agency, service, and collectorship existing as aforesaid."

The lower court sustained a demurrer to each of these indictments, and the commonwealth has appealed.

While the record does not disclose the ground upon which the demurrers were sustained, we assume from the brief of counsel for appellees that it was because, in the opinion of the lower court, more than one offense was charged in each indictment, or because neither of the indictments was sufficiently direct and certain as to the offense charged.

Section 1202 of the Kentucky Statutes reads as follows:

"If any officer, agent, clerk or servant of any bank or corporation shall embezzle, or fraudulently convert to his own use or the use of another, bullion, money, bank notes, or any effects or property belonging to such bank or corporation, or other corporation or any person, which shall have come to his possession or been placed in his care or under his management as such officer, agent, clerk or servant, he and the person to whose use the same was fraudulently converted, if he assented thereto, shall be confined in the penitentiary for not less than one nor more than ten years."

And section 1358a provides as follows:

"That any person who shall sell, dispose of or convert to his or her own use or the use of another, any money, property, or other thing of value without the consent of the owner thereof, shall be punished by confinement in the penitentiary for not less than one nor more than five years; if the money, property, or thing of value so sold, disposed of or converted to his or her own use be of the value of twenty dollars or more; or be confined in the county jail for not less than one nor more than twelve months if the value be less than twenty dollars."

The contention of the appellants is: (1) That the defendants were unable to tell from the indictments whether they were charged with the offense of embezzlement under section 1202, or whether they were charged with the offense of converting property of another without his consent under section 1358a; (2) that in the indictment against Holliday alone it was uncertain whether he was charged with the offense of converting to his own use a note, or whether he was charged with converting to his own use a horse, or whether he was charged with converting to his own use money of greater value than \$20; and (3) that the charge in the indictment against Holliday and Masters that they had fraudulently converted to their own use buggies, wagons, and notes was too general, and did not sufficiently apprise them of the charge against them.

[1] It will be observed that the crime denounced by section 1202 is against any officer or agent of a bank or other corporation who shall fraudulently convert to his own use the property or effects of such corporation, while the offense described in section 1358a is against all persons who shall convert to their own use property of another without the consent of the owner, and applies whether the defendant is an officer or agent of the owner or not, and does not depend upon whether the owner is a bank or other corporation.

These indictments, in the accusative part, clearly do not refer to the offense described in section 1202, for in that part of the indictment there is no reference whatever to the fact that the owner of the property was a corporation; but when the draftsman of the indictments came to the descriptive part he used language which would indicate that he had both sections in mind, and charged more than was necessary to make the indictment good under section 1358a, which he had plainly started to do, as shown by the accusative part.

The recent case of *Drury v. Commonwealth*, 162 Ky. 123, 172 S. W. 94, was where the indictment was objected to because it was said it charged two offenses. The indictment was under section 1164 of the Kentucky Statutes, denouncing the crime of breaking into and entering a storehouse with intent to steal, and the indictment, in addition to alleging the breaking into with intent to steal, alleged that the defendant did take, steal,

and carry away therefrom certain personal property. It was urged that this was also an indictment under section 1162, Kentucky Statutes, describing the offense of feloniously entering and breaking into a dwelling house and stealing therefrom things of value, and this court, in answering that argument, said:

"While in this case it would be sufficient in the accusative part of the indictment to charge that the defendant feloniously broke into the storehouse with the intent to steal therefrom, the additional allegation that he did feloniously steal therefrom, the additional allegation that he did feloniously steal therefrom articles of value does not create any duplicity in the indictment, and does not vitiate it. Neither do the allegations in the descriptive portion of the indictment which charge that the accused did feloniously take, steal, and carry away articles of value from said saloon, giving the name of the owner of the property, create any duplicity in the indictment or vitiate it."

The accusative part of each of the indictments in this case unmistakably describes the offense denounced by section 1358a, and the fact that there is in the descriptive part certain surplusage which might have had reference to the crime denounced by section 1202 does not make it bad on account of duplicity. Taking the indictments as a whole, and considering all of the allegations, it is fairly apparent that these charge the offense described by section 1358a, and are not open to the charge of duplicity. The difference between the accusative part of the indictment and the descriptive part is not so substantial as to be fatal to their sufficiency on demurrer. *Overstreet v. Commonwealth*, 147 Ky. 471, 144 S. W. 751.

[2] On the second proposition there is little difficulty. The charge against Holliday in the indictment that he without the consent of the owner converted to his own use one note of the value of \$100 by giving said note to Graham for one horse and then selling the horse and converting the proceeds of the sale to his own use amounts in the final analysis only to a charge of converting to his own use the money of another and setting forth in a descriptive way the source from which the money came.

[3] The charge in the other indictment that Holliday and Masters converted to their own use buggies, wagons, and solvent notes to the value of more than \$2,000 is said to be too general, and not sufficiently descriptive of the property charged to have been converted. It is quite true that the indictment is very general in its allegations as to the personal property alleged to have been converted by Holliday and Masters; but a demurrer is not the proper way to reach this question; it is within the discretion of the trial court whenever an indictment has a general charge in it which is good on demurrer, but which does not sufficiently point out or describe the property alleged to have been converted to require the commonwealth to file a bill of particulars so that the defendant may know the particular property which he is charged

with converting. *Bailey v. Commonwealth*, 130 Ky. 301, 118 S. W. 140.

Treating as surplusage the unnecessary allegations in each of these indictments, an offense was charged under section 1358a, and the demurrers should have been overruled.

For the reasons given, the judgment is reversed, with directions to overrule the demurrers.

WILSON et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 20, 1915.)

1. HOMICIDE \Leftrightarrow 300—INSTRUCTIONS—MAN-SLAUGHTER—SELF-DEFENSE.

Where the evidence on a trial for murder precludes the possibility of an altercation or struggle, and shows that deceased was shot stealthily from behind, failure to instruct upon manslaughter and self-defense is not error.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. \Leftrightarrow 300.]

2. CONSPIRACY \Leftrightarrow 48—EVIDENCE—SUFFICIENCY.

Evidence on a trial for murder reviewed, and held to justify the court in submitting to the jury the question of conspiracy between defendants.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. §§ 108-111; Dec. Dig. \Leftrightarrow 48.]

3. CRIMINAL LAW \Leftrightarrow 510—ACCOMPLICE TESTIMONY—WHAT IS.

Where, in a murder trial, a witness who overheard the two defendants talking together in jail, testified that one of them stated that the other had fired the fatal shot, it was not error to refuse an instruction limiting the weight of such evidence, under section 241, Cr. Code Prac., requiring corroboration of the testimony of an accomplice, since the section applies only to testimony given by the accused in open court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1124-1126; Dec. Dig. \Leftrightarrow 510.]

4. CRIMINAL LAW \Leftrightarrow 407—EVIDENCE—ADMISSIONS—FAILURE TO DENY.

Where, in an action for murder, it was fairly apparent that the witness overheard the whole conversation between the two defendants while in jail and believing themselves alone, and that the witness gave the substance of the entire conversation in his testimony, it was not error to admit a statement in the conversation, "You know you are the one that fired the shot," since under such circumstances it sufficiently appeared that the defendant so accused remained silent, when, if false, he would naturally have denied the charge.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 898-902, 949, 968, 970, 971; Dec. Dig. \Leftrightarrow 407.]

5. CRIMINAL LAW \Leftrightarrow 424—HOMICIDE \Leftrightarrow 174—JOINT MURDER—THREATENING LETTER.

On the trial of two defendants, jointly charged with murder, the admission of a letter in evidence, written by one of the defendants after the crime and while in jail, and containing a threat to kill the jailer, was error; such evidence being wholly irrelevant to the issues and calculated to prejudice the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1002-1010; Dec. Dig. \Leftrightarrow 424; *Homicide*, Cent. Dig. §§ 359-371; Dec. Dig. \Leftrightarrow 174.]

Appeal from Circuit Court, Christian County.

Ernest Wilson and Bubber Chafin were convicted of murder, and they appeal. Reversed.

John C. Duffy and Tom G. Skinner, both of Hopkinsville, for appellants. James Garnett, Atty. Gen., Chas. H. Morris and Robt. T. Caldwell, Asst. Attys. Gen., and W. T. Fowler, of Hopkinsville, for the Commonwealth.

TURNER, J. Appellants, Ernest Wilson and Bubber Clafin, were jointly indicted charged with the murder of J. M. Renshaw as the result of a conspiracy alleged to have been entered into by them; the indictment charging that one of them did the shooting from which Renshaw died and that the other was present at the time aiding and abetting therein, but the one who did the shooting was unknown to the grand jury. Upon their joint trial they were each convicted and sentenced to the penitentiary for life, and they jointly prosecute this appeal.

Renshaw lived a few miles south of Hopkinsville, on the Clarksville pike, and a short distance north of his home and in sight thereof was a bridge crossing Little river, over which he had to pass in going to Hopkinsville. On the afternoon of September 25, 1914, about 3:15 o'clock, he left his home alone in his buggy and started towards Hopkinsville. About the time he reached the bridge, or was just past it, a shot was heard in that vicinity. A short distance beyond the bridge he was met by persons in two or more vehicles, was bent over in his buggy, had dropped the lines, and seemed to be either sick or drunk, although his horse continued to trot slowly along. A short distance further on his son, who was going home from Hopkinsville, met him, and, seeing his condition, stopped the horse, took him back home, and immediately sent for a physician, when it was discovered that he had been shot in the back of the head about 1½ inches back of the right ear. He never regained consciousness and died in about two weeks. A short distance north of the bridge is a depression in the road, where it is concealed from sight by trees or hedge, and it is at this point where the shot is supposed to have been fired. Renshaw at the time had about \$20 in money upon his person, which had not been disturbed when his son met him.

The appellants are shown by the evidence to have been very intimate friends and companions. Early that morning one of them went to the home of the other and called him out. They were later seen together on a railroad track some three-quarters of a mile distant from the scene of the killing, at which time Chafin was approached and asked to refund some money which he had promised to pay that day. He said he did not have the money, but, in the presence of Wilson, said to the witness that he would have some money before night if he had to kill some

son of a bitch. Within one hour before the shooting, probably within 30 minutes, Chafin was seen near the bridge, going in that direction, with a woman named Mattie Taylor, with whom he is shown to have been intimate. About the same time Wilson was seen approaching the bridge and near it. Within a very short time before the shot was fired two negro men were seen near the south abutment of the bridge, and a negro woman of the general description of Mattie Taylor was seen leaving there. Shortly after the shooting two negro men were seen about 100 yards below the bridge, as they dodged into the hedge along the river. Immediately after the shooting two men were seen to emerge from the south entrance of the bridge. There had been a shower that day and the ground was soft, and early the next morning it could be seen where they climbed over the fence near the south abutment, their tracks followed down the river to a shallow place where they crossed, and thence proceeded, as shown by their tracks, remaining together all the time, until they got several hundred yards away, when one of them left the other and proceeded toward the house, as shown by his tracks, of a negro woman in the neighborhood named Leavell. His tracks were then traced back to the point where he had left his companion, and thence they proceeded together until they reached the railroad track of the Tennessee Central Railroad. Later that afternoon two negroes were seen a few miles away proceeding hastily along the railroad track. The south abutment of the bridge is in sight of the house of Renshaw, and he could be seen from there as he drove out of his place toward the pike. The top of the buggy in which Renshaw was riding was partially down, and the shot which killed him first passed through the top of the buggy and struck him in the head, ranging up; the top of the buggy being powder-burnt, as well as the back of Renshaw's neck.

It is the theory of the commonwealth that these two negroes, being in desperate need of money, had entered into a conspiracy to murder and rob any one that might happen along at this bridge at a favorable time, and that after they had shot Renshaw they were deterred from carrying out their purpose of robbery by the unexpected appearance of other persons along the highway. The tracks made by the two persons were so far apart as to indicate that they were running at the time, and the tracks made by one of them showed that he had a cleat on at least one of his shoes such as is placed on baseball shoes, and it is shown by the evidence that two or three days after the killing Wilson was wearing a pair of baseball shoes. On the Tuesday following the killing on Friday Wilson was informed by his employer, Fowler, that the tracks showed that one of the men who had run away from the bridge had

a cleat on one of his shoes such as are placed on baseball shoes, and Fowler testifies that Wilson at the time had on a pair of old baseball shoes, which seemed to be too small for him, and which were split. After the arrest of Wilson he told the deputy sheriff that he had some clothes at the home of Eva Chafin, a relative of Bubber Chafin, and when the deputy sheriff went to the home of Eva Chafin he found among other things one baseball shoe, which had been split. He could not find the other shoe, but directed the woman to hunt it up, and upon going back the following day found a baseball shoe on the fire, partially destroyed.

In addition to this circumstantial evidence, there is evidence by a negro man that Bubber Chafin told him in November, at Nortonsville, before his arrest, that he had shot a white man at Hopkinsville and was on his road to St. Louis. A negro woman testifies that some time after the killing Chafin undertook to pay her some attention, or "to go with her," as she says, and she declined to permit him to do so, whereupon he told her that if she did not go with him that she would never do anybody else any good, that he had shot and killed Mr. Renshaw, and inferentially threatened to kill her. Doc Beaumont, colored, was an inmate of the jail at the same time Wilson and Chafin were, and testifies to a conversation between them, overheard by him, but which they did not know he heard. His statement is as follows:

"Bubber says to Ernest, 'Have you got you a lawyer?' and Ernest told him, 'No,' he didn't need no lawyer; and Bubber said, 'You ought to get you one;' and he said, 'I don't need no lawyer;' and Ernest said, 'You know you are the one that fired the shot;' and I never said nothing myself, because I wasn't concerned in it myself, and that is all I heard."

The witnesses who saw the two negro men at the bridge just a short time before the shooting did not know either of the appellants, and, having paid no particular attention to them, did not identify either one of them; but the witness who saw Chafin in company with the woman going toward the bridge knew him well and positively identifies him, and the witness who saw Wilson about the same time going toward the bridge and near it knew him also and positively identifies him. Each of the defendants denied being at the bridge on that day, or having anything to do with the shooting of Renshaw; and they each relied upon an alibi, which they undertook separately to establish. Several witnesses testified for Chafin that during that day at different times he was at work in his father's tobacco field, and some of them said that he was there at about the time the crime was committed; on the contrary, the commonwealth in rebuttal introduced at least three witnesses who denied that Chafin was in the field at that time. For Wilson, in addition to his own statement, two witnesses were introduced who stated that at the time of the

shooting he was at the house of Roy Carter; but this statement is denied by Carter and his family, some of whom stated that he was not there during that day.

Five reasons are urged as grounds for reversal: (1) That the trial court erred in failing to instruct on the law of manslaughter and self-defense; (2) that it erred in giving an instruction on conspiracy; (3) that it erred in failing to give an instruction conforming to the provisions of section 241 of the Criminal Code; (4) that it erred in admitting incompetent evidence against the defendants; and (5) that it erred in permitting improper argument to the jury by the attorneys representing the commonwealth.

[1] The contention that there should have been an instruction upon manslaughter and self-defense is based upon the rule, many times declared by this court, that when there is no eyewitness to a homicide, and no one who saw the parties after they met on the occasion of the killing, the law covering murder, self-defense, and manslaughter should all be given to the jury in the instructions, in order to meet any state of fact which the jury might find from the circumstances in evidence to have existed; and that is unquestionably the rule when there is no evidence, either direct or circumstantial, from which the jury might infer that an altercation had taken place between the parties. But where all the evidence and all the physical facts show that there could have been no altercation or struggle, and that the decedent was stealthily shot from behind without notice, as in this case, the idea of self-defense or manslaughter is positively precluded. In this case the uncontradicted evidence is that Renshaw, a few short moments before the shot was fired, was driving peacefully along the highway; that at the bridge which he had to cross there were two men; that when he was a short distance beyond the bridge a shot was fired from the rear, through the top of his buggy, into the back of his head; that two or three minutes thereafter he was seen in his buggy, but stooped over and resting upon the buggy, with the lines lying loose. It would be difficult to imagine under this evidence how an altercation could have taken place between Renshaw and the person or persons who killed him. In the case of *Bast v. Commonwealth*, 124 Ky. 747, 99 S. W. 978, 30 Ky. Law Rep. 967, all the authorities in this state were reviewed on this question, and the court, after an exhaustive investigation and analysis of all the cases, laid down the rule in this way:

"This court has held with a degree of uniformity that it is the duty of the trial court to give to the jury all the law of the case, as warranted by the facts and circumstances proven; and in those cases in which the physical facts show that the homicide could not have occurred in a particular way, then it is not the duty of the trial court to give to the jury the law on that phase of the case. Where the

physical facts are such as to preclude the idea that there was a struggle or any resistance offered whatever by the deceased at the time that his life was taken, the trial court would be fully justified and warranted in refusing to give an instruction on self-defense. And again, where the physical facts, as in the case before us, are such as to preclude the idea or the possibility that the killing was the result of an accident, or that it was the result of a sudden affray, then the trial court would be warranted in refusing to give an instruction on the subjects of voluntary or involuntary manslaughter."

The rule laid down in that case is just as applicable to the facts in evidence here as it was there.

[2] The second contention is that the instruction on conspiracy should not have been given, for the reason that there was no evidence of a conspiracy. While it may be admitted that there was no direct evidence of a conspiracy, an analysis of the evidence already stated shows such facts and circumstances as authorized the jury to infer that there was a conspiracy. The fact that they were chums and were together almost every day; that one of them went to the home of the other on that morning and by signal called him out; that they left there together, and some time later, when money was demanded from one of them, which he did not have, he stated in the presence of the other that he would have some money before night or kill some son of a bitch; that they were seen that afternoon, a short time before the shooting, each approaching the bridge; that shortly thereafter a shot was fired, and two men were seen immediately running across the bridge and emerging from its southern entrance; that in two or three minutes thereafter two men answering to their general description were seen a short distance down the river from the bridge, and upon being discovered dodged into the bushes; the fact that the tracks of one of those men showed that the shoe he wore had a cleat on it, and that a day or two later one of them had on a pair of baseball shoes which had been slit down in front, and that one shoe answering this description was some time later found by an officer at a place where Wilson said he had some clothes; the fact that one of the defendants immediately after the killing disappeared from the vicinity of Hopkinsville, and that the other remained thereabouts, but was hidden in the daytime; the fact that shortly thereafter one of the defendants stated to a witness that he had shot a white man at Hopkinsville and was going to St. Louis; the fact that the same defendant stated to another witness that he had killed Mr. Renshaw; and the further fact that one of the defendants said to the other, after they were in jail, "that you know you are the one that fired the shot," when all taken together, and put together, form a chain of circumstances which authorized the jury to believe that there had been a prearranged plan between them to commit this or some other

crime of a similar nature for the purpose of obtaining money.

The facts and circumstances in evidence in this case, when they are analyzed and their relation to each other is understood, form a much stronger case of conspiracy than that which was shown in the case of *Shelby v. Commonwealth*, 91 Ky. 563, 16 S. W. 461, 13 Ky. Law Rep. 178, wherein the court said the evidence of conspiracy was insufficient to authorize the instruction. In that case, as stated by the court, the only evidence of conspiracy was the fact of the relationship of father and son existing between the two defendants; it was not shown there that either of them had threatened to commit murder for the purpose of obtaining money; it was not shown that they subsequently met at a convenient place for the carrying out of such a scheme; it was not shown that they left the place of the crime together and ran away; it was not shown that either one of them charged the other with the actual commission of the crime. After a careful examination and analysis of all the evidence of this case we have reached the conclusion that all the circumstances, when considered in their relation to each other, justified the giving of the instruction on conspiracy and authorized the jury to find that such a conspiracy existed.

[3] Section 241 of the Criminal Code provides:

"A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof."

Under this section it is insisted for the appellants that the court should have given an instruction limiting the weight to be given to the evidence of Beaumont about the conversation overheard by him between the defendants; but clearly this Code provision has no application to evidence of a conversation heard between two defendants, which is given by a third party, but applies only when the testimony of an accomplice is given in open court. The statement by one defendant to another, which is overheard and thereafter testified to by a third party, is not the testimony of one accomplice against another. It is only evidence which may be used against either or both of them. It may be admitted that the statement of Chafin subsequent to the commission of the crime, when Wilson was not present and did not assent to it, was not competent evidence against Wilson. But neither in his statement to the witness at Nortonville, that he had shot a white man at Hopkinsville and was going to St. Louis, nor in his statement to the woman at Hopkinsville that he had killed Renshaw, did Chafin in any way or manner implicate or connect Wilson with the commission of the crime, and consequently this evidence could

not have in any event affected Wilson or been prejudicial to him.

[4] It is the further contention that the evidence of Beaumont that he heard Wilson say to Chafin while they were confined in jail, "You know you are the one that fired the shot," was incompetent as against Chafin for two reasons: (1) Because it is not shown by the evidence that he either adopted or assented to the statement of Wilson; and (2) because under the circumstances he was not called upon to either deny or assent to it. It is true that the evidence of Beaumont does not, in terms, show that Chafin either denied or assented to this statement of Wilson; but, considering all of Beaumont's testimony, it is fairly apparent that he overheard the whole conversation between the parties and gave the substance of it all.

On the second proposition the appellants rely upon the case of *Merriweather v. Commonwealth*, 118 Ky. 870, 82 S. W. 592, 26 Ky. Law Rep. 793, 4 Ann. Cas. 1039. In that case eight persons were in custody of the officers, charged with murder, in a waiting room at a depot; they were manacled and being hurried to jail; there was great indignation in the community over the crime; surrounding the accused was a large and excited crowd, and none of the defendants had had an opportunity to consult their counsel or to receive any advice from their friends. Under these circumstances, some of the accused made statements involving the guilt of Merriweather, and he never denied, confessed, or assented to such statements, but remained silent, and the court held that under those circumstances he was not bound to speak, and that the evidence was not competent as against him on his separate trial. In the case of *Hayden v. Commonwealth*, 140 Ky. 634, 131 S. W. 521, the court followed the ruling in the Merriweather Case; the facts in the Hayden Case being that a man and woman were charged with grand larceny, and evidence was admitted against the man upon his separate trial to the effect that the woman had stated to the officers, in his presence, that she had thrown the things out of the window to him, and that he had taken them, and that he did not deny it, and it was held that such evidence on his separate trial was not admissible as against him.

But the difference between the situation of the parties in those cases and this calls for a different application of the rule. In this case the two defendants had been in jail for some time, were not immediately in custody of the officers, were not at the time surrounded by an excited crowd, but were quietly discussing their own case as they supposed in absolute privacy. Nothing could have been more natural than for Chafin to have immediately denied, if it had not been true, the accusation of Wilson that he (Chafin) had fired the shot that killed Renshaw. They were two ignorant negroes, each charged with

a crime, one with having committed a murder and the other with having been his confederate, and in their ignorance it was perfectly natural for them to believe that the one who actually fired the shot was more guilty than the other. It cannot be doubted that, when this conversation was had, Chafin, under the circumstances, would have immediately denied it if it had not been true. If our assumption that Beaumont overheard the whole conversation, and undertook to give the substance of it all, is correct, this evidence was competent against each of them. On another trial, doubtless, this point will be made clearer.

[5] While appellants were confined in jail Chafin wrote a letter to his mother, which was intercepted by the jail authorities and was introduced as evidence by the commonwealth over the objection of the appellants. In this letter he earnestly protested his innocence of the charge, but expressed doubt of his acquittal, because of perjured testimony which he expected to be used against him, and said to his mother, in addition, that, if she and his father did not come down there soon and aid him, he would kill the jailer or the jailer would kill him, as he had made up his mind to die, if necessary, to free himself. The letter, when analyzed, contains nothing but his declaration of innocence and his purpose to kill the jailer, if necessary, to get out of jail. It is apparent that the commonwealth did not want to introduce the letter because it contained this claim of innocence. It could only have desired its introduction for the purpose of showing the threat against the jailer.

Threats by a defendant being tried for homicide, made against persons other than deceased, are not competent, even though they are made before the commission of the crime. *Word v. Commonwealth*, 151 Ky. 527, 152 S. W. 556. And there is much better reason to exclude threats made by the defendant after the commission of the offense with which he was charged, unless the threat has some connection with the crime charged, or is made with the purpose of suppressing evidence of that crime. In this case the defendants were on trial charged with killing a man, and the commonwealth was undertaking to show their guilt only by circumstantial evidence; no statement in the letter elucidated any issue in the case nor shed any light upon any disputed fact; so far as we can see, it could have been used for no other purpose except to inflame the minds of the jury against a defendant who could be guilty of such a threat. The introduction of this letter was clearly error, and plainly prejudicial to both appellants, for in no event could it have been competent against Wilson.

The fact that one of the attorneys for the commonwealth, in his argument referring to this letter, said that it showed Chafin to be

a murderer in his heart and fully capable of killing Renshaw, not only demonstrates the purpose for which the letter was introduced, but emphasizes the necessity of excluding it.

For the reason given, the judgment is reversed, with directions to grant each of the appellants a new trial, and for further proceedings consistent herewith.

EXALL v. HOLLAND et al.

(Court of Appeals of Kentucky. Oct. 20, 1915.)

1. STATUTES ~~§~~161 — REPEAL BY IMPLICATION.

A statute may be repealed either by implication or by express provision of a subsequent statute, but a repeal by implication can only occur where the provisions of the two statutes are repugnant and irreconcilable, or where the later statute covers the whole subject-matter of the first and is manifestly intended as a substitute for it.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 230-234; Dec. Dig. ~~§~~161.]

2. STATUTES ~~§~~123—TITLES AND SUBJECTS OF ACTS—REPEALING STATUTES.

Const. § 51, provides that no law shall relate to more than one subject, and that shall be expressed in the title. Acts 1914, c. 80, the title of which recites that it is an act defining public roads, providing for their establishment, regulation, use, and maintenance, and creating the office of county road engineer, and describing the duties thereof, provides in section 89 that certain sections of Ky. St. 1909, embracing sections 4348-4356, inclusive, are thereby repealed. *Held*, that section 89, so far as it attempts to repeal the sections of the Kentucky Statutes mentioned, which relate to private passways, violates the Constitution, since, while a repealing statute may designate the statutes repealed by reference to the proper sections of the Kentucky Statutes, the repeal of the statute must be set out in the title as the purpose of the act, especially where the subject of the act proposed to be repealed is not naturally connected with the subject expressed in the title of the repealing statute.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 176-183; Dec. Dig. ~~§~~123.]

3. PRIVATE ROADS ~~§~~2—PROCEEDINGS TO ESTABLISH—APPEALS.

Ky. St. 1909, § 4348, subsec. 2, relative to proceedings to establish private passways, provides that upon the filing of the commissioners' report the clerk shall issue process against the owners of the land over which the way is proposed to be established to show cause why the report should not be confirmed. Subsection 3 provides that at the first regular term of the county court after the owners have been summoned the prescribed length of time it shall be the court's duty to examine the report, and, to the extent that no exceptions have been filed, to confirm it. Subsection 4 provides that, when exceptions shall be filed, the court shall cause a jury to be impaneled to try the issues of fact, that, if sufficient cause be not shown for setting aside the verdict, the court shall render judgment in conformity thereto, and that either party may appeal to the circuit court, and the appeal shall be tried de novo upon the confirmation of the report of the commissioners or the assessment of damages. Section 4351 provides that, when the report is filed, the county court shall proceed to establish the passway or refuse it, as in the case of a proceeding to establish a public road. *Held*, that an appeal to the circuit court and a trial in that court

cannot be had until a final judgment is rendered in the county court.

[Ed. Note.—For other cases, see *Private Roads*, Cent. Dig. §§ 3-21; Dec. Dig. ¶2.]

4. PRIVATE ROADS ¶2—PROCEEDINGS TO ESTABLISH—HEARING.

On the hearing of the application for the appointment of commissioners the only questions for determination are whether the petition shows facts which under the statute entitles the applicant to have commissioners appointed, and who shall be appointed commissioners, and the question as to the necessity of the passway cannot be then determined, but must be determined on exceptions to the report of the commissioners; the necessity for the passway being one of the subjects upon which the commissioners are required to report.

[Ed. Note.—For other cases, see *Private Roads*, Cent. Dig. §§ 3-21; Dec. Dig. ¶2.]

5. PRIVATE ROADS ¶2—PROCEEDINGS TO ESTABLISH—JURY TRIAL.

The court may have the advice of a jury on the question of necessity, but is not conclusively bound by its verdict, which has the same weight as the verdict of a jury in other cases.

[Ed. Note.—For other cases, see *Private Roads*, Cent. Dig. §§ 3-21; Dec. Dig. ¶2.]

Appeal from Circuit Court, McCracken County.

Proceeding by Tory Holland and another against Joe Exall. From an order of the circuit court dismissing an appeal from the county court, defendant appeals. Affirmed.

D. G. Park, of Paducah, for appellant. Clay & Reed, of Paducah, for appellees.

HURT, J. The appellees, Tory Holland and Sally Holland, are the joint owners of a tract of 9 acres of land which is situated in McCracken county, Ky., between the Broadway and Blandville public roads, and Joe Exall, the appellant, is the owner of lands which lie between the lands of appellees and the Broadway public road. In pursuance of section 4349, Ky. St. (Carroll) 1909, the appellees gave the appellant notice of an intended application to be made by them to the county court to have condemned for their benefit a private passway over his lands from their lands to the Broadway public road, and thereafter, on the day designated in the notice, the appellees filed their petition against appellant in the McCracken county court, in which they alleged their ownership, and residence upon the tract of land, and that they had no outlet from their farm to any public road, and that it was necessary for them, in order to enable them to attend the courts of the county, to go to elections, meeting houses, and railroad depots, and to convey their products from their farm, to have a passway across the lands of appellant, which was the only convenient route from their residence on their lands to a public road and to the county seat, courthouse, election places, meeting houses, warehouse, ferry and railroad depots, and asked that a private passway 16 feet wide be condemned for them over the lands of appellant, beginning at the northeast corner of their lands, and running in a

northern direction for a distance of about 930 feet to the Broadway road, and prayed that the court appoint commissioners to report whether or not it was necessary for them to have such passway for the purposes set out in their petition, and to perform the other duties required of such commissioners by the provisions of the act of June 23, 1893 (Laws 1893, c. 232, art. 2), which is section 4348, subsecs. 2-6, and sections 4349, 4350, 4351, 4352, 4353, 4354, 4355, and 4356, Ky. St. (Carroll) 1899.

The appellant entered his appearance and filed an answer, in which he denied that there was any necessity for a passway across his lands for the use of the plaintiffs, and as a further defense alleged that his lands and those of the appellees were once owned by one Reynolds, who sold and conveyed the lands now owned by appellees to one Wilkerson, and that by reason of other conveyances the title to the lands now owned by appellees had become vested in them, and that by reason of the deed from Wilkerson to Reynolds the appellees had an implied right to a passway over appellant's lands from their place to the Blandville public road, and for that reason the one sought by them over his lands was unnecessary. The appellees interposed a demurrer to the answer of appellant, but without waiving their demurrer filed a reply controverting the affirmative allegations of the answer, to which reply the appellant demurred generally.

The county court, without passing upon these demurrers, made an order appointing commissioners, as required by the statute above mentioned, when appellant took an appeal from the order of the county court to the circuit court. The case coming on for hearing in the circuit court, it was first ordered to be submitted upon the demurrers heretofore mentioned. Thereafter, upon the motion of appellees, the order submitting the case upon the demurrers was set aside, and an order entered dismissing the appeal, and from this order Exall prayed an appeal to this court, which was granted.

It is insisted by appellant that the statute by which the proceeding by appellees is authorized has been repealed, and that there is now no law in force to base such a proceeding upon or to authorize such a proceeding, and that the circuit court, instead of dismissing his appeal, should have dismissed the petition, and, furthermore, that the circuit court and county court should have tried and determined the question as to whether or not it was necessary under the statute for appellees to have the passway sought by them before a reference of the matter should have been had to commissioners; while the contention of appellees is that the appeal from the county court to the circuit court was prematurely taken, and that the circuit court was correct in its ruling when it ordered the

appeal dismissed that the proceeding might be terminated in the county court.

We will first consider whether the act of June 23, 1893, which is article 2 of chapter 110 of Carroll's Kentucky Statutes 1909, being sections 4348-4356, inclusive, has been repealed and is not now in force. If repealed, there is no statute providing for the enforced establishment of passways over the lands of one person for the use of another to enable him to attend courts, elections, meeting houses, mills, warehouses, or depots for the performance of his duties as a citizen of the community, and, there being no law upon which the court could rest its judgment, in such a state of case, the proceeding of appellees would be unauthorized. It is insisted that the statute supra was repealed by chapter 80 of the Acts of the General Assembly 1914, and especially by section 89 of that chapter. The last-mentioned act is embraced in article 1 of chapter 110 of Kentucky Statutes (Carroll) 1915, and is sections 4287-4356, inclusive, of chapter 110.

[1] A statute may be repealed by a subsequent statute, either by implication or by express provision of the subsequent statute. A repeal by implication can only occur where the provisions of the prior and subsequent statutes are repugnant to each other and irreconcilable (*L. & N. R. R. Co. v. Jarvis*, 87 S. W. 759, 27 Ky. Law Rep. 986; *Lawson v. First National Bank*, 102 S. W. 324, 31 Ky. Law Rep. 318; *Durrett v. Davidson*, 122 Ky. 851, 93 S. W. 25, 29 Ky. Law Rep. 401, 8 L. R. A. [N. S.] 546; *Com. v. Weller*, 14 Bush, 218, 29 Am. Rep. 407; *Gifford v. Com.*, 2 Ky. Law Rep. 437; *Auditor v. Trustees, etc.*, 81 Ky. 680; *Loran v. City of Louisville*, 4 Ky. Law Rep. 257; *Adams Express Co. v. City of Owensboro*, 85 Ky. 265, 3 S. W. 370, 8 Ky. Law Rep. 908; *Beatty v. Com.*, 91 Ky. 313, 15 S. W. 856, 12 Ky. Law Rep. 898; *City of Louisville v. Louisville Water Co.*, 105 Ky. 754, 49 S. W. 766, 20 Ky. Law Rep. 1529; *Mauget v. Plummer*, 107 Ky. 41, 52 S. W. 844, 21 Ky. Law Rep. 641), or the later statute must cover the whole subject-matter of the former one and be manifestly intended as a substitute for it (*Gorham v. Luckett*, 6 B. Mon. 146). An examination of the provisions of article 1, c. 110, Ky. St. (Carroll) 1915, demonstrates that it relates entirely to public highways and the manner of their establishment and maintenance, while article 2, c. 110, Ky. St. 1909, relates entirely to the manner of the establishment and protection of private passways, and defines the status of the persons entitled to such passways. The provisions of the two statutes are in no wise repugnant to each other, nor irreconcilable, and the later statute does not embrace nor cover the subject-matter of the former statute, and could in no event be considered as a substitute for it.

[2] It is, however, contended that the eighty-ninth section of the later statute,

which is section 4356, Ky. St. (Carroll) 1915, expressly repeals the former statute. It does expressly do so. The section is as follows:

"The following sections of Carroll's Kentucky Statutes of 1909, together with all other laws, or parts of laws, with amendments thereto, in conflict herewith, are hereby repealed: sections * * * 4287-4356, * * * inclusive, * * * and * * * are hereby repealed."

The act of June 23, 1893, upon the subject of passways, and which is embraced in sections 4348-4356, inclusive, of Carroll's Kentucky Statutes 1909, and which are a portion of the sections of the statutes referred to as sections 4287-4356, all inclusive, are thus attempted to be expressly repealed, and if the repealing clause is valid, it has the effect to do so. Sections 4348-4356, inclusive, Ky. St. 1909, supra, contain nothing that is inconsistent with or in conflict with the provisions of article 1, c. 110, Ky. St. 1915, supra.

The title of the act of 1914, which it is contended effects the repeal insisted upon, is as follows:

"An act defining public roads; providing for their establishment, regulation, use and maintenance; and creating the office of county road engineer, and prescribing the duties thereof."

Section 51 of the Constitution provides as follows:

"No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length."

It has been said that the purpose of the Constitution makers, in adopting that provision of the Constitution, was to prevent vicious legislation from being enacted by use of deceptive titles, which would mislead the legislators as to what was being attempted to be done. This court, in *Ex parte City of Paducah v. Petitioner*, 125 Ky. 510, 101 S. W. 898, 31 Ky. Law Rep. 170, in construing this provision of the Constitution, said:

"In 1904 the General Assembly by an act adopted the Kentucky Statutes as the law of the state, and provided that any of the chapters or sections therein might be amended or repealed by reference to and citation of the chapter or section without giving the date or title to the act from which the chapter or section was taken. When the Legislature amends or repeals a section of the Kentucky Statutes, and the title of the repealing or amendatory act mentions the section affected, the members of the General Assembly can at once conveniently examine the statute and ascertain the nature of the amendment. * * * We therefore conclude that the intention of the constitutional provision will be fully carried out when the title of an act calls attention to the section or chapter of the Kentucky Statutes to be repealed or amended."

It will be seen that the title of the act of 1914, which is article 1, c. 110, Ky. St. 1915, does not refer to or indicate in the remotest way that a clause of the act is designed to repeal the act embraced in article 2, c. 110, Ky. St. 1909. While it is not violative of section 51 of the Constitution for the Gen-

eral Assembly to repeal a statute by adopting a repealing statute in which the title refers to the act to be repealed by a reference to the section of Kentucky Statutes which embraces the statute, but a statute designed to expressly repeal another must have a title, wherein the repeal of the statute is set out as the purpose of the act, and that is doubly true where the subject of the act proposed to be repealed is not naturally connected with the subject expressed in the title of the act wherein the repealing clause is incorporated.

We conclude, therefore, that section 4356s, Ky. St. 1915, is violative of section 51 of the Constitution so far as it proposes to repeal article 2, c. 110, Ky. St. 1909, and the statute therein embraced is a valid and existing statute.

[3-5] The question remaining is whether or not the appeal from the county to the circuit court was premature. It is apparent from an examination of all the provisions of the statute embraced in article 2, c. 110, Ky. St. 1909 (Carroll), that it was intended that this statute should provide a complete proceeding for the establishment of a private passway. Jurisdiction was conferred upon the county court for that purpose, and it certainly was not contemplated that at any preliminary stage of the proceedings in the county court one or the other parties could remove the proceedings by appeal to the circuit court, and there complete what had been begun in the county court. It is true that the right of appeal from the county to the circuit court exists, and the trial in the circuit court should be a trial *de novo*, but, manifestly, this appeal to and trial in the circuit court cannot be had until a final judgment is rendered in the county court. Subsection 2 of section 4348 of article 2, c. 110, Ky. St. 1909, provides that upon the filing of the report of the commissioners the clerk shall issue process against the landowners over whose lands the way is proposed to be established to show cause why the report should not be adopted. Subsection 3 of section 4348 provides that at the first term of the county court, after the parties have been summoned the length of time prescribed by the Civil Code before an answer is required, if the court shall find that the report is in conformity to law, it will confirm the report as to all the parties who do not file exceptions to the report. Subsection 4 provides that, if exceptions are filed, the court will impanel a jury to try the issues of fact made by the exceptions. If sufficient grounds are not shown for setting aside the verdict of the jury, the court shall render judgment in conformity thereto. After the judgment then the parties may appeal to the circuit court, where the appeal shall be tried *de novo*, "upon the confirmation of the report of the commissioners by the county court, or the as-

essment of damages by said court, as herein provided." Section 4351 provides that, when the report of the commissioners is filed, the county court shall proceed to establish the passway or refuse it, as in case of a proceeding to establish a public road.

The contention of appellant that the court should determine the question of the applicant's necessity to have the passway condemned before the appointment of the commissioners is not tenable, for the reason that it is one of the subjects upon which the statute requires the commissioners to report, and it would be idle to make such requirement of the commissioners after the court had already determined that question. The parties may except to the finding of the commissioners upon the subject of the necessity of the passway, and the court may have the advice of a jury upon that question. Although it is not conclusively bound by the jury's verdict as to the question of the necessity for the passway, it has the same weight as the verdict of the jury in other cases. *L. & N. R. R. Co. v. Ward*, 150 Ky. 45, 149 S. W. 1145. It was held by this court, in *Kirk-Christy Co. v. American Association*, 128 Ky. 668, 108 S. W. 232, 32 Ky. Law Rep. 1177, that when the applicant filed his petition in the county court showing the necessary facts required by the statute, the court should appoint the commissioners, and when the commissioners' report was filed, process should go against the landowners, and then they could make their defense. The court must determine the necessity for the passway, so far as regards the appointment of the commissioners, from the statements of the petition, and the issue as to the actual necessity for the passway is one going to the merits of the case, and must be determined upon exceptions to the report of the commissioners. *Kirk-Christy Co. v. American Association*, *supra*. Ten days' notice of the application for the appointment of commissioners is required to enable the owner through whose land the passway is proposed to be condemned to have a hearing at that time as to who shall be appointed commissioners and whether or not the petition of the applicant shows facts which, under the statute, entitle him to have commissioners appointed. These are the only questions before the court at that time, and necessarily must be the only ones upon which the land owner can be heard.

With these views, it is not necessary for us to give any opinion as to whether the appellant's defense, as set out in his answer, will or not be sufficient, when offered at the proper time, and we make no intimation in regard to it.

The order of the circuit court dismissing the appeal taken by appellant from the order of the county court is therefore affirmed.

CUMBERLAND R. CO. v. WALTON.*

(Court of Appeals of Kentucky. Oct. 22, 1915.)

1. MASTER AND SERVANT \Leftrightarrow 137—PERSONS ON TRACK—DUTY OF RAILROAD COMPANY.

Defendant operating a short railroad carrying coal from mines, and running a daily passenger train and whose right of way was fenced, and along whose road there was a foot-path on one side and a space on the other affording room enough to walk from its blacksmith shop to its station in a small village, none of the buildings of which were located with respect to the track so as to require its use by its inhabitants, was not within the rule that, where its employees required use of the track, or its use by the public generally with its knowledge so continued that the presence of employees or others on the track must be anticipated, it was required to entertain a lookout and give warning of its trains.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. \Leftrightarrow 137.]

2. MASTER AND SERVANT \Leftrightarrow 89—ACTION FOR INJURY—SCOPE OF EMPLOYMENT.

Plaintiff, employed by defendant railroad as a car repairer, starting on his foreman's order to repair a house owned or occupied by the son of the road's superintendent, as to whom it was not shown that the road sustained any contractual relation compelling it to send its employee to repair it, was not within the scope of his employment, but, while walking on the track, was a trespasser.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 153-156; Dec. Dig. \Leftrightarrow 89.]

3. MASTER AND SERVANT \Leftrightarrow 137—INJURY ON TRACK—DUTY.

Where an employé of defendant railroad, while engaged in defendant's business found it reasonably necessary to go upon its track at a time when, and a place where, the presence of employés should have been reasonably anticipated, it was the railroad's duty to look out for him, and give him a timely warning of the approach of its train by blowing the whistle or ringing the bell.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. \Leftrightarrow 137.]

4. MASTER AND SERVANT \Leftrightarrow 278—TRESPASSER ON TRACK—NEGLIGENCE—EVIDENCE.

In action by car repairer employed by defendant railroad for injury upon its tracks while a trespasser, evidence held to show that defendant could not have prevented the injury by the exercise of ordinary care, after discovering his peril.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. \Leftrightarrow 278.]

5. MASTER AND SERVANT \Leftrightarrow 137—INJURY ON TRACK—TRESPASSER—NEGLIGENCE.

As to its car repairer while a trespasser on its track, defendant railroad owed no other duty than to use ordinary care to avoid injuring him after the discovery of his peril, and, where he stepped upon the track so near an approaching engine that his presence was not discovered in time to prevent it from striking him, it was guilty of no negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. \Leftrightarrow 137.]

6. MASTER AND SERVANT \Leftrightarrow 281—INJURY ON TRACK—CONTRIBUTORY NEGLIGENCE.

Evidence, in a car repairer's action against a railroad for injury on its track, held to show

his negligence so contributing to his injuries that but for it it would not have occurred.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. \Leftrightarrow 281.]

Appeal from Circuit Court, Knox County. Action by William Walton against the Cumberland Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

P. D. Black, and Black, Black & Owens, all of Barbourville, for appellant. B. B. Golden and Golden & Lay, all of Barbourville, for appellee.

SETTLE, J. This is an appeal from a judgment entered upon a verdict awarding the appellee, William Walton, \$12,000 damages for injuries sustained by being run over by an engine and caboose operated on the track of the appellant, Cumberland Railroad Company, in its switchyard at Artemus, this state. In view of the nature and extent of the injuries sustained by appellee, the amount recovered is not unreasonable, if the recovery was authorized at all.

The appellant's railroad lies wholly in Knox county, extends from Artemus, a village four miles from Barbourville, to Warren, where coal mines are located, and is only about eight miles in length. The principal business of the road is the transporting of coal from the mines, but in addition to its freight train, used for that purpose, it runs a passenger train, consisting of an engine and one or two old coaches, between Artemus and Warren daily. It owns no rolling stock, but leases its freight engine, coal cars, passenger engine and coaches from other railroad companies. Besides the engineers, firemen and brakemen in charge of its passenger and freight trains, it employs a small number of men, perhaps less than a dozen, in maintaining its stations and road-bed and doing other work necessary to the operation of its business.

The appellee, Walton, was employed by appellant as a car repairer, and had served it in that capacity about six months prior to December 12, 1912, the day on which his injuries were received. Shortly after 6 o'clock on the morning of that day appellee went to the appellant's blacksmith shop in Artemus, where he made a fire in the forge and assisted in welding some irons. After this work was completed he was directed by Joshua Parrott, an employé of appellant and his foreman in the latter's service, to go to Warren for the purpose of making some repairs on the dwelling house of B. O. Milner, a son of the superintendent of the appellant company. It appears that he intended going to Warren on appellant's freight train, but that while he was away from the shop to get some tools to take with him, the freight engine and caboose, which had been standing

on the main track near the station, went to the river, about a half mile distant, to take on sand and water, and when appellee returned to the shop he was erroneously informed by some one there that the freight train had gone to Warren, which made it necessary for him to take the passenger train soon to leave for Warren, to get aboard of which it was necessary for him to go to the depot building a hundred yards or more from the blacksmith shop. It turned out, however, that the freight train had not left for Warren as appellee was informed, and that its engine and caboose, which had gone to the river, were returning on the main track to the depot when appellee left the blacksmith shop to reach the depot for the purpose of taking the passenger train. So when the latter left the blacksmith shop he entered a narrow footpath leading up to the railroad track, where it turned and ran outside of and along the track to the depot. After walking along this path and outside of the ties for a distance of 50 or 70 feet from the blacksmith shop, he left it and stepped either upon the railroad track or upon the ends of the ties outside of the rail nearest him, immediately following which act he was struck in the side or back and knocked down by the returning caboose and engine of the freight train, resulting in the injuries complained of.

The ground of recovery set out in the petition is that the appellee's injuries were caused by the negligence of appellant's servants in charge of the freight engine and caboose, in failing to reduce its speed, maintain a proper lookout, and give the customary signals of its approach to the place of the accident. The answer of appellant denied the negligence charged, and pleaded contributory negligence on the part of appellee.

[1] It is appellee's contention that appellant's tracks at the place of the accident were so used by its employes and others, and such use acquiesced in by appellant, as to impose upon the latter and its servants the duty of anticipating their presence thereon and of exercising ordinary care to maintain such regulation of the speed of their moving trains and such lookout and signals therefrom as would prevent injury to the persons using the track. It is the contention of appellant that it owed no lookout duty to appellee, and that his presence on the track at the time of the accident was not to be anticipated. That although he was its employe he was not at the time he was injured discharging any duty that he owed it; in brief, that he was a trespasser. Appellee and some of his witnesses testified that the railroad track at the place of the accident and between that and the depot was frequently used by appellant's servants and others. On the other hand numerous witnesses introduced by appellant testified that such use of the track was only occasional; and it is apparent from the testimony of the witnesses

of both appellant and appellee that there was no necessity for such use of the track by any person, as the path from which appellee stepped on the track before receiving his injuries extended from the blacksmith shop and beyond it down to the depot; that it was of sufficient width to enable persons going to or from the depot up and down the railroad track to walk in comfort and without danger of coming in collision with passing trains; that in addition to the safe walking afforded by the path mentioned, there was and is, on the other side of the main track and between it and the only switch track in appellant's depot yard, ground or space, extending from a point above the blacksmith shop down to the depot, free of obstacles, and of sufficient width to prevent contact with the train on either track, which persons, not desiring to use the path, could walk on from the blacksmith shop to the depot.

The evidence was all to the effect that appellant's right of way on each side of the tracks at the place of the accident, as well as above and below it, was fenced; that there was no railroad crossing anywhere between the blacksmith shop and depot, and no residences, stores, or other buildings. In view of this situation no reason is apparent for the use of either of the railroad tracks as a walkway by appellee or other persons in passing between the blacksmith shop and depot or going up or down the railroad. It may be that in switching, coupling, or otherwise manipulating trains, the presence of some of the trainmen on the tracks at or near the place of the accident at times is necessary, but we can imagine no other cause for their use by other employes of appellant or pedestrians.

According to the evidence Artemus is a small village with a population of 250 or 300, and none of its residences, shops, or buildings are located with respect to appellant's railroad tracks so as to require or authorize their use by its inhabitants. On the contrary, they appear to be connected by the usual streets or highways, which render every part of the village accessible, without the use of appellant's railroad tracks. For the foregoing reasons, we must sustain the contention of appellant that the facts of this case are not sufficient to bring it within the rule that, where its employes required use of the track, or its use by the public generally with the knowledge and acquiescence of the railroad company has so continued as that the presence of such employes, or other persons, on them at the point where so used must be anticipated by it in running its trains, it will impose upon it the consequent duty of maintaining, in approaching such place of use, a lookout and giving warning of their coming.

In *C. & N. O. Ry. Co. v. Nipp's Adm'x*, 125 Ky. 49, 100 S. W. 246, 80 Ky. Law Rep. 1131, *L. & N. R. Co. v. Redmon's Adm'x*, 122 Ky.

385, 91 S. W. 722, 28 Ky. Law Rep. 1293, *Miller's Adm'r v. I. C. R. Co.*, 118 S. W. 348, and a number of other cases, in which it was sought to have the above rule applied, it was held that it should be confined to cities and thickly populated communities, and not extended to rural communities or sparsely settled places, although the track at those places may be used by a large number of persons. On the other hand, there are numerous later cases, such as *O. & O. Ry. Co. v. Warnock's Adm'r*, 150 Ky. 75, 150 S. W. 29; *Corder's Adm'r v. C., N. O. & T. P. Ry. Co.*, 155 Ky. 536, 150 S. W. 1144; and *O. & O. R. Co. v. Dawson's Adm'r*, 159 Ky. 296, 167 S. W. 125, in which it was held that the question whether the party injured is a mere trespasser or licensee must depend, not on the fact that the accident happened in a city or incorporated town, but on the number of persons using the track at the place of the accident, and, further, that the question should be left to the decision of the jury under a proper instruction from the court. Thus, in *C. & O. Ry. Co. v. Dawson's Adm'r*, supra, it is in the opinion said:

"In this case plaintiff shows that there were about 350 persons living in the town of Garrison. There was considerable travel between that point and the ferry landing. Persons going to and from the ferry landing to the depot used defendant's main track between Garrison lane and the depot. The track was used daily by about 100 persons. The decedent was between 15 and 25 feet from the station platform, and from 75 to 90 feet from the depot building. Under these circumstances, it was proper to submit to the jury the question whether or not decedent was a trespasser to whom no duty was owing until after her peril was discovered, or a licensee to whom the defendant owed the duty of keeping a lookout and giving timely warning of the approach of the train."

In the instant case the evidence falls to show such use of appellant's track as imposed upon it, while operating its train, the duty of anticipating the presence of its employes or other persons on it at the place of the accident, or of maintaining a lookout for them and giving warning of the movements of the train. If, however, the evidence had been stronger, and sufficient to prove such use of the track as was shown in *C. & O. R. Co. v. Dawson's Adm'r*, supra, the jury should have been allowed to determine whether the facts authorized the application of the rule in question. This the trial court failed to do. In none of the instructions was that question submitted to the jury. On the contrary, instruction No. 1, erroneously assumed the applicability of the rule and the existence of the facts necessary to authorize its application. As the instructions were objected to by appellant, this error, even in the absence of the graver one committed by the court, to be later indicated, would, of itself, have compelled the reversal of the judgment.

[2, 3] It is, however, insisted for appellee that he was, when injured, in the performance of a duty required of him by appellant's foreman, Joshua Parrott, and that fact gave

him the right to go upon the track, and required its servants in charge of the engine and caboose, not only to anticipate his presence on the track, but also to use such reasonable precautions in operating the engine and caboose as would have prevented his injuries. The duty required of him by the foreman was to repair a house at Warren, owned or occupied by a son of the superintendent of appellant's road. It is not apparent from the evidence that appellant was under any duty to make the repairs referred to. It was not shown to be the owner of the house, or that it sustained to the occupant any contractual relation that compelled it to send one of its employes to repair it. The service required of appellee under his employment by appellant was that of repairing cars, and not the doing of work for others, with which appellant was in no wise concerned. If, therefore, the work he was directed to do for the son of the superintendent was not such as appertained to his employment nor within the apparent scope thereof, it cannot be said that its performance was a duty required of him by appellant.

In order to recover on the contention he actually makes, appellee must have shown that he was engaged in appellant's business, and that it was reasonably necessary for him to go upon the railroad track at a time and place, when and where the presence of employes on the track should have been reasonably anticipated. Appellant would then have owed him the duty of looking out for him, and giving him a timely warning of the coming of the engine and caboose by blowing the whistle or ringing the bell. *C., N. O. & T. P. Ry. Co. v. Troxell*, 143 Ky. 770, 137 S. W. 543. The facts, however, do not sustain his contention, but give him a different attitude, and compel the conclusion that his status at the time of receiving his injuries was that of a mere trespasser. If a trespasser, the only other question to be determined is, Could appellant's servants in charge of the engine and caboose, after discovering his peril, have prevented his injuries by the exercise of ordinary care?

[4] As to this question there is little conflict in the evidence. Appellee's own testimony throws scarcely any light on the matter, for he admitted he did not know whether he was between the rails of the track or walking on the ends of the ties when struck by the caboose and engine. He professed to know when he stepped from the path onto the track, but not where he did so, nor how far he walked on the track or end of the ties before being knocked down by the caboose. He admitted he was rendered unconscious by the collision with the caboose, and that he did not regain consciousness until about three weeks later. While numerous witnesses testified in the case, only two of them claim to have seen the accident. These were James Parrott, fireman on the engine pushing the caboose that struck appellee, and Arnold

Rice, flagman on the passenger train then standing on the switch track. Parrott said he did not see appellee, although keeping a lookout, until "something like a thought before the caboose struck him," and that the latter was then six or eight feet from the caboose, and walking on the ends of the ties outside the rail; that he (Parrott) immediately notified the engineer to stop the engine, which was done as quickly as possible, but not until after appellee was struck and knocked down. Rice, who was standing between appellee and the depot, said he saw him come out of the blacksmith shop and walk toward the depot down the path a short distance parallel with the railroad track, and that he then stepped on the track in front of the approaching caboose, being pushed by the engine, after doing which he walked but two or three steps before being overtaken and knocked down by the caboose; that, upon seeing appellee's danger, he whistled to him, just before the caboose reached him, or as it did so, but failed to get his attention. The facts furnished by the testimony of these two witnesses, who alone were in a position to see the occurrence and know the circumstances, and whose statements are uncontradicted, demonstrate that the injuries sustained by appellee could not have been prevented after his presence on the track became known to those in charge of the engine and caboose.

[5] In view of the foregoing facts it is not material whether the engine and caboose gave the statutory, or any, signals of its approach; nor does the speed at which they were running enter into the case. It appears, however, that its speed was six or eight miles per hour and that the bell was constantly sounded. Appellant's servants in charge thereof owed appellee no other duty than to use ordinary care to avoid injuring him after the discovery of his peril; and, as he stepped upon the track at a point so near the approaching engine and caboose, his presence thereon was not discovered by them in time to prevent the train from striking him, they were not guilty of negligence, and on this ground alone the jury should have been peremptorily instructed to find for appellant, as requested by its counsel. *Gregory v. L. & N. R. R. Co.*, 79 S. W. 238, 25 Ky. Law Rep. 1986; *C. & O. Ry. Co. v. See's Adm'r*, 79 S. W. 252, 25 Ky. Law Rep. 1995; *Brown v. L. & N. R. Co.*, 97 Ky. 228, 30 S. W. 639, 17 Ky. Law Rep. 145; *C. & O. Ry. Co. v. Perkins*, 47 S. W. 259, 20 Ky. Law Rep. 608; *L. & N. R. Co. v. Redmon's Adm'r*, 122 Ky. 385, 91 S. W. 722, 28 Ky. Law Rep. 1293; *Helton's Adm'r v. C. & O. R. Co.*, 157 Ky. 380, 163 S. W. 224.

[6] It is also patent that the peremptory instruction was authorized upon the further ground, that, according to the evidence, appellee was himself guilty of negligence which so contributed to his injuries that but for same they would not have been received.

That is to say, the evidence conclusively shows an absolute failure upon his part to take any precaution for his own safety. Thus far we have considered the case without reference to the question whether the engine pushing the caboose in approaching the place of the accident gave the usual signals, or whether those in charge thereof maintained a lookout. In point of fact, the evidence conclusively shows that the engine bell was constantly ringing from the time the engine and caboose came in sight of the blacksmith shop until the accident occurred, and fairly apparent from the evidence that the engineer and fireman were also maintaining a lookout ahead of them on the track. Although in leaving the blacksmith shop appellee was facing in the direction from which the engine and caboose were approaching, according to his own testimony he never looked that way at all to see whether there was a train on the track. After getting upon the path paralleling the track, he turned in the direction of the depot without taking a look in the direction from which the engine and caboose came. After continuing in the path for some distance, and when the caboose had almost reached him, he then stepped upon the track or the end of the ties without heeding the ringing of the engine bell or looking in that direction to see if the track was clear. It is true he testified that the passenger train was then standing on the switch track but a short distance from him, and that the escape of steam from its engine prevented him from hearing the coming of the caboose and engine of the freight train, but this, in view of the fact that in stepping upon the track he became a trespasser to whom no lookout duty was owing by those in charge of the engine and caboose, instead of excusing him from using ordinary care to protect himself from danger, should have made him more mindful of the need of its exercise. As said in *Bauer v. I. C. R. Co.*, 156 Ky. 187, 160 S. W. 933:

"The rule in this state is that contributory negligence bars a recovery unless, notwithstanding the negligence of the person injured, and after his peril is perceived, * * * the defendant's servants could, by ordinary care, avoid injury to him. The traveler who by his own negligence puts himself in peril on a railroad track cannot recover, unless the danger * * * may be avoided by proper care on the part of the railroad after it has notice, actual or constructive, of the danger in which his negligence has placed him. If the train was by negligence running too fast and the deceased was by negligence on the track, the injury would be due to the concurrent negligence of both the parties, and in such a case he cannot recover for the negligence of the railroad company, because but for his own negligence he would not have been hurt; and when both parties have been negligent the law will not measure comparisons between them, and make the defendant responsible on the ground that its negligence was greater than his. * * * This would be to lay down the rule of comparative negligence, and to hold that, although the intestate was negligent, there could be a recovery if the negligence of the defendant, and not his negligence, was the proximate cause of the injury. The rule has been so

declared in some jurisdictions, but it has never been followed in this state."

The facts bring this case clearly within the rule announced in *L. & N. R. Co. v. Trower's Adm'r*, 131 Ky. 589, 115 S. W. 719, 20 L. R. A. (N. S.) 380; *Helm v. L. & N. R. Co.*, 17 Ky. Law Rep. 1004, 33 S. W. 396; *I. C. R. R. Co. v. Willis' Adm'r*, 123 Ky. 636, 97 S. W. 21, 29 Ky. Law Rep. 1187; *Craddock v. L. & N. R. Co.*, 13 Ky. Law Rep. 18, 16 S. W. 125; *Helton's Adm'r v. C. & O. R. Co.*, 157 Ky. 380, 163 S. W. 224.

For the reasons indicated the judgment is reversed and cause remanded for a new trial consistent with the opinion.

DEITCHMAN v. BOWLES.

(Court of Appeals of Kentucky. Oct. 19, 1915.)

1. LIBEL AND SLANDER ¶7—WORDS ACTIONABLE—"ROB"—CONSTRUCTION.

The word "rob" may be used to import commission of a felony, or it may be used colloquially, and in the latter sense it is not actionable per se.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 17-78; Dec. Dig. ¶7.

For other definitions, see *Words and Phrases*, First and Second Series, *Rob*.]

2. LIBEL AND SLANDER ¶123 — TRIAL — WORDS IMPUTING CRIME — QUESTION FOR JURY.

Where the defendant in an action for slander said that plaintiff robbed his sister-in-law, the word "rob" is susceptible of two meanings, one of which is actionable and one is not, and in the absence of other language determining the meaning the question is for the jury as to what sense the word carried.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 356-364; Dec. Dig. ¶123.]

3. LIBEL AND SLANDER ¶123—INSTRUCTIONS — DEFINITION OF TERMS.

Where defendant said that plaintiff robbed his sister-in-law, and in an action of slander therefor the court instructed that, if defendant thereby meant that plaintiff had committed the crime of robbery, the verdict should be for plaintiff, the refusal to define the crime of robbery was error, since the defendant was entitled to have the jury understand the crime.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 356-364; Dec. Dig. ¶123.]

4. APPEAL AND ERROR ¶500—RECORD—CONTENTS—RULING BELOW.

Where the appellant charges error in limiting the number of witnesses upon either side, but his bill of exceptions fails to show such an order, the appellate court will not consider the error assigned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2295-2298; Dec. Dig. ¶500.]

5. LIBEL AND SLANDER ¶63—MITIGATION OF DAMAGES.

In an action for slander, evidence that the words were used in the course of a political campaign and in retaliation for words used by the plaintiff against the defendant was admissible in mitigation of damages.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 164, 318; Dec. Dig. ¶63.]

6. WITNESSES ¶280—IMPEACHMENT—BIAS—EVIDENCE.

In an action for slander, where the plaintiff's witness was asked, "You were a follower of [the plaintiff] in that campaign?" on objection the question was excluded. Held that, while it was competent to show the state of feeling between a witness and the plaintiff, the question as put was improper.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 988, 990-993; Dec. Dig. ¶280.]

7. LIBEL AND SLANDER ¶100 — JUSTIFICATION.

In an action for slander, in which the defendant does not seek to show justification for the words used, plaintiff may show as part of his main case in aggravation of damages that he is of good character and that his reputation for honesty in the community is good.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 246-256, 258-272, 291, 322, 323; Dec. Dig. ¶100.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Fourth Division.

Action by J. A. Bowles against William Deitchman. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Clem W. Huggins, Robert J. Hagan, and L. D. Greene, all of Louisville, for appellant. Robert L. Page, of Louisville, for appellee.

HANNAH, J. J. A. Bowles sued William Deitchman in the Jefferson circuit court for slander. He recovered a judgment in the sum of \$500; and the defendant appeals.

This case is the aftermath of a hotly contested election, in the course of which appellant in a campaign speech made remarks to which appellee took exception. The language which plaintiff complained of was as follows:

"This man is a great booster of Highland Park. He robbed his sister-in-law of three hundred dollars, and caused her to have to send her children to an orphan's home."

[1] The word "rob" does not necessarily carry with it the imputation of crime. Given its technical meaning as used in law, it, of course, imports the commission of a felony; but colloquially it is quite often used when no imputation of crime is intended, and, where used in its colloquial sense, it is not actionable per se.

[2] If a consideration of all the language used at the time the word "rob" was used demonstrates that it was used only in its colloquial sense, it will be held nonactionable per se as a matter of law. *Macauley v. Elrod*, 27 S. W. 867, 16 Ky. Law Rep. 291. But, in the absence of accompanying language determining the quality of expressions having two interpretations, one actionable, and the other nonactionable, it is for the jury to determine in which sense the language was spoken. *Beams v. Beams*, 138 Ky. 818, 129 S. W. 298; *Welsh v. Eakle*, 7 J. J. Marsh. 424; *Dedway v. Powell*, 4 Bush, 77, 96 Am. Dec. 283; *Winstead v. Trice*, 5 Ky. Law Rep. 863; 12 Ky. Opinions, 590.

[3] The court instructed the jury that, if

they believed from the evidence that on November 3, 1913, in the presence and hearing of some other person, defendant, William Deitchman, falsely and maliciously spoke of and concerning plaintiff, the language above set forth, "thereby meaning that the plaintiff had committed the crime of robbery," the jury should find for plaintiff. Defendant objected to this instruction, and asked the court to give an instruction defining the crime of "robbery" as used in the instructions given. This request the court denied, and of this ruling appellant complains.

The case of *Beams v. Beams*, supra, is directly in point, and conclusive upon the contention here presented. In that case the word "stole" was complained of. After noting that the word has an actionable and a nonactionable sense, and that the plaintiff could not recover if the word was used colloquially, but could recover if it was used in its actionable sense, that is, "meaning thereby to charge the plaintiff with having committed the crime of larceny," the court held that the trial court should have told the jury what constitutes larceny, and should have instructed them that, unless the words spoken by defendant were intended to charge the plaintiff with the crime of larceny, and would be naturally so understood by the persons who heard them, the verdict should be for the defendant.

In the instant case, as the plaintiff may recover only in the event the word "rob" was used in its actionable sense (no special damages being shown), the court, in order that the jury might intelligently determine whether the language complained of was used and was understood by its hearers in its actionable sense, should have told the jury what is required to constitute the crime of robbery, and that, unless they believed from the evidence that the defendant, in using the language complained of, intended to charge plaintiff with the crime of robbery, as in the instructions defined, or that the language used was reasonably calculated to cause the persons who heard it to so understand it, they should find for the defendant. For this error in the instructions defendant is entitled to a new trial.

[4] 2. Appellant also complains that the trial court erred in limiting the number of witnesses permitted to be introduced by each side; but, as the bill of exceptions does not show that any such ruling was made by the court, the complaint cannot be considered upon appeal.

[5] 3. It is further contended by appellant that the trial court erred in refusing to permit him to show that the language complained of was uttered in the course of a hotly contested campaign in which appellant and appellee were opposing candidates for the office of trustee of the village of Highland Park and in response to attacks which had been made upon him by appellee. We think

it was competent to show that the language was uttered in the course of such a speech, that the parties were opposing candidates, and also (if defendant so desired) to prove statements made by plaintiff concerning defendant at that meeting, although statements made by him at other times or on other occasions were not competent.

[6] 4. Another ground urged is that the trial court erred in sustaining the objection to a question asked by him on cross-examination of one of appellee's witnesses as follows: "Q. You were a follower of Mr. Bowles in that campaign?" The ruling was right. It was competent, of course, to show that the state of feeling between the witness and appellee was friendly, but not by way of questions like the one propounded.

[7] 5. Finally, appellant complains of the ruling of the trial court in permitting appellee to show that his reputation for honesty was good, no attack upon his character, either by a plea of justification or by evidence, having been made by appellant upon the trial. This has been said to be "one of the most controverted questions in the whole law." 1 Wigmore on Evidence, §§ 70-76. This writer also says:

"The better rule seems to be that his reputation is assumed to be good, and that he has therefore no need to sustain it until it has been attacked."

Chamberlayne on Evidence, § 3284, says it is difficult to determine which is the prevailing doctrine in regard to the admissibility of evidence of the plaintiff's good character, especially where there is no plea of justification. The same uncertainty in respect to the course of decision and weight of authority is expressed in the following works: 1 Greenleaf on Evidence, § 55; 8 Ency. of Evidence, 274; Newell on Slander and Libel, § 933; 25 Cyc. 507.

We have been able to find but one reported case in this state where the question seems to have been directly presented. In *Williams v. Greenwade*, 3 Dana, 432, an action of slander, the defendant tendered the general issue, a common-law plea under which the defendant was not permitted to prove the truth of the defamatory words. The court said:

"And, as injury to character is the gravamen of slander, goodness of character may be proved in aggravation as badness may be proved in mitigation of damages in an action of slander."

Under the authority of this case, we hold that plaintiff may introduce in chief evidence of good character, although there be no plea of justification or any evidence offered by defendant attacking plaintiff's character; but, the same being competent only for the purpose of increasing the damages, the jury should be admonished that such evidence may be considered only as bearing upon that question.

For the errors indicated, the judgment is reversed for further proceedings consistent herewith.

BEALL v. LOUISVILLE HOME TELEPHONE CO.

LOUISVILLE HOME TELEPHONE CO. v. BEALL.

(Court of Appeals of Kentucky. Oct. 21, 1915.)

1. APPEAL AND ERROR \Leftrightarrow 982 — EXCESSIVE DAMAGES—VERDICT SET ASIDE—DISCRETION.

Where the action of the trial court in setting aside a verdict as excessive is questioned on appeal, the decision will depend on whether there has been an abuse of discretion, and not upon the opinion of the appellate court as to whether the damages are excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3877-3879; Dec. Dig. \Leftrightarrow 982.]

2. NEW TRIAL \Leftrightarrow 76—GROUNDS—EXCESSIVE VERDICT—ABUSE OF DISCRETION.

Where, in an action against a telephone company for personal injuries, there was no evidence that the injuries though severe and painful, were permanent, there was no abuse of discretion in setting aside a verdict for \$12,000 as excessive.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 153-156; Dec. Dig. \Leftrightarrow 76.]

3. DAMAGES \Leftrightarrow 132 — PERSONAL INJURY — EXCESSIVE DAMAGES.

Plaintiff was injured while riding on a railroad train by being struck by a large billet of wood attached to the end of a loose telephone wire, being knocked out of his seat on to his back in the aisle and cut in numerous places by flying glass. His left leg was so injured as to aggravate a varicose vein, requiring the subsequent removal of the entire vein, and he was injured in the spine so as to cause pain intermittently for months after the accident, so that upon every effort to resume work he would in a few days break down. At the time of injury he was earning \$7,300 a year. *Held*, that a verdict for \$7,250 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. \Leftrightarrow 132.]

4. TELEGRAPHS AND TELEPHONES \Leftrightarrow 20—INJURIES FROM MAINTENANCE—RES IPSA LOQUITUR.

While plaintiff was a passenger on a train and seated in a Pullman car at the rear of the train, a ventilator on top of the car came in contact with a telephone guy wire across the track, which had been strung there three hours before by workmen of defendant telephone company the wire extending from a pole across the track to a billet of wood 4 feet long and 8 inches in diameter, which had been braced in a tree and the wire thereto attached, the wire being loose on the billet and the billet not being fastened in the tree, but merely jammed among the limbs. The wire did not extend from the billet at right angles, but had a sideways and upward pull, and if tight would have cleared the top of the car by 12 feet. The wire had been similarly stretched across the track for a number of years without causing trouble; the change made being only in the fastening of the wire. *Held*, that the catching of the wire on the ventilator raised a prima facie presumption of negligence under the doctrine of res ipsa loquitur, and that the burden was upon the defendant to prove that the accident happened without negligence on its part.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 13; Dec. Dig. \Leftrightarrow 20.]

5. TELEGRAPHS AND TELEPHONES \Leftrightarrow 20—INJURIES FROM MAINTENANCE—PLEADING AND PROOF.

Under such facts, there is no variance between the evidence and the allegation that defendant was negligent "in placing and thereafter maintaining such stob in the forks of the tree."

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 13; Dec. Dig. \Leftrightarrow 20.]

6. TELEGRAPHS AND TELEPHONES \Leftrightarrow 20 — NEGLIGENT CONSTRUCTION—INJURIES—EXCUSES—ORDERS OF THIRD PERSON.

The court did not err in rejecting evidence offered by defendant that the owner of the land and tree limited the means of fastening the billet to the tree, since obedience to such limitation could not excuse defendant in risking an insecure fastening.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 13; Dec. Dig. \Leftrightarrow 20.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by John M. Beall against the Louisville Home Telephone Company. Judgment for the plaintiff, and defendant appeals, and plaintiff files a cross-appeal. Affirmed on both appeals.

Sheild, Campbell & McAtee and Bruce & Bullitt, all of Louisville, for appellant. W. Pratt Dale and Edwards, Ogden & Peak, all of Louisville, for appellee.

NUNN, J. On May 9, 1913, appellee Beall was the victim of a peculiar accident. He was a passenger on a Louisville & Nashville railroad train, leaving Louisville at 5 p. m. and bound for Cincinnati. He was seated in a Pullman chair car, the rear car, and as the train was passing the reservoir of the Louisville Water Company, a ventilator on top of the Pullman came in contact with a telephone guy wire, which had been strung across the track by employes of appellant telephone company about three hours before. The wire was tied to a round wooden stob about 4 feet long and 8 inches in diameter—the end of a telephone pole. The impact of the train pulled the stob loose, and it crashed through the car window where Beall was sitting. He was knocked out of the seat and fell on his back in the aisle. Four of the car windows were broken, and the shattered glass inflicted many painful and bloody wounds on his head and face. These injuries, however, were of a minor character. The serious and permanent injuries alleged were to his left leg and spine, due to the lick from the stob and his fall in the aisle. First aid was given by a physician who happened to be on the train. In this way the exterior wounds were washed and bandaged so that he continued the journey to Cincinnati, his destination. During the next few days his family physician in Cincinnati picked out many pieces of glass and redressed the wounds.

At the time of the accident Beall was 43 years of age and general manager for the Pugh Printing Company of Cincinnati, under a contract extending over several years, at a salary of \$7,300 per annum. His duties kept him traveling most of the time on business of the company. For 20 years there was a varicose vein in his left leg midway between the knee and ankle, but prior to the accident it had never caused him any trouble or inconvenience. There were many bruises on both legs, but the most serious was on the left leg. This so aggravated and inflamed the varicose condition that physicians advised a surgical operation to remove the vein. In three days after the accident his back began to pain him, and an abnormal nervous condition appeared; these conditions have continued intermittently and with increased severity. He grew nervous and irritable, and to obtain rest frequent administration of narcotics was necessary. During the summer he was under the care of physicians, not only in Cincinnati, but at Chicago and Battle Creek and finally at St. Louis. Several times during that period he thought himself sufficiently restored to take up his work, but in a few days he would break down. After the accident each of his physicians advised a surgical operation for the varicose vein, and in October, 1913, after ulcers had formed, surgeons in St. Louis removed the vein from ankle to hip. The operation was a success, and there is now no claim for permanent injury to the leg. The permanent injury is to his nervous system, resulting, as it is claimed, from concussion of the brain and spine at the time of the accident. Beall sued the Telephone and Railroad Companies to recover \$30,000 damages for pain and suffering and permanent injury, and \$2,303 for doctors, hospital, and traveling expenses. There have been two trials. At each trial there was a directed verdict for the railroad, and on this appeal there is no criticism of those rulings of the court.

On the first trial the jury returned a verdict for \$12,000 against the telephone company. On its motion this was set aside as excessive, because, in the opinion of the court, the proof did not then go to the extent of showing that the injuries were permanent, although at that time it appeared that he had not recovered. At the next trial there was a verdict and judgment for Beall for \$7,250. The jury assessed \$5,000 of it as compensation, and \$2,250 for doctor's bills and expense. It is from this judgment that the telephone company appeals, and claims, among other things, that this last verdict is excessive, although the amount awarded for medical expense is not seriously criticized. Beall brings a cross-appeal and asks for a reinstatement of the \$12,000 verdict and judgment in his favor.

[1] We will consider first the cross-appeal. The question is not whether the evidence on the last trial is sufficient to uphold a verdict

for \$12,000, but whether, in view of the evidence at the first trial, we can say that the court erred in setting aside the \$12,000 verdict then rendered. As said by the court on similar questions in the case of *Brown v. L. & N. R. R. Co.*, 144 Ky. 546, 139 S. W. 782:

"The question now to be considered is not confined to what our opinion may be as to the excessiveness of the verdict set aside, but depends rather whether the setting of it aside was an abuse of discretion on the part of the trial judge. Under the settled practice the granting of new trials is a matter largely within the discretion of the trial court, and unless it appears that this discretion has been abused, or, to state it differently, not properly exercised, we do not feel disposed to interfere with it." *Pace v. Paducah Railway & Lighting Co.*, 89 S. W. 105, 28 Ky. Law Rep. 278; *Walls v. Walls*, 99 S. W. 969, 30 Ky. Law Rep. 949; *Cochran v. Cochran*, 93 S. W. 18, 29 Ky. Law Rep. 333; *Floyd v. Paducah Railway & Light Co.*, 73 S. W. 1122, 24 Ky. Law Rep. 2364.

[2, 3] We have examined the evidence given on both trials, and, on the question of damages, have reached the conclusion that the court did not err in setting aside the first verdict, nor in refusing to set aside the second. The evidence as to permanent injury was not as strong on the first trial as it was on the second. There was a conflict both times in the medical testimony as to how long Beall would probably be affected by the injury to his spine, but at the first trial even those who thought it temporary were of the opinion that he would have to go to a hospital and submit himself to medical treatment for many months in order to be restored. Others were of opinion that he would never recover. The day before the last trial, and on motion of the telephone company, the court appointed Dr. Boggess, an eminent physician, to examine Beall. Each of the parties hereto had the privilege, and exercised it, of selecting a physician to be present at the examination made by Dr. Boggess. The testimony of Dr. Boggess shows his thorough examination and the various tests he made. They are technical, and it is unnecessary to mention them in detail. It is sufficient to state his conclusions:

"I should say that many of these symptoms and many of these conditions are permanent, and will remain permanent. I believe it is possible that the man will improve some in health from his present condition, but he will always have the trouble that he has now."

Without this evidence on the first trial, we cannot say there was an abuse of discretion in setting aside the first verdict. Certainly there is no good reason shown why we should disturb the last on the ground of excessiveness.

[4] But the telephone company asks a reversal on other grounds. It complains that there was a variance between the pleadings and proof; that there was not sufficient evidence of negligence to support the verdict; and that it was error to apply the doctrine of *res ipsa loquitur*. To weigh these questions it will be necessary to give more of

the facts in evidence. It appears that a telephone pole on the east side of the railroad track had, for a long while, been supported by this guy wire fastened to a tree west of the track and growing on the reservoir property. This tree had died on account of the wire wrapped around it. Those in charge of the reservoir property desired to remove the tree, and notified the telephone company to detach the wire. Permission was granted to use another tree near by. It may as well be stated here that the telephone company offered to prove to the jury that in granting permission to use another tree the—

"water company stated that they did not want wires tied around any trees on their property so as to injure or kill them, but that if the wire could be otherwise placed in the tree they were welcome to use it."

The court rejected all testimony as to conditions imposed for use of the tree. Appellant urges this also as a ground for reversal, and it will be referred to again. Anyhow, on the day of the accident and about 2 o'clock p. m. the change was made, and the wire was fastened to the new tree in the following manner: About 12 or 14 feet from the ground the tree forked into three limbs. This 4-foot stob, already referred to, was laid horizontally in the forks in such a way that it had a firm bearing against the two front prongs, and was supported by the prong which branched out behind it. Two laps of the guy wire were taken around this stob midway between the front forks, and then by means of block and tackle it was drawn tight over the railroad track and the end of the wire twisted or fastened around the tightened wire, the connection being 3 to 5 feet out from the stob. Each end of the stob projected about 4 inches beyond the tree forks, so that there was a space of 2 feet between the forks where the wire was wrapped around the stob. No hitches were cut or brads driven into the stob to hold the wire in place and thus prevent the wire from slipping toward either end and making an unequal strain. Appellants' witnesses say that with the guy wire stretched tight like they left it, such a thing as this could not occur. Neither was anything done to make the stob fast to the tree, except to tap it lightly with a hand axe. The wire did not run at right angle from the stob, and since the other end of the wire was fastened nearly to the top of the telephone pole, at least 49 feet from the ground, there was a constant up and side pull on the stob. But witnesses for the telephone company explain that there was no possibility of the stob being pulled upward, or at all out of place, because the wire was stretched one inch under a limb leading from one of these front forks, and at right angle to the wire. Therefore they argue there was no chance for an upward movement. Numerous witnesses for the telephone company, experienced in the

business, and experienced employes of other companies, who have similar duties to perform, all testified that it was customary to place guy wires and stobs in trees as this was placed, and that it was not necessary to tie or otherwise fasten the stob to the tree, and that the tree selected was in every way suitable for the purpose. They agree that the horizontal limb just over the wire made the stob secure; that is, protected it against the up pull.

From a diagram in the case it appears that a straight line drawn from a point 49 feet high on the telephone pole to the point in the tree where the stob was laid would clear the railroad track 26 feet and 8 inches. This is at least 12 feet higher than the standard car. Notwithstanding the inability of appellant's witnesses to account for the stob coming loose and the wire swinging down, and although for years the wire was across the track attached to its old fastening and at all times clear of the traffic, the fact remains that three hours after the men completed the new work the wire was down sufficiently low to catch on a ventilator of the Pullman car. Several other trains had passed during the interval, but this was the first to carry a Pullman. We understand from the evidence that all passenger cars are of the same height, but that Pullman ventilators extend slightly above the ventilators on other cars.

The accident occurred in May. The wind was blowing, although not out of the ordinary for the season. As the tree was swayed back and forth by the wind so that the wire was alternately made tight and loose, there was a natural tendency for the stob to shift laterally in one direction while the wire, by reason of its loose wrap around the stob, shifted its position on the stob in the other direction, and it is equally natural that in the course of three hours one end of the stob would be pulled entirely clear of the front fork furthest removed from the telephone pole. But appellant argues that presumptions or inferences of this kind are no more natural or plausible than a presumption that the water company objected to the manner in which the stob was placed in the tree, and for that reason removed it, or else that it was the work of a miscreant. In this we cannot agree with counsel. A presumption of interference by the water company or by miscreants would be based upon improbabilities, and without a scintilla of fact for support.

The wire which came down and was the direct cause of the injury was the same with which appellant's servants had just been working, and which they had just left as a complete and safe job. If their work had been done with proper care and the wire fastened securely, the accident that happened is one that in the ordinary course of things would not have happened. This af-

fords reasonable evidence that the accident happened from want of proper care. The burden is then upon the defendant to explain the cause in such a way as to demonstrate that it exercised proper care to make it safe. To reach this conclusion is to apply the maxim *res ipsa loquitur*. But appellant contends that the maxim should not be applied in this case, and argues that to prove merely that its servants had fastened the wire three hours before it fell is not enough to show that appellant had control of or was responsible for the condition of the guy wire and stob at the time of the accident, and therefore insists that the cause of the accident is simply a matter of conjecture. As has already been pointed out, the appellant offered no explanation, and their witnesses frankly confessed that they could not understand how the wire and stob got loose. When the uncontradicted evidence shows that the wire, with its former fastenings, had until three hours before the accident been suspended over the track for years without harm or hurt to any one, and that appellant's employes had just changed the fastening, and then the accident happened, and considering the uncontradicted evidence as to the insecure manner in which the stob was placed in the tree and the wire fastened thereto, we are of opinion that the cause was not a matter of conjecture. The stob was worked loose from that tree as certainly and as naturally as the wind blows. In *Hogan v. Manhattan Railroad*, 149 N. Y. 23, 43 N. E. 403, the court said:

"It is a well-settled rule of law that if a person erects a building, bridge, or other structure upon a city street or an ordinary highway, he is under a legal obligation to take reasonable care that nothing shall fall into the street and injure persons lawfully there. This being so it is further assumed that buildings, bridges, and other structures properly constructed do not ordinarily fall upon the wayfarer, so also, if anything falls from them upon a person lawfully passing along the street or highway, the accident is *prima facie* evidence of negligence, or, in other words, the presumption of the negligence arises."

In *Huddleston's Adm'r v. Straight Creek Coal Co.*, 138 Ky. 506, 128 S. W. 589, Huddleston was killed early one morning at a place in the mine which had been inspected the evening before and pronounced safe. The court said:

"The uncontradicted evidence" of the inspectors showed that they "exercised ordinary care, * * * and there was no known cause that interfered with or changed" the conditions between the time of inspection and the accident.

On this ground the lower court directed a verdict for defendant. This court in reversing the case said:

"Notwithstanding the uncontradicted evidence of Elswick [the inspector] the jury might be of the opinion, based upon the evidence of the physical conditions, that, as the roof fell soon after his inspection, he did not make a careful inspection, or, in other words, that the master did not exercise ordinary care to put and keep the entry in reasonably safe condition. This was a question for the jury, not for the court, so the court erred in taking the case from the jury."

In the following cases these principles are discussed and the maxim applied. *Shinn Glove Co. v. Sanders*, 147 Ky. 349, 144 S. W. 11; *Paducah Traction Co. v. Baker*, 130 Ky. 360, 113 S. W. 449, 18 L. R. A. (N. S.) 1185; *L. & N. R. Co. v. Clark*, 106 S. W. 1184; *Louisville Lighting Co. v. Owens*, 105 S. W. 435.

[5] But it is contended that the proof did not show the specific acts of negligence alleged. This is the variance complained of. Two grounds of negligence are alleged, in the alternative. It is said that Beall was injured either, "through the gross negligence and carelessness of appellant in extending said wire across the track at such a height that the car in which plaintiff was riding could not safely pass under said wire without colliding with same," or "by the gross negligence and carelessness of appellant in so placing and thereafter continuing said stob in the forks of said tree in such manner that the wire became a dangerous and unsafe obstruction across said track, so that the car could not safely pass under the same without colliding with it, and that one or both of said facts was true." The maxim *res ipsa loquitur* is a rule of evidence, not of pleading. Presumptions were not pleaded, but we think the evidence in the case does support the averment that there was negligence, "in placing and thereafter maintaining said stob in the forks of said tree." *Beard v. Klusmeyer*, 158 Ky. 153, 164 S. W. 319, 50 L. R. A. (N. S.) 1100.

[6] The court did not err in rejecting the proffered testimony of the water company's officials limiting the means of tying or fastening the stob to the tree. If the permission given by the water company was not sufficient to allow the stob to be securely and safely fastened to the tree, that did not excuse appellant in risking the wire with a partial or insecure fastening.

Beall's employer continued him upon the pay roll for full wages, but appellant cannot take credit for this. The fact could in no way decrease the amount Beall was entitled to recover.

Perceiving no prejudicial error, we are of opinion that the judgment of the lower court should be affirmed.

HURT v. MORGAN COUNTY.

(Court of Appeals of Kentucky. Oct. 22, 1915.)

1. OFFICERS \S 100—CHANGE OF COMPENSATION—FIXING AFTER ELECTION.

While, under Const. §§ 161, 235, prohibiting change of the compensation or salary of county and public officers after their election or during their term of office, compensation, not having been fixed before election, may thereafter be fixed, it cannot subsequently be changed.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152-157; Dec. Dig. \S 100.]

2. JUDGES \S 22—FISCAL COURT—DISQUALIFICATION BY INTEREST.

One is disqualified by interest to vote as a member of a county's fiscal court on a motion to fix salaries, including his own as county judge.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 75-88, 179; Dec. Dig. \S 22.]

3. COUNTIES \S 57—ORDER OF FISCAL COURT—COLLATERAL ATTACK.

The order of a county's fiscal court fixing salary and compensation of officers cannot be collaterally attacked.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 74, 75; Dec. Dig. \S 57.]

Appeal from Circuit Court, Morgan County.

The fiscal court of Morgan County made an order reducing the salary of S. M. R. Hurt, as County Attorney, and he appealed to the circuit court, and from its judgment of affirmance again appeals. Reversed.

Fogg & Kirk, of Paintsville, for appellant. A. N. Cisco, of West Liberty, for appellee.

MILLER, C. J. This appeal contests the right of the fiscal court of Morgan county to reduce the salary of the appellant, S. M. R. Hurt, as county attorney.

Section 161 of the Kentucky Constitution, reads as follows:

"The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office; nor shall the term of any such officer be extended beyond the period for which he may have been elected or appointed."

Section 235 of that instrument further provides:

"The salaries of public officers shall not be changed during the terms for which they were elected; but it shall be the duty of the General Assembly to regulate, by a general law, in what cases and what deductions shall be made for neglect of official duties. This section shall apply to members of the General Assembly also."

The appellant was elected county attorney for Morgan county at the regular election held in November, 1913, for a term of four years beginning January 1, 1914. The compensation of his office at the time he was elected was \$900 per year. The orders of the fiscal court show that an annual salary of \$900 had been paid to Haney, his predecessor in office, from 1910 to 1914, although there was no order of court formally fixing his salary.

At the meeting of the fiscal court held November 29, 1913, after appellant had been

elected, but before he had qualified, as county attorney, the following action was taken:

"On motion of W. G. Short and second by Franklin Walters that the salaries of the county judge, county attorney, and school superintendent for this ensuing term, beginning January, 1914, be fixed at \$900 each, and yeas and nays votes: W. G. Short, Yea. E. W. Day, Yea. A. F. Blevins, Yea. Franklin Walters, Nay. S. S. Dennis, not voting. J. S. McGuire, Nay. J. E. Lewis, Nay. There being three yeas and three nays, and a tie vote, I. C. Ferguson, county judge, presiding, voted yea, and the motion carried."

The fiscal court paid appellant \$900 for his services as county attorney for the year 1914; but at the regular term of the court held in November, 1914, it entered the two following orders:

"(1) On motion of B. F. Blankenship, and second by J. M. Carpenter, it is ordered and directed that the county judge and county attorney receive at the rate of \$900 per year each for their salaries up to January 1, 1915.

"(2) Motion made by B. F. Blankenship, and second by J. R. Day, that the salaries of the county attorney and county judge, be, and they are hereby, fixed at the sum of \$600 per year beginning January 1, 1915."

From this last order reducing his salary to \$600 per year, Hurt prosecuted an appeal to the circuit court. A jury trial was waived, and the case was tried by the circuit judge; and from his judgment affirming the order of the fiscal court, Hurt prosecutes this appeal.

[1] The meaning of section 161 of the Constitution, above quoted, is in no sense doubtful. It provides, in express terms, that the compensation of a county officer shall not be changed after his election or appointment, or during his term of office. Section 235 of the Constitution repeats the provision, by saying that:

"The salaries of public officers shall not be changed during the terms for which they were elected."

The purpose of these salutary constitutional provisions was to put it beyond the power of the fiscal court either to reward its attorney by raising his salary or from punishing him by reducing his salary during his term of office. This purpose is carried out by fixing the salary before those whose duty it is to fix it know who the incumbent will be. This is especially important with reference to the office of county attorney, who should, above all other officers, be entirely free from the influence that the power to regulate his pay would give to another.

In carrying out the provisions of the Constitution above quoted it was the duty of the fiscal court, by an order entered before the election of the county attorney, to fix his salary for the ensuing term; but, having failed in this case to fix the salary before his election, it had the right to do so after his election and before his qualification, or even after he had taken office. *Barrett v. City of Falmouth*, 109 Ky. 151, 58 S. W. 520, 21 Ky. Law Rep. 667; *Marion County Fiscal Court v.*

Kelly, 112 Ky. 831, 56 S. W. 815, 22 Ky. Law Rep. 174; Jefferson County v. Waters, 114 Ky. 48, 70 S. W. 40, 24 Ky. Law Rep. 816; Butler v. James, 116 Ky. 575, 76 S. W. 402, 25 Ky. Law Rep. 801; McNew v. Nicholas, 125 Ky. 66, 100 S. W. 324, 30 Ky. Law Rep. 1147; Grayson County v. Rogers, 122 S. W. 868; Fox v. Lantrip, 162 Ky. 184, 172 S. W. 133.

It is clear, therefore, that the order of November 29, 1913, fixing appellant's salary at \$900, was properly entered, and the subsequent order of November 26, 1914, changing his salary to \$600 per year, from January 1, 1915, was unauthorized and invalid.

[2, 3] The circuit judge seems to have reached his decision upon the theory that the order of November 29, 1913, fixing appellant's salary at \$900, was improperly entered, and was therefore ineffectual for any purpose. This conclusion was based upon the testimony of S. S. Dennis, who was a member of the fiscal court at that time, and had been elected county judge at the November election three weeks before, although he did not take his seat as judge until January, 1914. Dennis testified that he was present at the meeting of the fiscal court on November 29, 1913, but that he was prevented from voting on the motion fixing appellant's salary at \$900 be-

cause the clerk, Sebastian, told him he had no right to vote, and but for this advice he would have voted against fixing the salary of the county attorney at \$900. This testimony was admitted over the objection of appellant. Dennis, however, admits that after he qualified as county judge he received his salary at the rate of \$900 per year, under the order of November 29, 1913.

There are several reasons why the testimony of Dennis was incompetent. In the first place, the order in question also fixed Dennis' salary as county judge; and, being interested, he was not competent to vote upon the motion and thus break the tie. Grayson County v. Rogers, *supra*; Thomas v. O'Brien, 138 Ky. 775, 129 S. W. 103.

A court speaks by the record, and can speak in no other way. And, having spoken through the judgment and within its jurisdiction, the ruling is conclusive in a collateral proceeding and cannot be questioned, as is here attempted. Grayson County v. Rogers, *supra*. If a judgment could be attacked indirectly, there would be an end to that confidence in the stability of judgments, regularly entered, which is the very foundation of our system of jurisprudence.

Judgment reversed for further proceedings consistent with this opinion.

OWOSSO CARRIAGE & SLEIGH CO. v. McINTOSH & WARREN. (No. 2417.)

(Supreme Court of Texas. Oct. 13, 1915.)

1. FRAUDULENT CONVEYANCES — 3 — BULK SALES LAW—POLICE POWER.

The Bulk Sales Law (Acts 31st Leg. c. 27), requiring particular formalities for a sale of a stock of goods other than in the usual way, and making it invalid as to the creditors of the seller unless there is compliance, is a valid exercise of the police power, and does not unreasonably deprive the owners of merchandise of their control over it and right to contract in relation to it.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 5; Dec. Dig. — 3.]

2. FRAUDULENT CONVEYANCES — 229—REMEDIES OF CREDITOR—GARNISHMENT.

Under Bulk Sales Law (Acts 31st Leg. c. 27) § 1, declaring that any sale of a stock of goods not in the ordinary course of business shall be void as against the creditors of the seller, unless the purchaser shall at least 10 days before sale make full inquiry as to the names of all creditors, obtain from the seller a written answer to such inquiries, which answer shall be sworn to by the seller, and notify such creditors of the sale, one who purchases a stock of goods without complying with the statute becomes a trustee for the creditors of the seller, and, notwithstanding the goods have been sold, by him and proceeds disposed of, the seller's creditors may recover by garnishment.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 668-670; Dec. Dig. — 229.]

3. APPEAL AND ERROR — 747—ASSIGNMENT OF CROSS-ERROR—NECESSITY.

Where plaintiff did not on defendant's appeal assign as error the denial of complete relief, the question will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3053-3056; Dec. Dig. — 747.]

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by the Owosso Carriage & Sleigh Company against C. K. Sweet and McIntosh & Warren, garnishee. A judgment in part for plaintiff against the defendant garnishee was reversed and remanded by the Court of Civil Appeals (146 S. W. 239), and plaintiff brings error. Judgment of Court of Civil Appeals reversed, and that of trial court affirmed.

I. J. Rice, of Brownwood, for plaintiff in error. T. C. Wilkinson, of Brownwood, for defendant in error.

YANTIS, J. This case involves, as the main questions, the constitutionality of what is commonly known as the "Bulk Sales Law," passed by the Thirty-First Legislature, and the effect of the service of the writ of garnishment upon the proceeds of the sale of merchandise which was purchased by McIntosh & Warren, defendants in error, at private sale, and not in the ordinary course of trade, but in bulk, and in violation of all the provisions of said bulk sales statute, and afterwards resold by them and converted into cash prior to the service of the writ of

garnishment upon them, which was issued at the instance of the Owosso Carriage & Sleigh Company, plaintiff in error.

Trial in the court below was had on an agreed statement of facts, which showed, substantially, as follows:

One C. K. Sweet was engaged in the implement, vehicle and hardware business in the town of Brownwood. The evidence strongly indicates that on the 10th day of August, 1909, he was insolvent. On said date, and for at least 30 days prior thereto, he was indebted to the plaintiff in error, a foreign creditor, in the sum of \$1,700 for vehicles, etc., sold him by the plaintiff in error for use in said business. He was also indebted to various other wholesale dealers for goods used in said business, among them the Keating Implement & Machinery Company for \$3,617.95, and the Emerson Manufacturing Company for \$1,294. He owed various other creditors in the aggregate sum of \$3,000. On said 10th day of August, 1909, he sold his stock of goods in bulk to McIntosh & Warren, defendants in error, for the consideration of \$6,005.97; they assuming the payment of said \$3,617.95 to Keating Implement & Machinery Company, and \$1,294 to the Emerson Manufacturing Company as a part of said consideration, and paying to said Sweet in cash the sum of \$500, and giving him one negotiable promissory note for \$594.02, due January 1, 1910, which was paid to said Sweet on the day of its maturity. The consideration paid was a fair price for the property. At the time of said transfer and sale of said merchandise, the said Sweet had no other property except some negotiable promissory notes, amounting in the aggregate to about \$7,000, due him by various customers scattered over his trade territory, for merchandise which had been sold to them. The evidence shows that, if the crops had been good in that section for the years 1909 and 1910, said notes would have been worth something like their face value; but the crops were unusually short, and said notes were worth only about 50 cents on the dollar, and at the time of the trial it was agreed that Sweet was unable to pay all of his creditors, and was insolvent.

On October 19, 1910, plaintiff in error filed suit against the said Sweet on a promissory note in the sum of \$1,695.34, and interest thereon, and at the same time caused a writ of garnishment to be issued, which was served upon the defendants in error on the 20th day of October, 1910. On the 20th day of December, 1910, plaintiff in error recovered in said suit its judgment against said Sweet in the sum of \$1,883.60, with costs of suit and interest at the rate of 8 per cent.

The evidence indicates that there was no intentional fraud upon the part of the defendants in error in purchasing said mer-

chandise, or on the part of said Sweet in making the sale, and while there is no distinct finding of fact by the trial court, or in the statement of facts to this effect, we will assume such to be true in the consideration of the issues. In making the purchase of said merchandise, the defendants in error did not at least 10 days prior thereto, or at any time prior to the sale, make inquiry of the said Sweet, the transferrer of said goods, as to the names and places of residence, or place of business of each and all creditors of said Sweet, and the amount owing to each said creditor by him, or obtain from him a written answer in any form to such inquiries; nor did they 10 days prior to said purchase, or at any other time before said sale, notify each of the creditors of said Sweet of said proposed sale and transfer. The plaintiff in error had no notice of said proposed sale at any time before it occurred, and the bulk sales statute of 1909 was not complied with in any form in making said sale. Defendants in error, who were the garnishees, answered said garnishment suit to the effect that they were not indebted to said Sweet in any amount at the time said writ was served, or afterwards, nor at the time of answering the same, and that they did not have any of his effects in their possession. Plaintiff in error contested this answer, alleging both that they were indebted to said Sweet, and that they had effects of said Sweet in their possession at the time said writ was served, in that they purchased the stock of goods without complying with the bulk sales statute. The plaintiff in error did not allege that the defendants in error had sold said merchandise prior to the service of the writ of garnishment, and the defendants in error did not file any special exception to said pleading for said omission, but the defendants in error by their second special exception excepted to said pleading, as follows:

"Because it appears from said controverters' affidavit that plaintiff is endeavoring to hold these garnishees liable for property that has passed out of their possession, on the ground that they should be held as trustees for property wrongfully received by them."

In section 10 of the agreed statement of facts it appears that it was proven at the trial that the defendants in error, who were the garnishees, had sold all of said goods, wares, and merchandise prior to the service on them of the writ of garnishment, and that they had realized from same at least as much as they had paid for them. It does not appear which party to the suit introduced the evidence, and neither does it appear that either party to the suit objected to its introduction. It also appears that in their sixth assignment of error the defendants in error assert the fact of sale by them prior to the service of the writ of garnishment, and ask relief because of that fact, claiming that, having already sold the property before the service of the writ, no lien at-

tached, and no liability arose against them.

Upon the trial of the case in the court below plaintiff in error awarded judgment against the defendants in error for the sum of \$1,094, with 6 per cent. interest from the date of said judgment, which is the amount that was paid by defendants in error to Sweet as a part of the consideration for the transfer; but the trial court did not enter a judgment against the defendants in error for the full amount of the plaintiff in error's judgment against Sweet, which was \$1,883.60, and the plaintiff in error's cross-assignment complaining of the failure of the trial court to render judgment against the defendants in error for the full sum was abandoned on motion for rehearing in the Court of Civil Appeals. The judgment of the trial court was reversed and remanded by the honorable Court of Civil Appeals for the Third District, with instructions that a reasonable attorney's fee be allowed by the court below in favor of the attorney for the defendants in error; said court holding that the writ of garnishment was served too late to be effective, on account of the resale of merchandise before its service.

[1] The bulk sales law, so far as material to a correct determination in this case, is as follows:

"Section 1. That any sale or transfer of any portion of a stock of merchandise otherwise than in the ordinary course of trade in the usual and regular prosecution of the seller's or transferrer's business; or a sale or transfer of an entire stock of merchandise in bulk, shall be void as against creditors of the seller or transferrer unless the purchaser or transferee shall at least ten days before the sale or transfer, in good faith make full and explicit inquiry of the seller or transferrer as to the name and place of residence or place of business of each and all creditors of the seller or transferrer, and the amount owing to each such creditor by the seller or transferrer, and obtain from the seller or transferrer a written answer to such inquiries, which answers shall be sworn to by the seller or transferrer; and unless the purchaser or transferee at least ten days before the sale or transfer in good faith, notify or cause to be notified personally or by registered mail each of the seller's or transferrer's creditors of whom the purchaser or transferee has knowledge, of said proposed sale or transfer.

"Sec. 2. Any purchaser or transferee who shall conform to the provisions of this act shall not in any way be held accountable to any creditor of the seller or transferrer for any of the goods, wares or merchandise that have come into the possession of said purchaser or transferee by virtue of such sale or transfer.

"Sec. 3. Nothing in this act shall apply to sales by executors, administrators, receivers or any public officer conducting a sale in his official capacity, nor to a sale or transfer of stocks of merchandise for the payment of bona fide debts where all creditors share equally and without preference in the sale or transfer or the proceeds thereof." Acts 31st Leg. c. 27.

The defendants in error assail the constitutionality of the act. If the act is an unreasonable restraint of the natural rights of the owners of merchandise over their control and use of their property, and their right of contract connected therewith, it should be held unconstitutional; but, if it is merely a

proper exercise of the police power of the state in a wholesome restraint upon the said natural rights for the common good, then the said act would not be repugnant to the organic law. An unreasonable restraint of the natural rights of the owners of merchandise over the control and use of their property, and their right of contract connected therewith, would be intolerable, and violative of rights guaranteed under the Constitution; but a wholesome restraint upon the natural rights of such owners for the common good would be within the police power of the state, and therefore valid.

The identical question involved here was before this court in the case of *Nash Hardware Company v. Morris*, 105 Tex. 217, 146 S. W. 874. In that case the conclusion was reached by this court, speaking through the late Chief Justice Brown, that the act was within the police powers of the state, and was a reasonable regulation, and not in violation of the Constitution. We approve the holding in that case, and overrule the assignment which assails the constitutionality of the act.

[2] Passing from this we will now consider the important question as to the effect of the service of the writ of garnishment upon the defendants in error subsequent to the sale of the merchandise by them, which they had purchased from Sweet. It is contended that the garnishment did not fasten upon either the property belonging to Sweet, or upon its proceeds after sale, for the reason, as asserted, that the property belonging to Sweet, which passed into the hands of the defendants in error, had been sold by them, and that the proceeds of the sale could not be reached by the writ of garnishment, and that the writ of garnishment would not be effective unless served before such sale. Upon the other hand, the contention is made that the writ of garnishment took effect and became a lien upon the proceeds of the sale of said merchandise.

In considering this question it should be remembered that the purchase by defendants in error from Sweet, however innocently intended, was in open violation of the bulk sales law, and, under section 1 thereof, "void as against creditors of the seller." There was, then, no real sale, in law, but merely a change of possession. The parties could not accomplish that which was prohibited by law. The possession was transferred from Sweet to the defendants in error, which left them holding it in trust for the benefit of Sweet's creditors, with the title still in Sweet. This necessarily follows as the result of the attempted sale being rendered void by the statute. A contract between citizens, however honestly made, cannot prevail as against a statute which prohibits the making of the contract. Either the contract or the statute must fall in such a clash, and it could not be seriously contended that two

or more citizens of a state could repeal the state's laws by contract among themselves. Neither could they defy the state's laws, and expect the courts to uphold them. And if any one should suffer loss in the attempt, it should not fall upon a creditor who has been diligent to act within the law, but rather upon the ones who produced the situation and caused the loss.

Defendants in error had not the power nor the right to acquire title to this property as against creditors, for the statute in cases of this kind impounds and holds the merchandise for the benefit of the creditors of the seller. And since their act in attempting to purchase was void, it follows, as stated above, that the title to said property remained in Sweet, the seller, and did not pass to the defendants in error; and, when defendants in error sold said merchandise, the proceeds of said sale were subject to garnishment.

When the defendants in error sold the merchandise, the title to which remained by law in Sweet, they became indebted to Sweet for its value. Having sold and converted property which, in law, belonged to Sweet, it obviously follows that they owed him for its value. It is true, the law would not aid Sweet in recovering its value from the defendants in error; for, having acted in the sale in open violation and defiance of a statute, public policy would deny him a remedy, and leave the parties to the legal wrong where it found them. Especially would this be true since the statute in question, under the circumstances of this sale, holds the property for the benefit of Sweet's creditors, and the courts would not aid Sweet to withdraw it beyond their reach. But the plaintiff in error is not in the same attitude as Sweet. Not having participated in the wrongdoing, the law would aid it to recover the fund set apart by statute for creditors. Now the evidence shows that the defendants in error sold the merchandise for at least as much as they agreed to pay for it. In other words, the evidence shows that the defendants in error sold Sweet's property for at least as much as \$6,005.97, and at the time the writ of garnishment was served they still were indebted to Sweet in said sum, and the garnishment fastened upon said fund.

The identical question presented here has not been adjudicated by this court in connection with the bulk sales statute. In other jurisdictions the authorities appear to be somewhat in conflict, but the weight of authority is to the effect that, when one purchases merchandise in violation of the bulk sales law, he holds the property, not for himself, but as trustee for the seller's creditors, who may reach the trust fund by writ of garnishment, even though the purchaser has paid full value for the merchandise and has resold it. 14 Am. & Eng. Encyc. of Law,

pp. 341, 790; Waite on Fraud. Conveyances, § 177; Bump on Fraud. Conveyances, 567; Moore on Fraud. Conveyances, vol. 2, 743; 20 Cyc. 663; Interstate Rubber Co. v. Kaufman et al. (Neb.) 153 N. W. 585; Ferguson v. Hillman, 55 Wis. 181, 12 N. W. 394; Musselman Grocery Co. v. Kidd, Dater & Price Company, 151 Mich. 478, 115 N. W. 409; Marquette County Savings Bank v. Kolvisto, 162 Mich. 554, 127 N. W. 680; Jaques & Tinsley Co. v. Carstarphen Warehouse Co., 131 Ga. 1, 62 S. E. 82; Kohn v. Fishbach, 36 Wash. 69, 78 Pac. 199, 104 Am. St. Rep. 941; Armstrong v. Elbert, 14 Tex. Civ. App. 141, 36 S. W. 139; Willis v. Yates, 12 S. W. 232; Holloway v. Bank, 92 Tex. 187, 47 S. W. 95.

This holding is not in conflict with Legeirse v. Kellum, 66 Tex. 243, 18 S. W. 509, Kessler v. Half, 21 Tex. Civ. App. 91, 51 S. W. 48, and Blum v. Goldman, 66 Tex. 623, 1 S. W. 899. The holding in those decisions is to the effect that a creditor of an insolvent debtor cannot in a direct proceeding, without the aid of garnishment or other lien, obtain personal judgment against the purchaser, even though he purchase for the purpose of hindering, delaying, and defrauding the creditors of such debtor. The soundness of such holding could hardly be questioned, since in such a case the creditor did not lose anything by the wrongdoing of the fraudulent creditor in making the purchase. All the creditor lost was an opportunity to levy upon the goods of the debtor, but this damage is too remote to create a cause of action. In those cases no lien by garnishment, attachment, or otherwise, had been acquired by the creditor, while in the instant case a garnishment lien was secured.

The complaint by the defendants in error that there was error in rendering judgment for the plaintiffs in error because they failed to allege that the merchandise had been sold prior to the service of the writ of garnishment is without merit, since, as noted in this opinion, the defendants in error were indebted to Sweet for the value of the merchandise at the time the writ of garnishment was served, and it would seem unnecessary to plead in what manner they became so indebted. However this may be, they did not except to the pleading on said ground, and themselves made the allegation that they had disposed of the property prior to the service of the writ. They also allowed the proof to be offered without objection. Under such circumstances they should be held to have waived error on the question.

[3] There being no cross-assignment of errors by the plaintiff in error before this court, complaining of the action of the trial court in not rendering judgment for the entire debt due by Sweet, it is unnecessary for us to decide whether a judgment should have been rendered for the entire debt due by Sweet to them.

For the reasons indicated, the judgment of the Court of Civil Appeals should be reversed, and the judgment of the trial court should be affirmed, and it is so ordered.

STEPHENSON v. LUTTRELL. (No. 2770.)
(Supreme Court of Texas. Oct. 20, 1915.)

1. TENANCY IN COMMON — IMPROVEMENTS—RIGHT TO CONTRIBUTION.

A tenant in common who improved the common property by having it filled in and its level raised by a dredging company could not recover from his cotenant his share of a portion of the agreed price for doing the work, which he had not paid, and against which limitations had run, as he was only entitled to reimbursement for the money spent by him in making the improvement, and could not speculate on the transaction or obtain a profit from his cotenant, even though the cotenant received the benefit of the work which had not been paid for.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 89-92, 94; Dec. Dig. § 29.]

2. TENANCY IN COMMON — ACTIONS FOR CONTRIBUTION—JUDGMENT—CONFORMITY TO PLEADINGS.

In an action by one tenant in common against another to recover defendant's share of the cost of improving the property by filling it in and raising its level, plaintiff could not recover defendant's share of the cost of filling in a street adjacent to the property, where there was no allegation in the petition that he had incurred any expense in filling the street, or that it was necessary to fill the street as a benefit to the property.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 100-104, 107-118; Dec. Dig. § 38.]

3. TRIAL — OBJECTION TO TESTIMONY—TIME FOR OBJECTION.

In an action by one tenant in common against another to recover defendant's share of the expense of improving the property by filling it in and raising its level, the petition did not allege that plaintiff had incurred any expense in filling an adjacent street, or that it was necessary to fill the street as a benefit to the lot, but did allege that the lot was filled at an expense of \$6,825.87. Plaintiff testified without objection that the expense of filling the lot and the street was \$6,825.87, and was then asked whether it was necessary to fill the street as a benefit to the lot, to which question defendant objected. Held, that the objection was timely interposed, and there was no waiver of the objection on the ground of variance, since the testimony admitted without objection showed that only a part of the expense alleged was incurred in filling the lot, and thus contradicted the allegation of the petition, and defendant was not required to object thereto.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 172, 183-190, 237; Dec. Dig. § 76.]

Error to Court of Civil Appeals, Fourth Supreme Judicial District.

Suit by R. W. Luttrell against John Stephenson and others. A judgment for plaintiff was reformed and affirmed by the Court of Civil Appeals, Fourth District (160 S. W. 666), and the defendant named brings error. Reversed and remanded.

Geo. G. Clough, of Galveston, for plaintiff in error. Stewarts and J. E. Quaid, all of Galveston, for defendant in error.

YANTIS, J. R. W. Luttrell, defendant in error, sued John Stephenson, the plaintiff in error, William E. Stringfellow, Jas. W. Walker, Mrs. Jas. A. Borard, and husband, Jas. A. Borard, in trespass to try title for "out lot No. 7," in the city and county of Galveston, and, in the alternative, sued them for contribution to recover their proportion of the expense incurred by the defendant in error in filling said lot and raising its level, if it should be decided that said Stephenson, plaintiff in error, and others sued with him, owned any interest in the lot.

The defendant in error, Luttrell, alleged in his petition that at the time he contracted to purchase said lot it was a part of a low marsh, worth about \$3,500, and that preparations were then being made to fill up the surrounding territory, which was in a like condition, and that a necessity existed for the owners of said lot to fill same, and that he made a contract with the North American Dredging Company, with whom he was employed in doing other work, to fill said lot, at a cost of 17½ cents per cubic yard, or at a cost of \$6,825.87 for the entire lot; that the filling was to be done by hydraulic process, the solid material being held in position by the water by which it was borne into the lot and there allowed to settle, and, unless the opportunity then offered for filling the lot was availed of, it would have been left a hole in the ground, which could not afterwards have been filled, except at a cost greatly in excess of its value; that for his own protection, and that of his co-owners, it was necessary that the filling of the lot be done at that time in connection with the general scheme for filling the surrounding territory; and that otherwise it would have been rendered absolutely worthless, whereas after it was filled it was worth from \$10,000 to \$12,000, having been raised to a grade of 5.5 feet above mean low tide, as required by an ordinance of the city of Galveston. The defendant in error, Luttrell, in addition to his claim for contribution, sued for the establishment of a lien on the undivided one-third interest of the plaintiff in error and those under whom he claimed for a proportionate part of the expense incurred in filling said lot.

The plaintiff in error, John Stephenson, assumed the defense for himself and those under whom he claimed, and alleged that about the 7th day of June, 1909, the defendant Stringfellow sold to George Clough, and that about the 18th of the same month he purchased from said Clough. The undisputed evidence established said dates of sale and purchase. He also alleged that neither he nor his vendors had any notice of the claim of a lien by the defendant in error, Luttrell, and that they purchased in good faith for value without notice; that the property was already filled to grade when they bought; that the defendant in error, Luttrell, had no right or authority to have the lot filled at

his expense; and that it was an unnecessary act of an intermeddler.

There is evidence to support the finding that the lot had not been filled when plaintiff in error purchased it, but that the filling began while owned by his vendor the latter part of May, 1909, and continued until July 12th, thereafter. It was purchased by plaintiff in error June 18, 1909, and his deed withheld from record.

At the trial the defendant in error, Luttrell, dismissed as to the defendants Jas. W. Walker, Jas. A. Borard, and Mrs. Jas. A. Borard, and also as to Stringfellow, though in the judgment that was entered after the trial the last name was omitted therefrom by a "clear oversight." After the trial the district court corrected the oversight by rendering a judgment *nunc pro tunc*, dismissing said Stringfellow from the suit.

The case was tried before the court without a jury, and the findings of fact filed by the trial court are as follows:

"I find the facts to be as stated in the petition, except as to the ownership of the one-third interest in out lot No. 7, formerly owned by the defendant Stringfellow, and that the ownership of that interest is as stated in the answer of the defendant Stephenson. I find that the plaintiff acted in good faith and with due diligence in seeking to learn the true ownership of the one-third interest not owned by him, with the purpose of trying to get the owner to join in availing of the opportunity of having the whole out lot filled at the moderate cost, made practical at the time by the North American Dredging Company being in position to do it, growing out of the fulfillment of contracts with the city of Galveston; that, if it had not been filled at the time, the out lot would have become a public nuisance, a menace to the life and health of the inhabitants of the city; and that it could not have been filled later except at a cost entirely prohibitory, because greatly in excess of the value of the property after being filled. I find that the plaintiff, in having the out lot filled without the co-operation of the owner of the Stringfellow interest, did so because he was unable to learn who the owner was, the deeds of Stringfellow to Clough and of Clough to Stephenson having been withheld from record until after the filing of this suit, and was compelled to do it to save the common property and his own interest in it from being entirely lost and destroyed; that it was properly filled, at moderate cost; and that the plaintiff has paid to the North American Dredging Company in services the cost of the filling, except the sum of \$1,000, which he still owes. I find that said filling operations for the area including this out lot, began about the last of May, 1909, and were completed on July 12, 1909, and that defendant Stephenson and those under whom he claims, knowing they were going on, stood by mute, and speculated in the chance of not having to pay for it. The total cost of filling the out lot was \$6,825.87, payable July 12, 1909. I find that the filling saved the property from becoming valueless and increased its value by a sum at least equal to the expense."

There is evidence of probative force to support all of the findings of fact by the trial court, except the finding that the total cost of filling the lot was \$6,825.87, and this finding is true if a filling of a portion of the street adjacent to the lot should be treated as a part of the lot. On this question the

evidence shows that 24,358 cubic yards went into the lot, which, at 17½ cents per cubic yard, would be \$4,262.65, which represents the total amount expended by the defendant in error, Luttrell, in filling said lot; that 14,652 cubic yards went to fill the street, which, at 17½ cents per cubic yard, would be \$2,564.10. The defendant in error, Luttrell, in his amended petition, upon which trial was had, did not allege that he had included any expense of filling any portion of the street. His allegation was, in substance, that he filled out lot No. 7 to the established grade, at an expense of \$6,825.87. The evidence shows that this sum covered the expense incurred by him in filling both the lot and the street.

[1] It is contended by the plaintiff in error that he should not be held liable for any portion of the \$1,000 which the defendant in error, Luttrell, still owes the North American Dredging Company, since it appears from the undisputed evidence that, as between said dredging company and Luttrell, the defendant in error, the said \$1,000 is barred by the two-year statute of limitation, and, not having been paid by the defendant in error, and there being a legal defense to its payment by Luttrell, there should be no contribution required of the plaintiff in error, the expense not having been actually incurred by Luttrell, until he has paid the same. We think this contention must be sustained. When two persons are cotenants in the ownership of land, and one of them incurs expense in the improvement of the property which is necessary and beneficial, it is equitable that the one incurring the expense shall have contribution from his cotenant in an amount which is in proportion to the undivided interest owned by such cotenant; but there is no principle of equity that will permit him to speculate on the transaction, and require his cotenant to return to him any greater sum than his proportion of the money actually expended. It is not an undertaking where he would be permitted to profit in any way except in proportion as his cotenant would also make profit. He could not claim more from his cotenant than his proportion of the money actually expended; for equity only allows a reimbursement of the money spent by him in making the improvement. The law implies a contract between him and his cotenant, authorizing him to spend for him the money which was necessarily spent, but further than this there is no implied contract. The cause of action allowed in such cases is not grounded on benefits received, though this be considered an element necessary to recovery, for he would not be authorized in law to spend money for his cotenant for a useless and unnecessary improvement; but the cause is founded on reimbursement for money necessarily, or beneficially spent. He could not contend that he drove a good bargain in the improvements, and that they were really worth more to his cotenant than

they cost him, and that he should have his cotenant contribute to him in proportion to what it should have cost under ordinary circumstances. He must not be permitted to profit either by business ability or otherwise. His cotenant, by rules of equity and justice, is required to contribute back to him his proportion of the expense actually incurred, and no more. He is required to share the burdens of the expense incurred, and, being so required, he is in justice allowed the benefits that might accrue by reason of the business sagacity of his cotenant making the improvements.

In this case the defendant in error, Luttrell, has expended for filling the lot and the street the sum of \$5,825.87. The plaintiff in error owns a one-third interest in the lot, and should be required to refund to Luttrell one-third of the expense incurred in filling the lot, but nothing for filling the street, in the present state of the pleadings, as indicated later herein. The defendant in error, Luttrell, still owes the North American Dredging Company \$1,000 for filling said lot and street, which amount is barred by the two-year statute of limitation, since it became due on July 12, 1909, and had not been paid at the time of the trial of this suit, which was had on the 22d day of March, 1912, nearly three years having elapsed since the maturity of the account. Now, the defendant in error, Luttrell, has the legal right to defeat the payment of this claim to said dredging company by pleading the statute of limitation. We would not presume that he would plead the statute of limitation, neither should we assert that he would not, as he has a legal right to do it. But suppose he does plead the statute of limitation against the dredging company, and defeats the claim; would equity require that the plaintiff in error, Stephenson, refund to him one-third of this \$1,000, disregarding for the sake of discussion that a portion of it was spent in filling the street, when the amount has never been expended by Luttrell? Would a court of equity require the plaintiff in error, Stephenson, to return to Luttrell money that Luttrell had never spent for his benefit? All equity should require would be that Stephenson refund to Luttrell the money that Luttrell spent for his benefit. In no circumstances would Luttrell be allowed, while demanding that Stephenson do equity, to speculate on him in the transaction.

It is no answer to this position to say that Stephenson received the benefits of the \$1,000 which has not been paid by Luttrell, for a suit for contribution is not based alone on the benefits received by his cotenant. For instance, the improvements placed on the lot by Luttrell, at an expense of \$5,825.87, may have been worth much more than that to Stephenson, but Luttrell would not be heard to demand it, for this would be speculating on his cotenant, whereas the principle of contribu-

tion has no element of speculation in it. In cases of this kind it is implied that the person seeking contribution had authority from his cotenant to expend the money that was actually spent. It is the same as if he had been actually instructed by his cotenant to expend that much money for him in improving the lot. This much is implied by law. And if he spent it, equity would demand that it be returned to him; but if he failed to spend it, it would be an injustice to say that it should be returned to him anyhow, by his cotenant.

It follows, from what we have said, that the plaintiff in error, Stephenson, should not be held, as the judgment of the lower court undertakes to hold him, for the refund to Luttrell of one-third of \$1,000, which has not been expended by Luttrell, and which may never be expended by him.

[2, 3] The recovery in favor of the defendant in error, Luttrell, against the plaintiff in error, Stephenson, for one-third the expense of filling the street adjacent to the lot, should not have been allowed; there being no allegation in the amended petition by Luttrell upon which the case was tried that he had incurred any expense in filling the street, and no allegation that it was necessary to do so as a benefit to said lot. Not having sued for this item, he should not be permitted to recover it in the state of the pleadings. It is contended that there was no objection on the part of the plaintiff in error to the evidence as to the expense incurred in filling the street at the time it was offered, and that by reason of the failure to make a timely objection the error was waived. But we find from the record that the plaintiff in error, Stephenson, did object at the proper time to make the objection. The defendant in error, Luttrell, testified that the expense of filling the lot and the street was \$6,825.87, all of which had been paid by him, except \$1,000. There was no objection made to this evidence, but when the defendant in error was asked by his counsel whether it was necessary to fill said street as a benefit to the lot, the plaintiff in error objected to the evidence, on the ground that there was no allegation in the pleading to support the proof. This objection was overruled, and the plaintiff in error excepted. The objection was made at the proper time. It was permissible for Luttrell to testify that the total expense of \$6,825.87 covered the expense of filling the lot and the street, and the plaintiff in error was not called upon to object, for the sufficient reason that the evidence as offered was contradictory of Luttrell's allegation that he had expended said amount in filling the lot. It established for the plaintiff in error that he only expended in filling the lot a portion of the sum; and the evidence went further and established the number of cubic yards which went into the street, whereby

it was shown that only \$4,262.65 went into the lot, instead of \$6,825.87 alleged by Luttrell, the defendant in error. The balance, \$2,564.10, went towards filling the street. As the evidence of Luttrell about filling the street reduced the claim which he had pleaded against the plaintiff in error \$2,564.10, it should not be expected that the plaintiff in error, Stephenson, would object to its introduction. But when it was attempted to fasten on the plaintiff in error the expense of filling the street, by showing that it was necessary to do so, and a benefit to the lot in order to have a way of ingress and egress, the plaintiff in error objected, because there was no pleading to support it. This was the appropriate place to make the objection, and we cannot treat the error as having been waived.

We have carefully examined the other assignments, and find no error in them which would likely arise upon another trial.

For the errors indicated, the judgments of the Court of Civil Appeals and of the trial court are reversed, and the cause is remanded for another trial.

PARIS & G. N. R. CO. et al. v. FLANDERS. (No. 2771.)

(Supreme Court of Texas. Oct. 20, 1915.)

APPEAL AND ERROR ~~882~~—INVITED ERROR— SUBMISSION OF ISSUE.

In a railroad switchman's action for injuries, defendant could not complain of the submission, as a ground of recovery, of its negligence in permitting an engine with a brilliant headlight to stand in the yards, though this was not the proximate cause of the injury, where its own requested charges called for a determination of the same issue of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. ~~882~~.]

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by Charles Flanders against the Paris & Great Northern Railroad Company and others. A judgment for plaintiff was affirmed by the Court of Civil Appeals (165 S. W. 98), and defendants bring error. Affirmed.

Terry, Cavin & Mills, of Galveston, Andrews, Streetman, Burns & Logue, of Houston, and Wright & Patrick, of Paris, for plaintiffs in error. Carlock & Carlock, of Ft. Worth, for defendant in error.

PHILLIPS, C. J. The suit of the defendant in error, Flanders, for damages on account of personal injuries suffered while engaged in his duties as a switchman in the employ of the plaintiffs in error, was predicated upon two distinct issues of negligence, and each of them was submitted by the court in its general charge to the jury. One was permitting a road engine to stand in the railway yards where Flanders was working at

night—at the time of his injury setting the brakes on a car which had been shunted or “kicked in” by the switch engine on a side track, and which violently collided with another car stationary on the track, causing him to be thrown to the ground—with its electric headlight brilliantly burning, which, it was claimed, had the effect of blinding him, and rendering his work dangerous by obscuring his vision, and because of which he was unable to set the brakes on the car before the collision.

The honorable Court of Civil Appeals, upon the original hearing, reversed the judgment obtained by Flanders in the trial court because of the submission of this issue, holding that, while there was sufficient evidence to warrant a finding that this was an act of negligence, yet, under the evidence, it could not have contributed to the injury. On rehearing it affirmed the trial court judgment, because of its view that the error in submitting the issue had been invited by certain instructions requested on the trial by the railway company. The writ of error was granted on this latter ruling. It presents the only question which it is necessary to discuss; on all other questions the judgment, in our opinion, being entitled to affirmance.

[1] The rule of invited error rests in the principle of estoppel; its reason being that a party is in no position to complain of an error which he has induced the court to commit. It may easily be carried too far, especially in the case of requested instructions, which, in general, are as often framed by counsel for the purpose of adapting the submission of issues to what are understood to be the views of the court upon the questions involved as inducing the submission of a particular issue, or an issue in a particular way. The consequence of an evident error on the part of the court substantially affecting a party's rights and depriving the trial of the legal character which it is the duty of the court to maintain ought not to be avoided by its technical application. For their elements of finality and conclusiveness the judgments of courts are dependent upon a legal trial. The conduct of the proceeding so as to insure such a trial is an obligation resting primarily upon the court itself; and the responsibility for the court's action in the commission of hurtful errors ought not to be transferred to a litigant unless it is reasonably plain that through the action of his counsel he is equally chargeable with the mistake. As applied to errors in the charge apparently induced by requested instructions, the test of the question, therefore, is that definitely announced in the thoughtful opinion of Chief Justice Gaines in *Railway Co. v. Eyer*, 96 Tex. 73, 70 S. W. 529, following but limiting *Railway Co. v. Sein*, 89 Tex. 63, 33 S. W. 215, 558, namely, whether by means of a special instruction requested before the charge is read to the jury the court

is asked to affirm the proposition which is erroneously affirmed in the given charge. If so, the rule applies; otherwise it does not.

Making use of that test here, it is manifest that the error of the court in submitting in the general charge as an issue of negligence the presence of the brilliant headlight in the railway yards while Flanders was engaged in his particular duties must be regarded as having been invited by at least one of the special instructions requested by the railway company. The instruction referred to is in the following language:

“If you should believe from the evidence that the light from the headlight of one of the defendants' locomotives in the yard at the time of the plaintiff's injury shone on plaintiff while he was in performance of his work in such manner as to render the performance of same dangerous, and if you should further believe from the evidence that plaintiff had knowledge of the presence of said light before beginning his work, or that a person exercising such care under the same circumstances would have had knowledge of the presence, position, and probable effect of said light upon a person attempting to perform the duties plaintiff was to perform on said track, and you further find from the evidence that plaintiff, in attempting to perform his duties, under the circumstances, failed to exercise ordinary care for his own safety, if he did, or if you believe from the evidence that by the exercise of ordinary care in the performance of his duty, plaintiff could by changing his position on the car, if you find he did not do so, have avoided the effect of said light and danger therefrom, then in event you find that in either or all of the instances above named plaintiff failed to exercise ordinary care, and that such failure, if any, proximately caused or contributed to his injury, you are instructed that same would not bar a recovery by plaintiff, but the damage, if any, should be diminished by you in proportion to the amount of negligence attributed to plaintiff.”

The purpose of this special instruction was the submission of the issue of contributory negligence, predicated upon the plaintiff's attempting the particular work with knowledge of the presence of the headlight, or under circumstances charging him with such knowledge, and in making no effort to avoid its effect. But in its direction “that, if the jury should believe from the evidence that the light from the headlight shone on the plaintiff while he was in the performance of his work, in such manner as to render its performance dangerous,” and should further find in accordance with the additional part of the instruction “a recovery would not be barred,” but the damages should only be diminished in proportion to the negligence attributable to him, the plain sense of the instruction is that on the issue of the headlight the plaintiff was entitled to recover in some amount, if the effect of its presence was to render dangerous the performance of his work. By its terms the recovery by the plaintiff, which it says would not be barred by a consistent finding under the entire instruction, is as definitely based upon that issue as a diminution of the damages is related to the issue of contributory negligence.

In the general charge the issue as to the

headlight was presented in substantially the same terms, except that it required, as a condition for any recovery by the plaintiff upon the issue, not only that the light was of such brilliance as to render it dangerous to switchmen in the discharge of their duties, but that it blinded the plaintiff so as to prevent his seeing the standing car, or interfered with him in the discharge of his duties, and that permitting the light to be as it was amounted to negligence. The special instruction, in fact, imposed a less burden upon the plaintiff, in that, as already noted, it authorized a recovery in his favor on the issue, provided only that the jury found the headlight rendered dangerous the performance of his work.

The special instruction was more than a mere reference to this issue. It announced the right of the plaintiff to recover on the issue, and, as stated, it furthermore permitted such recovery on a finding of less than the general charge exacted. Having in this instruction distinctly affirmed the proposition erroneously embodied in the general charge, under the ruling of *Railway Co. v. Eyer*, the plaintiff should not be heard to complain of the charge, unless there is sufficient indication in the record that the instruction was requested after the charge was given. Upon the trial no contention appears to have been made by the plaintiff in error that this was not properly an issue to be submitted to the jury. The record suggests nothing that would amount in any form to an objection to its submission. It in no wise indicates that the instruction was not requested until after the charge was given. With the record in this state, the presumption obtains that it was requested before that time. *Railway Co. v. Bein*.

The judgments of the district court and Court of Civil Appeals are affirmed.

FREE AND ACCEPTED MASONS OF THE STATE OF TEXAS v. ANCIENT FREE AND ACCEPTED MASONS, COLORED, et al. (No. 7380.)

(Court of Civil Appeals of Texas. Dallas.
July 8, 1915. Rehearing Denied
Oct. 16, 1915.)

BENEFICIAL ASSOCIATIONS §4 — INFRINGEMENT IN NAMES.

A colored order, known as the "Free and Accepted Masons," is not entitled to enjoin a rival order, subsequently started, which took the name of "Ancient Free and Accepted Masons, Colored," it appearing that there was no confusion of mail, or applications of membership, and that the last order distinctly held itself out as being different from the first, for, as the orders were charitable and humanitarian and were not engaged in business, there was no question of infringing a trade-name.

[Ed. Note.—For other cases, see *Beneficial Associations*, Dec. Dig. §4.]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by the Free and Accepted Masons of the State of Texas against the Ancient Free and Accepted Masons, Colored, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Mike E. Smith and O. W. Gillespie, both of Ft. Worth, for appellant. Thompson, Knight, Baker & Harris and George S. Wright, all of Dallas, for appellees.

TALBOT, J. The appellant, Free and Accepted Masons of the State of Texas, sued the appellees, Ancient Free and Accepted Masons, Colored, and others, to restrain the latter from using a name so similar to that of appellant, and especially from the use as a part of the appellees' name of the words "Free and Accepted Masons." Upon the presentation of appellant's petition a temporary injunction was granted, but upon final hearing judgment was rendered that appellant take nothing by reason of its suit and that the injunction be dissolved. From this decree of the court appellant appealed.

All of the parties to the suit are negroes. Since 1875 the appellant, as a Masonic organization under the name of "Free and Accepted Masons of the State of Texas," has conducted its affairs and acquired its membership and property. In 1885 appellant was duly incorporated by virtue of the laws of Texas under its said name. In 1908 or 1909 the appellees organized a Masonic order under the name "Ancient Free and Accepted Masons, Colored," and have since maintained their organization in Texas, using practically the same password, emblems, badges, etc., as those used by appellant and other Masonic organizations. The charter of appellee is dated February 6, 1909, and many of its members were formerly members of the appellant, and acquired a knowledge of the secret work and principles of Masonry while members thereof. Some of them were probably expelled from appellant's lodge, and some voluntarily abandoned appellant's organization and became members of the appellee's organization. The appellant has a membership of about 7,000 men and 4,000 women. It owns property of the estimated value of \$300,000. This property is not used for profit. It is used for lodge purposes and as homes for orphan children of deceased members of the order and for indigent Masons of the order. The funds necessary for conducting and maintaining the work of the order seem to be raised by dues assessed and collected from its members. The appellee has a membership of about 740 men and about 320 women. It has no capital stock, but some property used for the purpose of conducting the work of the order, and the organization is not for the purpose of making money. Like appellant, its members are required to pay certain dues appropriated to charitable purposes and to care for the sick and wid-

ows and orphans of deceased members. In other words, the objects of both associations are "charitable and humanitarian."

No question of property is involved, and the evidence, as we view it, shows no pecuniary injury to appellant by the use of the name adopted by appellee, under which it maintains its organization, unless the teachings of the appellee's order, to the effect that it is entirely different from the appellant order and the only regularly constituted Masonic order, which has led some of the latter's members to withdraw and join appellee order, constitute such property or pecuniary damage. In 1908 some of the former members of the plaintiff order, in conjunction with various other colored men, organized five lodges of the "Ancient Free and Accepted Masons," and later, prior to March 16, 1909, these five lodges organized the Sunset Grand Lodge of Masons, and on March 16, 1909, the state of Texas granted to the Sunset Grand Lodge of Masons a charter, which showed that the Sunset Grand Lodge Free and Accepted Masons, Colored, of Texas, had incorporated, and that said charter gave to said Grand Lodge the rights to practice ancient free and accepted Masonry in the state of Texas. Since that time the Sunset Grand Lodge, Ancient Free and Accepted Masons, has been establishing subordinate lodges, practicing free and accepted Masonry, and engaged solely in a benevolent undertaking—the upbuilding of the negro race and the paying of benefits to the widows and orphans of deceased members of said order. The evidence further shows, or tends to show, that no person has ever made application to the defendant order, thinking or believing that he was making application to the plaintiff order; that no mail intended for defendant order has ever been received by plaintiff order; that there has never been any confusion in the minds of the public or in the minds of any person with reference to the identity of these two orders. On the contrary, the undisputed evidence shows that each of these orders has been contending that it was the only colored Masonic order, and that the other was spurious and clandestine.

Appellant presents but one assignment of error, which is as follows:

"The testimony is conclusive that the plaintiff, long prior to the organization of defendant organization, having theretofore long used the name, was duly and legally incorporated by virtue of the laws of the state of Texas under its said name, 'Free and Accepted Masons of the State of Texas,' and that long subsequent to plaintiff's incorporation, the defendant, without any valid authority pretended to organize a Masonic order and Supreme Lodge in the state of Texas, contrary to Masonic law, under the same, or substantially similar name, to wit, under the name 'Ancient Free and Accepted Masons (Colored),' and by virtue thereof began operations in Texas, asserting and pretending that the last-named body was the only true and regularly constituted body of colored Masons in this state, using the same password, emblems, badges, and other insignia common to Masonry, and which had been adopted and used long prior by the plaintiff.

The court therefore erred in not holding that the defendants were infringing upon plaintiff's corporate name, and in not perpetuating the temporary injunction and permanently enjoining the defendants from operating and continuing the use of any part of plaintiff's corporate name."

The proposition asserted and urged under the assignment is:

"Where a corporation has appropriated and used a name for such a length of time as to become identified by the name, and has established a character and reputation under it, it is a fraud on the corporation if this name, or one similar thereto, is assumed by others under circumstances likely to lead the public to believe that the latter is the former body; and where injury will, or is calculated to, result to the former corporation on account thereof, a court of equity will, at the suit of the injured parties, restrain the further perpetration of the wrong."

It is said that as applied to trading concerns the decisive principle is that no man has a right to sell or advertise his own business or goods as those of another. *Williams v. Farrand*, 88 Mich. 478, 50 N. W. 446, 14 L. R. A. 161. Therefore one must not adopt a name so similar to that of another as to draw to himself business intended for that other. *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; *Supreme Lodge K. of P. v. Improved Order K. of P.*, 113 Mich. 133, 71 N. W. 470, 38 L. R. A. 658. In the last case cited it is said that this principle is correctly stated in the following language quoted in the opinion of the court:

"Where a corporation has appropriated and used a name for such length of time as to become identified by the name, and had established a character and reputation under it, it is a fraud upon the corporation and the public if this name be assumed by others under such circumstances as would lead the public to believe that they constitute the original corporation; and where injury will result to the corporation on account thereof, courts of equity will, at the suit of the injured parties, by injunction restrain the further perpetration of the wrong. It is the special injury to the party aggrieved and the imposition upon the public that constitute the wrong which the courts will redress. It is not necessary that the wrong should be intentionally committed. It is enough that the name should be used under such circumstances as would lead the public to believe that the latter organization was the former, and thereby cause injury to the former corporation." But "where the name was not chosen for the purpose of deception, and has not been used under circumstances intended or calculated to deceive, the similarity of names must be such as to deceive ordinary persons proceeding with ordinary care to justify the inference." *Supreme Lodge K. of P. v. Improved Order K. of P.*, supra.

Mr. High, in his excellent work on Injunctions, after stating the general doctrine governing the jurisdiction of equity in restraint of the infringement of trade-marks, says:

"Courts of equity, in granting relief by injunction in this class of cases, proceed upon the principle that it is a fraud upon one who has established a trade and carried it on under a given name to permit another to assume that name, or the same name with a slight alteration, in such manner as to induce persons to deal with him in the belief that they are dealing with one who has given a reputation to that name," and

that, "since false representation is the principal ground for relief in equity by injunction against the piracy of a trade-mark, when no false representation or deceit is used, defendant only endeavoring, by his advertisement and by selling the article complained of, to show to the public that the article is that of his own manufacture, equity will not interfere, in the absence of any evidence of persons having been misled or deceived in the matter, even though defendant may also use, as designating his article, the name of the original manufacturer of the article sold by plaintiff," and that "when, upon the case presented, there is no evidence of fraud or deceitful representation, the court will decline to interfere." Sections 1085 and 1086.

Thus it appears, according to the rule announced by Mr. High, that even in suits involving the infringement of a trade-mark injunctive relief cannot successfully be invoked unless the evidence discloses that persons have been misled or deceived to their injury by false representations used by the party charged with the infringement. The only difference in the names of the organizations involved in the case of Supreme Lodge K. of P. v. Improved Order K. of P., cited above, consists in the words, "Improved Order," which is found in the title of the appellee therein. There was no evidence that the appellee chose the name "Improved Order Knights of Pythias," with the intention that their order should be supposed to be the order Knights of Pythias, nor that they had done anything since the order was founded to lead the public to believe that the orders were the same, and the court, after stating that the question was, "Is the name 'Improved Order Knights of Pythias' so nearly like the name 'Knights of Pythias' that ordinary persons, using ordinary care, would think them identical, would think them two names for the same order, or for branches of the same order, so that they would become members of the defendant's society when they really wanted to join complainant's society?" answered the same in the negative, and held that the name "Improved Order Knights of Pythias" could be lawfully taken as the name of the new order formed by members who had withdrawn from the old order of Knights of Pythias. There is as much dissimilarity in the names of the two organizations involved in the suit now before this court as in the names of the organizations before the court in the case cited, and just as much reason for holding that the appellant here is not entitled to the injunctive relief sought. There is no evidence warranting the conclusion that appellee order selected the name "Ancient Free and Accepted Masons, Colored," with the intention that its order should be understood and supposed to be the appellant order. On the contrary, the evidence tends strongly to show, if it does not conclusively do so, that since the organization of the appellee order it has uniformly sought to convince the public and those contemplating taking membership in the order that it

was materially different from the appellant order and the only colored Masonic order in the state or elsewhere. So upon the authority of Supreme Lodge K. of P. v. Improved Order K. of P., supra, it might be held in the instant case that the appellee is using the name "Ancient Free and Accepted Masons" under circumstances which do not lead the public to believe that it is the same or a branch order of the appellant, and hence could lawfully take the name adopted by it.

The cases cited by appellant very clearly show that, where a firm or corporation has built up a business under a firm or corporate name which has given that name a pecuniary value, another firm or corporation cannot adopt another name so similar as to mislead the public, and lead individuals to the belief that the firm or corporation using the new name is the same firm or corporation that was using that old name. This principle of law is well established, but it is not, in our opinion, applicable in the case at bar. The rule applicable to the facts of the present case is announced in the case of Grand Lodge v. Grimshaw, 34 App. D. C. 383. In that case the court, speaking through Mr. Chief Justice Shepard, says:

"The principle upon which courts of equity proceed in restraining the simulation of names is not that there is property acquired by one party in the name, but to prevent fraud and deception in the dealing with the party charged with the simulation of a name used by another in a similar business or manufacture. * * * Courts of equity do not exercise jurisdiction to inquire into and adjudicate the right of different associations for charitable or religious objects who hold themselves out to be the regular and only accredited representatives of some particular order or religious system. There must be some pecuniary injury resulting from the use of a name that may have been adopted by another, to warrant inquiry and justify relief. The injury must not be fanciful or sentimental, but real. It must be substantial, and such as a court of equity, upon principles of justice, will interpose to prevent"—citing *Original La Tosca Social Club v. La Tosca Social Club*, 23 App. D. C. 96-104.

The case of *International Committee of Young Women's Christian Association v. Young Women's Christian Association of Chicago*, 194 Ill. 194, 62 N. E. 551, 56 L. R. A. 888, is more in point and comes nearer sustaining the contention of appellant in this case, in our opinion, than any other authority cited by its able counsel; but, as pointed out by counsel for appellee:

"The Supreme Court in that case gave relief solely upon the ground that the names were so similar as to deceive and mislead the public into believing that the defendant was the plaintiff or a committee of plaintiff, and the court in its opinion said, in substance, that it clearly appeared from the entire record that the defendant adopted the name advisedly, and for the purpose of leading the general public to believe that it stood as a committee and representative of plaintiff association."

Our conclusion is that the facts did not warrant the interference of a court of equity in this case, and that the judgment of the

district court should be affirmed. It is therefore accordingly so ordered.

Affirmed.

HOUSTON BELT & TERMINAL RY. CO. v. VOGEL et al. (No. 6959.)

(Court of Civil Appeals of Texas, Galveston. June 21, 1915. Rehearing Denied Oct. 14, 1915.)

1. TRIAL §139, 140—PROVINCE OF JURY—WEIGHT OF TESTIMONY.

The credibility of witnesses and the weight of testimony is a question peculiarly for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332-335, 338-341, 365; Dec. Dig. § 139, 140.]

2. EVIDENCE §568—OPINION EVIDENCE.—EXPERT TESTIMONY.

A jury are not concluded by opinion evidence, but may apply their own experience and knowledge in solving the question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2392-2394; Dec. Dig. § 568.]

3. EMINENT DOMAIN §307—CONSTRUCTION OF RAILROAD—DAMAGES.

Whether plaintiff's property was depreciated by reason of the construction of a railroad held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 820-824; Dec. Dig. § 307.]

4. EVIDENCE §474—OPINION EVIDENCE.

Where plaintiff testified to his familiarity with conditions and knowledge of the market value of his property, which he claimed had depreciated by reason of the construction of a railroad, he was competent to testify as to the depreciation, and, notwithstanding that on cross-examination he became confused as to the distinction between actual and market value, his testimony could not be stricken; that fact going only to the weight of his testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.]

Appeal from District Court, Harris County; Norman G. Kittrell, Special Judge.

Action by John Vogel and wife, against the Houston Belt & Terminal Railway Company. From a judgment for plaintiffs, defendant appeals. **Affirmed.**

See, also, 156 S. W. 261.

Andrews, Streetman, Burns & Logue, Coke K. Burns, and W. L. Cook, all of Houston, for appellant. John Lovejoy and Presley K. Ewing, both of Houston, for appellees.

McMEANS, J. John Vogel and wife sued the Houston Belt & Terminal Railway Company, alleging damages by way of depreciation in the market value of certain real estate in the city of Houston owned by them, the depreciation complained of being charged to the fact that the Houston Belt & Terminal Railway Company had built certain tracks in front of said property and had carried on railway operations over said tracks from and after the early part of the year 1910. Defendant answered by general denial, and pleaded that the property, instead of depreciating, had enhanced in value by reason of

the construction. The case was tried before a jury upon special issues, and damages to plaintiffs' property from railroad construction and operations in proximity thereto were found by special verdict, as follows:

"(1) What was the fair market value of plaintiffs' property, inclusive of improvements thereon, immediately before the construction and operation of the defendant's railroad in the vicinity of it? Answer: \$10,000.

"(2) What was the fair market value of plaintiffs' property, inclusive of the improvements thereon, immediately after such construction and operation of defendant's railroad? Answer: \$5,250.

"(3) If the market value of said property was less immediately after than immediately before the construction and operation of defendant's railroad, was the depreciation or decrease of value caused by such construction and operation of defendant's railroad? Answer: Yes."

On this verdict a judgment was rendered in plaintiffs' favor for \$4,750, from which the defendant has appealed.

Appellant's first, second, third, fourth, and fifth assignments of error in different forms contend that the verdict was excessive, under the claim that the value found before the railroad operations, to wit, \$10,000, was too large, and the value found after, to wit, \$5,250, was too small. The claim is made, particularly in the first assignment, that the value fixed before the railroad operation was so grossly excessive as to indicate that the jury was actuated by sympathy, bias, prejudice, or some other improper motive.

[1-3] We shall not undertake to set out the testimony bearing upon the issues presented by the assignments, but find that the evidence adduced upon the trial fairly warranted the verdict in that regard. Seven witnesses, including the plaintiff John Vogel, testified as to the market value of the plaintiffs' property before and after the construction of defendant's railroad and the operations thereover, and no two of them agreed. Vogel's estimate was that the property, including the improvements thereon, was worth before the construction and operation \$12,500, and after \$8,000; his witness W. E. Carter placed the value before at \$11,500, and after at \$6,000; while the five following named witnesses placed the value as follows: W. H. Taylor, \$5,187.50 before, and \$8,750 after; J. W. N. Burkett, \$5,400 before, and \$6,250 after; J. H. McCracken, \$6,000 before, and an increase in value of 30 to 50 per cent. after; L. W. Murdock, \$5,500 before, and \$11,000 after; and L. Dunn, \$6,250 before, and the same amount after. As before shown, the jury found the value to be \$10,000 before, and \$5,250 after. There was testimony admitted which would warrant a finding that there was no demand for property situated as was plaintiffs' for other purposes than residences; and the witness last named testified that plaintiffs' property for residence purposes had decreased 75 per cent. by reason of the construction and operation of defendant's railroad. The wit-

nesses testified at length as to their knowledge of property values and as to their methods of arriving at the market value of plaintiffs' property both before and after the construction and operation of defendant's railroad; and it was a matter peculiarly within the province of the jury to weigh the testimony, judge the credibility of the witnesses, and to reach a conclusion supported by testimony to which they gave credence, or a conclusion reached by blending all the evidence admitted before them, aided by their own experience and knowledge of the subject of inquiry. We cannot say, therefore, that the jury, in arriving at the conclusion they reached, did so without regard to the testimony, or that their verdict was against the preponderance of the evidence to that degree which shows that manifest injustice has been done, or to indicate that they were actuated by sympathy, bias, prejudice, or some other improper motive. They were not concluded by the opinion of experts, but in weighing the testimony they had a right to apply their own experience and knowledge, and to deduce therefrom the truth as they believed it. Thus in *Lawson's Expert and Opinion Ev.* (2d Ed.) p. 496, under rule 61, it is said:

"We have seen the opinions of attorneys testifying to the value of lawyers' services are not conclusive on the jury, who may act independently or in opposition to them, applying to the case their own experience and knowledge of the character of the services. The same is true of the opinions of all experts and nonexperts as to value."

In *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028, it is said:

"While they [the jury] cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry."

In *Patterson v. Boston*, 20 Pick. (Mass.) 166, it is said:

"Juries would be very little fit for the high and responsible office to which they are called, especially to make an appraisal, which depends on knowledge and experience, if they might not avail themselves of those powers of their minds when they are most necessary to the performance of their duties."

The jury were not compelled to credit all the testimony of any witness or reject it all (*Railway v. Taylor*, 20 Tex. Civ. App. 654, 49 S. W. 1055), but could have accepted as true a portion of the testimony of any or either of them, rejecting the remainder, in order to base their verdict upon what they believed to be the real facts. *Garcia v. Sanders*, 90 Tex. 109, 37 S. W. 314.

The assignments do not point out reversal error, and are overruled.

[4] The sixth assignment complains that the court erred in overruling defendant's motion to exclude all of the testimony of the plaintiff John Vogel as to the value of his property, the motion being predicated upon

the grounds that the cross-examination of plaintiff developed that he was not qualified to give an opinion as to the market value of his property, since it showed that he had never been in the real estate business; that the estimate which he gave was not based on any actual sales with which he was familiar; that he had had no experience in fixing the values of property or estimating such values; and that his estimate was simply an unsupported opinion.

On a former appeal of this case a judgment in favor of plaintiffs was reversed, for the reason that the plaintiff John Vogel, although he testified that he was not acquainted with the market value of property in question, nor of the market value of property in that neighborhood, was permitted, over the objection of the defendant, to testify what its market value was. *Houston Belt & Terminal Ry. Co. v. Vogel*, 156 S. W. 261. On the last trial he testified on direct examination to the effect that he was specially familiar with the property in question, and the other property in the neighborhood of it, and of the location and character thereof, and had been for about 30 years, and had owned and lived on the property in question as the home of his family for 28 years, and had special knowledge of the uses to which the property in question and the other neighborhood property had been put during that period, which was for residence purposes exclusively, and of the uses to which the property was adapted before and since the railroad operations, and that from his knowledge and familiarity with the property in question and its improvements, which he had built, and with property in the neighborhood, its location and character, and the uses to which same had been put, and to which such was adapted, he had knowledge and an opinion of the market value of the property immediately before and immediately after the railroad operations in question on August 10, 1910, and that the market value of the same immediately before such operations was \$12,700, and immediately after not more than half that amount, say, \$6,000. Among other things, he testified on the direct examination:

"From my knowledge and the nature and character of this property, and the uses for which it is fit, and its location, I am able, from my knowledge of these things, to estimate and give an opinion of the market value of this property just before the railroad began its operations there. In my opinion, its market value, without the road there, at that time, was \$6,000 a lot, with the improvements (there were 2½ lots). In my opinion, immediately after the road was constructed and began operations there, it was not worth hardly half of what it was worth before; I don't think it was. Nobody would have it; you couldn't sell it to anybody—that is, for home purposes. That is my opinion, from my acquaintance with the property and knowledge of it."

On cross examination he testified:

"I say that my property, in my opinion, just before these tracks were built there, with the

improvements on it, was worth \$6,000 a lot; I mean \$6,000 a lot, not for the entire property, but \$6,000 a lot, was what I estimated it. I don't believe after those tracks were built in there that I could get half what it was worth before. Of course, I have got to have a place to live in, and it takes money to build another place to live on. I could not get hardly half for it now. I testified that, in my opinion, after those tracks were built there, immediately afterwards, my property was only worth one-half as much as it was before, because nobody else would have it; nobody would want to live there to make it a home."

On redirect examination, he testified:

"The opinion I gave counsel on the other side is not based on any experience as a real estate man, or anything of that sort, but it is based on my knowledge of the property and its uses—my own acquaintance with it and its uses."

After Vogel had testified on direct examination he was interrogated by defendant's counsel, and the questions propounded to him and his answers thereto are set out in defendant's bill of exceptions No. 3. The pertinent answers, reduced as far as practicable to narrative form, are as follows:

"I could not say that I knew what the market value of my property was before these tracks were built there in 1910; I just had an opinion. There was no transfer made before that, or at any time that I knew of, that I could judge by. I just had that opinion; thought it was worth that much. I didn't have an opinion as to the market value of that property upon the former trial of this case at all. I didn't know what it was. That thing came so sudden on me that I couldn't think of it quick enough to form an opinion on it, but I have now."

"Q. I will ask you whether or not, on the former trial of this case, you testified that you had no opinion as to the market value of that property. A. No, no; I did not."

"Q. I will ask you whether or not on the former trial of this case, Mr. Vogel, you testified that you didn't know the market value of this property, and was not acquainted with the market value of the property in that vicinity. A. I was not. I was not acquainted with it. I didn't have no opinion what it was. I have not been acquainted with all these laws, and I didn't know what it meant. I know what it means now. I think it means—I am not sure, but I think it means, if one man comes and wants to buy, and offers you so much, and you don't care to sell it, and sell it; I think it is that way; I don't know. After these tracks were built there I never heard of any demand for the property; I never had no offer made me; it was not on the market; it never was. I never put any price on it after these tracks were built. I have never been in the real estate business nor engaged in buying and selling property, and I have never had occasion to become familiar with property values in general, and I never bothered myself in regard to the demand for property of any particular kind, and am not familiar with property in different parts of the city and the demand for it—not familiar with these matters at all; and the price that the property was worth, in my opinion, before these tracks were built is simply my estimate, but that was not based on any experience which I have had in the real estate business."

After Vogel had thus testified the defendant's counsel moved to strike out his testimony as to the value of the property, upon the ground that it was developed on cross-examination that he was not qualified to give an opinion as to the market value of

his property, his testimony showing that he had never been in the real estate business, and that the estimate which he gave was not based upon any actual sales with which he was familiar, and that he had had no experience in fixing or estimating value of property, and that his statement was simply an estimate and an unsupported opinion, which objection was overruled. The court, in approving the bill of exceptions, referred to the statement of facts as a part of the bill for the other testimony of the plaintiff as showing his qualification to express an opinion as to the market value of his property, a part of which we have referred to above preceding the testimony elicited by cross-examination and set out in the bill of exceptions. The witness also testified:

"I didn't know at that time [the former trial] what market value meant. Since then they have been talking about it, and I studied it over. I came to the conclusion that 'market value' means property is worth so much; that is the way I understand it now."

The statement of facts discloses that in the cross-examination referred to Vogel, in attempting to define "market value," used the word "have" where the word "care" is used in the bill of exceptions; thus his definition, as given in the statement of facts, is:

"If one man comes and wants to buy and offers you so much, and you don't have to sell it, and sell it, I think it is that way."

No assignment is presented by appellant complaining of the admission of Vogel's testimony, given on direct examination, to the effect that he knew the market value of his property, and as to the difference in values before and after the construction of the tracks and the operations thereover. He said he knew such values, and testified what they were. His testimony as to the amount of depreciation by reason of the construction and operation, we think, was clearly admissible even as against an objection timely urged. *Railway v. Maddox*, 26 Tex. Civ. App. 297, 63 S. W. 137; *Railway v. Ruby*, 80 Tex. 175, 15 S. W. 1040. Having plainly stated that he knew the market value, he was competent to testify as to such value (*Davis v. Fain*, 152 S. W. 218), and the matter brought out upon the cross-examination went only to the weight of the evidence and credibility of the witness, and not to the competency of his testimony (*Railway v. Fagan*, 72 Tex. 130, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 778). The determination of whether the witness was qualified to testify as to the market value of his land under all the facts testified to by him was largely a matter resting within the discretion of the trial judge, and, as we have concluded that no abuse of that discretion has been shown, his action in admitting the testimony complained of will not be disturbed. In *Byrd Irr. Co. v. Smyth*, 157 S. W. 262, it is said:

"What is sufficient to show the qualification of a witness to give his opinion concerning the value of land is very largely in the discretion

of the trial court, and its conclusion upon such a matter will not be disturbed by the appellate court unless it be clearly shown that he has abused his discretion. *G. C. & S. F. Ry. Co. v. Norfleet*, 78 Tex. 321, 14 S. W. 703; *Railway v. Houghton*, [163 Mo. 470] 68 S. W. 718; 17 Cyc. 31; *Telephone & Telegraph Co. v. Forke*, 2 Willson, Civ. Cas. Ct. App. § 365."

It is our conclusion that the assignment should not be sustained.

The remarks made by plaintiff's counsel in the closing argument, even if not appropriate or proper, were not, in our opinion, so prejudicial to the defendant as to be calculated to cause or probably cause the rendition of an improper judgment, and the seventh assignment, which raises the point, is overruled without further discussion.

It is our opinion that no reversible error is pointed out in any of the assignments presented by appellant in its brief.

The judgment of the trial court is affirmed. Affirmed.

TRAMMELL et al. v. NEIMAN-MARCUS CO.
(No. 7366.)

(Court of Civil Appeals of Texas, Dallas. June 19, 1915. Rehearing Denied Oct. 16, 1915.)

1. VENUE § 22 — RESIDENCE — ACTIONS AGAINST HUSBAND AND WIFE.

Under Rev. St. 1911, art. 1840, providing that husband and wife shall be jointly sued for all debts contracted by the wife for necessities furnished herself and children and for all expenses incurred by the wife for the benefit of her separate property, an action against a husband and his divorced wife for the value of alleged necessities purchased by the wife during the marriage, in which plaintiff sought to make the wife liable individually, was properly brought in the county of the wife's residence, though the husband resided in a different county, as, she being no longer his wife, his domicile did not control as to her domicile, and she could be sued in the county of her residence.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 35-37; Dec. Dig. § 22.]

2. HUSBAND AND WIFE § 235—ACTIONS FOR VALUE OF NECESSARIES—INSTRUCTIONS.

In an action against a husband and his divorced wife for the value of alleged necessities purchased by the wife during the marriage, the court submitted a question as to whether the goods purchased were, as between plaintiff and the wife, necessary wearing apparel, and charged that the wife had pleaded and testified that such wearing apparel was necessary and that accordingly the jury would answer this question "Yes." The court also submitted a question as to whether the goods were necessities as between plaintiff and the husband. *Held*, that the instruction was erroneous, since, there being an issue as between plaintiff and the husband as to whether the goods were necessities, the charge was calculated to and did unduly impress the jury that the goods were necessities.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 589, 849-852, 982; Dec. Dig. § 235.]

3. HUSBAND AND WIFE § 235—ACTIONS FOR VALUE OF NECESSARIES—SUBMISSION OF ISSUES.

In an action against a husband for the value of alleged necessities purchased by his wife, it was error to submit a question as to whether

the goods were necessities, taking into consideration the financial circumstances and station in life of the husband and wife at "and prior" to the time the goods were sold, where there was evidence that at the time of the sale the husband was to some extent indebted, and worth much less than he was some time prior thereto, since the test was his standing and financial ability at the very time of the purchase.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 589, 849-852, 982; Dec. Dig. § 235.]

4. HUSBAND AND WIFE § 235—ACTIONS FOR VALUE OF NECESSARIES — QUESTIONS FOR JURY.

Where, in an action against a husband for the value of alleged necessities purchased by the wife, though he admitted that he was in plaintiff's store when the wife purchased some of the goods, he testified that he had notified plaintiff prior to that time not to charge to his account any purchases by the wife, and that he did not know that they were being so charged, and it was also shown that he had made her a sufficient allowance, the question whether he knew that the goods were being charged to him should have been submitted to the jury, plaintiff having pleaded an estoppel.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 589, 849-852, 982; Dec. Dig. § 235.]

5. ESTOPPEL § 54 — ELEMENTS—KNOWLEDGE — LIABILITY OF HUSBAND FOR NECESSARIES.

If the husband did not in fact know that the goods were being charged to him, he would not be estopped from defeating liability on that ground.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 128-135; Dec. Dig. § 54.]

6. HUSBAND AND WIFE § 19—LIABILITY OF WIFE FOR GOODS PURCHASED.

A wife, who in person purchased goods which were necessities for her own use, was personally liable for their value.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 109, 121-138, 142, 146, 322; Dec. Dig. § 19.]

7. EVIDENCE § 248—ADMISSIONS OF DIVORCED WIFE—EFFECT AS AGAINST HUSBAND.

Though a husband is liable for actual necessities furnished his wife during marriage, the pleadings and evidence of a divorced wife, in which she admitted that goods purchased by her during the marriage were necessities, did not necessarily establish that fact as against the husband.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 953-964; Dec. Dig. § 248.]

Appeal from Dallas County Court; W. F. Whitehurst, Judge.

Action by the Neiman-Marcus Company against W. T. Trammell and another. Judgment for plaintiff, and defendants appeal. Affirmed in part, and reversed and remanded in part.

Cockrell, Gray & McBride, Henry P. Edwards, and George, Hancock & Hardwicke, all of Dallas, and Tarlton Morrow, of Hillsboro, for appellants. Thompson, Knight, Baker & Harris, Will C. Thompson, and J. Hart Willis, all of Dallas, for appellee.

RAINEY C. J. Suit in the county court of Dallas county by appellee against W. T. Trammell and former wife, Fay Trammell, appellants, to recover \$480.60 and interest, al-

leged to be for goods purchased by the said wife during their marriage. Special issues were submitted to a jury, and upon a return of their answers a judgment was entered for appellee, from which this appeal is taken.

[1] W. T. Trammell resides in Taylor county, Tex., and Fay Trammell resides in Dallas county, Tex. Appellee brought suit in the last-named county, alleging liability of W. T. Trammell and against Fay Trammell's separate estate, alleging the goods purchased were necessities for the wife and being purchased during the marital relations. W. T. Trammell interposed a plea of privilege to be sued in the county of his residence. After filing said plea, the same was continued several times by agreement, and no action was taken thereon by the court; but when the cause was submitted to the jury W. T. Trammell asked the court to give the following charge, which was refused by the court, viz., in effect to return a verdict for Trammell on his plea of privilege to be sued in the county of his residence. The refusal to give said charge is assigned as error.

At the time suit was instituted W. T. Trammell and Fay Trammell were living apart, having been prior to that time divorced. The plaintiff sought to make Fay Trammell liable individually for the value of the goods purchased, and in such a case the statute (Rev. St. 1911, art. 1840) requires the husband and wife to be jointly sued. She being no longer his wife, the domicile of the husband did not control as to her domicile. She being a feme sole, she could be sued in the county of her residence, which was Dallas county, and the county court of said county had jurisdiction of W. T. Trammell in this suit, being joined therein by his former wife, of whom said court had jurisdiction. No error was committed by the court in refusing said special instruction.

[2] 2. W. T. Trammell complains of the instruction given to the jury in submitting the issues as follows:

"Question 1. As between plaintiff and Mrs. Fay Trammell, was the wearing apparel which was sold by Neiman-Marcus Company necessary wearing apparel for Mrs. Fay Trammell, taking into consideration the financial circumstances and station in life of W. T. Trammell and Mrs. Fay Trammell at and prior to the time when the merchandise was sold and delivered by plaintiff? (You are instructed that Mrs. Fay Trammell has pleaded in her answer, and has also testified in her deposition, read in evidence in this case, that such wearing apparel was necessary. Accordingly you will answer this question 'Yes.'). Answer: Yes.

"Question 2. As between plaintiff and W. T. Trammell, was the wearing apparel which was sold by Neiman-Marcus Company necessary wearing apparel for Mrs. Fay Trammell, taking into consideration the financial circumstances and station in life of W. T. Trammell and Mrs. Fay Trammell at and prior to the time when the merchandise was sold and delivered by plaintiff? Answer: Yes."

The objection, in effect, was that the attention of the jury was called to Fay Trammell's plea admitting the goods were necessities for herself, and to her testimony that

such were necessities, and misleading the jury in their finding on said issue as to W. T. Trammell.

We are inclined to think the court erred in the instruction complained of. It is true that, Fay Trammell having admitted by plea and testified that the goods were necessities, she has no ground of complaint; but, it being an issue as between plaintiff and W. T. Trammell, we think the charge was calculated to and did unduly impress the jury that the goods were necessities, and probably influenced a verdict against him.

[3] 3. W. T. Trammell also complains of the issue as submitted, in that the jury are told, in determining his liability, they would consider his financial ability and standing "at and prior to the time the goods were purchased." The test is his standing and financial ability at the time of said purchase, and the court erred in inserting the word "prior." There is some evidence tending to show that at the time the goods were purchased Trammell was to some extent indebted, and worth much less than he was some time prior thereto, which, if true, might not warrant the expenditure then made, when his affairs at some prior time might have done so; hence the court erred in not limiting his liability on the ground of necessities to the very time of purchase.

[4, 5] 4. Trammell complains of the failure of the court to submit to the jury the issue whether or not he (Trammell) knew when he was in the store of plaintiff that the goods were being furnished to his wife and charged to him. Plaintiff pleaded estoppel as against said Trammell, and there was evidence tending to show that he was in the store with his wife when some of the goods were purchased, while he admits this, he testifies that he had notified plaintiff, prior to that time, not to charge to his account any purchases made by his wife, that he did not know that the purchases were being charged to his account, and it was also shown that he made her sufficient allowance for this purpose. These facts raised the issue, and it was for the jury to determine. If Trammell did not in fact know that the goods were being charged to him under the circumstances detailed by the evidence, he would not be estopped from defeating liability on that ground.

[6] 5. We will now consider the appeal of Fay Trammell. The question as to her is: Were the goods contracted for by her, and were they necessities for herself? The evidence shows that she in person purchased the goods and had them charged. She admits in her pleadings that the goods were necessities for her own use, and she testifies to the same effect. Having contracted for the goods in person, and she testifying they were necessities for her own use, renders her personally liable for the value of the goods. Under the pleadings and evidence of Fay Trammell, there was no error in the

court in instructing the jury to find against her.

[7] While a husband is liable for the actual necessities furnished the wife during the marriage, the pleadings and evidence of the divorced wife do not necessarily establish that fact as against Trammell. That being a controverted issue, and the court having erred, as we have indicated, the judgment will be reversed and remanded as to him, but affirmed as to Fay Trammell.

Reversed and remanded in part, and affirmed in part.

MISSOURI, K. & T. RY. CO. OF TEXAS v. FORREST. (No. 7358.)

(Court of Civil Appeals of Texas. Dallas. June 28, 1915. Rehearing Denied Oct. 16, 1915.)

1. AGRICULTURE ⇐8 — JOHNSON GRASS — JURY QUESTION.

In an action under Rev. St. 1911, §§ 6601, 6602, against a railroad company for injuries to plaintiff's land sustained by reason of the company's allowing Johnson grass to go to seed on its right of way contiguous thereto, where there was substantial evidence that, when land becomes infested with Johnson grass, it is impossible to eradicate it, the submission of the question of permanent injuries under the rule that damages should be estimated at the difference between the market value of the property before and after the infection with Johnson grass is proper.

[Ed. Note.—For other cases, see Agriculture, Dec. Dig. ⇐8.]

2. AGRICULTURE ⇐8—JOHNSON GRASS—ACTIONS—INSTRUCTIONS.

In an action for damages for defendant's act in allowing Johnson grass to go to seed on its right of way, there was evidence that the Johnson grass on plaintiff's property might have come from other sources. The jury were charged that plaintiff was bound to show the amount of his damage caused solely by defendant's act. *Held*, that defendant could not complain of the submission of the matter to the jury, on the ground that, where the damage might have come from several sources, only nominal damages can be recovered.

[Ed. Note.—For other cases, see Agriculture, Dec. Dig. ⇐8.]

Error from District Court, Ellis County; F. L. Hawkins, Judge.

Action by T. C. Forrest against the Missouri, Kansas & Texas Railway Company of Texas. There was a judgment for plaintiff, and defendant brings error. Affirmed.

C. C. Huff and A. H. McKnight, both of Dallas, and G. C. Groce, of Waxahachie, for plaintiff in error. Clyde F. Winn and Supple & Harding, all of Waxahachie, for defendant in error.

TALBOT, J. This is the second time this case has been before this court. See 148 S. W. 1176. The suit was instituted July 5th, 1910, by the defendant in error, hereinafter called plaintiff, against the plaintiff in error, hereinafter called defendant, under what is known as the Johnson grass statutes, now articles 6601 and 6602 of the Revised Stat-

utes 1911, for the recovery of penalties prescribed for a violation of those statutes and for damages sustained by reason of the defendant allowing Johnson grass to go to seed on its right of way contiguous to certain lands owned by plaintiff. In his first amended petition these lands were described as four separate tracts, but in a second amended petition, filed after the case was remanded for a new trial on appeal heretofore prosecuted to this court, they are described as two tracts containing, respectively, 117 acres and 239 acres, there being of the 117 acres 109 acres in cultivation, and of the 239 acres 232 acres in cultivation.

The petition of the plaintiff charges:

"That his lands were in cultivation during the years 1903, 1909, and 1910, and that the right of way of the railway company ran through the same for one mile, and was during the said time thickly set and matted with Johnson grass, placed there by the railway company, and that during said years matured and went to seed sufficient to incur penalties of \$500; that Johnson grass is a rank, pernicious, tall, and perennial plant of the grass species, propagated both by roots and seed, producing enormous growth of underground stems and great quantities of seed; that its roots penetrate so deeply into the earth and ramify through same in so many directions as that it can be exterminated only with the greatest difficulty and labor, and that it has such a depressing effect on crops that good crops cannot be grown on land infested by it; that it seeds many times each year, and during the time complained of the water from rains washed enormous quantities of seed from the said right of way onto and over the lands of plaintiff, by reason of the defective, improper, and negligent construction of the roadbed, dump, bridges, and culverts of railway company through said lands; that seed of Johnson grass on the right of way was also carried by winds, birds, and animals and deposited on said lands; that such seed so conveyed to and over the lands of plaintiff sprouted, grew, and infested said lands and damaged the same to the extent of \$2,848."

The answer of the defendant put in issue all the material allegations of the petition, and alleged that the plaintiff had permitted Johnson grass to seed on the lands for which he sued during the years covered by the suit. A trial resulted in a verdict for plaintiff for \$125, besides interest and cost. A motion for a new trial was made and overruled, and afterwards a writ of error to this court was duly sued out and perfected.

The first assignment of error is as follows:

"The court erred in its charge to the jury in charging, in effect, that the measure of plaintiff's damages, if he was entitled to recover damages, was the difference in the market value of said lands on July 5, 1910, and what would have been their market value as to the 56-acre tract on May 5, 1909, when plaintiff acquired it, and the other land on July 5, 1903, in so far as the difference in market value, if there was a difference, was attributable solely to the defendant company permitting, if it did, Johnson grass to mature and go to seed on its right of way between said respective dates, such not being the true measure of damages under the evidence in this case, or, if the true measure, then, under the evidence, to determine damages under the rule given was impossible in any reasonable way, and the rule stated, under the

evidence before the jury, necessarily made any findings of damages by the jury purely speculative."

The propositions contended for are, in substance: First, that the measure of damages as given in the court's charge applies only to cases of permanent injury to land; second, that the evidence failed to show any permanent injury to the lands of the defendant in error during the years for which he sues, or, if permanent injury did result to defendant in error's lands from Johnson grass seeding on the railway company's right of way during said years, it was from his own failure to kill the grass as it came up, as the evidence showed that, if attacked at such time, it can with reasonable effort be easily killed; third, that the evidence showed that, if the plaintiff's lands were, to any material extent, more infested by Johnson grass when this suit was brought than they were two years before, such increased infestation probably resulted largely, if not wholly, from causes other than the seeding of Johnson grass on the railway company's right of way during the years for which suit is brought, and there was no evidence distinguishing between damage resulting from the seeding complained of, and that from other causes, and there was no way, under the evidence, of determining with any reasonable certainty what was recoverable under the rule charged, hence any verdict under the evidence and rule charged was necessarily purely speculative; fourth, that under the evidence in this case and the well-settled rule that, although a legal injury is shown, yet, if the extent of injury is not also shown, and evidence given from which it may be determined, only nominal damages are recoverable, plaintiff, if entitled to recover damages at all, was entitled to recover only nominal damages, and the court should have so charged, and, under the evidence, erred in submitting the case under the rule as to measure of damages that was given.

[1] We think that neither of the foregoing propositions should be sustained and the case reversed, under the evidence shown by the record sent to this court. The evidence is conflicting upon the material issues in the case, but sufficient, as we understand it, to support the verdict and judgment rendered. There are doubtless many cases in which it has been held that, in the absence of proof of injury to the soil, no recovery for permanent injury to the land could be had, and that the "market value rule" is applicable only when permanent injury to the land is shown, and there are also authorities holding, and it may be conceded that the general rule is, that a party should ordinarily protect himself against the injurious consequences of the wrongful acts of another when it can be done without great expense; but, if it be admitted that these principles of law are applicable to the character of case before us, the evidence is clearly not so one way as to justify

this court in declaring, as a matter of law, that no permanent injury to plaintiff's lands was shown, or that he failed to exercise the care required of him to prevent or lessen the damages sustained as the result of the alleged wrongful acts of the railway company. The following are some of the cases in which the difference between the market value of the land before and after infestation with Johnson grass from a railroad right of way has been recognized as the proper measure of damages. *Railway Company v. Doeppenschmidt*, 120 S. W. 928; *Railway Company v. Malone*, 126 S. W. 936; *Railway Company v. Tolbert*, 134 S. W. 280. It is true, as contended by the defendant, that it does not appear from the report of those cases that there was any contention in either of them as to the measure of damages, but there evidently was, as here, evidence from which the jury was authorized to find injury to and depreciation in the value of the land because of the communication to it of Johnson grass from the right of way of the railway company. In the case before us the plaintiff offered substantial testimony from which the jury was warranted in concluding that his land was infested with Johnson grass from the defendant's right of way during the years for which he sues; that said grass had grown and spread during those years, notwithstanding diligent efforts on his part to prevent it, to such an extent as to injure his land and depreciate its value in the amount awarded him. This being the state of the evidence, the court correctly instructed the jury as to the measure of damages. Touching the permanency of injury to land from infestation with Johnson grass and the efforts made by the defendant in error to rid his land of it, he testified, among other things, that he had been fighting Johnson grass for 20 years, and had used everything he had ever heard of in trying to exterminate it without success.

[2] The evidence shows that there were sources other than the defendant's right of way from which the plaintiff's lands might have become infested with Johnson grass, and, of course, defendant would not be liable for infestation and the resultant damage of plaintiff's land from such sources. It was therefore essential that the evidence be of such a character that the jury could distinguish between the damage resulting from the seeding of Johnson grass on the defendant's right of way and from other sources, and determine with reasonable certainty the amount thereof. The defendant claims that such was not the character of the evidence, and that, even though a legal injury was shown, in the absence of evidence disclosing the extent of the injury, the plaintiff was entitled to recover only nominal damages. We recognize the force in this contention, but after a careful examination of the evidence have concluded that it was sufficient to take these questions to the jury, and that its findings

should not be disturbed. The defendant's rights in respect to these issues were carefully guarded, both in the court's general charge and in a special charge given at its request. This special charge reads:

"The court is requested to instruct the jury that it is the duty of the plaintiff claiming damages to produce evidence by which the amount of his damages may be reasonably estimated according to the rule of law applicable to the case, and, unless they are able from the evidence to determine what damage, if any, accrued to plaintiff from July 5, 1908, to July 5, 1910, solely from Johnson grass going to seed on defendant's right of way during said years, to plaintiff's land, excluding from consideration all other character of damage, then plaintiff is not entitled to recover damages, and the jury will not find any."

What we have said disposes of the questions raised in defendant's remaining assignments of error against its contention, and we deem it unnecessary to state and discuss them.

Believing the judgment should be affirmed, it is accordingly so ordered.

McCONNON & CO. v. McCORMICK et al.
(No. 7391.)

(Court of Civil Appeals of Texas. Dallas.
June 19, 1915. Rehearing Denied
Oct. 16, 1915.)

1. APPEAL AND ERROR \S 724, 736, 742—**ASSIGNMENT OF ERRORS—INDEFINITENESS.**

An assignment of errors which is multifarious, indefinite, and not supported by a sufficient statement will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2997-3001. 3022, 3028, 3029; Dec. Dig. \S 724, 736, 742.]

2. PRINCIPAL AND AGENT \S 22—**EVIDENCE OF RELATION—TESTIMONY OF AGENT.**

Where the issue is whether one is an agent with authority to bind his principal and to vary the terms of a written contract, his own statements as to the relationship are incompetent, and it is error to admit them.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 40; Dec. Dig. \S 22.]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

Action by McConnon & Co., a corporation, against W. A. McCormick and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Terry & Brown, of Kaufman, and Tawney, Smith & Tawney, of Winona, Minn., for appellant. Fred Rogers, of Dallas, for appellees.

TALBOT, J. The appellant in this case is a Minnesota corporation engaged in the manufacture and sale of proprietary medicines, extracts, spices, stock tonics, and other articles. On the 23d day of January, 1911, it entered into a written contract with the appellee W. A. McCormick, of Kaufman county, Tex., by the terms of which appellant agreed to sell and deliver to said appellee f. o. b. cars at Winona, Minn., in such

reasonable quantities as the appellee might from time to time require in Kaufman county, Tex., or in such other territory as appellant might direct at the usual and customary wholesale prices at which the same are sold and delivered by appellant in other similar territories. The appellee upon his part agreed to sell goods delivered to him under the contract in Kaufman county, Tex., or such other territory as the appellant might direct from the date of the contract until the 1st day of March, 1912, at which time the agreement should terminate. It was further stipulated in the contract that appellee should keep a complete record of the goods disposed of in his territory and on hand and to make a written report of the same to appellant as it might require, and that at the expiration of the contract appellee would pay to appellant the whole amount then remaining unpaid for goods sold and delivered to him. The contract was signed by appellant in its corporate name, by Henry J. McConnon, president, and by appellee W. A. McCormick. Indorsed on or attached to this contract is a writing signed by the appellees M. L. McCormick and W. E. Jones in which they, for the recited consideration of \$1, the execution of the written contract sued on by appellant, and the sale and delivery of its goods to the appellee McCormick, jointly and severally guarantee to the appellant the full payment of all indebtedness of appellee W. A. McCormick to appellant according to the terms and conditions of the contract executed by appellant and said appellee. On March 14, 1913, appellant instituted this suit against the appellees, W. A. McCormick, M. L. McCormick, and W. E. Jones, to recover the sum of \$878.28 alleged to be the balance due and unpaid for goods sold to appellee W. A. McCormick under the contracts mentioned. In answer to appellant's suit, the appellee W. A. McCormick, alleged fraudulent representations made to him by one J. H. Sturdevant, charged to be the agent of appellant, which, he says, induced him to sign the contract sued on, the nature of which alleged representations will sufficiently appear in the discussion of the questions raised by the assignments of error. The appellees M. L. McCormick and W. E. Jones also filed answers, but we deem it unnecessary, in view of the disposition we shall make of the appeal, to state the nature of their answers. The case was tried and submitted to a jury on special issues, and, their findings being favorable to appellees, judgment was rendered thereon that appellant take nothing by its suit, and that the appellees recover their costs. Appellant filed a motion for a new trial, which was overruled, and it appealed.

[1] A consideration of appellant's first assignment of error is objected to, in effect, on the grounds that it is multifarious, does not

definitely point out the several errors complained of, and is not followed by a sufficient statement in explanation and support thereof to enable the court to determine the questions raised without searching the record for the facts in relation thereto. The objections are well taken, and the assignment will not be considered.

[2] The second assignment of error is as follows:

"The court erred in admitting in evidence the alleged statements of J. H. Sturdevant to establish his agency of and authority to represent the plaintiff, over the objections of appellant, to which exceptions were duly taken, and erred in refusing to give appellant's special charge No. 1, instructing the jury to disregard the evidence of such statements, to which refusal appellant duly excepted, and also erred in giving the last paragraph of the charge to the jury instructing them 'that the fact of agency cannot be established upon the declarations of the agent alone that he was such agent, but may be established by proof of circumstances, or other facts which satisfy the minds of the jury that such relation of agency existed,' because no such other facts had been proven, to which appellant duly excepted, all of which appears in plaintiff's bill of exceptions, and was complained of in the third, fourth, and fifth grounds of appellant's motion for a new trial."

The consideration of this assignment is also objected to on the ground that it is multifarious, but the rulings of the court therein complained of relate to the same subject, and the objections will be overruled. The proposition propounded under this assignment is to the effect that declarations of an agent as to his authority are incompetent to prove agency, and, there being no other evidence in the case sufficient to prove the agency or authority of J. H. Sturdevant to represent the appellant, the rulings complained of were errors, for which the judgment should be reversed. The main defense to appellant's suit, in substance, was and is that J. H. Sturdevant, the authorized agent of appellant before and at the time the written contract declared on was executed, represented orally to appellee W. A. McCormick, among other things, that if he, appellee, would enter into the written contract declared on, appellant would furnish him their goods to be sold in his territory; that he would be required to make cash, credit, and trial sales to his customers of said goods; that in the event he was unable to make cash or credit sales, he was to leave a considerable amount of goods with prospective customers as a "trial sale, and if the articles of goods so left were found to be satisfactory, and the prospective customer desired to keep them, after using a portion of them, he was to pay for same, but, if not, he (appellee) was to take back such of the goods which had not been used"; that in making such "trial sales" there would be no risk on appellee's part, as appellant was anxious to introduce its goods in the state of Texas,

and that he (appellee) would not have to stand any loss by reason of his failure to collect outstanding accounts resulting from time or trial sales; that these representations were relied upon in good faith by the defendant at the time he entered into the written contract with appellant, and they were the "sole inducing cause which resulted in the consummation of said contract; that said representations were willfully and fraudulently made for the purpose of intentionally inducing appellee to enter into said contract; that he made at least \$2,000 worth of trial sales, \$1,800 of which cannot be collected." These alleged representations are materially variant from the terms of the within contract sued on, and therefore the authority of J. H. Sturdevant as the agent of appellant to make and bind appellant by said alleged fraudulent representations was a vital issue in the case. The jury found in response to questions asked by the trial court that said representations were made by Sturdevant, and that he was authorized by appellant to make them; that appellee relied upon said representations, and was thereby induced to execute the written contract declared on.

That the declarations of an agent are incompetent to establish his agency is so elementary that we need not cite authorities in support of the proposition. Hence the admission in evidence of the declarations of the witness Sturdevant to the effect that he was the authorized agent of appellant, clothed with authority to bind it by his representations, was clearly error, and, in view of the state of the evidence as shown by the record sent to this court, was prejudicial error. The testimony offered by appellant upon the question was to the effect that Mr. Sturdevant was not clothed with any such authority, and the facts and circumstances shown, independently of the declarations of agency admitted over the objections of appellant, were not sufficient, in our opinion, to justify the findings of the jury. At all events, it is clear, we think, that the admission of the declarations and the refusal of the court to instruct the jury, as requested by appellant, not to consider them, resulted in material injury to appellant and requires a reversal of the case.

There is but one other assignment of error, and a consideration of it is objected to by appellees on the ground that it too is not briefed in accordance with the rules. The objection should probably be sustained, but, as we think it points out no reversible error, it will be overruled.

For the reason indicated, the judgment is reversed, and the cause remanded for a new trial.

Reversed and remanded.

HARPER v. STEWART et al. (No. 7375.)

(Court of Civil Appeals of Texas. Dallas.
June 26, 1915. Rehearing Denied
Oct. 16, 1915.)

1. TRESPASS TO TRY TITLE ⇨27—JUDGMENT—PARTIES.

A judgment for plaintiff in an action of trespass to try title was void where the land at the time was the homestead of defendant and his wife, but the wife was not a party to the suit, and it was not res judicata in a subsequent action against the husband, though the wife had in the meantime died childless, as the homestead interest is analogous to an estate by the entirety, and the interests of the husband and wife are not separable.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 33; Dec. Dig. ⇨27.]

2. INJUNCTION ⇨109—ENJOINING TRESPASSES—DEFENSES AND COUNTERCLAIMS.

In a suit to enjoin trespasses upon lands, it was proper for defendant to deny plaintiff's title and assert ownership in himself and to set up a claim for damages for being unlawfully dispossessed of his lands during the time plaintiff had asserted title and ownership.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 187; Dec. Dig. ⇨109.]

3. APPEAL AND ERROR ⇨1010—REVIEW—QUESTIONS OF FACT.

Where an issue of fact was not requested to be submitted to the jury, but was determined by the court, the Court of Civil Appeals could only inspect the evidence to ascertain whether the finding was supported thereby.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. ⇨1010.]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

Action by Y. H. Harper against Cicero Stewart and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Bumpass & Crumbaugh, of Terrell, for appellant. Huffmaster & Huffmaster, of Kaufman, for appellees.

RASBURY, J. Appellant, Harper, sued appellees, Cicero, Gus, Guy, Buck, and Dan Stewart, alleging that he was the owner of certain lands in the town of Lawrence, Kaufman county, Tex., including block 41 thereof, and that appellees were interfering with his use and enjoyment thereof by disputing his title thereto, thereby preventing him from selling or renting same, whereby said premises had been vacant for a period of six months. Judgment was sought for damages for the use and rental of said premises at \$10 per month for six months, and for injunction pendente lite, restraining the appellees from disputing his title, trespassing upon, occupying, or using his premises or interfering with his tenants. Upon filing the petition injunction was issued in the terms prayed for. Subsequently all the appellees, except Dan Stewart, in response to the suit, tendered the general issue. Dan Stewart, in effect, pleaded that said block 41 was his homestead, notwithstanding which the appellant, prior to the commencement of his suit,

unlawfully entered thereon and took possession of same, and has since, without right, asserted ownership therein. By cross-action said Dan Stewart charged, among other matters, that by the issuance of the said injunction he was deprived of the use of his said homestead premises for a period of several months, whereby he was damaged in the sum of \$10 per month, for the reason that said injunction was unlawfully procured. By appropriate pleading appellant denied that block 41 was appellee Dan Stewart's homestead, or that he had been damaged as alleged, and, in addition, pleaded the facts constituting his title thereto. There was trial by jury to whom was submitted the facts upon special issues. Upon the findings of the jury the court by appropriate judgment decreed the title to block 41 to be in Dan Stewart, and awarded him \$147.50 damages for loss of rentals. The injunction as to the other lands was perpetuated against all the appellees. From the judgment thus outlined, this appeal is taken.

The essential and material facts adduced at the trial are, in substance, these: Dan Stewart and wife married in the year 1897. In the year 1900 he bought block 41 in Lawrence from Sarah E. King, and moved thereon with his wife, occupying and using same as their homestead, although he did not secure deed until March 19, 1901. Stewart and his wife lived upon block 41 eight years. In 1908 Stewart, who by occupation is a machinist, was employed in the town of Talty. While so employed he went to and from his place of employment to Lawrence where his wife remained until the spring of 1909, at which time he rented a residence in Talty, whence he removed his wife and household goods. When Dan Stewart and his wife removed to Talty they did so temporarily, intending to return to Lawrence when his employment permitted. They did leave Talty in September, 1911, and returned to Lawrence. They attempted, but failed, to secure possession of their homestead, due to the refusal of one Rhodes to surrender possession of same. Rhodes went in possession of the premises as a tenant of Stewart, and claimed to have leased the house for a year, which had not expired, while Stewart claimed his tenancy was from month to month. Except for a short period of time at Terrell, Stewart and wife continued to live in Lawrence after their return from Talty, maintaining block 41 was his homestead, and attempting to secure possession of same until the commencement of this suit.

In the meanwhile appellant had recovered judgment in the district court of Kaufman county upon simple debt against Cicero and Dan Stewart. Upon that judgment execution was issued and levied by the constable March 21, 1912, upon certain lands, among them being block 41. In the manner provid-

ed by law said block 41 was sold May 7, 1912, at public auction to appellant for the sum of \$40. Thereafter, on May 8, 1912, said constable by deed conveyed said block 41 to appellant, Harper. Subsequently appellant sued Dan Stewart in statutory form of trespass to try title to recover block 41, conveyed to appellant by the constable's deed noted. In that suit Stewart defaulted and on August 1, 1912, judgment was entered decreeing that appellant recover of appellee Dan Stewart block 41, and awarded appellant writ of possession and costs. The judgment was not against Dan Stewart's wife, who was living at the time the judgment was rendered, and was not made a party thereto. In such connection it appears from the evidence that she died in the summer of the year 1913, childless. The sole issue submitted to the jury was this question:

"On August 1, 1912, the date of the judgment of the plaintiff against the defendant Dan Stewart, and at the time of the levying of the execution on said judgment and the sale of the land thereunder, was the land described in the answer of the defendant Dan Stewart the homestead of Dan Stewart and his wife, Bessie Stewart?"

The answer of the jury was, "Yes."

[1] It is first urged under appropriate assignment of error that the court erred in rendering judgment for Dan Stewart for the title and possession of block 41, for the reason that, such title and possession having been adjudicated between the same parties in a former suit, Stewart was concluded thereby, and could not again urge in a similar suit his title thereto; in other words, that the issue was res judicata between Stewart and appellant. We recognize the nearly universal rule that the judgment of a court of competent jurisdiction upon an issue litigated between parties or an issue which the parties might have litigated is conclusive in all subsequent controversies directly involving the same or incidental issues, and the citation of authorities is unnecessary in support of the rule. But obviously such rule would have no application if the judgment asserted as a bar was void. Such was the claim made in the court below in reference to the judgment of August 1, 1912, against Dan Stewart, and the contention is renewed in this court. Hence the inquiry is: Was that judgment void? And upon the facts presented by the record we conclude it was. As we have shown in our statement of the case, at the time of the sale of block 41 to appellant under execution, and at the time of the rendition of the judgment in the suit of trespass to try title divesting title out of Dan Stewart and investing appellant with title thereto, said block 41 was the family homestead of Stewart and wife and exempt from forced sale for the payment of the character of debt for which it was sold. As much is admitted by counsel for appellant, but the contention is made that Stewart, failing to plead his exemption in that suit,

was, on that issue, concluded thereby, and that, while the judgment against Stewart did not conclude the wife's homestead right, yet upon her subsequent death, which occurred before the filing of this suit, her right of use and occupancy being personal ceased, as did her husband's; in short, that Stewart's right of use and occupancy after the judgment against him was merely incidental to such right on the part of the wife. The precise question under facts nearly analogous was decided adversely to appellant's contention in the case of *Mexia v. Lewis*, 3 Tex. Civ. App. 113, 21 S. W. 1016. In that case, as in the instant one, judgment was secured against the husband, and not the wife, for lands constituting their homestead. Subsequently a second suit was filed, based on the claim that Lewis and wife had abandoned the homestead, which would in law entitle plaintiff to possession against both. In disposing of the case the court said:

"As to all of the land which was used and occupied as a homestead by Lewis and wife at the time of the institution of the first suit, the judgment obtained against Lewis in that suit was inoperative and of no effect as to either Lewis or his wife. Mrs. Lewis was not a party to that suit and the homestead right was not put in issue. Whatever may be said of the character of the homestead estate, it is considered as an entirety, and the interests of the husband and wife are not separable. The judgment against Lewis could have no prospective effect, and if at the time of its rendition it was inoperative, it could not be put into operation by a subsequent abandonment of the land as a homestead."

To the same effect is the case of *Campbell v. Elliott*, 52 Tex. 151, where it is said:

"The homestead estate is more analogous to an estate by entirety than that of joint tenancy, they having alike the four unities of interest, title, time, and possession, while the estate by entirety has the fifth unity of person; that this, unlike an estate of joint tenancy, can be vested in but two natural persons only, who are regarded as but one in law, who are seised not of an undivided moiety of the whole, but each takes an entirety and are seised per tout, but not per my, who cannot alienate separately, but must alienate jointly, who cannot sever at pleasure, but hold an estate which, while it remains theirs, is inseverable, who cannot have partition unless in a divorce proceeding severing their matrimonial relations, and who have not the right of survivorship, but upon the decease of either spouse the other continues to hold the entire homestead estate as such."

It is unnecessary to discuss the obvious purpose of the rule quoted, since, being the rule, no beneficial purpose could be attained in that respect. It is sufficient to say that by the rule of entirety, or, as said in *Campbell v. Elliott*, supra, by the rule per tout et non per my, the judgment of August 1, 1912, affected neither the homestead right of Stewart nor his wife and is void in that respect.

[2] It is also urged that in a suit to enjoin trespass upon lands it may not be urged as defensive matter that the party sought to be enjoined is, in fact, the owner of such lands, and to incidentally sue for damages resulting from the issuance of such injunction. We are unable to agree with the

contention. Appellant based his right to the injunction upon ownership. Appellee denied that appellant owned the land, and asserted ownership in himself. We can conceive no defense more natural or more responsive than such a one, nor one that more nearly subserves the purpose of the answer which is said to be to rebut the facts alleged by the petition. The claim for damages for being unlawfully dispossessed of his lands during the time appellant had asserted title and ownership was equally natural and responsive, and followed, as matter of course, if appellee was owner of the lands.

[3] It is also urged that the court erred in allowing appellee damages in the sum of \$147.50, in effect, because such finding is not sustained by the evidence. This was an issue of fact not submitted to the jury, nor requested to be submitted to the jury, but which was found by the court. In such cases our duty and authority is circumscribed, being confined to an inspection of the evidence to ascertain whether the finding of the court is supported thereby. This we have done, and, without attempting to set out the evidence, we conclude that there is in the record sufficient testimony to support the finding in that respect.

All other assignments of error raise in a different way the issues already discussed, and for that reason will be overruled.

Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

TITTERINGTON v. DEUTSCH et al.*
(No. 7400.)

(Court of Civil Appeals of Texas, Dallas.
June 26, 1915. Rehearing Denied
Oct. 16, 1915.)

MORTGAGES — 356 — FORECLOSURE — NOTICE.

Where a builder's contract conveyed the property to a trustee with power to sell at public sale on default and after the trustee had given public notice of the time prescribed by the statutes of Texas for the sale of real estate under deeds of trust, and that after such sale the trustee should make a deed, etc., a sale is not void; notice having been given in three public places in the county as required by statute, though the trustee himself had the notices posted by another and selected only one of the public places.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1063-1067; Dec. Dig. — 356.]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Suit by George A. Titterington against B. Deutsch and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Geo. A. Titterington, of Dallas, pro se. Read, Lowrance & Bates, of Dallas, for appellees.

TALBOT, J. Appellant, George A. Titterington, brought this suit against the appellees, B. Deutsch and W. F. Smith, to set

aside a trustee's sale of land made on the 4th day of November, 1913. The ground alleged for setting aside the sale is that the trustee had failed to properly post notices thereof. The case was tried before the court without the intervention of a jury and judgment rendered in favor of the defendants. The plaintiff's motion for a new trial was overruled, and he appealed.

The court filed conclusions of fact and law; the substance of the conclusions of fact, so far as is necessary to be stated for the purposes of this appeal, which we adopt, being as follows: That on the 14th day of March, 1913, Leopole Schwarz and wife, Amelie Schwarz, executed a certain mechanic's lien contract, granting and conveying to A. C. Schwarz Construction Company a mechanic's and builder's lien on lot 3 in block B. Warran's revised addition to the city of Dallas, Tex., for the purpose of securing three notes of even date therewith, two of said notes for the principal sum of \$300 each, and one for the sum of \$450, and said notes for \$300 each maturing respectively three and four years after date thereof, and the one for \$450 maturing five years after date thereof. Said mechanic's and builder's lien contract provides that said notes bear interest at the rate of 8 per cent. per annum, payable semiannually, and if default is made in the payment of any of said notes, or in any installment of interest on said notes when due, the holder thereof may mature said notes at his election. Said mechanic's and builder's lien contract also conveys to A. C. Moser, trustee, power and authority to sell said property at public sale at the request of the holder of said notes after default in the payment of said notes or any installment of interest thereon, and provides that said trustee shall sell said property at public auction at the door of the county courthouse in the city of Dallas, Dallas county, Tex., "after having given public notice of the time prescribed by the statutes of Texas for the sale of real estate under deeds of trust," and after such sale to make to the purchaser thereof a good and sufficient deed in fee simple for said premises, and also provides that the deed made by said trustee shall be prima facie evidence of the truth of all recitals as to default in the payment of said notes or interest, the request to the trustee to sell, to advertise such sale, the proceedings at such sale, and the facts, if any, authorizing the substitute trustee to act in the premises. Said mechanic's and builder's lien was duly acknowledged, as required by law, on March 14, 1913, and duly filed for record on the 15th day of March, 1913, recorded in volume 27, p. 87, of the records of mechanic's liens, etc., of Dallas county, Tex. Said three notes as set out in said mechanic's and builder's lien contract were duly executed on, to wit, the 14th day of

March, 1914, and delivered to said A. C. Schwarz Construction Company. On said date the A. C. Schwarz Construction Company executed a written transfer, conveying said notes and the lien securing same to B. Deutsch, and said transfer was duly acknowledged on the 14th day of March, 1913, and filed for record on the 15th day of March, 1913, and recorded in volume 576, p. 392, of the records of deeds, etc., of Dallas county, Tex.

Default was made in the payment of the semiannual interest due on said notes on, to wit, the 14th day of September, 1913, and B. Deutsch thereafter declared said notes due and requested the trustee, A. C. Moser, to sell said property after default had been made in the payment of said semiannual interest. That Tom F. Lewis was requested by B. Deutsch to prepare notices of sale of said property under said trust agreement, and said A. C. Moser, trustee, called at the office of Tom F. Lewis, and signed said notices, and requested said Lewis to post one of said notices at the courthouse door in the city and county of Dallas, Tex., and post the other two of said notices in public places in Dallas county, Tex. That said Lewis posted one of said notices at the courthouse door in Dallas county, Tex., and one on the Hutchins Road in Dallas county, and one on the White Rock Road in Dallas county, and all of said notices were duly signed by said A. C. Moser, trustee, and all of said notices were posted more than 20 days prior to the 4th day of November, 1913, but said trustee did not know where said other two notices were posted, and said notices duly stated the time, place, and manner of making said public sale, and said sale was made by A. C. Moser at the courthouse door in the city and county of Dallas, Tex., on the 4th day of November, 1913, between the hours of 10 o'clock a. m. and 4 o'clock p. m. That said trustee, A. C. Moser, duly made said sale of said property at said time and place and executed a trustee's deed conveying said property to B. Deutsch, who bid in said property at said sale, and said trustee's deed was duly acknowledged on the 4th day of November, 1913, and filed for record on the 4th day of November, 1914, and duly recorded in volume 598, p. 39, of the records of trustees' deeds, etc., of Dallas county, Tex. That on the 12th day of May, 1913, Leopole and Amelle Schwarz executed a deed conveying said property to W. F. Smith, and said Smith assumed the payment of said three notes described in said mechanic's and builder's lien contract, and executed a note of even date therewith for the sum of \$485 payable to the order of Amelle Schwarz, and due and payable in monthly installments of \$15 each, the first installment being due on or before June 12, 1913, and one installment due on or before the 12th day of each and every month thereafter until paid, and said note bearing interest at the rate of 8 per cent. per annum,

payable semiannually, and said deed and note expressly provided for a vendor's lien contract, and said note expressly provided that failure to pay any installment of principal or interest when due thereon should at the election of the holder thereof mature same. On the 15th day of May, 1913, Amelle Schwarz and Leopole Schwarz executed a written transfer, conveying said note and the lien securing same on said property to George A. Titterington, and said transfer was duly acknowledged, as required by law, and filed for record on the 21st day of May, 1913, and recorded in volume 583, p. 38, records of deeds, etc., of Dallas county, Tex., and said note was duly indorsed by said Amelle Schwarz and Leopole Schwarz, and made payable to George A. Titterington, without recourse on them. That \$30 was paid on said note and credited on same on July 22, 1913. That George A. Titterington had no notice or knowledge of the sale of said property under said deed of trust, until several days after trustee's sale, and after said property had been sold and the deed executed by the trustee on or about November 10, 1913, he went to see B. Deutsch and offered to redeem said property for his said sale and to pay B. Deutsch the amount of his notes and interest and costs of sale, but said B. Deutsch refused to accept same and claimed that he was the owner of said property. Said George A. Titterington made no further inquiry as to whether or not said interest had been paid on said three notes described in said mechanic's and builder's lien contract, at the time same became due on September 14, 1913, except prior to said date he inquired of W. F. Smith if said Smith would pay said interest, and was led to believe by said Smith that said interest would be paid when due.

The prayer of the plaintiff's petition was that the deed made by Moser as trustee be canceled; that plaintiff be allowed to pay off the indebtedness due the defendant Deutsch, together with the expenses of the trustee's sale; and that plaintiff's junior lien on the property involved be foreclosed.

The court held, as a matter of law, that the sale by A. C. Moser, trustee, was valid; that defendant Deutsch by his purchase at said sale acquired a good title to the property in controversy; and that the plaintiff, Titterington, had no right to redeem the same or to foreclose his lien thereon.

The first assignment of error shows the appellant's contention and presents the only question for our decision. This assignment is as follows:

"The court erred in rendering judgment against plaintiff and in favor of defendant B. Deutsch, and in refusing to allow plaintiff to redeem the property from the trustee's sale which was made to B. Deutsch by the payment to him of his debt and interest up to the time of tender; the evidence showing that said defendant had a first and superior valid lien against the land described in plaintiff's petition under mechanic's lien and trust deed, in which

there was a power of sale, upon default, given to A. C. Moser as trustee to sell the land covered thereby only after having given public notice of the time and place of sale in the manner and form and length of time prescribed by the statutes of Texas for the sale of real estate under deeds of trusts. And it further appearing that in foreclosure and sale to said defendant the said notices were not posted by said trustee; that he turned over to T. F. Lewis—a stranger to said mechanic's lien and trust deed—the posting of said notices; and that said A. C. Moser did not select the places where said notices were to be and were posted, and did not direct the posting of any one of such notices, and did not know where any one of them was posted, except that he told said Lewis to post one at the courthouse door at Dallas, Tex.; the evidence further showing that plaintiff had and held a valid and subsisting unpaid debt and lien against the same property second and inferior to that so held by defendant B. Deutsch; and the evidence further showing that the property was worth at least \$1,600."

The validity of the notes and mechanic's lien, in its nature a deed of trust authorizing the trustee, A. C. Moser, to sell the property therein described upon default in the payment of the principal or interest of the notes held by the defendant Deutsch, is not questioned; and, as shown by our conclusions of fact, default was made in the payment of the installment of interest which became due September 14, 1913. After such default, the defendant Deutsch declared the notes due and payable and requested his attorney, T. F. Lewis, to prepare notices of the sale of the property covered by the deed of trust and requested the trustee, Moser, to call at the office of the said Lewis and sign said notices. The notices were prepared, and the trustee called and signed them as requested. The trustee, Moser, then requested Mr. Lewis to post said notices as provided for in the deed of trust, and this he did. The trustee, Moser, directed that one of the notices be posted at the courthouse door of Dallas county, Tex., and knew that direction was complied with. He directed that the other two notices be posted in two other public places in Dallas county, and this was done, but the trustee, Moser, did not himself know at what places they were posted. The trust agreement, with power of sale, provided that:

"The deed made by said trustee shall be prima facie evidence of the trust, of all recitals as to default in the payment of said notes or interest, the request to the trustee to sell, to advertise such sale, the proceedings at such," etc.

The question then is: Was the sale by the trustee, Moser, and at which the defendant Deutsch bought, invalid and should have been set aside because the said Moser did not in person post the notices of said sale? The deed of trust under which the sale was made provided, as has been seen, that the trustee should sell after having given public notice of the time and place of sale in the manner and form and length of time prescribed by the statutes of Texas for the sale of real estate under deed of trust, and the statutes referred to are, in substance,

that such sales shall be made at public vendue in the county where the real estate is situated between the hours of 10 o'clock a. m. and 4 o'clock p. m. of the first Tuesday in any month, after giving at least 20 days' notice thereof by posting written notices thereof in three public places in the county, one of which notices shall be posted at the courthouse door of said county. That the evidence was sufficient to show a compliance with the terms of the deed of trust and the statutes referred to, in giving notice of the sale at which the defendant purchased, we have no doubt. Indeed, similar sales under practically the same state of facts have been upheld by decisions of our appellate courts. *Roe v. Davis*, 142 S. W. 951; *Id.* (Sup.) 172 S. W. 708; *Walker v. Taylor*, 142 S. W. 31; *Adams v. Zellner*, 174 S. W. 933. That the trustee, Moser, did not specifically name the places where two of the notices of the sale should be posted, does not materially affect the question and distinguish the case from those above cited. He did direct that one of said notices be posted at the courthouse door of Dallas county, Tex., and that the other two be posted in public places in said county, and that these instructions were literally complied with is not denied. The deed of trust provided that the sale should be made upon such public notice thereof as is prescribed by the statutes for the sale of real estate under such instruments, and among the things prescribed is that the notices shall be posted in three public places of the county. The notices of the sale in this instance were so posted, and hence we hold that both the terms of the deed of trust and the statutes were met and complied with.

The cases cited expressly hold that it is not necessary, in cases of this character, that the trustee should personally post the notices, but that this may be delegated to an agent, and we can see no good reason for holding that, notwithstanding this is true, the "public places" at which such several notices be posted, other than the courthouse door of the county, should be named by the trustee or the sale will be held to be void. If the opinion in the case of *Meisner v. Taylor*, 56 Tex. Civ. App. 187, 120 S. W. 1014, embraces such a holding, the same was not necessary to a decision of that case, is not an authoritative expression upon the question, and has not been followed in subsequent cases of the appellate courts of this state. In our opinion the selection of the places by the trustee named in a deed of trust involves no such element of judgment or discretion as requires either the posting of the notices of sale by the trustee in person or the naming by him, in the event he commits the performance of that duty to another, of the places where such notices shall be posted. The terms of a deed of trust requiring the sale authorized under it to be advertised in

the manner prescribed by the statutes of this state for the sale of real estate is, in our opinion, satisfied when the notices thereof have been posted as required, whether posted by the trustee in person or by some person selected by him to perform that service, and without regard to whether such person so selected was instructed to post the notices at certain designated public places. Such is the effect of the holdings in the cases cited above, and especially in the case of *Adams v. Zellner*, supra, decided by this court, and in *Walker v. Taylor*, decided by the Court of Civil Appeals for the Fourth District. In *Adams v. Zellner*, one of the notices was posted by the trustee at the courthouse door in Hill county, one was mailed to some one at Whitney, and the other to some one at Hubbard or Itasca, with the request in each instance that the notice be posted. It does not appear that specific directions accompanied the notices that they be posted in places named by the trustee, and, notwithstanding this, it was held that the evidence justified a finding of compliance with the law and terms of the deed of trust. In *Walker v. Taylor*, supra, it is correctly said that:

"The strictness required in following the terms of the power granted by the deed of trust is to protect the property of the mortgagor, and when he is satisfied no one else can with reason complain."

There is no one complaining in this case except the appellant, a junior lien holder, and there is no evidence of collusion or fraud to prevent the collection of his debt by means of the security he held. On the contrary, so far as the record discloses, the makers of the deed of trust in question and all others at interest, except appellant, were and are fully satisfied with the steps taken by the trustee in making the sale to the defendant Deutsch. Our conclusion is that the district court correctly held that the notices of the sale under which the defendant Deutsch claims the property in controversy were duly posted as required by the deed of trust in question and the statutes of this state, and that, as there is no other question raised which requires a reversal of the case, the judgment of the district court should be affirmed, and it is, accordingly, so ordered. Affirmed.

PULKRABECK v. GRIFFITH & GRIFFITH. (No. 7385.)

(Court of Civil Appeals of Texas. Dallas. June 19, 1915. Rehearing Denied Oct. 16, 1915.)

1. INTERPLEADER — 23 — GROUNDS — PARTIALITY OF STAKEHOLDER.

In an action against brokers who employed plaintiff to assist them in selling farm lands in a certain county, they alleged that they had made a similar agreement with H., that on a certain sale a commission was due either plaintiff or H., and that according to their informa-

tion and belief H. was entitled thereto and they tendered the money into court and made H. a party to the suit. *Held*, that the allegation on information and belief that H. was entitled to the commission did not show such partiality as prevented defendants from interpleading H., since, while it is the duty of a stakeholder to be fair and impartial, it is also his duty to disclose to the court all facts possessed in reference to the matters in issue, and the remedy of interpleader is so beneficial and so just that any reasonable doubt as to a party's right to an interpleader will be resolved in his favor.

[Ed. Note.—For other cases, see *Interpleader*, Cent. Dig. §§ 47, 51; Dec. Dig. — 23.]

2. EVIDENCE — 317 — HEARSAY — ADMISSIBILITY.

In an action against brokers who employed plaintiff to assist them in selling lands in which they interpleaded H. with whom they had a similar arrangement, one of the defendants testified that H. brought the purchaser into the office, that defendant asked him whether or not plaintiff had sent him in with the purchaser, and that H. stated that he had not, but that he brought the purchaser himself, and that thereupon defendant told H. that he would pay him half of the commission to close the deal. *Held*, that this testimony was obviously hearsay and inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1174–1192; Dec. Dig. — 317.]

3. APPEAL AND ERROR — 1060 — HARMLESS ERROR — ADMISSION OF EVIDENCE.

Even though there was other competent evidence tending to sustain H.'s claim to the commission, it could not be said that the admission of such evidence was harmless, as it could not be told how much importance the jury attached to such evidence, and hence, though there was no statement of facts, the admission of such evidence could not be regarded as harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. — 1050.]

4. EVIDENCE — 314 — HEARSAY EVIDENCE — ADMISSIBILITY.

Except in cases of pedigree, relationship, marriage, death, age, and boundaries, hearsay evidence is inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1168–1173; Dec. Dig. — 314.]

5. APPEAL AND ERROR — 688 — PRESUMPTIONS IN SUPPORT OF JUDGMENT — OMISSIONS FROM RECORD.

Though the language of defendants' counsel in stating in his argument that plaintiff was a liar was severe and might under certain circumstances constitute serious error, it could not be said that it was error, where there was no statement of facts, as counsel's remark may have been reasonably deducible from the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2894–2896; Dec. Dig. — 688.]

Appeal from County Court, Kaufman County; James A. Cooley, Judge.

Action by John Pulkrabeck against Griffith & Griffith. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Woods & Morrow and Huffmaster & Huffmaster, all of Kaufman, for appellant. Terry & Brown, of Kaufman, for appellee.

RASBURY, J. There is no statement of facts in the record of this cause, but it does

appear from the pleading that by mutual agreement appellees employed appellant to assist them in selling certain farm lands in Kaufman county for which appellees were agents. By the agreement appellees were to divide their commissions with appellant on all sales made to customers introduced, procured, or brought to appellees by the efforts of appellant. Other provisions of the agreement need not be detailed. After the agreement was reached, appellant sued appellees alleging generally that he had earned \$250 under his agreement with appellees, which they refused to pay. Appellees, in answer to the suit, admitted the agreement, and alleged in addition that it made a similar agreement with one Holick and others, but had not made an exclusive agreement with any one; also, that a sale of certain of the lands was made to one Kovar upon which there was due either appellant or Holick the sum of \$80, and that according to appellees' information and belief Holick was entitled thereto. The money was tendered into court and Holick made a party to the suit. Holick intervened in the suit, either voluntarily or in response to citation, and alleged a contract with appellees similar in all respects with the one between appellant and appellees and that he was the procuring cause of the sale to Kovar since it was through his efforts that the sale had been consummated. There was trial by jury to whom the court submitted two special issues of fact: The first being, "Was the plaintiff John Pulkrabek the procuring cause of the sale of the 151-acre tract to Martin Kovar by Charles C. Cobb by reason of any aid or assistance rendered by him to the said defendants Griffith & Griffith?" and to which the jury answered "No." The second being, "Was the intervenor John R. Holick the procuring cause of the sale of the 151-acre tract of land to Martin Kovar by Charles C. Cobb by reason of any aid or assistance rendered by said John R. Holick to the said defendants Griffith & Griffith?" and to which the jury answered "Yes." Upon the jury's findings judgment was rendered that appellant take nothing by his suit against appellees and that intervenor Holick recover of appellees the sum of \$80, and from which judgment this appeal is taken.

[1] The second, third, and fourth assignments of error challenge the right of appellees to interplead Holick in the suit on the ground that there is no privity of contract between appellant and Holick and on the ground of the partiality of appellees. While we are not unmindful of the rule invoked by the assignment, it has nevertheless been held by our Supreme Court that, "under our blended system, where law and equity are administered by the same court, and the rights of all parties to the suit in the subject-matter thereof may be adjudicated and fully protected," a defendant is entitled to the equitable remedy of interpleader. Also,

that "the remedy is so beneficial and so just that any reasonable doubt as to his right to an interpleader will be resolved in his favor." *Nixon v. New York Life Ins. Co.*, 100 Tex. 251-262, 98 S. W. 380, 99 S. W. 403. See, also, *Rochelle et al. v. Pacific Express Co.*, 56 Tex. Civ. App. 142, 120 S. W. 543. The rule being as stated and so highly favored by courts, we do not think that appellees should be denied the right to have the rival claimants to the commissions adjust their claims in one suit, merely because appellees assumed the position in their pleading based upon information and belief that Holick was entitled to the commissions. Such pleading does not, in our opinion, constitute such partiality as will prevent the application of the rule. The pleading at most is but the expression of an opinion. Other portions of the pleading are clear in the statement that appellees do not know who earned the commissions, but are willing to pay to whomsoever is entitled thereto and for that purpose tenders the money into court. While it is clearly the duty of a stakeholder to be fair and impartial, it is also his duty to disclose to the trial court all facts possessed in reference to matters in issue, and to do so is not in law a showing of partiality.

[2-4] The fifth and ninth assignments of error attack the action of the court in admitting certain testimony. By bill of exception it is shown that while the trial of the case was in progress T. B. Griffith, one of the appellees, was permitted over objection of appellant, after he had testified that appellant had not in any manner contributed to the sale of the land, to further testify:

"Holick brought Kovar into my office, and I stated to Holick that I wanted to know whether or not Pulkrabek had sent him in with Kovar, * * * and if not I would pay him half the commission to close the deal, and he stated he had not, that he brought him himself. I thereupon told him that I would pay him half of the commission to close the deal."

Appellant was not present when the conversation took place between the witness, appellee, and intervenor, Holick. Appellant contends that the evidence detailed was hearsay and self-serving and hence inadmissible. We concur in the contention. The testimony was obviously hearsay (*Ross et al. v. Moskowitz*, 95 S. W. 86), and its effect was clearly to support the contention of both appellees and intervenor that the latter was the procuring cause of the sale. Save in cases of pedigree, relationship, marriage, death, age, and boundaries, hearsay evidence is inadmissible. The fact, as contended by appellees, that a statement of facts is not in the record, will not support a finding that the admission of the evidence was harmless. Even though there was a statement of facts which disclosed other competent evidence tending to sustain intervenor's claim, we would yet be unable to say that the hearsay evidence was harmless. Appellees assumed correct an attitude of impartiality and admit-

ted the debt. Occupying such a position, it is difficult to say exactly how much importance the jury would attach to the statement of appellees that Holick had said that appellant had in no way contributed to the sale of the property to Kovar. Certainly we cannot say it was harmless, particularly in view of the further fact that appellees had testified that they had received no assistance from appellant in the sale of the lands.

[5] In reference to the alleged misconduct of counsel in stating in argument before the jury "that old John Pulkrabeck was a liar," it may be conceded that the language was severe, and might under certain circumstances constitute serious error if permitted, at the same time, in the absence of a statement of facts, we cannot say in this case that it was. Unlike the admission of hearsay evidence, it may be that if all the evidence was before us the remark of counsel could be reasonably deducible therefrom.

The remaining assignments of error have been carefully considered and in our opinion fail to disclose reversible error, and for that reason are overruled.

Because of the action of the trial court in admitting the evidence of the witness Griffith, the judgment is reversed, and the cause remanded for another trial not inconsistent with the views expressed herein.

Reversed and remanded.

MASTERTON et al. v. HARRIS et al. (No. 5352.)

(Court of Civil Appeals of Texas. Galveston.
June 25, 1915. Rehearing Denied
Oct. 7, 1915.)

1. APPEAL AND ERROR \S 1195 — RULES OF DECISION—STATE SUPREME COURT.

The answers to questions propounded by the Court of Civil Appeals to the Supreme Court are conclusive upon the Court of Civil Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4661-4665; Dec. Dig. \S 1195.]

2. WILLS \S 230—WITHHOLDING FROM PROBATE—AGREEMENT BETWEEN HEIRS—ESTOPPEL.

The agreement between the widow and the children of a testator, whose will contained a devise of \$3,000 to plaintiff's mother for the education of her children, conditioned upon the widow's acceptance of the will in lieu of her community interest, to withhold it from probate and to take agreed shares of the estate, at which time the plaintiff's father stated that the other parties might do as they pleased and not consider his children, and the ratification of such agreement by acting thereunder for 21 years up to the widow's death, did not estop them from claiming title under the will after it had been probated at the instance of purchasers of realty from the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 555-559; Dec. Dig. \S 230.]

3. ADOPTION \S 6—EVIDENCE—INTEREST OF ADOPTED CHILD.

In an action for partition of the estates of a decedent, his wife, and their daughter, evi-

dence held not to sustain a finding that it was intended by decedent that a daughter of his intended wife, whom he adopted on his marriage to her mother, should be treated as his own and have a child's interest in his estate, so as to be entitled to take in case of intestacy or testament equally with his own children.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. \S 11; Dec. Dig. \S 6.]

4. ADOPTION \S 6—PLEADING—INTEREST OF ADOPTED CHILD.

In such action, where no such contract of adoption was pleaded, but only a promise to adopt and performance by decedent on the day of his marriage with the child's mother by executing and filing an instrument of adoption whereby she became his legal heir, proof that decedent had intended that the adopted child, under whom plaintiffs claim, should have the same interest in his estate as his own children, could not properly become the basis of a judgment in plaintiffs' favor.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. \S 11; Dec. Dig. \S 6.]

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

Action for partition by Thomas W. Masterton and others against John W. Harris and others. Judgment for defendants, and plaintiffs appeal to the Court of Civil Appeals, which certified questions, answered by the Supreme Court. 174 S. W. 570. Affirmed.

D. D. McDonald, of Galveston, and Masterton & Masterson, of Houston, for appellants. Edward F. Harris, Harris & Harris, and P. A. Drouilhet, all of Galveston, and W. H. Newton, of San Antonio, for appellees.

McMEANS, J. Appellants, plaintiffs in the court below, brought this suit against appellees, defendants, for partition of the property of the estates of John W. Harris, deceased, Annie P. Harris, deceased, and Rebecca P. Harris, deceased, alleging that appellants and appellees owned in undivided interests the property of the three estates in the proportions set out in the petition. The case was tried before the court without a jury, and resulted in a judgment for defendants from which the plaintiffs have appealed.

This case was submitted to this court on December 21, 1911. Thereafter, after mature consideration, we concluded to certify to the Supreme Court two questions raised by appellants by appropriate assignments of error, a decision of which we then thought would practically settle the case, and we see no reason now for changing the conclusion then reached. The statement of the case embraced in our certificate is a sufficiently clear statement of the issues presented by the pleadings of the parties and the facts proved at the trial, and we now here adopt and copy the same as a part of this opinion:

"The plaintiffs are the sole devisees under the will of Mrs. Annie Masterton, who died in 1900, leaving a will duly probated (except that one of the plaintiffs is sole beneficiary under the will of one of such devisees). Of the defendants, John W. Harris and Mrs. Cora Dav-

enport are children of John W. Harris and his wife Annie P. Harris, both deceased. Frederick Kenner Fisher is only child and heir of one of such children, Mrs. Elizabeth Byrd Fisher, deceased, and B. R. A. Scott is one of the executors of the will of Mrs. Annie P. Harris. John W. Harris, the executor, is also sued in such capacity. Plaintiffs under appropriate averments, which need not be here more particularly set out, seek partition of the property of the estates of John W. Harris, Mrs. Annie P. Harris, and Miss Rebecca P. Harris, another of the children of John W. and Annie P. Harris, who died intestate in 1900. It was alleged that these three estates of John W. Harris, Annie P. Harris, and Rebecca P. Harris owned in undivided interests the property sought to be partitioned, and that plaintiffs and defendants owned in undivided interests the property of said estates. There is no controversy as to the interests of the parties, respectively, in the property of the estates of Mrs. Annie P. Harris and Miss Rebecca Harris, but defendants deny that plaintiffs have any interests in the property of the estate of John W. Harris proper. Upon the trial the court decreed partition, recognizing the interests of plaintiffs in the property of the estates of Mrs. Harris and Miss Harris, but denied them any interest in the property of the estate of John W. Harris. From this judgment this appeal is prosecuted by plaintiffs.

"John W. Harris died in 1887, leaving surviving him his widow, Mrs. Annie P. Harris, and four children of their marriage, to wit, John W. Harris, Mrs. Cora Davenport, Mrs. Elizabeth Byrd Fisher, and Miss Rebecca P. Harris. There also survived him an adopted daughter, Mrs. Annie W. Masterson, mother of plaintiffs, who was a daughter of Mrs. Annie P. Harris by a former marriage, and who had by instrument of writing duly executed by John W. Harris in 1852, on the day of his marriage to her mother, been adopted 'as his legal heir' under the terms of the statute, which instrument was duly recorded in the records of Matagorda county, where the parties lived; but none of the parties in interest knew anything of this act of adoption until it was discovered by one of plaintiffs in 1908. By the terms of his will John W. Harris devised his entire estate as follows: To his wife, one-fifth of all the property which he acquired before the marriage, and one-fifth of that portion which had been and may be hereafter acquired during the marriage, together with the Galveston homestead during her life, with power to bequeath the same at her death to any one or more of their four children. The bequest was stated to be an extinguishment of all claims which Mrs. Harris had to any of his separate property, or to the community estate, it being stated that much the greater portion of the property theretofore acquired was his separate estate. The rest and residue of his property was left to their four children, to wit, Rebecca P. Harris, John W. Harris, Lillie B. Harris (afterwards Fisher), and Cora L. Harris (now Davenport), share and share alike. There was also left to Branch T. Masterson, husband of Annie W. Masterson, the sum of \$3,000, to be used in the education of their children, the present plaintiffs, but this legacy was made conditional upon Mrs. Harris accepting the terms of the will. Mrs. Annie P. Harris, John W. Harris, Branch T. Masterson, and Miss Rebecca P. Harris were appointed independent executors of the will without bond, and were each given \$500 as compensation for their services. The will was dated in 1880. Judge Harris died in 1887. Immediately after his death, upon reading of the will in presence of the widow and four children and Mr. Masterson, Mrs. Harris expressed great dissatisfaction with its terms to herself, and also on account of its failure to make any provision for Mrs. Masterson. The four chil-

dren also thought that the will was unjust to their mother, and that to probate it would 'be a reflection upon their father's memory.' This feeling led to, and resulted in, a family compact between Mrs. Harris and her said four children that all of the property should be treated as community, that Mrs. Harris should take one half, and that the heirs at law of John W. Harris should take the other half. In order to carry out the compact, it was agreed that the will should not be probated. This was done, and the property has been since managed by John W. Harris as a whole for the benefit of the parties named and those claiming under them. The right of Mrs. Masterson, or her children after her death, to share in the property was not considered, in so far as the estate of John W. Harris proper is concerned. The legacy to Branch T. Masterson was never paid or demanded.

"In 1906 Thomas W. Masterson, one of the plaintiffs, found upon the records of Matagorda county, duly recorded on the day of its date, in all respects duly executed according to the provisions of the act of 1850 (articles 1, 2, title 1, R. S.), an instrument, signed by John W. Harris, as follows:

"The State of Texas, County of Matagorda.

"Know all men by these presents, that I, John W. Harris, a resident of the county and state aforesaid, have adopted and do hereby adopt, as my legal heir, Annie W. Dallam, the only child of the late Mrs. Annie P. Dallam, whom I have this day married. Given under my hand and seal this 1st day of July, one thousand eight hundred and fifty-two.

"John W. Harris. [Seal.]

"Signed, sealed, and delivered in the presence of C. R. Patton. I. R. Lewis."

"At the time of this discovery Mrs. Annie P. Harris was living, but shortly afterwards she died, leaving a will whereby she left her property to her two surviving children by Judge Harris, Frederick Kenner Fisher, son of Elizabeth Byrd Fisher, and the children of Annie W. Masterson, her child by the former marriage. As stated, the other child of John W. and Annie P. Harris had died in 1900 intestate.

"Upon the filing of this suit in 1908, setting up the rights of Mrs. Annie W. Masterson, or her children, she being deceased, as an adopted 'legal heir' of John W. Harris, to participate in the distribution of his estate, St. Mary's Orphan Asylum of Galveston, a corporation, filed an application in the probate court at Galveston county to have probated the aforesaid will of John W. Harris, alleging as ground for such application that it had in 1901 purchased from the heirs of John W. Harris certain lots in the city of Galveston, that at the time of their said purchase it believed that John W. Harris had died intestate, and that its vendors were entitled to his estate, 'and a probate of the will is necessary and proper to complete, protect, and make good of record and in fact applicant's title to the above mentioned lots.' It was further alleged that applicant was not in default in applying for the probate of the will, because it did not know of its existence until about two weeks before the filing of the application.

"To this application John W. Harris made answer (which answer was adopted by Kenner Fisher, by his guardian, and Mrs. Davenport), setting up the execution of the will, the death of John W. Harris, and the family compact herein referred to. They admitted the allegations of the Orphan Asylum and its interest in the probate of the will, and that such probate was necessary and proper 'to complete, protect, perfect, and make good of record and in fact its title' to the property mentioned. It was further represented that about 80 other persons, citizens of Texas, occupied the same attitude as purchasers of lands from said heirs as the Orphan Asylum, and that there was as to them the

same necessity to probate the will for the purpose of protecting their titles, and in addition that about 250 persons had leased lands from said heirs, and for the protection of their rights there was the same necessity to probate the will. Respondents specially admit and recognize the right of the estate of Mrs. Annie P. Harris to one-half of the property of John W. Harris and Annie P. Harris, as fixed by law at the date of the death of John W. Harris. The further allegation is made as to the necessity for the probate of the will arising from the fact of the discovery of the act of adoption by John W. Harris of Mrs. Annie W. Masterson, as herein set out, and the filing of this suit for partition. W. T. Hefley intervened, also praying for the probate of the will, alleging that he was also purchaser of certain lands from the heirs of John W. Harris, that the probate of the will was necessary to protect, perfect, and make good his title, alleging substantially the same grounds that are set out in the petition of the Orphan Asylum.

"The probate of the will was contested by the plaintiffs in the present action, devisees of Mrs. Annie W. Masterson, deceased. In their answer, which is very lengthy, they alleged that 'John W. Harris and Annie Pleasants Dallam, who was then a widow, then citizens of the county of Matagorda and state of Texas, entered into an antenuptial marriage contract, in which they agreed to be married, and John W. Harris agreed that on that day of the marriage he would adopt as his legal heir Annie W. Dallam, who was a child of said Annie Pleasants Dallam by her former marriage; that in conformity with said contract said John W. Harris and Annie Pleasants Dallam were married on the 1st day of July, 1852, and on the same day he, the said John W. Harris, by an instrument in writing duly executed by him and duly filed and recorded in the office of the clerk of the county court of Matagorda county, adopted said Annie W. Dallam as his legal heir and thereby faithfully performed his aforesaid contract; that thereupon the said Annie W. Dallam became the legal heir of said John W. Harris, and became entitled to all of the rights and privileges in law and in equity of a legal heir of said John W. Harris.' They also alleged substantially the facts hereinbefore set out with regard to the death of John W. Harris and the family agreement not to probate the will, setting out in detail the circumstances with regard thereto. They disclaim any right to or interest in the lands or other property conveyed to the Orphan Asylum or Hefley, or others, and admit the validity of all such conveyances, and of all leases executed by said heirs, and disclaim any desire or intention to disturb the same. The said contestants conclude: 'And these contestants say that the legacy of three thousand dollars directed to be paid over to Branch T. Masterson to be expended in the education of these contestants by reason of said agreement not to probate either of said alleged wills and the actual failure and refusal to probate the same by said John W. Harris, Jr., Rebecca P. Harris, Lillie B. Fisher, and Cora L. Davenport, deprived these contestants of the benefit of said legacy, and the same remained in the estate in which each of said parties have been receiving and are entitled to receive their respective shares, and by asserting their right thereto as heirs at law each of said parties is estopped to deny that they hold their respective shares as such heirs, and by asserting their right thereto as heirs at law each of said parties are estopped to deny that they hold their respective interests as heirs at law of said John W. Harris, and are estopped from having either of said alleged wills probated, and are estopped to claim as devisees under said alleged wills, or either of them, and these contestants deny that said alleged will attached to the application of said St. Mary's Orphan Asylum, or said Exhibit X, and attached to the

answer of said John W. Harris, or either of said papers, is the last will of said John W. Harris, deceased. Wherefore these contestants pray that all of said applications for probate of said alleged wills of said John W. Harris, deceased, be refused and dismissed at the cost of the respective applicants.

"The county court in this proceeding admitted the will to probate upon the application of all the persons praying therefor. On appeal to the district court, probate was refused upon any of the applications. From this judgment the Orphan Asylum, Hefley, and John W. Harris, Kenner Fisher, and Mrs. Davenport appealed. The Orphan Asylum and Hefley gave separate appeal bonds, and John W. Harris, Kenner Fisher, and Mrs. Davenport executed a joint appeal bond. By the judgment of the Court of Civil Appeals of the Fourth District the judgment of the district court was reversed, and judgment rendered that the applications of appellants, St. Mary's Orphan Asylum of Galveston, Texas, and W. T. Hefley, for the probate of the last will and testament of John W. Harris, deceased, be and the same is hereby granted.' The opinion of that court upon the original submission, and also upon motion for rehearing (which is reported in 57 Tex. Civ. App. 646, 122 S. W. 587, case styled St. Mary's Orphan Asylum of Texas v. T. B. Masterson et al.) is referred to and made a part of this statement to illustrate and explain the questions here presented. All of the facts herein set out were embraced in the pleadings of the parties by appropriate averments. Conclusions of fact and law were filed by the trial judge. The conclusions of fact, with slight exception, are adopted by us. At the risk of repetition of much that has been heretofore stated, we here set out such conclusions:

"In the early part of the summer of 1852 Judge John Harris and Mrs. Annie P. Dallam, a widow with one child (Annie W. Dallam, about five years old, afterwards Annie W. Masterson, by marriage with Branch T. Masterson), became engaged to be married. In his proposal of marriage to Mrs. Dallam, Judge Harris said that he would adopt her daughter, Annie W. Dallam, as his own child, and urged this as a consideration for Mrs. Dallam's accepting his proposal. She did accept his proposal so made, and on the day they were married, July 1, 1852, Judge Harris duly adopted the said Annie W. Dallam by an instrument in writing duly acknowledged and filed on the 16th day of that month in the office of the county clerk of Matagorda county, where at the time both parties resided. The fact that he had so adopted her was not known to any of the parties to this suit, or to any other member of the Masterson and Harris families, as far as disclosed by the evidence, until the month of July, 1906, when Mr. Thomas W. Masterson happened to discover the act of adoption in the office of the county clerk of Matagorda county. The court finds as a fact that it was intended by Judge Harris in his proposal to Mrs. Dallam that the child should be treated as his own, and that she should have a child's interest in his estate.

"So far as disclosed by the evidence, Mrs. Annie P. Harris never mentioned the fact of Judge Harris' promise to adopt the child of her first marriage to any member of the family until on the 1st day of April, 1887, after Judge Harris' death, when the two purported wills were produced by John W. Harris, Jr., son of Judge Harris, who, for some time previous to his father's death and on account of his failing health, had charge of his father's business affairs and custody of his papers, at a meeting of the members of the Harris family, consisting of Mrs. Annie P. Harris, her daughters, Lillie, Rebecca, and Cora, and son, John W. Harris, Jr., and at which Mr. Branch T. Masterson was also present by invitation. She did not then mention it in the meeting, but after both

instruments had been read and general surprise expressed at their contents, particularly at the attempt to dispose of the entire estate as though it were his separate property, when it was notorious that it was community of the marriage, she called Mr. Branch T. Masterson aside in another room and expressed her own surprise that Judge Harris had not made provision for their daughter, Annie W., and then stated to him Judge Harris' promise at the time she accepted his proposal of marriage, and added that she had always supposed that he had kept his promise, but now that it seemed he had not. She subsequently made the same statement to one of her grandchildren, probably on more than one occasion.

"At said meeting it was agreed by Mrs. Harris and her children by Judge Harris, they being the exclusive devisees under each of said instruments, not to offer the same for probate, because they thought what they considered to be the injustice of the wills to Mrs. Harris would be a reflection on Judge Harris' memory, and it was agreed between them that the whole estate should be considered as community, Mrs. Harris taking one half interest and Mr. Harris' four children the other half in equal parts, as though he had died intestate; and Mr. Masterson, being asked what he thought of this, assented to it, saying, in substance, that they could do what they pleased, that if they did not offer the wills for probate he would not, and that they need not consider his children (referring to the legacy of \$3,000 for their benefit), as he was able to care for his own children. The wills were accordingly withheld from probate until after the discovery of the act of adoption, more than 20 years after Judge Harris' death; Mrs. Annie P. Harris and her daughter, Mrs. Annie W. Masterson, having died in the interim.

"The will of Judge Harris was duly probated in Galveston county on the 10th day of February, 1910, pursuant to the decree of the Court of Civil Appeals of the Fourth Supreme Judicial District, in the case entitled "In the Matter of the Estate of John W. Harris, Deceased. Application for Probate of Will," No. 26,731 in this court, and to the orders of this court also made pursuant to said decree, and copy is hereto attached and marked Exhibit B. The case is reported in 57 Tex. Civ. App. 587, 122 S. W. 587. The plaintiffs and those under whom they claim are the only devisees of Mrs. Annie W. Masterson; and the defendants (other than the executors and administrator) and those under whom they claim are the only devisees of Judge John W. Harris; and said plaintiffs and defendants and those under whom they claim are the only devisees of Mrs. Annie P. Harris. These estates consist of a large number of tracts of land in different parts of the state, and other property, which it is agreed, for the purposes of this case, was all originally community of the marriage of Judge John W. Harris and his wife, Annie P. Harris. The accounts of John W. Harris, Jr., who has had charge of the property since his father's death, have been audited and found correct."

Under the foregoing facts it was the contention of appellants that: First. The probate of the will of John W. Harris by the Court of Civil Appeals is a limited probate, inuring to the benefit of the Orphan Asylum and W. T. Hefley, and that appellees John W. Harris, Kenner Fisher, and Mrs. Davenport, having been held in default by said court in failing to probate the will within four years, can take no benefits thereunder, but that, as to them, John W. Harris must be treated as having died intestate. Second. That by virtue of the antenuptial agreement of John W. Harris with Mrs. Annie P. Dallam and

the subsequent act of adoption of her child, Mrs. Annie W. Masterson, he was estopped and prevented from making any will which by its terms did not make provision for his said adopted child equally with his own children.

The questions propounded to the Supreme Court are:

"First. Did the probate of said will inure to the benefit of appellees as devisees thereunder, or is the same to be limited in its operation to the parties upon whose application it was probated, to wit, St. Mary's Orphan Asylum and W. T. Hefley?

"Second. Does the verbal agreement between John W. Harris and Mrs. Annie P. Dallam, made in prospect of their marriage, and the subsequent act of adoption by John W. Harris of the child of said wife, operate to prevent or interfere with his right to make such disposition of his property and estate by will as was done by the will admitted to probate?"

[1] The Supreme Court, in reply to these questions (see *Masterson v. Harris*, 174 S. W. 570), answered that the probate of the will in question inured to the benefit of the appellees, and decided the second question in the negative. These answers are conclusive upon us, and require us to overrule all of appellants' assignments of error in which the questions are presented.

[2] By their fifth assignment of error appellants complain that the court erred in holding that the agreement between John W. Harris, Jr., Cora L. Davenport, Rebecca P. Harris, and Lillie B. Harris, and their mother, Annie P. Harris, not to probate the will of John W. Harris, and to set said will aside and ignore it, coupled with their ratification of such agreement by acting under it for 21 years, did not preclude them from now claiming title under said will. Under this assignment there is urged a proposition to the effect that, where the widow and children of deceased, having custody of the will, agreed with each other to not have the will probated, and that one of the children, John W. Harris, should be manager of the estate, and the property would be treated as if the deceased had died intestate, and the widow was agreed by them to be the owner of one-half of the property and should take against the will, and the will was in the custody of the widow and the manager and other children of the deceased for more than 20 years after the death of the deceased, and during that entire period the agreement was carried out by all the parties to it, and large amounts of money drawn from the estate by each of the parties to the agreement, and several thousand acres of land belonging to the estate were sold by said widow and children as heirs, and the proceeds used by them, the agreement is binding on all of the parties to it, and after the death of the widow and two of the children, who were parties to the agreement, the other children cannot repudiate the agreement, retain the proceeds of the land sold

and money of the estate received by them under it, and claim the estate as devisees under the repudiated will, which the court refused to probate on their application; that under such state of facts the agreement is binding on the parties, and that they did not acquire any right under the will, and could not take as devisees under the will, but only as heirs at law according to the agreement. The facts upon which the plea of estoppel is predicated are set out in our findings of fact, *supra*, and will not be here repeated. We agree with the trial judge that:

"What transpired at the meeting of the members of the Harris family and Mr. Branch T. Masterson at the time of the reading of the wills, immediately after Judge Harris' death, did not constitute such an agreement as the plaintiffs can avail themselves of, and does not operate to estop the devisees under Judge Harris' will from availing themselves of the probate thereof."

Certainly estoppel cannot be predicated upon the agreement of Mr. Masterson not to insist upon receiving the \$3,000 bequeathed to him in trust for his children and to be used for their education. This bequest was conditioned on Mrs. Harris' acceptance of the will in lieu of her community interest, and the evidence clearly shows that she rejected it. On this point Mr. Masterson testified that at the meeting at which the wills were read Mrs. Harris expressed dissatisfaction with the will and said that she did not think it was just to her, that it was not the will she had understood Mr. Harris intended to make, and that she would not recognize it. The fact that the will was not offered for probate, and that all of the parties to the agreement agreed that Mrs. Harris, instead of taking under the will, should take a half interest in all the property, and the fact that this agreement was recognized and acquiesced in during the remainder of Mrs. Harris' life is proof that the contingency under which the bequest of the \$3,000 to Mr. Masterson should be payable never arose. His response, upon being asked by the parties to the agreement as to what he thought of it and in assenting to it, that "they could do as they pleased, that if they did not offer the wills for probate he would not, and that they need not consider his children (referring to the legacy for their benefit), as he was able to care for his own children," was not of a contractual nature, "but rather the spirited reply of an independent gentleman, who thought his wife had not been treated in the alleged wills with the consideration she had a right to expect from one who from early childhood had otherwise shown her paternal affection." The assignment cannot be sustained.

[3, 4] We come now to a consideration of a cross-assignment of error presented by the appellees. It is as follows:

"The court erred in finding as a fact that it was intended by Judge Harris in his proposal

to Mrs. Dallam that the child should be treated as his own, and that she should have a child's interest in his estate—meaning thereby such an interest as the child would be entitled to take in case of intestacy, or in case of last will and testament by equal provision with his own children, if any, and it was so understood by Mrs. Dallam."

The assignment contains the exact language of the finding complained of. In our statement made in certifying questions to the Supreme Court, which is adopted as our statement in this opinion, we omitted therefrom that portion of the court's findings which reads as follows:

"Meaning thereby such an interest as the child would be entitled to take in case of intestacy, or in case of last will and testament by equal provision with his own children, if any, and it was so understood by Mrs. Dallam."

We did this because, after a careful consideration of all the evidence bearing upon the point, we concluded that the finding was not justified. The evidence upon this issue consists of proof of statements made by Mrs. Harris as to what the antenuptial agreement between herself and Mr. Harris was. On this point Mr. Branch T. Masterson testified that just after the reading of the wills Mrs. Harris said to him, quoting the language of the witness:

"Well, she said to me that, at the time she became engaged to Mr. Harris, engaged to marry him, he had promised to adopt her daughter as his daughter."

Miss Reba Masterson, one of the plaintiffs, a granddaughter of Mrs. Harris, testified to a conversation she had with her grandmother on this subject, as follows:

"She said they were standing at the gate, my mother was standing beside them, and that he was saying how much better it would be for the child, too, if she would consent to marry him. He said that he would adopt her as his own, and then grandma went on to say that he did adopt her."

Again she says:

"She laid special stress upon his having promised to adopt her; * * * that he said as soon as they were married he would make her his own child."

The findings of fact in the probate proceedings, which were introduced in evidence, and to the introduction of which no objection is here urged, contain the following:

"Here Mr. Harris promised to adopt her little child, Annie W. Dallam, about four years old, for whom he had already shown affection, then in company with her mother. He said he would adopt her legally the day they were married." "The next day Mrs. Harris told Mr. Branch T. Masterson she wished to see him privately, and when they were alone she said that Mr. Harris had promised her at the time they were engaged to be married that he would adopt her daughter, Annie, legally, and treat her as his own child. She said she had never asked him whether he had in fact legally adopted her or not, but had always supposed he had, but now saw he had not kept his word to her, referring to no provision being made for her in his will."

We think that this evidence proves nothing more than a promise upon the part of Mr. Harris that he would adopt Annie W.

Dallam as his heir under the statute as it then existed, and falls short of proof that he contracted with Mrs. Dallam that her child should have an interest in his estate—meaning thereby such an interest as the child would be entitled to take in case of intestacy, or in case of last will and testament by equal provision with his own children. But if we are mistaken in this, and even if the evidence had shown the existence of a binding contract upon the part of Mr. Harris to give to the child such an interest in his estate as a child of his own would take in case of intestacy, or in case of last will and testament by equal provision with his own children, we do not think, in view of the state of the pleadings of the plaintiffs, that the proof of such facts could properly in any event have become the basis of a judgment in their favor. No such contract was pleaded, but only the promise to adopt, and the fact that the promise was faithfully performed by Mr. Harris on the day of his marriage with Mrs. Dallam, by executing an instrument of adoption and filing the same for record in the office of the county clerk of the county of their residence. Their pleading on this point is as follows:

"That heretofore, to wit, in 1852, John W. Harris and Annie Pleasants Dallam, who was then a widow, then citizens of the county of Matagorda and state of Texas, entered into an antenuptial marriage contract in which they agreed to be married, and she and John W. Harris agreed that on the day of the marriage he would adopt as his legal heir, Annie W. Dallam, who was a child of said Annie Pleasants Dallam by her former marriage. That in conformity with said contract said John W. Harris and Annie Pleasants Dallam were married on the 1st day of July, 1852, and on the same day he, the said John W. Harris, by an instrument in writing duly executed by him and duly filed and recorded in the office of the clerk of the county court of Matagorda county, adopted said Annie W. Dallam as his legal heir, and thereby faithfully performed his aforesaid contract. That thereupon the said Annie W. Dallam became the legal heir of said John W. Harris, and became entitled to all the rights and privileges in law and equity of a legal heir of said John W. Harris."

For these reasons the findings of fact by the trial court, complained of in the cross-assignment, cannot be adopted by us as a part of our findings of fact. In view of the importance of the legal principles involved in the questions presented for review upon this appeal, and of the magnitude of the estate in litigation, we have given mature consideration to all the questions presented by appellants for a reversal of the judgment appealed from; but it is our conclusion that none of their assignments point out reversible error. The only two questions in regard to which we have had serious doubt have been decided by the Supreme Court adversely to appellants. We think the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

FITZGERALD et al. v. AYRES et al. *
(No. 7350.)

(Court of Civil Appeals of Texas, Dallas.
June 19, 1915. Rehearing Denied
Oct. 16, 1915.)

DEATH—WILLS—775—CONSTRUCTION—SURVIVORSHIP—INTENTION.

A husband and wife made their wills, each naming the other as primary beneficiary, but each in the event of prior death of the other naming their foster son as sole beneficiary. They were frozen to death in the same snowstorm. There was no evidence as to which died first. *Held*, that the son would take, there being no presumption as to survivorship or simultaneous death, and, it being the evident intention of both that he should take, the wills would stand as if they contained only the bequest to the son.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 7; Dec. Dig. 775; Wills, Cent. Dig. §§ 1997-2000; Dec. Dig. 775.]

Error from District Court, Dallas County; Kenneth Foree, Judge.

Action by W. H. Fitzgerald and others against R. C. Ayres and L. R. Terry, executors of Willis A. Skinner and of Sallie E. Skinner, deceased. Judgment for defendants, and plaintiffs bring error. **Affirmed.**

Wood & Wood, W. H. Clark, and W. T. Strange, all of Dallas, for plaintiffs in error. Chas. F. Clint and Chilton & Chilton, all of Dallas, for defendants in error.

TALBOT, J. This suit was instituted in the district court of Dallas county, Tex., by the plaintiffs in error, W. H. Fitzgerald and others, hereinafter called plaintiffs, as the next of kin and sole heirs of Willis A. Skinner and Sallie E. Skinner, deceased, against the defendants in error, R. C. Ayres and L. R. Terry, executors of the estates, respectively, of the said Willis A. Skinner and Sallie E. Skinner, Carnage Frank Skinner, a minor, and Charles F. Clint, guardian ad litem of said minor, hereinafter called defendants, to recover all the real and personal property belonging to the estates of said deceased persons, which property is fully described in the petition. There is no controversy over the pleadings, and it is unnecessary to set them out. The material facts are as follows: Some of the plaintiffs are the next of kin and sole heirs of the said Willis A. Skinner, and the others are the next of kin and sole heirs of Sallie E. Skinner, and Willis A. Skinner and Sallie E. Skinner were husband and wife. On the 21st day of August, 1911, the said Willis A. Skinner and his said wife died in a snowstorm while ascending, on foot, Pike's Peak, in the state of Colorado, and they were buried in the city of Dallas, Tex., at the same time, on the succeeding Sunday. They had resided in the said city of Dallas a number of years, and had acquired and owned at the time of their death property of the estimated value of \$60,000, the larger part, if not all, of which

was situated in said city. The dead bodies of Mr. and Mrs. Skinner were found about a half mile from the summit of Pike's Peak. They were lying almost side by side, and there was snow on the ground. The body of Mr. Skinner was lying on its back, almost touching that of his wife, with one arm in a folded position across his chest and the other arm and hand lying partly across his body. He had on a light alpaca coat, and the sleeves of both his coat and shirt were pushed back from his wrist. The body of Mrs. Skinner was lying face downward, with her arms under her face. There is testimony to the effect that Mr. Skinner appeared to be about 60 years of age, and a light, frail man; that Mrs. Skinner was rather robust and the stronger and heavier of the two. There were no tracks in the snow where the bodies were found. Mr. and Mrs. Skinner were seen about 12 o'clock, or a few minutes after, at a place called Mountain View, on the cog railroad leading to the top of the mountain. They remained at this point about 20 minutes, and were there informed that "a storm was coming over the mountain" and advised to take the train. Mrs. Skinner then remarked: "We are from Texas, and I will show you that we will walk it." She was then offered coats and wraps for herself and husband, but she declined them, saying that they did not need them. Mr. and Mrs. Skinner were again seen making the ascent of the mountain about 3 o'clock in the afternoon. At this time they were about 2 or 2½ miles from the summit of the mountain, and the wind was blowing hard, and it was quite cold. They were here told that it was "a bad day to be walking to the Peak," and Mrs. Skinner replied: "It is bad, but it does not seem to be getting any worse." It does not appear that they were again seen until they were found dead as above related. Neither Mr. Skinner nor Mrs. Skinner ever had any children, but some years before their death a child, who took the name of Carnegie Frank Skinner, and who is one of the defendants in error in this suit, was given by his mother to them, and they had raised and cared for him since his infancy. At the time of their death this boy was about 13 years old. On the 28th day of July, 1904, Willis A. Skinner and Sallie E. Skinner made their wills, and on the 2d day of August, 1904, made codicils to their respective wills. These wills and codicils were made at the same time, attested by the same witnesses, and provided for the same executors. Both the wills and codicils were properly executed, were duly probated in the county court of Dallas county, and the executors named therein qualified thereunder. Charles F. Clint was duly appointed guardian of the said Carnegie Frank Skinner. The clauses of the will and codicil of Willis A. Skinner are as follows:

"I, Willis A. Skinner, of the county of Dallas, state of Texas, being of sound mind, do

make and publish this my last will and testament, hereby revoking all former wills at any time made by me:

"Item One. Should my beloved wife, Sallie E. Skinner, survive me, I give and bequeath to her all of my estate, real, personal and mixed, wheresoever situated.

"Item Two. In the event my said wife dies before I do, then and in that event I give, devise and bequeath to Carnegie Frank Skinner, the adopted son of myself and my said wife, all of my estate, both real, personal and mixed, and wheresoever situated.

"The boy, Carnegie Frank Skinner, has not been formally adopted by us, but his mother by an instrument in writing, gave him to me and my said wife, when he was an infant, and myself and wife have raised and cared for him since infancy.

"Item Three. In the event I survive both my said wife, Sallie E. Skinner, and my said adopted son, Carnegie Frank Skinner, then and in that event I give, devise and bequeath to Buckner's Orphans' Home and the Julia Fowler's Orphans' Home, both situated in Dallas county, Texas, all my estate, real, personal and mixed, and wheresoever situated, to be divided between said orphan homes, share and share alike.

"Item Four. Should my said wife, not be living at the date of my death, I give and bequeath to Mrs. Jennie Loughery, of the county of Dallas, the sum of \$200.00, which my executors will at once pay to her without interest.

"Item Five. I hereby nominate and appoint Leroy R. Terry and R. C. Ayres, both of the city of Dallas, the executors of this, my last will and testament, and I direct that my said executors be not required to give bond, and that no action of any kind be had in any of the courts of this state in reference to my estate, except the probate of this will, and the return of the inventory and appraisement of my estate.

"Item Six. I hereby give to my executors, or the survivor of them the absolute power to sell and dispose of any part of my estate, except such lot or lots as are situated on Main street in the city of Dallas, and to use the interest, rents and revenues arising or growing out of my estate, for the support, education and maintenance of my adopted son, Carnegie Frank Skinner. And for this purpose my said executors shall retain possession and control of my estate until the said Carnegie Frank Skinner reaches the age of twenty-one years.

"Item Seven. It is my wish that the said Carnegie Frank Skinner be given a liberal education; my preference being the public schools of Dallas. The amount to be expended in support, education and maintenance of my said adopted son I leave to the discretion of my executors, admonishing them that labor is honorable, and that many boys have been ruined by extravagant allowances of money.

"Item Eight. Should the contingency happen upon which my estate vests in Buckner's Orphan Home, and the Julia Fowler Orphan Home, as above provided, it is my wish that my executors surrender the estate to said orphan homes immediately upon the probate of this will.

"Item Nine. Should either of my said executors die or refuse to qualify, the other executor is hereby vested with the power and authority which by the terms hereof is vested in both. In the event that both of my executors herein named die or fail or refuse to qualify I direct that an executor or executors be appointed by the proper court, which executors so appointed by the court shall execute such bond as the law may require.

"Item Ten. I direct that my body be buried by the side of my beloved wife, and that a suitable but not expensive monument be erected over our grave, bearing the following inscription:

They remembered the fatherless and the orphan."

"Witness my hand this the 28th day of July, 1904. Willis A. Skinner.

"At the request of the testator and in his presence and in the presence of each other we sign as witnesses this the day and date above written.

M. L. Crawford,
"W. L. Crawford, Jr."

"Codicil No. One.

"Item One. My real estate in Dallas, Texas, shall not be sold by my executors unless the rents and revenues from my estate, economically administered are insufficient for the education and support of the said Carnagie Frank Skinner.

"Item Two. I wish my executors to pay to Mrs. Jennie Loughery \$50.00 in addition to the \$200.00 heretofore mentioned.

"Item Three. In case said Carnagie Frank Skinner leave no child or children living by him lawfully begotten, then and in that event, it is my will that the whole of my estate be divided between the Buckner's Orphan Home and the Julia Fowler Orphan Home, share and share alike.

"Item Four. This codicil in no wise modifies or changes item one of my will dated July 28th, 1904.

"This August 2, 1904.

"Willis A. Skinner.

"Witness:

"M. L. Crawford.

"W. L. Crawford, Jr."

The will of Mrs. Skinner provides in item 1 that:

"Should my beloved husband, Willis A. Skinner, survive me, I give and bequeath to him all of my estate real, personal and mixed, wheresoever situated."

Item 2 of her will is as follows:

"In the event my said husband dies before I do, then and in that event, I give, devise and bequeath to Carnagie Frank Skinner, the adopted son of myself and my said husband all of my estate, both real, personal and mixed, and wheresoever situated.

"The boy, Carnagie Frank Skinner, has not been formally adopted by us, but his mother by an instrument in writing gave him to me and my said husband when he was an infant, and myself and husband have raised and cared for him since infancy."

Item 3 reads thus:

"In the event I survive both my said husband, Willis A. Skinner, and my said adopted son, Carnagie Frank Skinner, then, and in that event, I give, devise and bequeath to Buckner's Orphans' Home and Julia Fowler Orphan Home, both situated in Dallas county, Texas, all my estate, real, personal and mixed, and wheresoever situated, to be divided between said orphan homes share and share alike."

In other respects the will of Mrs. Skinner is practically the same as that of her husband, Willis A. Skinner. The case was tried by the court without a jury, and, upon the conclusions of law and fact found and filed in writing, judgment was rendered that the plaintiffs take nothing by their suit, and that the defendants go hence and recover their costs.

As matters of fact the court found that on August 21, 1911, Willis A. Skinner and his wife, Sallie E. Skinner, died in a snowstorm on Pike's Peak, in Colorado, and that the evidence introduced in the case was not sufficient to show which one died first. As a

matter of law the court concluded, as far as we need state, that:

As it was "unascertainable from the evidence which one, if either of the testators, Willis A. Skinner or Sallie E. Skinner, survived the other, their property rights are to be disposed of and adjudged as if death occurred to both at the same time; that the failure of proof as to which of the two testators, if either, survived the other, brings into operation items 2 of the wills and items 3 of the codicils, respectively, and the other parts of said wills and codicils, respectively, and under the said wills and codicils of each testator all the property of each was devised to and vested in the defendant Carnagie Frank Skinner."

The correctness of these conclusions of law is challenged by plaintiffs, and the principal propositions urged are, in substance: First, that under the statute, as at common law, the lands of decedents pass to their next of kin and heirs, and a devise claiming adverse to the heirs under a will must establish his right through the will, but an heir is not required, before taking as heir, to prove that the deceased died intestate; second, that the rule has been long established in England, and is now well established in Texas, and most of the American states, that when it is shown that two or more persons perished in the same calamity, there is no presumption of law that one survived the other, or that they died simultaneously, and he whose right or claim depends on the fact of survivorship or simultaneous death, must prove the one or the other by legal and competent evidence, and the law allows no presumption in reference thereto; third, that a will which is to become effective only upon the happening of a certain contingency or condition is a contingent will, and in case the contingency does not arise, or is unascertainable, the will becomes, by the failure or inability to prove the happening of the event, of no effect, and the property of the decedent goes to his next of kin and sole heirs, under and by virtue of the statutes of descent and distribution, the same as if the decedent had died intestate; and, fourth, that Carnagie Frank Skinner having failed to prove survivorship or simultaneous death, this rule of the law operated on the wills, and caused them to lapse, whereupon the title and ownership of the property vested in the plaintiffs, the next of kin and sole heirs of the decedents, by operation of law. These propositions, although plaintiffs have propounded others, raise the questions presented by the assignments of error for our decision.

The decisions of the appellate courts of this state cited by plaintiffs are unquestionably to the effect that there is no presumption either of survivorship or of the simultaneous death of persons who perish in a common disaster, and that, as applied to this class of cases, the general rule is "that courts will not change the existing status or possession of property except upon adequate proof of facts authorizing such change." *Hildenbrandt v. Ames et al.*, 27 Tex. Civ.

App. 377, 66 S. W. 128; *Paden, Administrator, v. Briscoe*, 81 Tex. 563, 17 S. W. 42. It has also been held, in effect, as contended by plaintiffs, that ordinarily "a condition in the will of survivorship must happen or be fulfilled before the estate can vest under the will." As has been shown by the will of Willis A. Skinner, he bequeathed to his wife, Sallie E. Skinner, all of his property in the event she survived him, and in the event she died before him he bequeathed it to Carnagie Frank Skinner; and by the will of Mrs. Skinner all of her property was bequeathed to her husband, Willis A. Skinner, in the event he survived her, and in the event he died before her, it was bequeathed to Carnagie Frank Skinner. So, the rule being that no presumption of survivorship or simultaneous death will be indulged in case of persons who perish by a common disaster, and there being no evidence in this case showing which one of the testators died first, or that they died at the same instant, the question for decision is: Did the property of Mr. and Mrs. Skinner pass to and vest in Carnagie Frank Skinner under the second item of their respective wills? We do not regard any decision of the courts of this state to which our attention has been called or of which we have any knowledge decisive of the question. But we think the construction to be given the wills in question, under the evidence and findings of fact made by the trial court, is made plain by decisions of other jurisdictions cited by appellees upon similar states of facts, and especially by the decision of the Supreme Court of the United States in the case of *Young Women's Christian Home v. French*, 187 U. S. 401, 23 Sup. Ct. 184, 47 L. Ed. 233. That case was appealed from the Court of Appeals of the District of Columbia to review a decree which reversed a decree of the Supreme Court of the District, and involved the construction of the will of Mrs. Sophia Rhodes. In item 1 of Mrs. Rhodes' will she devised to her husband during his life one-half the income of her property. In item 2 she devised all her property to her son, Eugene Rhodes, subject to the life estate of her husband. In item 3 she devised, in the event of the death of the son before the death of herself or her husband, the income to her husband for life, and at his death all the property to the Young Women's Christian Home; and in item 4, in the event of her becoming the survivor of both husband and son, she devised all her property to the Young Women's Christian Home. The husband died in January, 1895, the wife and son were later lost in a shipwreck, and the court held that the proof was not sufficient to show the order in which they died. The next of kin of Mrs. Rhodes claimed the property, but their claim was denied. The statement of the case as made by Chief Justice Fuller, who delivered the opinion of the court, shows that the Supreme Court of the District held that there was no

presumption of survivorship as between Mrs. Rhodes and her son, Eugene; "that the will manifested an unmistakable desire to guard against intestacy;" and that the intention of Mrs. Rhodes was clearly apparent that, if her husband and son should not survive her so as to receive the property, or if it remained under her control at the time of her death, it should go absolutely to the charity she had named, the Young Women's Christian Home, and decreed accordingly. From this decree Barbara Faul and Andrew Wasner, next of kin of Mrs. Rhodes, and John L. French, administrator of Eugene Rhodes, carried the case to the Court of Appeals of the District of Columbia, which concurred in the view that there was no presumption of survivorship as between the testatrix and her son, but held that:

The terms of the will "vesting the estate in Eugene Rhodes immediately upon testatrix's death, we agree that it raises a prima facie right in the personal representatives of the son, and imposes the burden upon her next of kin of displacing them by proof of his mother's survival," and that the representatives and next of kin of the son were entitled to the entire fund."

The decree of the Supreme Court of the District was thereupon reversed, and the cause remanded to the court below, with a direction to enter a decree in conformity with that conclusion. From this decree of reversal an appeal was taken to the Supreme Court of the United States, and resulted in a reversal by the court of the decree of the Court of Appeals, with direction that the case be remanded, and that the decree of the Supreme Court of the District of Columbia be affirmed. In remanding the case with the direction stated the Supreme Court of the United States recognized the rule that there is no presumption of survivorship in the case of persons who perish by a common disaster, in the absence of proof tending to show the order of dissolution, but held that the question of actual survivorship, in such a case, is regarded as unascertainable, and that "descent and distribution take the same course as if the deaths had been simultaneous," citing a number of cases. It is also declared that the cardinal rule in the construction of a will is that the intention of the testator, as expressed in the instrument, or clearly deducible therefrom, must prevail, if consistent with the rules of law, and that another familiar rule is that the law prefers a construction which will prevent an intestacy to one that will permit it, if such a construction may reasonably be given. These rules being declared, the court proceeds to say that:

It is "apparent that Mrs. Rhodes designed to dispose of her entire property; to provide for her husband by securing to him for life an income from one-half of her estate; to provide for her son by leaving him the estate absolutely, subject to the husband's income; and, if her son died before his father, that the husband should have the income of the whole estate for his life, and at his death the estate should go * * * at once to the charitable institution,

that is to say, that if they did not survive her, the property on her death was immediately to take that destination."

The principle announced is supported by a citation of cases and quotations therefrom, based upon similar facts, among them, being the case of *Robison v. Female Orphan Asylum*, 123 U. S. 702, 8 Sup. Ct. 327, 31 L. Ed. 293.

"In that case *Robison* left a will providing, thirdly, that his widow should have the income of all his estate, with the right to spend it, but not to have it accumulate for her heirs; fourthly, that if his sisters, *Ann Smith* and *Eleonora Cummings Robison*, 'be living at the death of myself and wife, *Jane S. Robison* aforesaid, that they or the one that may be then living shall have the income of all my estate so long as they may live, and at their death to be divided in three parts, one-third part of the income to go to the *Portland Female Orphan Asylum*,' and one-third to each of two other institutions. Both sisters died before the testator."

In construing this will and determining to whom the property passed under the facts the court, after stating that the question was one "of the reasonable interpretation of the words of the particular will, with the view of ascertaining through their meaning the testator's intention," ruled that:

The fact that the sisters died before their brother, the testator, "whereby the legacy to them lapsed altogether, is not material, because if property be limited upon the death of one person to another, and the first donee happen to predecease the testator, the gift over would, of course, take effect, notwithstanding the failure, by lapse, of the prior gift"; that unless it appeared on the face of the will 'that the gift to the defendants was not intended to take effect unless the prior gift to *Ann Smith* and *Eleonora Cummings Robison* took effect, the former must be considered as taking effect in place of and as a substitute for the prior gift which, by reason of the contingency, has failed'; and that, considering the third and fourth subdivisions together, the limitations were to be taken as a complete disposition of his estate in the mind of the testator, who did not intend to die intestate as to any portion thereof, giving to the widow an estate for life, with an estate over for life to the sisters, contingent on surviving the widow, and with the ultimate remainder to the charitable institutions."

In the case of *Newell v. Nichols*, 12 Hun (N. Y.) 604, affirmed in 75 N. Y. 78, 31 Am. Rep. 424, it was held that:

"Where a devise is limited to take effect upon a condition or contingency annexed to a preceding estate, if that preceding estate should not arise, the remainder over will take place; the first estate being considered as a preceding limitation, and not as a preceding condition. * * * As when a testator meant to dispose of all his property and uses the words 'if the legatee should not survive,' held to mean 'if the preceding legacy should from any cause fail.'"

This holding in *Newell v. Nichols* is approved by the Supreme Court of the United States in the case of *Young Women's Christian Home v. French*, supra, and the court, after citing and reviewing several other analogous cases, and after reviewing and discarding the conclusions reached in *Underwood v. Wing* and *Wing v. Angrave*, 19 Beav. 459, 4 Deg. M. & G. 632, 8 H. L. Cas. 183, says:

"As in all of these cases, so in this, we are remitted to the language of the will to ascertain the intention of the testatrix, and if that intention is clearly deducible from the terms used, taking the whole will together, then we are bound to give that construction which will effectuate, and not defeat, it. Reading this will from the standpoint of the testatrix, as we must, we think it not open to doubt that she intended to dispose of all her estate, and did not intend to die intestate as to any part of it; that she had in mind only three objects of her bounty, her husband, her son, and the home; and that her intention, failing husband and son, was that the home should take. If husband nor son survived, it was to go to the home at once. Is her manifest intention to be defeated because, instead of saying, 'If neither my husband nor my son should survive me, I give and bequeath my property to the home,' she said, 'In the event of my becoming the survivor of both my husband, *Oliver Wheeler Rhodes*, and of my son, *Eugene Rhodes*, I then give, devise, and bequeath all my property to the *Young Women's Christian Home*?' We do not feel compelled to so hold, and, by accepting so technical and literal a view, to reach an adverse result on the theory of a change in the burden of proof, or of an accidental omission to prevent it. This is not a case of supplying something omitted by oversight, but of intention sufficiently expressed to be carried out on the actual state of facts. And as the estates of persons perishing in a common disaster, intestate, notwithstanding the statutes of descent and distribution, may not have made provision in respect thereof, are disposed of as if each survived as to his own property, we think, upon principle, that the property of *Mrs. Rhodes* should go as directed as if she survived her son, in the absence of proof to the contrary."

The court also announced that:

"Whether in a given case a condition precedent, a condition subsequent, or a conditional limitation is prescribed is, in the absence of unmistakable language, matter of construction, and that conditions cannot be annexed from words capable of being interpreted as mere description of what must occur before the estate given can arise."

We have thus liberally quoted from the case of *Young Women's Christian Home v. French*, supra, for the reason we believe the principle therein enunciated and the language used peculiarly applicable to the instant case, and settles the controversy initiated thereby against the plaintiffs. But the decision of the question need not be rested alone upon that case. There are others, we think, not mentioned therein, that support the contention of defendants here. *St. John v. Andrews Institute*, 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708, appears to be in point. In that case *Andrews* made a will bequeathing his property to his wife, but provided that, if she should die before him, the property should go to the *Andrews Institute*. The testator and *Mrs. Andrews* perished together in a fire which destroyed their home, and the court having found that as between the husband and wife survivorship was unascertainable, and after announcing the rule that there is no presumption of survivorship in case of persons who perish by a common disaster, in the absence of proof tending to show the order of dissolution, held that there was no point of time when the title of *Mr. Andrews* was divested at which *Mrs. An-*

draws could have taken it, and that her simultaneous death was, in effect, the same as a death before his death, and the will of Mr. Andrews was therefore given effect in favor of the Institute.

In *Supreme Council of Royal Arcanum v. Kacer*, 96 Mo. App. 93, 69 S. W. 671, it is said:

"Whether based on a presumption of synchronous death or not, the law is settled that, if two or more persons are lost in the same catastrophe, and the ownership of property is afterwards drawn into litigation by contesting parties, each claiming to derive his right from one of the deceased persons as being the actual owner of the property when he died, and the question of which . . . turns on which survived longest, and there is no proof on that subject, the right to the property will be adjudged as it would be if it were known that both died at the same instant."

In 13 Cyc. 308, the rule that, where two or more persons perish in a common disaster, there is no presumption that one survived the other or that they died at the same moment, is stated, but it is further stated in that connection, sustained by many authorities cited, that:

"However this may be, it is certain that when two or more persons have perished in a common disaster, and there is no evidence as to which died first, the courts will dispose of property rights as though death occurred at the same time."

In *Loving v. Rainey*, 36 S. W. 335, decided by this court, the language of Mr. Redfield in his work on Wills, to the effect that, "where the words of a will are in the form of a condition precedent, but the intention of the testator as collected from every part of the will clearly indicates a different purpose, the latter will prevail," is quoted with approval.

So we think the authorities from which the foregoing quotations are taken establish, as in effect argued by counsel for defendants, that where the maker of a will and his primary devisee die in a common disaster, and there is no proof as to the order of death, the primary devisee will be treated as not surviving, and the gift to the secondary or substituted devisee shall take effect; that when the condition or limitation upon which the second devisee shall take is stated as the death of the primary devisee "before" the testator, and there is no evidence as to which died first, the condition or limitation is satisfied by the death of both the testator and the primary devisee in a common disaster. It is very plain, we think, that it was

not the intention of either Mr. Skinner or Mrs. Skinner to make the devise of their property to their adopted son, Carnagie Frank Skinner, depend upon a condition precedent which would admit of the property going to third persons. They manifestly had in mind only three objects of their bounty: Upon the part of Mr. Skinner, his wife, his adopted son, and the Buckner's Orphan Home and the Julia Fowler Orphans' Home; upon the part of Mrs. Skinner, her husband, her adopted son, and said homes—the intention of each being that, if for any reason the primary devisee could not receive the property, then it should go to the adopted son, the boy whom they had raised and for whom they evidently entertained great affection, and that, should neither the primary devisee named in the wills nor the adopted son be capable of receiving the property, then it was to go to the homes in the proportion devised. This being the clear intention of the testators, and both of them having died in the same calamity, and there being no proof as to the order of their dissolution, the wills stand as if they contained only the bequest to their adopted son. *Re Willbor*, 20 R. I. 126, 37 Atl. 634, 51 L. R. A. 863, 78 Am. St. Rep. 842. It necessarily follows, therefore, that the property devised by the wills passed to the defendant in error Carnagie Frank Skinner, and that the judgment of the district court denying the claim of plaintiffs in error was the proper one to be rendered.

As before indicated, we do not regard the ruling here made as being at variance with any former decision of the Supreme Court or Court of Civil Appeals. In no case cited by plaintiffs in error or known to us was the precise question involved in this case before the court. No similar question as to the construction of a will was involved in either of the cases cited, and it seems to us that no one can read the wills of Mr. and Mrs. Skinner without recognizing that, unless the primary devisee named lived to receive the gift intended, each purposed that it should pass to their adopted son, Carnagie Frank Skinner, and that in the event he was not living to receive the gift, it should go to the orphans' homes. We therefore readily follow the sound and just rule announced in *Young Women's Christian Home v. French*, supra, and other similar cases, and affirm the judgment of the court below.

Affirmed.

FIRST STATE BANK OF AMARILLO v. COOPER et al. (No. 817.)

(Court of Civil Appeals of Texas. Amarillo. June 26, 1915. Rehearing Denied Oct. 9, 1915.)

1. APPEAL AND ERROR — 1040 — HARMLESS ERROR—RULINGS ON PLEADING.

In an action on a note, error, if any, in overruling plaintiff's exception to a part of defendants' answer, because not presenting the issue of fraud, was harmless, where that issue was presented by the supplemental answer, on which the case was tried.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. — 1040.]

2. EVIDENCE — 434—PAROL EVIDENCE—NOTE—FRAUD.

Where fraud was alleged in the answer of sureties to an action on a note with respect to the plaintiff's representation as to the application of collateral to the note, parol evidence of the agreement was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. — 434.]

3. PRINCIPAL AND SURETY — 156—ACTION—ANSWER—ISSUES.

In an action against a surety on a note, the answer alleged that at the time of its execution the plaintiff had certain collateral, that defendants asked plaintiff as to it and were assured by the president of plaintiff that part of the collateral was being collected, and that the amount collected would be credited on the note, and that the part not collected would remain as security for the note. *Held*, not a defense to the note, but a recital of statements that the collateral would be held to secure the note.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 423-426; Dec. Dig. — 156.]

4. PRINCIPAL AND SURETY — 156 — ACTION AGAINST SURETY—ANSWER—CERTAINTY.

In an action against a surety on a note, an answer failing to specify the collateral which plaintiff was alleged to have misapplied, and alleging that defendants were unable to give a more accurate description of the collateral notes, or what part of them had been so used, and that such notes were in the hands of the plaintiff, who was in a position to know the description of it, was not objectionable, as indefinite and uncertain.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 423-426; Dec. Dig. — 156.]

5. APPEAL AND ERROR — 1046—TRIAL — 25—ARGUMENT—RIGHT TO OPEN AND CLOSE.

Under rule 31 for district and county courts (142 S. W. xx) providing that plaintiff shall have the right to open and close, unless the burden of proof under the pleadings rests upon the defendants, or the defendants make the admission of record at the stage prescribed by the rule, including the provision of Rev. St. art. 1853, relating to the argument, plaintiff bank, in an action on a note, where defendant had the burden of showing its right to recover, that defendants were liable because of their interest in a company, and their assumption of its debt, and where plaintiff had the burden of showing a proper application of the proceeds of collateral, and an agreement that the proceeds were to be applied upon two different debts, the granting to defendants of the right to open and close was reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4131, 4134; Dec. Dig. — 1046; Trial, Cent. Dig. §§ 44-75; Dec. Dig. — 25.]

6. TRIAL — 85—ADMISSION OF EVIDENCE—OBJECTIONS—EVIDENCE ADMISSIBLE IN PART.

There was no error in overruling an objection to the whole of testimony, part of which was admissible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 222-225; Dec. Dig. — 85.]

7. EVIDENCE — 471, 472—FACT OR CONCLUSION.

In an action on a note, where one of the issues of fact and law made by the pleadings was whether one M. was a principal or a surety, his statement that he was a surety involved a legal conclusion from the facts and circumstances of the transaction, and invaded the province of the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2195, 2248; Dec. Dig. — 471, 472.]

8. BILLS AND NOTES — 511—ACTION—ISSUES AND EVIDENCE.

In an action on a note, with an allegation of an agreement that the collateral should be divided between the note and another, evidence that a defendant, at the time the agreement was made, objected to switching any of the collateral to protect the other note, was admissible.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1760-1770; Dec. Dig. — 511.]

9. BILLS AND NOTES — 499—ACTION—BURDEN OF PROOF.

In an action on a note, defendants, whose pleadings raised the issue that plaintiff had failed to account for certain collateral, and sought relief to the extent of the value thereof, had the burden of showing the value of the securities not accounted for.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1682, 1695-1697; Dec. Dig. — 499.]

10. TRIAL — 252 — SUBMISSION OF ISSUES — EVIDENCE TO SUPPORT.

In an action on a note, where there was no evidence to support the issue as to whether plaintiff had failed to account for collateral, it should not have been submitted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. — 252.]

11. TRIAL — 191 — INSTRUCTIONS — ASSUMPTION OF FACT.

In an action on a note, an instruction that if the note was executed by two of the defendants on condition that it should not be delivered or be effective until a company and the other defendant should sign as principals, and should be held until such condition was complied with, defendants would not be liable on the note, was not objectionable, as assuming that the court thought that the first two defendants were sureties.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. — 191.]

12. PRINCIPAL AND SURETY — 27—DELIVERY—CONDITIONS.

Two signers of a note as principals had the right to sign and deposit it with the payee, on condition that it should not become valid until other principals had signed it.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 56; Dec. Dig. — 27.]

13. APPEAL AND ERROR — 699—INSTRUCTIONS—HARMLESS ERROR.

In an action on a note, where it appeared that defendants had given three separate notes for the debt in question, one dated April 25, 1912, renewed by note dated November 1, 1912, and again renewed by the note in suit dated April 1, 1913, and the court on appeal could not

determine upon the record upon which note the general verdict was based, it could not determine whether or not the failure to give charges intended to instruct with reference to the rights of plaintiff under each of the notes was error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2928-2930; Dec. Dig. 699.]

14. APPEAL AND ERROR 6928 — PRESUMPTION IN SUPPORT OF JUDGMENT.

In the absence of any information enabling it to determine error in the refusal to give charges, the presumption must be in support of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. 928.]

15. TRIAL 6194—INSTRUCTION—WEIGHT OF EVIDENCE.

In an action on a note, where there was a dispute as to whether or not other collateral had been substituted for the stock of defendant's company, the refusal of a requested charge that the jury could not consider the capital stock of the company which had been put up as collateral, because part of it had been sold before the execution of the renewal note with knowledge of the defendants that the proceeds had not been applied, but that other collateral was substituted, was proper, as being upon the weight of the evidence.

[Ed. Note.—For other cases, see Trial. Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. 6194.]

16. BILLS AND NOTES 6430, 537—RENEWAL NOTES—EFFECT.

If either of two renewal notes constituted a novation, the note for which the renewals were given was no longer a binding obligation, and this was a question for the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1251-1256, 1862-1893; Dec. Dig. 6430, 537.]

Appeal from District Court, Potter County; Jas. N. Browning, Judge.

Action by the First State Bank of Amarillo, Tex., against W. P. Cooper and others. Judgment for defendants, and plaintiff appeals. Reversed, and cause remanded.

Turner & Rollins, of Amarillo, for appellant. Jones & Miller, of Amarillo, for appellees.

HALL, J. The original petition filed by appellant bank was to recover the amount due on a promissory note of \$2,500, dated April 1, 1913, bearing interest at 10 per cent. from date and providing for 10 per cent. attorney's fees, signed by W. P. Cooper, R. R. Wheatley, and Frank Morris, Jr. The note contained the usual provision waiving presentment for payment, notice of nonpayment, protest, etc. The following credits were admitted in the petition: \$587.50, paid August 26, 1913; a number of small credits from \$1 up to \$10, aggregating \$116.33, being dated from June 6, 1913, at various times, to November 8, 1913.

Defendants' original answer alleged in substance that the note sued upon was given in lieu of a prior note for the same amount, and that collateral to the value of \$2,500 had been put up with said previous note to protect the signers of the note in suit, and that

the defendants signed the note sued upon solely as sureties for an indebtedness due by Lankford Furniture Company; that at the time of the execution of the note in question, in suit, the president of plaintiff bank claimed to have collateral security, consisting of certain furniture notes due the Lankford Furniture Company, amounting to about \$1,700; that other such notes, worth about \$800, were in process of collection at Panhandle and other neighboring towns, and that something more than \$280 of said \$800 in notes had been collected; and that the bank would at once look up the exact amount and credit same on the back of the note in suit; that the remainder of the \$800 worth of collateral would remain as security to the note sued upon. It was further alleged that plaintiff bank, without defendants' consent, thereafter took away half, or about half, of the collateral notes, and applied them to the payment of another note due plaintiff bank, upon which defendants were liable; that plaintiff had been negligent in failing to collect the collaterals, by reason of which defendants had sustained a loss; that Frank Morris, Jr., took a number of the collateral notes for collection, some of which he collected, turning the proceeds over to the bank, amounting to \$264.65, which should be credited on the note sued on, together with about \$126.50 worth of furniture, which was sold by the bank and the proceeds of which should be applied as a credit. Defendants also claimed a further credit of \$280, being the amount which plaintiff admitted was in its possession at the time of the execution of the note in suit; that, if plaintiff did not have in its possession said \$800 worth of collateral notes, it perpetrated a fraud on defendants in making such representations; that, at the time the note in suit was executed, defendants signed it upon condition that the Lankford Furniture Company and H. C. Lankford individually would also sign it, and that this was never done, thereby releasing them.

Plaintiff filed several supplemental petitions, alleging, among other things, that the defendants were stockholders and directors in the Lankford Furniture Company, a corporation, which had become bankrupt prior to the execution and delivery of said note; that the indebtedness evidenced by the note had existed in varying amounts for several years, and that there was therefore no necessity for any new consideration in order to render defendants liable thereon; that the benefit received by them was the extension of time on the indebtedness already due. It is further alleged that, at the time the note described in the original petition was executed and delivered, plaintiff had certain collateral notes, which were attached to another note made by said Lankford Furniture Company, in the principal sum of \$1,175; that, at the request of defendants, plaintiff's president agreed with them that in the fu-

ture in would divide said collaterals in half whenever money should be collected thereon, crediting one half on the last-named notes and the other half on the note in suit; that this was done, and the credits made simply as a favor to defendants without any consideration or legal duty resting upon plaintiff to do so; that all sums of money paid by defendants through Frank Morris, Jr., to plaintiff, have been credited in accordance with said agreement, with the full knowledge and consent of all defendants.

By first supplemental answer, defendants, among other things, alleged that the note in suit was given in lieu of a note dated November 1, 1912, executed by the Lankford Furniture Company, H. C. Lankford, Frank Morris, Jr., R. R. Wheatley, and W. P. Cooper, in the sum of \$2,500, due and payable April 1, 1913; that it was executed in such manner as entitles the defendants to all of the defenses urged to the note originally sued upon and that they set up all of said defenses to said note of April 1, 1913, and further pleaded that said note was delivered with collateral notes worth \$2,500, which last-named notes were secured by contracts and written liens on furniture sold by the Lankford Furniture Company; that large sums were collected on said collateral notes and the proceeds not applied to either of said notes; that the collaterals were changed several times by plaintiff or its agents, substituting for the original collateral others of a later date; that the note sued upon and set out in the original petition was procured through fraud and fraudulent representations on the part of the plaintiff, to the effect that the signature of the Lankford Furniture Company and H. C. Lankford would be secured thereto, and that the bank would immediately ascertain the amount collected upon collaterals and credit thereon, and that all collateral notes would remain with the note last executed, and but for such fraudulent representations the note first sued upon would not have been executed.

In its last supplemental petition, plaintiff prayed in the alternative that, if it should be held that it was not entitled to recover upon the note described in the original petition, then that it be allowed to recover upon the note for which it was substituted, dated November 1, 1912. There was a trial before a jury, resulting in a general verdict for the plaintiff in the sum of \$100.98, and from a judgment entered accordingly this appeal is prosecuted. There is nothing in the record to indicate upon which note the jury based the verdict.

[1, 2] The first assignment is based upon the action of the court in overruling plaintiff's special exception to all that part of the answer alleging that the president of bank told defendants that \$800 worth of collateral was in process of collection and that something more than \$280 of said amount had been collected, and that the exact amount would be looked up at once and credited on

the back of the note. Appellant insists that the effect of this allegation is to vary the terms of the written note signed by defendants by oral evidence, and that the effect of the evidence was to prove an amount really different from that stated in the face of the obligation. Fraud in the execution of the note, described in the original answer was not alleged therein; but in the first supplemental answer (which repeats many of the facts set up in the original answer, and by reference to the original answer urges the defenses there set up to the note originally sued upon also in defense of the note dated November 1, 1912), it is alleged that the statements made by plaintiff's president, to the effect that the amount collected upon the collateral would be looked up and credited on the renewal note, were fraudulently made. The error of the court, if any, in overruling this exception, is harmless. The issue of fraud being squarely presented by subsequent pleadings, and the case having been tried with reference to the issues contained in such supplemental pleadings, no injury has resulted by the court's ruling. In *Ablowich v. Bank*, 22 Tex. Civ. App. 272, 54 S. W. 794, it is said:

"No fraud, accident, or mistake in execution was alleged and we must indulge the legal presumption that all prior agreements, so far as assented to, had been merged in the written instruments executed, and that they contained the exact terms upon which the minds of both parties thereto met. The instrument sued upon evidenced an absolute promise to pay \$450 within a specified time, without condition, and we do not think it was competent to show by parol that the agreement in effect contained a condition upon which a less sum was to be paid."

We must imply from the language quoted that, in accordance with the general rule, if fraud, accident, or mistake had been alleged, parol evidence of the agreement would have been admissible. This assignment is overruled.

In effect the same contention is made under the fourth and seventh assignments. It seems clear to us that, if the appellees signed the last note for an amount greater than was actually due, but upon the assurance that the proper credits would be made thereon, thereby reducing it to the correct amount, and their pleadings alleged fraud on the part of the bank president in making such promise, it is a matter of inducement which they are entitled to prove. These assignments present as error the action of the court in not sustaining a specific exception to one paragraph in the original answer, setting up the execution of the note and the statement by the president that the proper credit would be made, but in which no allegation of fraud is found. Technically, this paragraph of the answer was insufficient; but if fraud is set up elsewhere in the answer, or by supplemental pleadings, as appears to be the case here, we think no harm has been done by the ruling of the court in this instance. The fourth and seventh assignments are also overruled.

[3] The fifth paragraph of defendant's answer is as follows:

"Defendants allege that at the time of the execution of the note sued upon the plaintiff bank had as collateral for the same \$1,700 worth of the same paper that was placed up with said previous note, and defendants asked the plaintiff, through its president, what had become of the remaining portion of said collateral security, to wit, the \$800 worth of collateral notes, whereupon the said president, who was the duly authorized agent and representative of the plaintiff bank, told the defendants and informed them that said \$800 worth of collateral was in process of collection, some of it being at Panhandle and at other places, and that something more than \$280 of said \$800 worth of collateral notes had been collected, and that the bank would at once look up the exact amount that had been collected and credit the same on the back of said notes as the various items were shown on the bank book, but that it would take some little time to figure up the exact amount, and that the remaining portion of the \$800 worth of collateral would remain as security for said note sued upon, making the entire amount equal to the notes; that said collateral notes were of the value of \$2,500, and said \$1,700 worth of notes were in the bank at said time, and were to be as collateral for said previous note, and were placed as collateral for the note involved in this suit, and the remaining portion of said collateral was to be held, as above explained, to secure the payment of the note in suit, though said additional collateral notes were out in process of collection."

The objection urged in the exception to this paragraph is:

"It seeks to vary the terms of the written note, signed by defendants, by oral evidence, and thus defeat the payment of the amount shown to be due by said note, and does not set up any defense worthy of being considered by this court, or that could properly be urged to defeat the payment of the said note, or any part thereof."

In the absence of any allegation of fraud, this paragraph of the answer should have been stricken out. We are unable to agree with appellant in its construction of the language. As we understand appellee's allegation, referring to the \$1,700, it is not an effort to set up a defense, but merely a recital of the statements made by the bank's president as to the existence and location of the collateral notes and as assurance that they would be held to secure the note for \$2,500. Reference to the bill of exception shows that the evidence did not sustain the allegation in full. Of course, if the language used by the pleader means what appellant claims it does, the exception should have been sustained; but, as we understand it, the assignment is without merit.

[4] Under the third assignment, appellant insists that paragraph 2 of the defendant's first supplemental answer is too indefinite and uncertain, in that it fails to particularize the collateral which it is alleged was misapplied and changed from one note to another by the bank. Appellees excuse their inability to point out the particular note or notes and other collaterals which had been collected and misapplied by the following allegation:

"These defendants are unable to give a more accurate description of said \$2,500 worth of notes, which were attached to that note and put up with the same as security; but they say that a part of the same was the same collateral as they put up with the note originally sued on by plaintiffs, but the defendants are unable to state what part of the same was so used, but they allege that said collateral notes were at all times in the hands of plaintiff bank, and they were in position to know the description of the same and the contents of the same."

A pleader is not required to allege matters peculiarly within the knowledge of the opposite party, and which he shows a good excuse for not being able to state. *Florida Athletic Club v. Hope Lumber Co.*, 18 Tex. Civ. App. 161, 44 S. W. 10.

[5] In the fifth assignment complaint is made of the action of the court in permitting defendants to open and conclude in the introduction of evidence and in the argument of the case. From the brief synopsis of the pleadings, which we have heretofore made, we think the burden of proof of the whole case rested upon the plaintiff. Rule 31 for the government of district and county courts (142 S. W. xx) provides that the plaintiff shall have the right to open and conclude, both in adducing his evidence and in the argument, unless (1) the burden of proof of the whole case under the pleadings rests upon the defendant; or (2) the defendant make the admission of record at the proper stage of the proceedings prescribed by the rule. This rule, as originally promulgated (47 Tex. 623), did not contain in the first clause the words:

"Unless the burden of proof of the whole case under the pleadings rests upon the defendant."

This language was no doubt added in the revision, in order that the rule might include the provisions of article 1953, Revised Statutes, on this subject. The rule relates to both the evidence and the argument, but the statute relates to the argument alone. *Hittson v. Bank* (Sup.) 14 S. W. 780. The bill of exceptions under this assignment shows that appellee declined to make the admission required by the rule. We therefore conclude that the court permitted them to open and close upon the idea that the burden of proof upon the whole case under the pleadings rested upon them. The decisions in cases where the defendant made the required admission, or endeavored to do so, in order to gain the right to open and close, have little or no bearing upon the question here presented. The first part of rule 31 merely states the common rule with reference to the onus probandi and the incident right to open and close. The note to *Brunswick & W. R. R. v. Wiggins*, 61 L. R. A., 513, 563, states and discusses what we understand to be the common-law rule thus:

"In Best's little work, 'Right to Begin and Reply,' it is stated that by the affirmative of the issue is meant the affirmative in substance, and not the affirmative in form; i. e., that the judges, in examining the record in order to see on

whom the onus probandi lies, and consequently in whom the right to begin resides, will consider, not so much the form of the pleadings, as the substantial question between the parties, and will cast the onus probandi on the party with whom the real affirmative seems to lie. The author then goes on to give two cases which afford, in terms, two different tests for the discovery as to with which party the affirmative lies, and states that they are the same proposition in different dresses. In the first of the cases mentioned, *Amos v. Hughes* (1835) 1 Mooly & R. 464, the test was laid down by Alderson, B., to be which party would be successful if no evidence at all were given, as upon the opposite party would necessarily rest the onus probandi, and, according to the author, the consequent right to begin. In the other case, *Willis v. Barber* (1834) 1 Mees. & W. 425, 5 Dowl. P. C. 77, 2 Gale. 5, 5 L. J. Exch. N. S. 204, the same judge, in holding that a defense to an action on a bill of exchange against the acceptor that the bill had been accepted without consideration for the accommodation of the drawer, and had been subsequently indorsed to the plaintiff without consideration, * * * placed the onus probandi on the defendant notwithstanding the affirmative shape of the replication, said: "The replication is in the affirmative, but it is in answer to a negative. Upon the question as to who is to begin, is it not the proper test to examine whether, if the particular allegation be struck out of the plea there will or will not be a defense to the action?" Thus the two general rules * * * are: (1) To conceive the negative and affirmative allegations by which the issue is joined both struck out of the record, and then the onus probandi lies on the party against whom the judgment must, in their absence, pass; (2) to consider at the trial which party would succeed if no evidence at all were given, as the onus probandi must lie upon his adversary. In the natural course of litigation this burden and right usually reside with the plaintiff, the party who initiates the action, proceeding or suit; and, this being so, it follows that, so long as the affirmative of any substantial issue, however slight, remains with the plaintiff, he retains the right to open and close, even though the affirmative of a majority of such issues is with the defendant. * * * Whenever the general issue is in the case, the plaintiff has the right to open and close. * * * The result of an examination of all the authorities on the subject shows that the general rule or principle at common law is that, where the defendant does not admit the entire demand of the plaintiff, and where there are several issues, if the plaintiff is called on to maintain a single one, he retains and has the right to open and close; * * * that the burden of proof, with its incident right to open and close, naturally and necessarily is, in the first instance, with the plaintiff, or party who initiates the action, suit, or proceeding, and remains with such party so long as it continues incumbent on him to make any proof whatever; that when the defendant, either by an admission in express and absolute terms, or by refraining from denial of plaintiff's cause of action and alleging affirmative matter in avoidance of it, renders it wholly unnecessary for the plaintiff to give any evidence whatever to have a complete recovery of all that he claims, the burden and right are with the defendant."

The rule is further illustrated by the Supreme Court, in *Kennedy v. Upshaw*, 66 Tex. 442, 1 S. W. 308, where appellee offered a will for probate. Appellant contended that the instrument offered by appellee and the codicil offered by him (appellant) should be taken together and probated as the last will of the deceased. The appellee charged that the codicil was a forgery, and Judge Stayton

held that in this state of the pleadings the appellee had the burden upon the whole case. To the same effect is the holding in *Heath v. First National Bank*, 19 Tex. Civ. App. 63, 48 S. W. 123. In the instant case, notwithstanding the admissions in appellees' original answer and supplemental pleading, the burden rested upon appellant to show its right to recover upon one of the notes declared upon; that defendants were liable because of their interest as stockholders in the Lankford Furniture Company, and their assumption of the debt and the pleadings of defendants necessarily cast upon them the burden of showing a proper distribution and application of the proceeds of the collaterals, as well as the agreement that the proceeds were to be applied upon two different debts. The right to open and close is a valuable right and especially so in cases where the issues of fact are clearly drawn and sharply contested, as in the instant case. We think the court committed reversible error in granting the right to appellee. *Cunningham v. Daves*, 141 S. W. 808; *Meade v. Logan*, 110 S. W. 188; *Sanders v. Bridges*, 67 Tex. 93, 2 S. W. 663. In the case last cited, Wille, Chief Justice, said:

"The right of which he was deprived is statutory, and in this case may have been of importance to the plaintiff, and we cannot say that his rights were not prejudiced in being deprived of his proper position in the trial of the cause."

The correct rule we think is announced in *Ann. Cas. 1912D, 254*, note, where it is said:

"In Texas * * * it seems to be the rule that the denial of the right to open and close is not a ground for reversal, if it is apparent from the record that no injury resulted, but that if it is not so apparent a new trial will be granted."

[6] Appellant insists that the court erred in permitting the defendant Wheatley to detail a conversation alleged to have taken place between himself and Le Master, president of appellant bank. This contention is made the basis of the sixth assignment of error. Most of the evidence objected to we think was admissible, under the issue, tendered by appellees' pleadings, that the proceeds of some of the collateral attached to the debt as evidenced by the various notes, had been misapplied by the bank. The objection being to the whole of the testimony and part of it being admissible the court did not err in overruling the objection. *Wandelohr v. Grayson County National Bank*, 106 S. W. 413; *Id.*, 102 Tex. 20, 108 S. W. 1154, 112 S. W. 1046.

[7] The defendant Morris was permitted to testify that he signed the note of April 1, 1913, as a surety. We think this was error. One of the issues made by the pleadings is whether Morris was a principal or a surety. Appellant contended that he had executed the note under circumstances which made him liable as a principal debtor. His status and relation to the debt was a mixed question of law and fact, and the effect of his testimony

was a construction of the agreement under which he signed and we think invaded the province of the jury. His statement that he was a surety involved a legal conclusion from the facts and circumstances surrounding the transaction. *Connor v. Uvalde National Bank*, 172 S. W. 175; *McClung v. Watson*, 165 S. W. 532; *Sackville v. Storey*, 149 S. W. 239.

[8] Under the ninth and tenth assignments appellant complains of the admission of certain evidence from the defendant Wheatley, in which Wheatley objected to switching some of the collaterals to protect a note of \$1,100. The evidence is as follows:

"The night before we decided to throw Lankford Furniture Company into bankruptcy there was a meeting of a bunch of us in the Lankford Furniture shop and we talked the matter over. We talked in regard to the collateral security of the \$2,500 on the note. Mike (Le Master) said he would switch it to another note at the time, and I said, 'You won't do no such thing.' We talked about something else then, and Mr. Zimmerman brought the matter up, and said we ought to help the bank out, and Mike said he would switch the collateral security from that \$2,500 note, and I spoke up and said he would do no such thing. I said, if the bank had to lose their amount, I will keep my part of the balance, whatever it is, and take care of our home people, and let the others suffer."

[9] In the thirteenth paragraph of the first supplemental petition appellant alleged that there was an agreement that the collateral should be divided between the \$2,500 note and the \$1,175 note, and we think this testimony was pertinent and admissible upon that issue. A material issue made by the pleadings was that the plaintiff had failed to account for certain collateral securities held by it as security for the indebtedness of the defendants, and defendants sought relief to the extent of the value thereof. This issue having been raised by defendants, the burden of proof was upon them to show the value of the securities unaccounted for, and no evidence was introduced upon that point.

[10] The fifth paragraph of the main charge authorized the jury to find for plaintiff, less the reasonable value of any such collaterals not accounted for. There being no evidence to support the issue, it should not have been submitted.

[11, 12] Complaint is made in the twelfth and thirteenth assignments of paragraph 3 of the court's charge, as follows:

"If you find and believe from a preponderance of the evidence that the note dated April 1, 1913, was executed by the defendants R. R. Wheatley and Frank Morris, Jr., on the condition and agreement that the same should not be delivered or become effective until H. C. Lankford Furniture Company and H. C. Lankford should sign the same as principals, and that the same was to be held until such condition was complied with, then in such event the said defendants would not be liable upon said note, and you will, if you so find and believe, return your verdict in their favor upon this issue."

There is nothing in this charge which indicates that the court thought Wheatley and Morris were sureties. In our opinion the

charge does not assume that fact. Even though Wheatley and Morris be considered as principals, they had the right to sign the note and deposit it with the payee, upon condition that it should not become valid and binding until other principals had also signed it. The charge is not subject to the criticism. *Merchants' National Bank v. McNulty*, 31 S. W. 1091; *Parker v. Naylor*, 151 S. W. 1103. This also disposes of the fourteenth assignment.

The fifteenth assignment is disposed of by what we have said with reference to the first, fourth, and seventh assignments.

[13, 14] Under the sixteenth and eighteenth assignments appellant complains that the court refused to give two special charges with reference to the alleged failure of the plaintiff to exercise diligence in collecting the collateral securities. It appears that the defendants had given three separate notes for the debt in question—one dated July 25, 1912, which was renewed in a note dated November 1, 1912, and again renewed by note described in the original petition, dated April 1, 1913. We agree with appellant that, if for any reason defendants could escape liability on the note last signed, they might nevertheless be liable on the note immediately preceding it, and, if relieved from liability on that note, they could probably then be held on the first note executed. These special charges were intended to instruct the jury with reference to the rights of the plaintiff under each of the notes; but since the verdict was a general one, and we are not able to determine from the record upon which note it was based, we cannot, of course, decide whether or not the failure to give either of the charges was error. If the finding of the jury was based upon the note last executed, the failure to give the charge was harmless, but if upon the first or second note we think the charges should have been given. In the absence of any information upon this point, the presumption must be in support of the judgment.

Appellant requested special charge No. 6, to the effect that the jury should disregard all evidence on the question of whether the bank had failed to collect and apply the proceeds of certain collateral notes, because the evidence was too general, and did not show with sufficient certainty any amount which the bank had failed to collect or apply, and because the evidence further failed to show what notes could have been collected by diligence and were not so collected. This charge was clearly upon the weight of the evidence and should not have been given.

[15] Appellant also requested the court to instruct the jury not to consider the capital stock of the Furniture Company, which had been put up as collateral, in making their verdict, because it had been admitted on the trial that \$1,500 worth of it had been sold prior to the execution of the note dated No-

vement 1, 1912, with full knowledge on the part of the makers that the stock had been sold and the proceeds not applied, but that other collaterals were substituted for the same and accepted by the defendant in lieu thereof. There seems to be some dispute in the record as to whether or not other collaterals had been substituted for the stock, in which event the charge would have been upon the weight of the evidence. Of course, if there was no dispute upon the question, the charge should have been given.

[10] Under the last assignment it is insisted that the verdict is contrary to the law and evidence, in that it was shown that Wheatley was bound by the note executed December 1, 1911, and was therefore without regard to any agreements thereafter made with reference to the renewal notes, liable upon the debt as originally created and that after allowing the credits, to which he may have been entitled, from the amounts collected on collateral notes, judgment should have been rendered against him in any event for the balance. If either of the renewals constituted a novation, then the note for which the renewal was substituted was no longer a binding obligation, and this is a question which should have been submitted to the jury. *Rushing v. Bank*, 162 S. W. 460; *Heath v. First National Bank*, 19 Tex. Civ. App. 63, 46 S. W. 123.

For the errors pointed out, the judgment is reversed, and the cause remanded.

BOOTH et al. v. CITY OF DALLAS et al.
(No. 7493.)

(Court of Civil Appeals of Texas. Dallas.
July 3, 1915. Rehearing Denied
Oct. 10, 1915.)

1. LICENSES — 5½ — POWER OF CITY — CHARTER — MOTOR BUS.

The city of Dallas, under its charter power to license and regulate enumerated occupations, and all other occupations which, in the opinion of the board of commissioners, should be the proper subject of police regulation, and to regulate the use of automobiles or any motor vehicles and the use of its streets, could fix an annual license tax of \$75 for the privilege of operating a motor bus over its streets.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. — 5½.]

2. LICENSES — 1 — MOTOR BUS — REASONABLE LICENSE OR TAX.

An annual license fee of \$75, fixed by ordinance for the privilege of operating a motor bus in the streets of a city, where the cost of inspection and regulation would be in excess of the amount realized from the fees, was a reasonable fee based on the cost of regulation, and not objectionable as a tax.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 1; Dec. Dig. — 1.]

3. CONSTITUTIONAL LAW — 208 — EQUAL PROTECTION OF LAWS — DISCRIMINATION.

Class legislation, affecting a particular class, is not unenforceable for that reason alone, since the Legislature has the right to classify persons or subjects for taxation or regulation, which right includes the right to ex-

empt. The test of the validity of laws directed against a class is that the same means and methods be applied impartially to all the members of the class, so that it shall operate equally and uniformly upon all.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 649-677; Dec. Dig. — 208.]

4. LICENSES — 7 — MOTOR BUS — DISCRIMINATION.

An ordinance imposing an annual fee of \$75 for the privilege of operating each of about 500 motor busses over its streets, not sufficient to pay the expenses of inspection, regulation, etc., subjecting the drivers to a rigorous physical and mechanical examination, regulating the number of passengers, requiring them to select a fixed route and operate thereon at least six hours a day, was not discriminatory, in comparison with an ordinance imposing an annual license fee of \$10 on each of about 100 motor vehicles, known as "rent cars," allowed to stand upon the streets only at certain places and certain hours, not operated over fixed routes, and charging a greater fare, regulated by the city, since they were engaged in different classes of street traffic.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15, 19; Dec. Dig. — 7.]

5. CONSTITUTIONAL LAW — 88 — PERSONAL RIGHTS — LIBERTY — BUSINESS OR VOCATION.

An ordinance for the regulation of motor busses, providing that a bus should be operated along the termini designated by the operator for at least six consecutive hours a day, such operation to be in accordance with the terms of the ordinance, and making it unlawful to operate any motor bus on any other street or route than that designated in its license certificate, was not in derogation of the citizen's right to engage in any lawful pursuit of business.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 164, 165; Dec. Dig. — 88.]

6. MUNICIPAL CORPORATIONS — 591 — POLICE POWERS — DELEGATION — MINISTERIAL DUTIES.

A provision of an ordinance for licensing and regulating motor busses, that the operator of each bus should submit it to the city automobile inspector once every week, that if the inspector found it safe he should issue a certificate permitting its operation for one week, that if unsafe he should refuse such certificate, and making its operation without the inspector's certificate displayed thereon a penal offense, was not objectionable as an attempt on the part of the city to delegate the police power intrusted to it by the state.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1310; Dec. Dig. — 591.]

7. LICENSES — 29 — REGULATION OF MOTOR BUSES — CHARGE FOR LICENSE.

A city, having the right to charge a license fee reasonably commensurate with the cost of regulating motor busses, had the further right to make a charge of \$1 for any additional expenses resulting from the loss of the original certificate, or a change of route or of seating capacity.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 63; Dec. Dig. — 29.]

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Action for injunction by C. C. Booth and others against the City of Dallas and others. From the dissolution of a temporary injunction, plaintiffs appeal. Affirmed.

McCutcheon & Church and L. R. Challaway, all of Dallas, for appellants. C. F. O'Donnell and G. C. Adams, both of Dallas, for appellees.

RASBURY, J. This is an appeal from the action of the judge of the Sixty-Eighth district court in dissolving a prior temporary injunction. The action of the court as disclosed by the record was based upon substantially the following matters:

Prior to the commencement of this suit appellee the city of Dallas in the manner provided by its charter enacted an ordinance defining a motor bus, imposing a license for the privilege of operating same, regulating its use, declaring the unrestricted use thereof a nuisance, penalizing same, and declaring an emergency. A motor bus by the ordinance is declared to be:

"Any automobile, automobile truck or trackless motor vehicle engaged in the business of carrying passengers for hire within the city limits, * * * held out or announced by sign, voice, writing, device or advertisement to operate or run, or which is intended to be operated or run, over any particular street or route or to any particular or designated point or between particular points or to or within any designated territory, district or zone."

The ordinance also contains many other provisions, but only those, together with relevant collateral provisions, deemed necessary to a discussion of the issues presented on appeal will be detailed, and those so necessary will be related while discussing the particular issue to which they relate. After the several successive steps necessary for the legal enactment of the ordinance had been observed, and after same had been published in the official organ of the appellee city one of the three required times, appellants, Booth, Cochran, Birthright, and Smith, for themselves and approximately 500 others similarly situated, filed this suit against appellees, the city of Dallas and its commissioners, for the purpose of having said ordinance declared void and unenforceable, and sought pendente lite a temporary injunction restraining appellees from in any manner enforcing same. Upon ex parte hearing temporary injunction was granted, and appellees cited to appear subsequently and show cause why the temporary injunction should not be continued in force pending trial. At the time set there was a hearing, and the temporary injunction was dissolved.

The evidence adduced by appellants on the hearing tended to show that there was at that time 400 or 500 vehicles as defined by the ordinance being operated upon the streets of the city of Dallas, either by the owners or those who rented same, engaged in transporting passengers for hire from point to point in the city for a fare of 5 cents per passenger. Those so engaged had a fixed route or terminal, but would divert therefrom and make special journeys to any or all portions of the city upon terms agreed

upon between the operator and those seeking such service. The operators of these vehicles averaged a gross income of \$5.70 per day, with an average expense of \$3 per day, leaving approximately a net income of \$2.70 per day. Included in such earnings was whatever amount was secured from the special journeys above referred to, and for which special journeys the operators, as a rule, received greater compensation than they did for running over the fixed route. Those operators who testified at the trial gave it as their opinion, based upon their experience in the business, that a license fee of \$10 was sufficient, and that the number of vehicles engaged in the business could not successfully operate without being permitted to divert from their fixed route and make special journeys here or there, as demanded by the public.

The evidence adduced by appellees tended to show that the operators of the vehicles defined by the ordinance have greatly congested the city's streets with traffic in the downtown sections. Since the operation of such vehicles there have been numerous accidents in which such vehicles were concerned, and as a consequence of which persons have been injured and property damaged and destroyed. Many of the vehicles are old and worn. The operators run irregularly over their selected routes, and do not go to the limit thereof, but return as soon as they secure enough passengers to fill the car, taking them on at any point. Many of the vehicles are operated at a rapid and dangerous speed. Many of them transport passengers in double the number of their rated capacity, and after filling the body of the car they permit them to stand upon the running board. It was also shown that the cost of enforcing the regulatory provisions of the ordinance, including supervision, inspection, and police surveillance, would be in excess of the amount which could be realized from the license fee and other charges provided for in the ordinance.

It was further shown that there are in operation in the city of Dallas 75 or 100 motor vehicles designated by ordinance as "rent cars." There are two ordinances that regulate the right to operate these rent cars. Such regulations, material to the issues presented on appeal, are that such cars are required to pay a license fee of \$10 per annum and may stand upon the streets only at certain places at given hours. The evidence further shows that such cars do not operate over fixed routes, but stand at the places on the city streets fixed by ordinances or in garages from whence they are called by those desiring their services. These vehicles charge a much greater fare for their services than the motor bus, such charges being regulated by the city.

[1] We will consider first the attack on section 6 of the ordinance. Said section

fixes an annual license fee of \$75 for the privilege of operating a motor bus over the streets of the city. This charge is declared to be void for many reasons; the first in natural order being the claim that the city's charter did not authorize same. By article 2, section 3, subdivision 24, of its charter, the city has authority, among other things, to license and regulate, in addition to the businesses and occupations therein enumerated, "all other business or occupations whatever, which in the opinion of the board of commissioners shall be the proper subject of police regulation." By subdivision 33 of the same article and section authority is conferred upon the city "to regulate the use of automobiles, motor cars, motorcycles, or any motor vehicles. * * * " By subdivision 4 of section 7 of the same article there is conferred upon the city, in addition to certain enumerated things, the further right "to regulate the use" of its streets. These provisions are specific grants by the state of its police power, intrusted to the city for its exercise and enforcement. From these grants it is clear that the city has complete dominion over the entire subject in controversy in this suit, since it has the right to regulate every conceivable kind of motor vehicle, the right to control and regulate the use of its streets by such vehicles, and the right to license and regulate all occupations. So broad and comprehensive are the specific grants that the right of the city to fix a license fee against those operating the motor bus is not dependent upon the quoted grants as a whole, but, in our opinion, can be sustained by authority of any one thereof. The right to regulate the use of the city's streets, or the right to regulate the use of all vehicles upon the city's streets, is broad enough to authorize both the regulation of the motor bus and the imposition of a fee for the privilege of such use. We said as much in *Southwestern Tel. & Tel. Co. v. City of Dallas*, 174 S. W. 636. That the city would have the right to fix the license fee under the express provision permitting it to license and regulate every conceivable business or occupation seems too clear for discussion. The charter grants that much authority, the Constitution does not forbid it, and the operating of a motor bus is an occupation or business. Further, the right to prescribe a license in such cases is not an open question in this jurisdiction, but has been repeatedly sustained in cases enacted under charter provisions no broader than those contained in the grant to the city of Dallas. We therefore feel that a discussion of the reasons for the rule and its applicability in the instant case is unnecessary, since in the cases presently cited those matters are fully discussed and many other authorities cited. *Ex parte Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516; *Klassinger v. Hay*, 52 Tex. Civ. App. 295, 113 S. W. 1005; *Ex parte Denney*, 59 Tex. Cr. R. 579, 129 S. W. 1115.

[2] It is next urged that the license fee is unreasonable and arbitrary, because in fact a tax, though denominated a license fee, in order to cloak and conceal its real purpose. If the conclusions stated in the proposition were supported by or fairly deducible from the evidence, it would present a serious issue. There is, however, in the record no evidence that tends to support the contention. We have said at another place that appellant's testimony tended to show that they could not pay the tax and profitably operate the motor bus. Incidentally such fact might result from many causes, conceivably competition or a fare out of proportion to the cost of operation, but which would in no respect lessen the expense of regulation, or make regulation any the less necessary. We have also said at another place that the evidence of appellees tends to show that the cost of supervision, inspection, and police surveillance would be in excess of the amount realized from the fee prescribed. No one seems to challenge the necessity of regulation on any of the many authorized grounds. The details of the evidence from which such conclusion is deduced, and the truth of which is not challenged, reveals that it is based upon the increased number of officers necessary to be employed as a result of so large an additional number of public vehicles upon the streets and the purchase of additional motorcycles to be used in that connection. This evidence shows that the sum charged is reasonable, in view of the added expense, and no testimony challenging same was offered by appellees. The unchallenged testimony being as stated, it results that the license fee is not in truth a tax, but purely a charge based upon the cost of regulation. *Ex parte Gregory*, supra; *Brown v. City of Galveston*, 97 Tex. 1, 75 S. W. 488.

[3, 4] The next issue presented is the familiar and necessarily oft-recurring claim that the ordinance is discriminatory, in that all persons subject to its provisions are not treated alike under like circumstances, and hence denies to appellant that equal protection of the law guaranteed alike by our state and national Constitutions. In the recent case of *Southwestern Tel. & Tel. Co. v. City of Dallas*, supra, we stated that the general rule, gathered from the decisions of the appellate courts of this state, those of the Supreme Court of the United States, the courts of the other states of the Union, and the text-writers, which were cited, is that "class legislation or laws that affect a particular class are not unenforceable for that reason alone," since "the right of the Legislature to classify persons, corporations, or subjects for taxation, regulation, or restriction in the broadest sense is not an open question under either our state or national Constitution, and the right to classify includes the right to exempt, as does the right to exempt include the concurrent right to discriminate." The

controlling test of the validity of all laws directed against a particular class may be said to be that the same means and methods shall be impartially applied to all the constituents of the particular class, so that the law shall operate equally and uniformly upon all persons in the class sought to be regulated. If appellants are constituents of the class defined by the ordinance attacked, and others in the same class are exempt from its provisions, they have just cause for complaint.

Appellants maintain that such condition is shown in the treatment accorded them and that accorded those engaged in the rent car business, since there is a difference in the regulatory measures as applied to rent cars and those applied to the motor bus. The facts do disclose that the regulations applicable to rent cars, which are covered by another and prior ordinance, the essential provisions of which have been herein noted, and those applicable to the motor bus, are dissimilar in many and important respects. Some of the salient differences are that the rent car is required to pay a license fee of \$10, while the motor bus pays \$75. The rent car operator is not subjected to the same rigorous physical and mechanical examination touching his qualifications to operate his vehicle that the motor bus operator is. The number of passengers that may be carried by the motor bus is regulated, but not so with the rent car. The motor bus is required to select a fixed route or termini and traverse the same for not less than six hours per day, while the rent car is permitted to go from its garage or stand to any point in the city over any route chosen. These radical and important differences in the regulatory provisions between the motor bus and the rent car are noted, not because in our opinion they establish discrimination, but for the purpose of emphasizing the fact that the regulatory provisions of any ordinance are without significance whatever in determining whether all the constituents of the defined class are legislated against equally and uniformly; for if rent cars and the motor bus do not engage in like street traffic they are not as matter of fact in the same class, and if not in the same class a difference in regulations as applied to distinct classes is immaterial. Thus the true inquiry is not, is there a difference in the manner of regulating rent cars and the motor bus, but is the rent car and the motor bus, as defined by the respective ordinances, engaged in similar or dissimilar street traffic? This is, of course, a question of fact to be determined from the evidence contained in the record.

The record of the evidence beyond controversy discloses great dissimilarity in the business pursued by the two classes of vehicles. As affecting street traffic and congestion thereof there are in operation 500 motor busses as against 100 rent cars. The

motor bus has no fixed stand, but is continually in motion upon a fixed route upon the streets of the city, soliciting and halting to accept business at any place where the passenger is found, and upon some of the fixed routes there are as many as 100 busses. As related to the same question, rent cars do not transact their traffic in such manner, but are located either at garages or stands upon certain streets between hours fixed by ordinance, whence they are called by the public when their services are needed. Thus the mere statement of the manner and method of the traffic in which the respective vehicles are engaged demonstrates that each is pursuing a different class of business, so radically dissimilar in fact as to leave no room for fair dispute or disagreement. Appellants being then in a class entirely dissimilar from that of those who operate rent cars, it is immaterial that the regulations are dissimilar. Dissimilar regulations of dissimilar occupations cannot, of course, serve as a basis or support in law for holding the one or the other discriminatory, since dissimilar methods of regulating similar classes are, under the rule cited, the test of discrimination.

[5] The constitutionality of section 9 is also attacked. This section provides that the motor bus shall be operated along the termini designated by the operator, save in certain excepted cases not material here, and for any portion or all of the day, at option of operator (but must by section 2 be operated for at least six consecutive hours), and concludes with the provision:

"But such operation shall be at all times in accordance with the terms of this ordinance, and it shall be unlawful to operate such motor bus as a public conveyance at any place or on any street other than along the route designated in the license certificate."

The concluding provision just quoted is vigorously attacked as being in derogation of appellant's common right to pursue any other lawful occupation than that of operating a motor bus. We do not construe the quoted portion of section 9 as does able counsel for appellants. The ordinance of which section 9 is a part does not, in our opinion, expressly or impliedly undertake to interfere with the free and undeniable right of the citizen to engage in any other lawful pursuit or business for which he may qualify, but undertakes to regulate solely those who may wish to engage in the operation of a motor bus as therein defined. The language contained in section 9 should and will be construed in the light of the purpose sought by the ordinance. So regarded, it is clear to us that the provision that it "shall be unlawful to operate such motor bus as a public conveyance at any place or on any street other than along the route designated," means necessarily no more than that the citizen who desires to engage in the business defined by the ordinance shall, while engaged in that business, be confined to the particular fixed route or termini se-

lected by him at the time he applies for his license. Any other construction is not warranted by the general purpose of the ordinance as reflected by its various special provisions. We do not agree with counsel that the effect of the quoted provision is to deny any appellant the right to engage in another business when he has complied with the provisions of the one in controversy. It does enact, of course, that certain regulations must be observed in order to legally engage in the business regulated by the ordinance. From that circumstance, however, it surely cannot be said that any one is prohibited from engaging in any other lawful pursuit. If any appellant desires to engage in any other lawful occupation, his right to do so may not be denied, whenever he has complied with any regulations that may be imposed upon such other business or occupation.

[8] It is also urged that section 15 of the ordinance is void. This section requires the operator of each motor bus to submit his vehicle to the city automobile inspector once every week for inspection. If upon examination the inspector finds the vehicle safe for use as a motor bus, he shall issue the operator a certificate permitting its operation for one week. If the inspector finds the vehicle unsafe for use as a motor bus, he shall refuse to issue certificate. Operation of the motor bus without the inspector's certificate displayed conspicuously thereon is made a penal offense. This section is attacked in effect on the ground that it is an attempt upon the part of the municipality to delegate to another the police power intrusted to it by the state, which it is argued it may not do, since the trust is official and personal, and may be exercised only by those to whom it is committed by the state.

In connection with section 15, just referred to, and as a matter to be considered in connection therewith, the city of Dallas, simultaneously with the passage of the ordinance regulating the motor bus, enacted another ordinance creating the office of city automobile inspector. Omitting formal and nonessential portions, the last-mentioned ordinance makes it the duty of and confers upon the inspector the authority to inspect and examine every character of motor vehicle operated for hire in the city of Dallas and keep a record thereof, to require them to secure license or inspection certificates required by other ordinances, to examine all applicants for license and enforce ordinances regulating the number of passengers to be carried, etc.

Recurring, then, to the proposition asserted by appellants, it is readily conceded that it states a correct and long-settled principle of law which it is unnecessary to sustain by the citation of authority. Accompanying the rule stated, however, at all times, is the further rule, equally well defined and established, that the former will not be construed

and applied so as to require the city commissioners, in the exercise of the city's police powers, to personally engage "in every step necessary for the exercise of the function"; but they may "fully discharge their official duty and exhaust the municipal discretion by enacting by-laws or ordinances to be executed by the proper board or officer." 28 Cyc. 694. Another concomitant of the rule invoked by appellants is that the municipality, after exercising its discretion as to the enactment of laws, is not forbidden from delegating its "ministerial or administrative functions to subordinate officials." 28 Cyc. 276. Thus it appears that on either limitation of the general rule section 15 may be sustained. Having the charter authority, as we have determined at another place in this opinion, to regulate every character of motor vehicle engaging in street traffic upon its streets, the city had the right, under the first limitation of the rule noted, to enact an ordinance voicing or exercising its authority on the particular and precise subject, and to confer upon the inspector the authority to enforce the provisions thereof. This was done, and nothing left to the discretion of the inspector, since he is required to inspect every motor vehicle and its mechanism, and determine if it is one that can be safely operated upon the city's streets.

We may, however, discard the broad rule, which holds that the municipality may by exact and precise ordinance confer on another the enforcement of its discretion as declared by duly enacted ordinance, and yet find ample authority for the act complained of in the second limitation of the general rule noted. That is that section 15, taken in connection with the ordinance creating the office of city automobile inspector and defining his duties and authority, evidences nothing more nor less than a transfer by the city to said officer of its ministerial and administrative functions. The discretion of the city in reference to the matters covered by either ordinance is in the last analysis whether it will require the operators of the motor bus to submit it to inspection, a requirement obviously intended for the protection of the life and property of the citizen. By the enactment of section 15 and the ordinance creating the office of inspector, it clearly and fully exercised that discretion, and directed that thereafter each motor bus should be examined and inspected in all of its mechanism and parts, in order to determine whether it could be safely operated upon the city's streets. The further provision that such examination shall be made by the inspector confers upon him none of the discretion conferred on the city, since the acts of examining the car and the issuance of the certificate are but ministerial or administrative, as distinguished from legislative and discretionary, authority. Bouvier defines a ministerial act "to be one which a person performs in a given state of facts,

in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the acts being so done," and cites in support of the defined meaning *Rains v. Simpson*, 50 Tex. 501, 32 Am. Rep. 609, and which case in turn cites *Commissioner v. Smith*, 5 Tex. 471, and *Arberry v. Beavers*, 6 Tex. 457, 55 Am. Dec. 791. See, also, *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659.

Every element of the ministerial act is found in section 15 and the other ordinance, unless it can be said that the method of examining the motor vehicles is not precisely prescribed. The city automobile inspector is required to be one skilled in the mechanism of automobiles, and it is the nearly unanimous rule that in ministerial matters much may be left to the judgment and discretion of public officials in reference to matters resting peculiarly upon professional or expert knowledge or skill. Further, it is common knowledge of all that the mechanism of automobiles, while not exceedingly intricate, is nevertheless of that character that requires the judgment at least of a skilled mechanic, and for whose guidance a set or fixed rule would be out of the question. Should the inspector, as appellants argue might be the case, refuse arbitrarily in the exercise of his authority to issue the certificate, notwithstanding the applicant was entitled thereto, this will not affect the validity of the regulation, since the presumption is that the officer will proceed impartially in the exercise of the discretion conferred, and until it is shown to the contrary no cause of action exists. *Kissinger v. Hay*, 52 Tex. Civ. App. 293, 113 S. W. 1005.

[7] It is next urged that sections 5, 12, and 14 are ultra vires. These sections, in the order in which they are enumerated, provide that, in the event an operator desires to change his route after it has been selected, he will be required to pay \$1 for the new certificate made necessary by the change, or, if he loses his original certificate, he is required to pay \$1 for a new certificate, or, if he desires to operate a car of greater seating capacity than he is licensed to operate, he is required to pay \$1 for a new certificate to that effect. The evidence of appellees tends to show that the cost of securing and issuing the license certificates and number plates enumerated will reasonably be the charges fixed. On that issue appellants made no proof. The city having the right to charge a license fee reasonably commensurate with the cost of regulation, it would have the further right to make a charge for any additional expense resulting from loss of original certificate, etc., or change of route when sustained by the evidence, as it is on the issue under discussion.

Finding no reversible error in the record, the judgment of the court below is affirmed.

CONSUMERS' LIGNITE CO. v. HOUSTON & T. C. R. CO. (No. 7339.)

(Court of Civil Appeals of Texas. Dallas.
July 8, 1915. Rehearing Denied
Oct. 16, 1915.)

1. CARRIERS — 20 — CARRIAGE OF GOODS — DELAY IN SHIPMENT — STATUTES.

Rev. St. 1911, art. 6670, subd. 1, declares that it shall be an unjust discrimination to subject any traffic to unreasonable delay, while subdivision 2 declares that every railroad which shall fail or refuse to receive and transport without delay cars of any connecting line, or destined to a point over a connecting line, shall be guilty of unjust discrimination. *Held*, that subdivision 2 and not subdivision 1, governs an action for unjust discrimination for delay in the transportation of a car destined to a connecting carrier.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 83-49, 133, 927; Dec. Dig. ¶ 20.]

2. CARRIERS — 13 — UNJUST DISCRIMINATION — RULES OF RAILROAD COMMISSION.

Under Rev. St. 1911, art. 6670, subd. 2, declaring that every railroad company which shall fail or refuse, under such regulations as may be prescribed by the Railroad Commission, to transport freight destined for a connecting carrier, shall be guilty of unjust discrimination, it is contemplated that the Commission shall establish rules; hence, in an action for unjust discrimination, such rules are admissible.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 21-24; Dec. Dig. ¶ 13.]

3. CARRIERS — 13 — CARRIAGE OF GOODS — DELAY — RULES.

Rule 2 of the Railroad Commission declares that railroad companies shall promptly receive and issue bills of lading for car load freight and transport it at a rate of not less than an average of 30 miles per day of 24 hours, inclusive of Sundays and legal holidays. The 2d day of March, Texas Independence Day, is declared a legal holiday by statute (Rev. St. 1911, art. 4600). It fell on Sunday. *Held* that, as a custom or usage repugnant to the express provisions of a statutory regulation is unavailing, the fact that it was customary to observe the following Monday, when Sunday was a legal holiday, will not, under the rules of the Railroad Commission, excuse the carrier for delay in transporting goods on the Monday following Sunday, March 2d.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 21-24; Dec. Dig. ¶ 13.]

4. CARRIERS — 13 — CARRIAGE OF GOODS — RAILROAD COMMISSION — RULINGS OF.

Where Sunday, March 2d, was a legal holiday, a reply by the chairman of the Railroad Commission, to an inquiry by a railroad company as to whether the succeeding Monday would be recognized as free time, stating that the tariff merely said Sundays and legal holidays, but that as, when holidays fell on Sunday, it was generally the custom to consider Monday as a holiday, the Commission would recognize Monday as free time, fails to show that the Railroad Commission as such had promulgated a rule recognizing Monday as free time.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 21-24; Dec. Dig. ¶ 13.]

Error from District Court, Dallas County; Kenneth Foree, Judge.

Action by the Consumers' Lignite Company against the Houston & Texas Central Railroad Company. There was a judgment for

defendant, and plaintiff brings error. Reversed and remanded.

Etheridge, McCormick & Bromberg and Chas. T. McCormick, all of Dallas, for plaintiff in error. Baker, Botts, Parker & Garwood, of Houston, and Smith, Robertson & Robertson, of Dallas, for defendant in error.

TALBOT, J. The plaintiff in error, hereinafter referred to as plaintiff, sued the defendant in error, hereinafter referred to as defendant, to recover damages and a penalty for delay in the transportation of a shipment of freight over the defendant's line of railroad. The petition alleges, in substance, that the defendant, on the 26th day of February, 1913, accepted at Ferris, Tex., for shipment, a car load of bricks, consigned to the plaintiff at Hoyt, Tex., and that under the contract of shipment the bricks were to be delivered by the defendant to its connecting carrier at Dallas, Tex., a distance of 19.4 miles, from which latter point the car load was to be carried by defendant's connecting carrier to Hoyt; that defendant delayed delivery to its connecting carrier until March 4, 1913, and this delay caused damage to plaintiff, and constituted an unjust discrimination, as defined by article 6670 of the Revised Statutes of 1911, and entitled the plaintiff to the recovery of the penalty provided for in article 6671 of said statutes. The petition further alleged:

"That there existed in full effect rules and regulations of the Railroad Commission of Texas, regulating, covering, governing, and requiring the interchange of freight from one connecting carrier to another connecting carrier at all points of junction in the state of Texas of all lines of railway being operated therein."

The defendant answered, admitting that the car was received and delivered by it on the dates set forth in plaintiff's petition, but set up by way of avoidance: (1) A certain rule of the Railroad Commission of Texas, known as rule 2, entitled "Reception and Transportation of Car Load Freight," and alleged that it had carried the car with the expedition required by that rule; and (2) that, if any delay had occurred in the delivery of the car, it was due to the fact that the transfer track at Dallas, used in the interchange of freight between it and its connecting carrier, was unduly congested, such congestion being due to the insufficient capacity of the freight yards at Dallas of its connecting carrier, and the delay of its connecting carrier in the interchange of such freight. The defendant further pleaded that March 2, 1913, was a Sunday, and that March 2, 1913, was also a legal holiday, being Texas Independence Day; that there was a general custom that in such a case as this, when a legal holiday fell on a Sunday, the next day, Monday, would be and was regarded as a holiday. A jury trial, February 14, 1914, resulted in a verdict and judgment for the defendant, and the plaintiff in due time sued out a writ of error to this court.

[1, 2] There is evidence to the effect that the plaintiff, which was the consignee, in addition to its rights as such consignee, had by assignment all the rights of the consignor, and that the shipment in question was delivered and received as alleged in plaintiff's petition; that the distance from Ferris to Dallas is 19.4 miles; that the shipment was not delivered by the defendant to its connecting carrier at Dallas until about 4 o'clock in the afternoon of March 4, 1913; that March 2, 1913, was Sunday, and was also a legal holiday, being Texas Independence Day; that the banks and post office in Dallas observed March 3, 1913, as a holiday; that the defendant, in the matter of demurrage, has a custom, rule, or order with reference to holidays; that this custom or rule, for which free time can be allowed in demurrage record, is that, with the exception of Decoration Day, all holidays falling on Sunday are observed on Monday. When Decoration Day falls on Sunday, the preceding Saturday is observed. The Railroad Commission rule pleaded by the defendant was introduced in evidence, and so much of it as is material here is as follows:

"When car load freight of any character proper for transportation is legally tendered to a railroad company at its customary place of receiving shipments, and correct shipping instructions given, such railroad company shall promptly receive the same and issue bills of lading therefor; the same must be carried forward at a rate of not less than an average of thirty (30) miles per day of twenty-four hours, exclusive of Sundays and legal holidays, computed from 7 o'clock a. m. of the second day following the receipt of shipment. For failure to so receive and transport such shipments the railroad company at fault shall forfeit and pay to the owner or party injured the sum of fifty (50) cents per car for each day or fraction thereof during which the terms of this rule are not complied with: Provided, however, that twenty-four hours additional time shall be allowed at each junction or division terminal where it is necessary to rehandle or transfer the car or cars; also, forty-eight (48) hours additional when it is necessary to transfer contents from one car to another."

The court's action in admitting in evidence the foregoing rule of the Railroad Commission is the basis of the plaintiff's first assignment of error. The proposition advanced is that this rule had no application to the issue of whether or not the delay pleaded and proved constituted unjust discrimination as defined by the statute.

Article 6670 of the statute provides that if any railroad, directly or indirectly, or by any special rate, rebate, etc., shall charge or receive from any person or corporation a greater or less compensation for any service rendered by it than it charges or receives from any other person or corporation for doing like and contemporaneous service, such railroad shall be deemed guilty of unjust discrimination; and subdivisions 1 and 2 of said article read:

(1) "It shall also be an unjust discrimination for any such railroad to make or give any undue or unreasonable preference or advantage to

any particular person, company, firm, corporation or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever."

(2) "Every railroad company which shall fail or refuse, under such regulations as may be prescribed by the Commission, to receive and transport without delay or discrimination the passengers, tonnage and cars, loaded or empty, of any connecting line of railroad, and every railroad which shall, under such regulations as may be prescribed by the Commission, fail or refuse to transport and deliver without delay or discrimination any passengers, tonnage or cars, loaded or empty, destined to any point on or over the line of any connecting line of railroad, shall be deemed guilty of unjust discrimination."

We agree with the view, expressed by counsel for the defendant, to the effect that, if any penalty can be recovered under the petition of plaintiff on account of the alleged delay in the transportation of the shipment in question, it is recoverable under subdivision 2 of article 6670 of the statute. As argued, it seems clear that subdivision 1 of said statute is not applicable, because it is dealing with the general subject of preference or advantage in the ordinary handling by railroads of shipments, while subdivision 2 specifically covers the cause of action set out and relied on herein, namely, the case of a railroad company's duty to transport and deliver shipments destined on the line of a connecting carrier. The case at bar, as shown by our statement of its nature, in the former part of this opinion, is one in which it devolved upon the defendant to transport and deliver the shipment of bricks without delay or discrimination to its connecting carrier at Dallas, and, if it has failed to do so, then a recovery for the penalty sought may be had; but the same must be had under subdivision 2 of the statute, to which we have referred. Subdivision 2 of article 6670 provides, as has been seen, that every railroad which shall, under such regulations as may be prescribed by the Railroad Commission, fail or refuse to transport and deliver without delay tonnage or cars destined to any point on or over the line of any connecting line of railroad, shall be deemed guilty of unjust discrimination. This provision of the statute clearly contemplated, if it did not require, that the Railroad Commission of the state should prescribe rules and regulations upon the subject to which it relates, and evidently the Commission, to meet this purpose and intent of the statute, promulgated the rule admitted in evidence over the objections of the plaintiff, and of the admission of which it complains in the assignment of error under consideration. We think, therefore, the rule was properly admitted, and the assignment will be overruled.

[3] The second assignment of error is to the effect that the court erred in admitting the testimony of the witness W. Bruce Luna that it was the custom of the Post Office

Department at Dallas, Tex., to observe the following Monday as a holiday when a legal holiday falls on the Sunday preceding. The propositions under this assignment are, first, that a statute cannot be varied by proof of local custom or usage; and, second, that the custom of the post office as to the observance of the day in question as a holiday has no tendency to show a custom upon the part of railways in the city of Dallas as to the observance of such day as a holiday. The 2d day of March, among a number of others, is declared by statute of this state to be a holiday—

"on which all the public offices of the state may be closed and shall be treated and considered as Sunday or the Christian Sabbath for all purposes regarding the presenting for payment or acceptance and of protesting for and giving notice of the dishonor of bills of exchange, bank checks and promissory notes placed by the law upon the footing of bills of exchange." Rev. St. 1911, art. 4606.

Rule 2 of the Railroad Commission, referred to in discussing the defendant's first assignment of error, prescribes that railroad companies—

"shall promptly receive and issue bills of lading for car load freight and transport the same at a rate of not less than an average of thirty (30) miles per day of twenty-four hours, exclusive of Sundays and legal holidays."

Neither the statute nor the rule makes any provision for the observance of the following Monday when the holiday falls on Sunday, and the question is: Can the defendant excuse itself for not moving the plaintiff's shipment on Monday, March 3, 1913, and avoid the penalty provided by law for unjust discrimination or delay, by showing a custom in such case not to do so? It is well established that a custom or usage repugnant to the express provisions of a statute is void, and that, whenever there is a conflict between a custom or usage and a statutory regulation, the statutory regulation must control. 12 Cyc. 1054. So, too, if a statute has given a definite meaning to any particular word, no evidence of custom will be admitted to attach any other meaning. 12 Cyc. 1055.

Railway Co. v. McCown, 25 S. W. 435, was a suit to recover damages under our statute for failure of the railway company to deliver a car load of corn upon tender by the owner of the amount of freight charges, as shown by the bill of lading. Among the defenses set up by the company was a custom of railroads in the United States to require the surrender of the bill of lading before the delivery of freight, and that the plaintiff had refused to do this or give an indemnity bond demanded in lieu of such surrender. The court held that the failure of the defendant to comply with article 4258a, Rev. Civ. St., requiring railway companies to deliver freight on tender by the owner of the freight charges, as shown by the bill of lading was not excused by the refusal of the owner to surrender the bill of lading, or to

give an indemnity bond in lieu thereof, and upon the question of custom said:

"It [the custom] cannot deprive one of a legal right without his consent and without compensation; it cannot make contracts for parties; it can in some cases construe the terms used in a contract; but it is not a good custom if it is unreasonable, or contrary to law. The custom contended for cannot be enforced."

Likewise we think it must be held that the custom set up by the defendant in the case at bar to excuse itself from transporting or delivering the shipment in question to its connecting carrier at Dallas on Monday, March 3, 1913, cannot be enforced under the statute and regulations of the Railroad Commission as they existed on that day. The observance of that day as a legal holiday was not authorized, as heretofore indicated, by either the statute or a rule or regulation prescribed by the Railroad Commission. In the absence of some provision of the statute or rule of the Commission authorizing the observance of Monday as a legal holiday when the holiday falls on the preceding Sunday, a carrier in this state cannot justify and excuse its failure to transport or deliver a shipment received by it on that day, on the ground that a custom prevailed to recognize and observe that day as a legal holiday. The specific day named by the statute as a holiday cannot be varied by evidence of a custom that some other day was observed as such.

[4] But the defendant contends that the evidence introduced in this case, and of which the plaintiff complains, does not have the effect to vary a statute, or the definition thereof, by proof of a local custom or usage; that it is nothing but the application of the rule or regulation of the Railroad Commission in force with respect to the subject. The contention is based upon a telegram received by the attorneys for the defendant, which was introduced in evidence, from the chairman of the Railroad Commission, in reply to one sent by them, stating that March 2, 1913, fell on Sunday, that the post office and banks in Dallas observed March 3d as holiday, and asking if there was "any ruling of Railroad Commission that in such a case March 3d should be excluded in movement of car load freight under rule 2 as to transportation of car load shipments?" The telegram in question reads as follows:

"Yours 9th. Commission's tariff simply says Sundays and legal holidays, when holidays fall on Sunday the custom being generally to consider Monday as holiday, Commission would recognize Monday as free time.

"[Signed] Allison Mayfield, Chairman."

This telegram fails to show that the Railroad Commission had promulgated a rule or regulation to the effect that, when a holiday falls on Sunday, railway companies were authorized to observe the following Monday as such. It is but the statement of the

chairman of the Commission to the effect that if a holiday should fall on Sunday, and there was a custom *generally* to consider Monday as a holiday, the Commission would recognize Monday as such. The telegram does not, therefore, in our opinion, sustain the contention of the defendant, and we think the admission of the evidence of the custom sought to be established by the defendant, over the objection of the plaintiff, was error which requires a reversal of the case. Clearly, rule 2, which was introduced in evidence, does not, expressly or by implication, authorize the observance of Monday as a holiday when a holiday falls on the Sunday preceding, and the mere statement, made by the chairman of the Commission in the telegram referred to, would not warrant this court in holding that such was the effect of the rule. Furthermore, we think it may be gravely doubted that under the custom shown by the evidence in this case the Railroad Commission would "recognize as free time" Monday, March 3, 1913. The custom was not shown to be general. The extent of the evidence is that the post office and the banks in Dallas and the defendant observed Monday as a legal holiday when a holiday fell on Sunday. There is absolutely no evidence, so far as we have been able to discover, showing that such was the custom of any other railroad in or out of Texas, and it may be doubted, from the character of the evidence introduced on the subject, that it was the custom of the defendant to observe Monday as a holiday when a holiday fell on the preceding Sunday, in so far as the movement and delivery of car load shipments were concerned. To prove that such was the custom of defendant, H. J. Fitzgerald was introduced, and he testified that the defendant *in the matter of demurrage has a custom, rule or order with reference to holidays*. He further said:

"The rule in effect in March, 1913, as to free time that the Houston & Texas Central Railroad Company would allow its patrons, is as follows:

"Houston & Texas Central Railroad Company.

"Circular No. 913. All Agents:

"For your information and guidance I quote you below legal holidays in Texas for which free time can be allowed in demurrage record:

"March Second. Texas Independence Day.
"May Thirtieth. Decoration Day."

"With the exception of Decoration Day, all holidays falling on Sunday are observed on Monday. When Decoration Day falls on Sunday, the preceding Saturday is observed. Those are the rules we have been following since 1909."

All the evidence admitted on the question of custom should have been excluded, and because of its improper admission, and hurtful effect upon the rights of the plaintiff, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

ALEXANDER v. ELKINS et al.

(Supreme Court of Tennessee. Sept. 29, 1915.)

1. INJUNCTION \S 105—CRIMINAL PROCEEDINGS.

Courts of equity have no jurisdiction to enjoin threatened criminal proceedings under a statute exercising the state's police power in a matter as to which the Legislature has complete jurisdiction, though it be charged that the statute is invalid, that a multiplicity of actions thereunder will injure and destroy civil and property rights of complainant, and that the damages resulting will be irreparable, when complainant's defense in a court having jurisdiction of the offense is adequate and unembarrassed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. \S 105.]

2. INJUNCTION \S 105—CRIMINAL PROCEEDINGS—PROSECUTIONS UNDER UNCONSTITUTIONAL ACT.

Where the father of a girl threatened her husband, whom she had left, with interminable criminal prosecutions under a statute which the Supreme Court had declared unconstitutional, unless he contributed to her support, having procured a justice of the peace who was willing to issue warrants for such husband's arrest whenever demanded, such husband could restrain the father and justice from effecting such series of prosecutions, since the rule that courts of equity cannot enjoin threatened criminal proceedings under a statute enacted by the Legislature in the exercise of its police power has no application to prosecutions threatened under acts adjudged unconstitutional by the Supreme Court, as a warrant of arrest, charging a party with a violation of such an act, is absolutely void, and if by collusion between an officer and a private citizen the latter is suffered to procure warrants of arrest and the purpose is expressed by such citizen to continue the procurement of false warrants if money demanded is not paid, and if the officer agrees to continue to issue them and to cause the defendant to be arrested on them until he comply with the demand to pay money, such defendant is not relieved of the illegal persecution by the facts that the warrants in fact and law charge no crime, and that he has an adequate defense as against them in any court of competent jurisdiction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. \S 105.]

3. PLEADING \S 214—DEMURRER—ADMISSION. On demurrer the allegations of a bill must be taken as true.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. \S 214.]

Appeal from Chancery Court, Bradley County; V. C. Allen, Chancellor.

Action by R. M. Alexander, Jr., by next friend, against James P. Elkins and others. Judgment of dismissal, and from a decree of the Court of Civil Appeals affirming the same, plaintiff appeals. Reversed, and cause remanded for further proceedings.

John C. Ramsey, of Cleveland, for appellant. Mayfield & Mayfield, of Cleveland, for appellees.

NEIL, C. J. The bill alleges, in substance, that a short time prior to November 12, 1912, complainant and defendant Maude Alexander (formerly Elkins) intermarried; that they were both minors, and are still under

age; that after living together a few months they separated, the wife returning to the home of her father, defendant James P. Elkins; that there was much controversy between the respective families as to which one was to blame, and in consequence great bitterness grew up; that soon after the separation the said defendant Elkins began a crusade against the complainant for the purpose of compelling him to support his wife; that with this view, on November 6, 1913, he procured a warrant and caused complainant to be arrested under the provisions of chapter 207, Acts 1909, one purpose of which was the compelling of husbands who had deserted and failed to provide for their wives to support them; that he was, under this warrant bound over, tried and convicted in the circuit court of Bradley county, and fined \$25, but the judgment was stayed, with a view to obtaining a reconciliation if possible, but no reconciliation has resulted; that he sought to have his wife return to him; that she refused to come back and live with him, yet, notwithstanding this, he sent her \$10 per month for five months; that on June 3, 1914, about two months after the payments ceased, defendant Elkins procured another warrant for complainant's arrest under the same act; that defendant Elkins is now threatening to have complainant arrested every week, and that he will continue until he is arrested 365 times, unless he continues to pay \$10 per month to his wife; that the defendant Barrett, a justice of the peace of Bradley county, has expressed his willingness to issue warrants for complainant's arrest whenever demanded by Elkins under the statute referred to; that in this manner complainant is being harassed and persecuted, and that such persecution will continue as threatened unless restrained by injunction; that is to say, that complainant will be continually arrested under warrants sworn out by Elkins and issued by Barrett, under the statute referred to, to compel him to pay the money demanded by Elkins for his daughter, complainant's wife; that complainant is thus wrongfully and maliciously persecuted, and required to give bond for his appearance at court, or be placed in jail, and that he is forced to incur great expense in making his defense and resisting the said unlawful encroachments on his rights as a citizen; that the only authority claimed for such arrests is the said chapter 207, Acts 1909, but that said supposed act is no true act, and is not a law of the state; that on the 16th of July, 1910, this supposed act was, by the Supreme Court, declared unconstitutional and void, a certified copy of the court's judgment in the case referred to (State v. Thomas Miller) being made an exhibit to the bill; that defendants Elkins and Barrett have been informed of the action of the Supreme Court on said chapter 207,

Acts 1909, but have continued their persecution notwithstanding, and say they will still continue it, the defendant Barrett saying that he finds the act printed in his copy of the statutes for the year 1909, and that he will continue to issue warrants of arrest under it so long as it remains in his book; that the defendants Elkins and Barrett are thus defying the law as declared by the Supreme Court of the state, and through the existence of this unconstitutional, supposed act printed among the published Laws of 1909, they are directing the machinery of the law to purposes of gross injustice, with a view to compelling the complainant to pay the money demanded of him.

A demurrer was filed by the defendants offering, as a legal defense to the bill, that the complainant was "not entitled to enjoin defendants from prosecuting complainant for an alleged violation of the criminal laws of the state." This demurrer was sustained by the chancellor, and the bill dismissed.

The records of this court show that chapter 207, Acts 1909, was declared unconstitutional on July 16, 1910, on the ground that the act was in violation of section 17, art. 2, of our Constitution of 1870.

[1] In the case of *Kelly v. Conner*, 122 Tenn. 339, 396, 123 S. W. 622, 25 L. R. A. (N. S.) 201, it was said:

* * * "Courts of equity have no jurisdiction to enjoin threatened criminal proceedings under a statute enacted by a state in the exercise of the police power in relation to which the Legislature has complete jurisdiction, although it be charged that the statute is invalid, and that a multiplicity of actions thereunder will injure and destroy civil and property rights of the complainants, and that the damages resulting will be irreparable, when the complainants' defense thereto, in a court having jurisdiction of the offense, is adequate and unembarrassed; and we hold that the chancery courts of Tennessee, neither under their inherent nor statutory jurisdiction, have any such power or jurisdiction, whatever may be the exceptions to the general rule in the courts of equity of other jurisdictions."

[2, 3] We adhere to this statement of the law, but it does not apply to prosecutions threatened under acts which have already been adjudged unconstitutional by this court. In *Kelly v. Conner* that question was not in the mind of the court. There it was sought to enjoin threatened prosecutions under an act which had never been impeached. The bill charged that the act was unconstitutional, and sought to have it so declared. Ample reasons were given in the opinion of the court why such a course of litigation would be inadmissible under the facts presented in that case; but those reasons cannot be held to apply to a spurious prosecution under a supposititious act, already declared and adjudged by the highest judicial authority in the state, in a regular judicial proceeding, to be no true law. A warrant of arrest, charging a party with the violation of such an act, is just as void of efficacy on its face as if it charged a violation of the laws of

China or Japan. But if by collusion between an officer of the law and a private citizen, the latter is suffered to procure warrants of arrest, and the purpose is expressed on the part of such private citizen to continue the procurement of such false warrants until he has obtained hundreds of them, if money demanded be not paid, and if the officer of the law agrees to continue to issue them, and to cause the complainant to be arrested on them, until he comply with the unlawful demand to pay money, such citizen is not relieved of the persecution by the fact that the warrants in fact and law charge no crime. He can, it is true, be ultimately relieved when each case is finally brought before the higher courts, but under the allegations of the bill new prosecutions of the same false character will be brought, since, according to the bill, the threats of arrest are made notwithstanding knowledge of the decision of the Supreme Court declaring the act void. It will boot the complainant little that he is sure of overthrowing each new prosecution as it arises. He will suffer the harassment of the repeated interferences with his liberty, the constantly recurring trials, and the accumulating expenses. Under such circumstances the remedy at law is very inadequate. The whole persecution can be ended by the chancery court, through its injunctive power, at one stroke. Why should the court not exercise this power? It is urged that the chancery court has no jurisdiction to interfere with criminal prosecutions, except in the way of protecting property rights already under its care, and sought to be disturbed through the agency of a criminal prosecution by some party to the litigation, or connected with the interests in litigation, thus depriving the court, indirectly, of its control. Some other cases take a wider view of the power of the court to protect property rights against assaults through criminal prosecutions, but even on the stricter view, there can be, as we think, no objection to the bill before us. The chancery court is not asked to invade the jurisdiction of the criminal court. There is no question of guilt or innocence to be tried. Under the case stated there are no controversies to be settled by a criminal court. There is in this state no law under which the acts charged can be held criminal, and hence no crime is charged. None of the evils therefore stand in the way which are to be encountered when the court of chancery attempts to usurp the functions of courts of criminal jurisdiction. There is before us (accepting the bill as true, as must be done on demurrer) simply a bold misuse of criminal process, actual and threatened, to harass a man without any color of legality, and the expression of a purpose to continue this unlawful use indefinitely, through connivance of one of the law officers of the state, to compel complainant to pay money demanded. If there be no pre-

edent for the interference of a court of chancery in such a case it is time one should be made. Certainly the relief sought falls within the general scope of those equitable principles which entitle a citizen to protection against multiplied, repeated, and vexatious suits. Compare *Ulster Square Dealer v. Fowler*, 58 Misc. Rep. 325, 111 N. Y. Supp. 16.

We have no knowledge of any direct authority on the precise point, unless it be *Block v. Crockett*, 61 W. Va. 421, 56 S. E. 826. The syllabus of that case correctly expresses its substance in the following language:

"Equity will not, as a general rule, interfere by injunction with criminal proceedings; but when a statute or municipal ordinance has once been declared illegal by a court of law of competent jurisdiction, and other prosecutions thereunder are begun or threatened which will result injuriously to one in the enjoyment of his civil rights of property in which he is protected by general law, equity will interfere by injunction to restrain the same."

The court referred to in this excerpt was not a court of last resort, and therefore we do not wish to be understood as approving the ruling in that case in its entirety. In the case before us, as already stated, the act had been declared void by our court of last resort. In *Block v. Crockett*, other cases are referred to in support of the proposition stated in the syllabus; but, as we understand these cases, they merely suggest, or imply, without deciding the point, that equity would interfere by injunction, in case there had been, at law, a previous decision holding the statute void. These cases are *Poyer v. Des Plaines*, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494; *Wallack v. Society for Reformation of Juvenile Delinquents in City of New York*, 67 N. Y. 23; *West v. New York*, 10 Paige (N. Y.) 539.

The authorities on the general subject may be found collected in the cases, and the notes, to *Crighton v. Dahmer*, 70 Miss. 602, 13 South. 237, 21 L. R. A. 84, 35 Am. St. Rep. 666; *Littleton v. Burgess*, 14 Wyo. 173, 82 Pac. 864, 2 L. R. A. (N. S.) 631; *Hall v. Dunn*, 52 Or. 475, 97 Pac. 811, 25 L. R. A. (N. S.) 193; *Denton v. McDonald*, 104 Tex. 206, 135 S. W. 1148, 34 L. R. A. (N. S.) 453; also very many of these are in *Kelly v. Conner*, supra; also reported in 122 Tenn. 339, 123 S. W. 622, 25 L. R. A. (N. S.) 201; *Old Dominion Telegraph Co. v. Powers*, 140 Ala. 220, 37 South. 195, 1 Ann. Cas. 119, and note; *Thompson v. Tucker*, 15 Okl. 486, 83 Pac. 413, 6 Ann. Cas. 1012, and note; *Sullivan v. San Francisco Gas & Electric Co. et al.*, 148 Cal. 368, 83 Pac. 156, 3 L. R. A. (N. S.) 401, 7 Ann. Cas. 574; *New Orleans Baseball & Amusement Co. v. City of New Orleans*, 118 La. 228, 42 South. 784, 7 L. R. A. (N. S.) 1014, 118 Am. St. Rep. 366, 10 Ann. Cas. 757, and note; *Fritz v. Sims*, 122 Tenn. 137, 119 S. W. 63, 135 Am. St. Rep. 867, 19

Ann. Cas. 458, and note; *Fellows v. City of Charleston*, 62 W. Va. 665, 59 S. E. 623, 13 L. R. A. (N. S.) 737, 125 Am. St. Rep. 990, 13 Ann. Cas. 1185; *Mahoning, etc., Co. v. New Castle*, 233 Pa. 413, 82 Atl. 501, Ann. Cas. 1913B, 658.

In the case before us, the Court of Civil Appeals affirmed the chancellor's decree. This action, we think, was erroneous, and we accordingly direct a decree to be entered reversing the decree of the Court of Civil Appeals, and that of the chancellor, and remanding the cause for further proceedings.

SEAY v. GEORGIA LIFE INS. CO.

(Supreme Court of Tennessee. Oct. 9, 1915.)

1. INSURANCE — 430 — LIABILITY INSURANCE — CONSTRUCTION — "WHILE ACTING UNDER ASSURED'S INSTRUCTIONS."

Defendant insured plaintiff, a physician having in his employ two younger doctors as assistants, against loss from liability for bodily injuries or death suffered in consequence of error, mistake, or malpractice by any assistant in his employ "while acting under the assured's instructions." One of his assistants made a mistaken diagnosis, resulting in a judgment for damages against the physician. The diagnosis and treatment was left wholly to the assistant, and the physician apparently had no knowledge of the particular case and gave the patient no personal attention; the assistant merely acting according to previous general instructions and the custom which prevailed under the contract between himself and the physician. Held, that defendant was not liable, since the quoted words were intended to qualify defendant's liability, and if they were treated as covering the physician's general instructions, they would neither expand nor restrict the insurer's liability, but would be altogether meaningless.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. 430.]

2. INSURANCE — 146 — CONSTRUCTION OF POLICY.

Though an insurance contract prepared by the company, when doubtful or ambiguous in its terms, will always be construed in favor of the insured, it should be construed, like other contracts, so as to give effect to the intention and express language of the parties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. 146.]

Buchanan and Fancher, JJ., dissenting.

Appeal from Chancery Court, Hamilton County; W. B. Garvin, Chancellor.

Action by John L. Seay against the Georgia Life Insurance Company. Decree for defendant, and complainant appeals. Affirmed.

Allison, Lynch & Phillips, of Chattanooga, for appellant. Thompson, Williams & Thompson, of Chattanooga, for appellee.

GREEN, J. The complainant, Seay, is a physician, and was under contract to render necessary medical attention to several hundred employes of a mine of the Tennessee Coal, Iron & Railroad Company. He had in his employ two younger doctors as assistants.

A miner was hurt in an accident, and Dr. Seay's office was notified. One of the assistants responded to the call, undertook to diagnose the injuries, and proceeded to treat them. In so doing the assistant acted under general directions, within the scope of his employment, but Dr. Seay appears to have had no knowledge of this particular case, or at any rate he gave the patient no personal attention, not seeing him at this time. The diagnosis and treatment was left wholly to the assistant.

There seems to have been a mistaken diagnosis, and the treatment was consequently unsuccessful. Malpractice was alleged by the miner, who claimed to have suffered a permanent deformity by reason thereof, and suit was brought against Dr. Seay to hold him for damages arising from the conduct of his assistant and employé. There was a judgment against Seay for \$1,000.

The case before us is a suit by Seay on a physician's liability policy issued to him by defendant company; the suit being to recover the amount of the miner's judgment, which Seay has paid, and the costs and expenses of that litigation.

The defendant company answered, denying liability for several reasons, and from a decree in favor of the company, complainant has appealed.

[1] The policy in question undertook to indemnify complainant, the assured—

"against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered by any person or persons in consequence of an alleged error or mistake or malpractice by any assistant in the employ of assured while acting under the assured's instructions and occurring while this policy is in force."

The question determining liability is whether the assistant was "acting under the assured's instructions," within the meaning of the policy.

[2] It is conceded that Seay did not personally direct the assistant with reference to the treatment of the injured man, but complainant contends that the assistant acted "in the line of his employment and according to previous general instructions and the custom which prevailed under the contract between himself and Seay." Complainant invokes the familiar rule that an insurance contract prepared by the company, when doubtful or ambiguous in its terms, will always be construed in favor of the assured, and maintains that the policy should be construed to cover acts performed under general directions or instructions of the assured, or, in other words, as protecting the assured against his assistant acting in the scope of the latter's employment.

We recognize the rule of construction relied on, but we must also bear in mind that "policies of insurance should be construed, like other contracts, so as to give effect to the intention and express language of the parties." 15 Cyc. 1037; *Travelers' Insur-*

ance Company v. Myers, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760; *Ward v. Maryland Casualty Co.*, 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514.

These words "while acting under the assured's instructions" were certainly introduced to qualify the company's liability in some way, but, should we hold an assistant acting under general instructions or within the scope of his employment to be acting under the "assured's instructions," then the qualification attempted entirely fails. If we eliminate the words "while acting under the assured's instructions," we have left an undertaking to indemnify against malpractice, etc., "by any assistant in the employ of assured * * * occurring while this policy is in force." Thus deleted, the contract would mean exactly what complainant argues it now means. It would cover the malpractice of any assistant acting "in the employ," that is, under general directions, of assured.

Interpreted as complainant insists the phrase under consideration would neither expand nor restrict the insurer's liability. It would add nothing to the contract, nor would it take anything out of the contract. It would be altogether meaningless.

We may not thus deny effect to the expressed language of the parties.

Moreover, as we have formerly had occasion to observe, all insurance is somewhat personal in its nature, resting to a great extent on the reputation and character of the assured. *Crouch v. Surety Company*, 131 Tenn. 265, 174 S. W. 1116.

In a physician's liability contract such as the one before us the learning, experience, and ability of the individual insured necessarily and largely enter into the consideration. The risk assumed is the assistant "while acting under the assured's instructions." As a safeguard against the error, mistake, or malpractice of the assistant, the insurer stipulates for the instructions of the assured. The insurer, relying on the professional skill of the assured, contracts for his supervision, or at least for his instructions.

It cannot be held that the insurer by this sort of contract undertakes to answer for the mistakes or malpractice of a doctor's helper acting on his own responsibility without any advice or directions from the assured; such subordinate being unknown to the insurer, and the policy without provision as to his qualifications. This would be an extraordinary hazard, and not one within the purview of this policy.

In the case at bar the assistant diagnosed and treated the patient without suggestion or aid from complainant. From a professional standpoint the assistant was acting independently. The insurer had no benefit of the supervising skill or instructions of complainant for which it had contracted. Such supervision or instructions might have averted

the mistaken diagnosis and the consequent malpractice.

Without passing on other defenses, we are satisfied the assistant was not "acting under the insured's instructions," within the meaning of this policy, and the chancellor's decree will be affirmed, and the bill dismissed.

BUCHANAN and FANCHER, JJ., dissent.

VAUGHT v. VIRGINIA & S. W. R. R.
(Supreme Court of Tennessee. Oct. 16, 1915.)

LIMITATION OF ACTIONS §130 — FEDERAL EMPLOYERS' LIABILITY ACT—NEW ACTION.

Under the federal Employers' Liability Act (Act Cong. April 22, 1906, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), giving a right of action for the death of a railroad employé while engaged in interstate commerce, which may be brought in the state courts conditioned on suit being brought within two years from the day the cause of action accrued, the limitation of the remedy is necessarily a limitation of the right to sue at all, so that Shannon's Code, § 4446, providing that if an action is commenced within the time limited, and the judgment against plaintiff is rendered upon a ground not concluding his right of action, or the judgment for plaintiff is arrested or reversed, the plaintiff may commence a new action within one year, does not apply; and hence plaintiff, whose suit under the act, brought within two years, was terminated by a voluntary nonsuit, could not maintain a suit brought within one year from the termination of the former suit.

[For other cases, see Limitation of Actions, Cent.Dig. §§ 539, 545, 553-556; Dec.Dig. §130.]

Appeal from Law Court of Sullivan County; Dana Harmon, Judge.

Action by G. C. Vaught, administrator, against the Virginia & Southwestern Railroad. From a judgment of the Court of Civil Appeals, sustaining a demurrer to the declaration, plaintiff appeals. Affirmed.

A. H. Blanchard, of Bristol, and Lindsay, Young & Donaldson, of Knoxville, for appellant. H. H. Shelton and John W. Price, both of Bristol, and J. A. Susong, of Greenville, for appellee.

FANCHER, J. Suit was brought by the administrator of W. R. Campbell averring a cause of action under the federal Employers' Liability Act, for the wrongful killing of his intestate while in the service of the defendant. A demurrer to the declaration was sustained by the trial judge and by the Court of Civil Appeals.

The second ground of demurrer is to the effect that the action is barred by the limitation of two years contained in the federal Employers' Liability Act. The plaintiff brought suit under this act within two years, but it was terminated by a voluntary nonsuit taken by the plaintiff with the permission of the court, and the present suit was brought within one year from the termination of the former suit.

Plaintiff therefore avers that he is entitled to maintain the action under section 4446, Shannon's Code, which is as follows:

"If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one year after the reversal or arrest."

The right to sue under the Employers' Liability Act is conditioned on suit being brought within two years from the day the cause of action accrued. The liability and the remedy are created by the same statutes, and the limitation of that remedy is necessarily a limitation of the right. See *Harrisburg v. Rickards*, 119 U. S. 189, 7 Sup. Ct. 140, 30 L. Ed. 362.

While the question has not been directly disposed of so far as we know, upon reason it cannot be true that there must be different rules of limitation in the states, depending upon state statutes extending time or granting a saving of limitation. The conclusion is inevitable that the federal government did not intend for the limitation of this right to be changed or altered by the statute of any particular state.

The case of *Morrison v. B. & O. R. R.*, 40 App. D. C. 391, Ann. Cas. 1914C, 1026 (a District of Columbia case), construed the limitation of one year in the former Employers' Liability Act of June 11, 1906 (34 Stat. 232, c. 3076). While not an opinion of the highest federal court, it is well considered. It was averred that suit was delayed under an agreement with the defendant, which agreement was made for the fraudulent purpose of inducing delay until the expiration of the period of limitation, and that the agreement had been violated. The court said:

"The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. * * * Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right."

The terms of limitation of the act of 1906 (which act was held invalid, except in the District of Columbia and territories of the United States) are the same as those in the present law, except the period of time has been extended from one to two years.

Upon this question, Thornton in his work on the Federal Employer's Liability and Safety Appliance Act (2d Ed.) § 114, pp. 173, 174, states the rule as follows:

"The action must be brought within two years after the death of the injured person, and the time is not extended by the pendency or dismissal of a former action, as allowed by some Codes in the ordinary cases. The statute re-

quiring action to be brought within two years is not, strictly speaking, a statute of limitations, which must be specifically pleaded, but is an absolute bar, not removable by any of the ordinary exceptions of that statute."

A similar proposition was passed upon by the federal Circuit Court of Appeals (Eighth Circuit) in the case of *Tom J. Gardner Lumber Company v. Boomer et al.*, 106 C. C. A. 168, 183 Fed. 730. That was an action under the federal statute requiring bonds to be given by contractors doing government work for the benefit of furnishers of material, etc., being an act of Congress of February 24, 1905 (33 Stat. 811, c. 778 [U. S. Comp. St. 1913, § 6923]), in which act a limitation was fixed of one year after the performance of final settlement of contract for the enforcement of the right given. Suit had been brought in the state court of Colorado, and dismissed, and was again brought in the federal court, after the lapse of one year. Plaintiff relied upon the Colorado statute, which permitted the commencement of a new action within one year after dismissal without trial upon the merits. It was insisted that the state statute should govern under section 721, Revised Statutes of the United States (U. S. Comp. St. 1913, § 1538), which provides that:

"The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The federal court refused to adopt the application of the Colorado statute and used the following language:

"When the United States have enacted a statute of limitations as to a cause of action created by them, there is no room for the application of the statute of limitations prescribed by another sovereignty. It is only where the Constitution, treaties, and statutes of the United States do not otherwise require or provide that the laws of the several states shall be regarded as rules of decisions in trials at common law in the courts of the United States in cases where they apply."

We think these authorities are sound. It was not the intention of Congress, upon enactment of this law, to permit any variation of its terms by the Legislatures of the states; but the intention is clear, from the rules of law applying in such matters, as well as upon reason, that Congress, in taking over the control of this whole subject, intended that the limitation of two years was a condition upon the right to sue at all. The statute created a right of action which did not before exist. The condition to that right was that suit should be instituted within two years from the date the right of action accrued. While Congress gave the right to institute the action in the state courts, this does not change the rule so well settled in other actions of like character predicated upon federal statutes. The act broadened the forum within which suit might be in-

stituted, and extended it to the state courts; but it is nevertheless a federal law. There is no provision in the federal act giving the right, upon voluntary nonsuit, to institute a new action after the expiration of the two years.

It results that we find no error in the judgment of the Court of Civil Appeals, and it is affirmed.

LONG v. STATE.

(Supreme Court of Tennessee. Oct. 2, 1915.)
CRIMINAL LAW §854—SEPARATION OF JURY—EFFECT.

Notwithstanding accused consented to a separation of the jury, a conviction of felony by such jury cannot be upheld; Const. art. 1, § 9, providing that in all criminal cases accused shall be entitled to a speedy public trial by an impartial jury, precluding separation of the jury in criminal prosecutions for felony or where the death penalty may be assessed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2039-2047; Dec. Dig. §854.]

Appeal from Circuit Court, Roane County; S. C. Brown, Judge.

Bud Long was convicted of abduction, and he appeals. Reversed and remanded.

J. W. Staples, of Wartburg, for appellant. Asst. Atty. Gen., for the State.

BUCHANAN, J. Long was convicted of the crime of abduction and sentenced to serve a term in the penitentiary Section 6462, Shannon's Code 1896. He has appealed to this court and assigned errors.

The several assignments of error are based on matters which we cannot consider, because a bill of exceptions was not seasonably filed. *Dunn v. State*, 127 Tenn. (19 Cates) 267, 154 S. W. 969. However, it appears on the technical record, to which our attention is called by the brief filed on his behalf, that the jury, upon his trial, after being impaneled and sworn, and after hearing a part of the evidence, was respited until the following morning, "and by agreement of the Attorney General and the defendant and his counsel the jury was allowed to go without an officer." The only reasonable construction to be placed on what the record shows is that there was a total separation of the jury. It was allowed to dissolve into its component parts, and each unit composing it to mingle at will with his fellow citizens. On the following day the same jury, as the record shows, reassembled in court, and the hearing of the cause was resumed. It does not appear by whom the conduct above during the trial was suggested, whether by the defendant, his counsel, the Attorney General, the court, or the jury; and no question was made on the verdict in the motion for new trial, nor is any account given by the record of the conduct of the units composing the jury during the time of the separation. Can such a verdict, and the judgment thereon based, be

allowed to stand by this court? We answer, No. Manifestly the fair and impartial trial guaranteed to the defendant under the Constitution was not given him. The Constitution provides:

"That the right of trial by jury shall remain inviolate." Article 1, § 6.

"That no man shall be * * * deprived of his life, liberty, or property but by the judgment of his peers or the law of the land." Article 1, § 8.

"That in all criminal prosecutions, the accused hath the right to * * * a speedy public trial, by an impartial jury." Article 1, § 9.

In an early and perhaps leading case on this question it was said:

"That the person accused may have the full benefit of a judgment by his peers, it is absolutely necessary that the minds of the jurors should not have prejudged his case, that no impression should be made to operate on them, except what is derived from the testimony given in court, and that they should continue impartial and unbiased."

And it was pointed out in that case that one of the means necessary to securing a fair and impartial trial by a jury of the defendant's peers was not to permit the jury to separate from each other, or mingle with the balance of the community after it had been sworn. *McLain v. State*, 18 Tenn. (10 Yerg.) 240, 31 Am. Dec. 573. See, also, *Stone v. State*, 23 Tenn. (4 Humph.) 27; *Hines v. State*, 27 Tenn. (8 Humph.) 597; *Troxdale v. State*, 28 Tenn. (9 Humph.) 412.

After the decision of the foregoing cases a prisoner charged with a capital crime was put upon trial, and on the first day thereof eight jurors were impaneled and sworn, who, with the consent of the defendant and the Attorney General, were by the court permitted to disperse until the next morning. On that day two other jurors were selected, and they, with the eight previously chosen, were permitted with like consent to disperse until Monday morning thereafter, on which day two other jurors were selected, and, the jury being thus complete, the trial proceeded regularly. The trial resulted in the defendant's conviction, and on his appeal to this court, after calling attention to the rule laid down in *McLain v. State*, supra, it was said:

"In the case before us the separation was permitted by the court, and consented to by the defendant, and therefore it is supposed the principles above do not apply. If the law requires the jury in a capital case to be kept together, the court cannot dispense with this requisition of law, nor ought the consent of the prisoner in a capital case to be taken. * * * The judge cannot lawfully dispense with the rule that the jury must be kept together, nor ought the consent of a prisoner in such case to be taken."

It was also pointed out that, where the charge against the defendant was one calculated to excite the community against him, the rules of law for securing an impartial trial of the case should be firmly enforced.

The judgment of the lower court was reversed, and the cause remanded. *Wesley v. State*, 30 Tenn. (11 Humph.) 502.

"The above ruling was extended to a felony case where the punishment provided was not capital upon identical reasoning in *Wiley v. State*, 1 Swan (31 Tenn.) 257.

For general authority on the point here involved, see *Armstrong v. State*, 2 Okl. Cr. 567, 103 Pac. 658, 24 L. R. A. (N. S.) 776, and the case note thereon.

We find in our cases, in respect of the particular question here involved, no modification of the ruling made in *Wesley v. State* and in *Wiley v. State*, supra.

We think the reasoning of those cases is sound and should be adhered to. The rule established by them, as indicated in one of them, does not apply in cases of misdemeanor, but we think the rule in its full strictness should be applied in cases punishable by imprisonment in the penitentiary or by death; and, when it appears that a separation of the jury, such as is shown by the record in this case, has taken place during the trial of a cause, the conduct of the jury during the separation being wholly unexplained, the verdict is ipso facto vitiated, and no judgment based thereon should be allowed to stand.

It is suggested on the brief for the state that the consent of the defendant to the separation of the jury should work an affirmation of the judgment, and, as supporting that view, we are cited to *Preston v. State*, 115 Tenn. (7 Cates) 343, 90 S. W. 856, 5 Ann. Cas. 722, and *Hobbs v. State*, 121 Tenn. (13 Cates) 413, 118 S. W. 262, 17 Ann. Cas. 177. But in the former of these cases the chief complaint was that the oath to the jurors had not been administered by the clerk in the formal way, and in the latter of these cases the point made was that the minute entry failed to show that the jury was sworn. We do not regard either of these cases as in point. In each of them the error complained of was one merely of procedure, and was properly held not to have vitiated the verdict. But in the present case the total separation of the jury, wholly unexplained, is an error of substance going to the very core of the right of the state to deprive the defendant of his liberty.

The present case is not to be taken as in conflict with those where a separation of the jury has occurred, but it appeared that the verdict of the jury was unaffected by the separation. *King v. State*, 87 Tenn. (3 Pick.) 304, 10 S. W. 509, 3 L. R. A. 210; *King v. State*, 91 Tenn. (7 Pick.) 617, 20 S. W. 169; *Sherman v. State*, 125 Tenn. (17 Cates) 54, 140 S. W. 209. No showing which can save the verdict appears in the transcript before us.

Reverse and remand.

SULLIVAN v. FARNSWORTH.

(Supreme Court of Tennessee. Oct. 10, 1915.)

1. CORPORATIONS §243 — STOCKHOLDERS — LIABILITY—SUBSCRIPTION.

Where defendant did not formally subscribe for stock in a corporation, but merely received for, accepted, and held the certificates, he was nevertheless liable for the unpaid balance of the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 943, 944, 946-950, 952-959, 974, 975, 979; Dec. Dig. §243.]

2. PLEADING §403 — OBJECTIONS — CURE — PLEADING OF ADVERSE PARTY—STATUTES OF OTHER STATES.

Although it is necessary to plead and prove the statutes of a foreign state in order to recover under them, plaintiff is relieved from doing so, if defendant pleads them and agrees that they control, since the defendant is thereby estopped from controverting them.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343-1347; Dec. Dig. §403.]

3. CORPORATIONS §243 — STOCKHOLDERS — HOLDING WITHOUT SUBSCRIPTION.

Where statutes provide for recovery of the unpaid balance on stock only in case of "subscription to or agreement for" the stock, the actual taking of the shares will support the action; no express agreement being necessary.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 943, 944, 946-950, 952-959, 974, 975, 979; Dec. Dig. §243.]

4. PLEADING §9 — REQUISITES — FORMAL WORDS—FRAUD.

Rev. St. Me. 1903, c. 47, § 50, provides that stock may be issued in payment for services, and, in the absence of fraud, the judgment of the directors shall be conclusive as to the value of such services. *Held*, that a bill charging the issuance of stock to defendant to be without consideration sufficiently impeaches the consideration as fraudulent, although the word "fraud" is not used.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. §9.]

5. CORPORATIONS §216 — LIABILITY OF STOCKHOLDERS — JURISDICTION — LAWS OF OTHER STATES—COMITY.

Although, under the general rule that stockholders may be compelled to pay up their stock in full for the benefit of creditors, in Tennessee it must appear that other assets, when collected, are insufficient, and all holders of stock not fully paid up must be made parties, so as to apportion the loss equitably among them, nevertheless, where the stock is that of a foreign corporation, the relation of the holder being contractual and entered into in contemplation of the laws of the state of incorporation, those laws govern, and the courts of Tennessee will enforce the remedy they provide against a single stockholder, in so far as that remedy is not penal.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 829-834; Dec. Dig. §216.]

6. CORPORATIONS §13—ORGANIZATION—POWERS—OTHER STATES.

Rev. St. Me. 1903, c. 47, § 6, providing for the incorporation of companies to carry passengers and freight in other states, and that "in all such cases the articles of agreement and certificate of organization shall state that such business is to be carried on only in states and jurisdictions when and where permissible under the laws thereof," is not void as attempting to create a corporation in one state in which it is prohibited to operate, but is merely restrictive of the right of such corporation to do business,

limiting it to the states whose laws also permit its operation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 48-52; Dec. Dig. §13.]

7. CORPORATIONS §228 — STOCKHOLDERS — LIABILITY—INTEREST.

The holder of corporate stock is liable for the unpaid balance thereon from the time he receives the stock; and hence the receiver, suing to recover such balance, may recover interest from the date of subscription, although he is not liable for interest where such principal liability is penal.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 874, 878; Dec. Dig. §228.]

Appeal from Chancery Court, Shelby County; Francis Fentress, Chancellor.

Action by J. H. Sullivan, receiver of the Lake View Traction Company, against C. F. Farnsworth. Judgment for plaintiff, and defendant appeals. Affirmed.

Caruthers Ewing, of Memphis, for appellant. Metcalf & Metcalf, of Memphis, for appellee.

FANCHER, J. Complainant is receiver of the Lake View Traction Company, a Maine corporation. This concern undertook to construct an interurban railway running out from Memphis to a point in northern Mississippi, and became insolvent.

The defendant was induced by his friend, the late W. A. Percy, of Memphis, to take stock in the concern. He first on July 31, 1906, put up \$1,000 on the assurance of Percy, acting for the traction company, that this was the full extent of his liability. Later, on May 9, 1907, \$1,000 of additional stock was issued in his name, and finally, on February 24, 1910, under a representation that it was necessary in order to successfully carry out the enterprise, he agreed to and did pay in \$5,000. Preferred stock issued to defendant to the par value of \$7,000. The second \$1,000 was not paid for, and the sum of \$6,000 was the total amount of money paid by defendant. He is not contradicted in his statement that he did not make these payments as an investment, but in order to assist his lawyer and friend, W. A. Percy.

Defendant also received as a bonus additional common stock to the par value of \$4,500, and it is inferred that the second \$1,000 of preferred stock was not intended to be paid for. Percy assured Farnsworth that the money he had paid would be his total liability, and Farnsworth did not inspect the certificates, and did not know that he had received any other than the \$6,000 of stock for which he had paid. He did not know whether this stock was common or preferred. The record of the corporation shows his receipt, however, for the full amount issued to him, and he retained all this stock until this suit was brought, June 10, 1913.

The company, in all its sales of preferred stock, issued an additional 50 per cent. of common stock as a bonus. Its entire capi-

tal, when organized, March 17, 1906, was \$50,000, but this was increased by amendment of its charter to \$1,000,000; the stock being divided equally, common and preferred. Its charter was filed in Tennessee with the secretary of state.

In addition to a bonded debt of \$350,000, there was established and judicially determined unpaid unsecured debts of \$119,000, at the time the present suit was brought. Under a general creditors' bill its entire assets were administered and exhausted in payment on certain secured debts, leaving all unsecured debts unpaid.

Thereupon the receiver was ordered to institute such action or actions as may be necessary to recover on account of unpaid stock subscriptions as may be due, for the common benefit of all who may be creditors in the receivership cause, and entitled to have said assets collected.

The present suit is brought to collect of defendant on behalf of the unsecured creditors the \$5,500, being the amount of the face value of the capital stock of the traction company, issued to defendant, for which it is conceded he did not pay anything, either in money or services.

The chancellor rendered a decree against defendant for \$5,500, with interest from June 24, 1910, date of the last delivery of stock to defendant.

The defendant has appealed, and upon his assignment of errors presents a number of propositions to determine.

[1] It was not necessary to make defendant liable to the responsibilities of a stockholder that he should have formally subscribed for stock. The fact that he receipted for, accepted, and held the certificates, rendered him amenable to all the responsibilities attaching in favor of unsecured creditors. *Upton v. Tribilcock*, 95 U. S. 45, 47, 23 L. Ed. 203; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Thompson's Liability of Stockholders*, § 105; *Jackson v. Traer*, 64 Iowa, 469, 20 N. W. 764, 52 Am. Rep. 456; *Calumet Paper Co. v. Stotts*, 96 Iowa, 147, 64 N. W. 782, 59 Am. Rep. 362; *Clevenger v. Moore*, 71 N. J. Law, 148, 58 Atl. 88; *Dunn v. Howe* (C. C.) 96 Fed. 160; *Barron v. Burrill*, 86 Me. 68, 29 Atl. 939; *Id.*, 86 Me. 72, 29 Atl. 938 (two cases); *Cook on Corporations*, p. 251, § 52; *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274.

The two cases of *Barron v. Burrill* are especially appropriate to this question. It would be highly dangerous to absolve a stockholder from liability because it appeared from his own statements that he did not remember or did not know that he had receipted for and held bonus stock in a corporation. Very many might escape the liability if this were so.

What are the laws of Maine upon the subject? We quote from the Code of Maine, 1903, as follows:

Chapter 47, § 50:

"Any corporation may * * * issue stock for services rendered to such corporation and the stock so issued shall be full paid stock and not liable to any further call or payment thereon; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the * * * services rendered, shall be conclusive."

Chapter 47, § 87:

"The capital stock subscribed for any corporation is declared to be and stands for the security of all creditors thereof; and no payment upon any subscription to or agreement for the capital stock of any corporation, shall be deemed a payment within the purview of this chapter, unless bona fide made in cash, or in some other matter or thing at a bona fide and fair valuation thereof."

Chapter 47, § 89:

"Any person having such judgment [i. e., on claims enumerated in section 88], or any such trustees, receivers or other persons appointed to close up the affairs of an insolvent corporation, may, within two years after their right of action herein given accrues, commence an action on the case or bill in equity, without demand or other previous formalities, against any persons, if a bill in equity, jointly or severally, otherwise severally, who have subscribed for or agreed to take stock in said corporation and have not paid for the same; * * * and in such action they may recover the amount of the capital stock so remaining unpaid or withdrawn, not exceeding the amounts of said judgments or the deficiency of the assets of such insolvent corporation. But no stockholder is liable for the debts of the corporation not contracted during his ownership of such unpaid stock, nor for any mortgage debt of said corporation; and no action for the recovery of the amounts hereinbefore mentioned shall be maintained against a stockholder unless proceedings to obtain judgment against the corporation are commenced during the ownership of such stock, or within one year after its transfer by such stockholder is recorded on the corporation books."

[2] It is said that the laws of Maine were not properly pleaded.

It is necessary to allege and prove the statutes of another state in order to pursue a remedy afforded or enforce a liability existing under such laws. *N. & C. R. Co. v. Sprayberry*, 9 Heisk. 852; *Railroad v. Foster*, 10 Lea, 351; *Railway Co. v. Lewis*, 89 Tenn. 235, 14 S. W. 603; *Kelley Bros. v. Fletcher*, 94 Tenn. 1, 28 S. W. 1099; *Harris v. Water & Lt. Co.*, 114 Tenn. 328, 348, 85 S. W. 897; *Mandel v. Swan, etc., Co.*, 154 Ill. 177, 40 N. E. 462, 27 L. R. A. 313, 45 Am. St. Rep. 124; *Ball v. Anderson*, 196 Pa. 86, 46 Atl. 366, 79 Am. St. Rep. 693; *Rice v. Merrimack Hosiery Co.*, 56 N. H. 114; *Salt Lake, etc., Bank v. Hendrickson*, 40 N. J. Law, 52; *Nashua, etc., Bank v. Anglo-Amer. etc., Co.*, 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782.

We think, however, the complainant was excused in this case from setting up the statutes and laws of Maine:

(a) Because the answer of defendant pleads those laws, averring:

"The defendant claims that the rights of the parties are to be determined by the laws of Maine, which, without further proof, may be taken and treated as shown in the public stat-

utes, and decisions of the Supreme Court of Maine."

(b) Because the agreed stipulation of proofs made by the parties filed as exhibit a copy of the Revised Statutes of the State of Maine in relation to unpaid stock subscriptions. The only qualification to the agreement was that:

"Defendant did not know the Maine laws and denies their materiality."

There is no exception by defendant to the introduction of the laws on the ground that they were not pleaded.

Defendant did not set forth the statutes of Maine in his answer, but insisted they were controlling, and agreed that they may be taken and treated as shown in the public statutes and decisions of the Supreme Court of Maine. He will not be allowed on appeal to take a position so contrary to his pleading and proposed agreement made of record.

[3] The insistence is, further, that the action cannot be maintained, except under the statutes of Maine, and these laws only provide a remedy in case of "subscription to or agreement for the capital stock." In *Baron v. Burrill*, 86 Me. 72, 29 Atl. 938, involving the question, the court said:

"An actual taking of shares is equivalent to subscriptions or an agreement to take. Either comes within the meaning of the statute."

That was a rational and practical construction of the statute. Defendant received and receipted for the shares sued on, and he should not be heard to say that he did not know or remember of the transaction.

[4] Another proposition presented is that the stock was issued to defendant as a result of the action of the board of directors on account of what they thought was or would be valuable services rendered by the defendant, and no proper pleading impeached that action.

The Maine Code (Rev. St. 1903, c. 47, § 50), hereinbefore set out, authorizes the corporation to "issue stock for services rendered to the corporation, and the stock so issued shall be fully paid stock and not liable to any future call or payment thereon," and that "in the absence of actual fraud in the transaction the judgment of the directors as to the value of the services shall be conclusive."

The bill charged in effect that for the stock here in question Farnsworth rendered no service to the company which was a valuable consideration, thereby impeaching the pretended consideration of services rendered.

The proof showed that on April 19, 1906, a resolution was passed by the board of directors providing:

"That the president and secretary be directed to issue every subscriber of one share of preferred stock a like amount of common stock upon the payment in full of the preferred stock."

It also appeared that \$1,000 of the common stock was issued to defendant after a resolution had been passed providing for the issuance

to certain named individuals, including defendant, each \$1,000, "in consideration of the services rendered by the several parties hereinafter named during the past year."

It is argued that inasmuch as it appears that Mr. Farnsworth was a man of wealth and prominence in Memphis, and that other men of high standing subscribed for stock subsequent to the time Mr. Farnsworth did, it is clear that the company considered the connection of Mr. Farnsworth with the company and his investment therein as the rendition of such services as would justify the company in issuing to him the common stock. Mr. Farnsworth testified that he did not render any services and paid nothing for the stock, except \$8,000 for the \$8,000 preferred stock. So on his own statement, nothing was paid in money or services for \$1,000 of preferred stock and \$4,500 of common stock issued to him. But his learned counsel says for him that, though he rendered no service considered valuable by him, the common stock was issued in the belief of the officials of the company that he had rendered valuable services, and that their judgment under the Maine act cannot be impeached, except under proper averment and proof to impute actual fraud.

The issuance of common stock was to all purchasers of preferred stock, and cannot be considered as in contemplation of services rendered. In reality it was issued purely as a bonus, as was also the issuance of the \$1,000 of preferred stock issued to defendant, for which he paid nothing. The issuance of the stock for pretended services was sufficiently attacked as a fraud, for while it is not so denominated in the bill in exact words, yet the issuance of all this stock is attacked, and it is distinctly averred that no consideration was paid for it. This is a sufficient attack within the Maine statute.

[5] The remedy of the creditor to finally look to stockholders who have not paid in full for their stock after the other assets have proven inadequate is applied by the American courts generally. The capital stock, especially unpaid subscriptions, constitute, in equity, a trust fund for the benefit of creditors, and the stockholders may be compelled to make payment upon his stock to its par, if so much is necessary to pay debts. *Shannon's Code*, § 2058; *Sweeney v. Railroad*, 118 Tenn. 297, 314, 100 S. W. 732; *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736; *Shields v. Clifton Land Co.*, 94 Tenn. 123, 28 S. W. 668, 26 L. R. A. 509, 45 Am. St. Rep. 700; *Cartwright v. Dickinson*, 88 Tenn. 476, 12 S. W. 1030, 7 L. R. A. 706, 17 Am. St. Rep. 910; *Railroad v. Parks*, 86 Tenn. 560, 8 S. W. 842; *Morrow v. Iron & Steel Co.*, 87 Tenn. 265, 10 S. W. 495, 3 L. R. A. 37, 10 Am. St. Rep. 658; *Chase v. Railroad Co.*, 5 Lea, 415; *Kelley v. Fletcher*, 94 Tenn. 1, 28 S. W. 1099; *Upton v. Tribilcock*, 91 U. S. 47, 23 L. Ed. 203; *Washburn v. Green*, 123

U. S. 80, 10 Sup. Ct. 280, 33 L. Ed. 516; *Appleton v. Turnbull*, 84 Me. 72, 24 Atl. 592; *Trust Co. v. Loan Co.*, 92 Me. 448, 43 Atl. 24; *Cook on Corporations*, § 199; *Beach, Private Corporations*, §§ 113, 116; *Thompson, Liability of Stockholders*, §§ 10, 11.

In Tennessee it should appear that the other assets have been or are being collected, and are insufficient to pay debts, and an account must be taken, and an order made in the nature of a call upon stockholders for unpaid subscriptions, and this must be made ratably, so as to be equal and uniform. *Simmons v. Taylor*, 106 Tenn. 740, 63 S. W. 1123.

And it is held in several jurisdictions, in accord with the Tennessee rule, that equality and complete justice should be meted out, and to this end all the solvent stockholders within the jurisdiction should be joined, at least where it is practicable to do so. *Adler v. Mil. Pat. Brick Mfg. Co.*, 13 Wis. 57; *Patterson v. Lynde*, 112 Ill. 196, 205; *Vick v. Lane*, 56 Miss. 681; *Pierce v. Construction Co.*, 38 Wis. 258; *Hadley v. Russell*, 40 N. H. 109; *Erickson v. Nesmith*, 46 N. H. 371; *Umsted v. Buskirk*, 17 Ohio St. 114; *Van Pelt v. Gardner*, 54 Neb. 701, 75 N. W. 874; *Clarke v. Cold Springs Opera House Co.*, 58 Minn. 16, 59 N. W. 632; *Dunston v. Hoptonic Co.*, 83 Mich. 372, 47 N. W. 322; *Thompson on Stocks & Stockholders*, art. 447.

The practice of bringing the various parties interested before the court in order to properly apportion the liability of each delinquent stockholder is the better practice in our opinion. But, under the Maine statute, each separate stockholder may be sued. The objection made by defendant is that the bringing of only one stockholder before the court, which this method permitted under the laws of Maine, is special and exclusive to that state, and will not be enforced in Tennessee, because it is not in harmony with our laws. He cites *Heliwell on Stocks and Stockholders* and opinions of a number of courts.

Many cases cited are upon statutes creating an additional personal liability to the extent of the par value of the stock to pay creditors, such, notably, as the national banking laws. These statutes impose an added liability of the stockholder, and such liability is a creature of the statute and somewhat penal in its nature. *Woods v. Wicks*, 7 Lea, 40. We will not confuse authorities applying to those statutes with the right, based upon public policy, of creditors to require that corporations with which they deal shall hold, as the equivalent of all stock issued, full value in money, property, or valuable services, and that bonus stock has not been issued to promoters or others, whether it be for mere influence or otherwise.

Our own courts favor this right, and the only difference is that the laws of Maine permit suits severally at law, or in equity either jointly or severally, without reference to equality of obligation, while this court has

indicated its preference that equity, so far as practicable, should be worked out and the liability prorated. The question then is: Will the courts of Tennessee enforce the action against one stockholder?

The liability of a stockholder in a foreign corporation for the debts of such corporation is to be determined by the laws of the state of incorporation. If the liability is in the nature of contract, and is not opposed to the legislation or public policy of the state in which it is sought to be enforced, the courts will enforce it. If the liability is penal in its nature, it will not be enforced outside of the state creating it. *Woods v. Wicks*, 7 Lea, 40.

This is not a penal statute, and the remedy given, while statutory, is in accord with the law of Tennessee, except the feature that this is a suit against one stockholder alone, and does not seek to adjust the equities.

Inasmuch as our courts favor the right sought to be enforced, the mere difference in the form of the remedy is not so materially opposed to the public policy of this state as to justify a refusal to recognize, *ex comitate*, the mode of procedure provided by the laws of Maine.

But, regardless of comity, it is the duty of the court to enforce this obligation in the manner provided by the laws of Maine. This obligation is in a sense contractual, for every creditor deals with the corporation in view of the statutes of the state of its organization, and the obligation arises upon the contract of subscription to the capital stock of the corporation. The action to enforce the same is transitory. It may be brought in any court having jurisdiction of such matters in any state where personal service can be made upon a stockholder. See *Whitman v. National Bank*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587.

[8] It is said that the Lake View Traction Company was incorporated under a statute of Maine which forbids it doing business in that state; that no state is bound to recognize laws of one state which undertake to organize a corporation and by the very act of incorporation oust it from that state; that to do so would be to recognize the right of one state by an act of sovereignty to legislate into being an artificial body for some other state.

Counsel for defendant quotes from Code of 1903, p. 434, c. 47, § 6, insisting that this authorizes a charter which must go into other states. This section in part as quoted is as follows:

"In all such cases the articles of agreement and certificate of organization shall state that such business is to be carried on only in states and jurisdictions when and where permissible under the laws thereof," etc.

Counsel then quotes from the charter of the Lake View Traction Company, as follows:

"All such powers are to be exercised and such business is to be carried on only in other states

and jurisdictions when and where permissible, under the laws thereof."

It is to *only* do business where permissible, but we fall to see by the language that it ousts the corporation from the state of Maine.

[7] We think defendant's contention as to interest is not sound. He insists that no right of action arose on behalf of the receiver for this unpaid stock until it was found that the other assets were insufficient to pay debts, and from this assumption he reasons that interest is not chargeable.

There are many authorities holding that interest cannot be charged under statutes providing individual, proportionate or double liability beyond the par value of the stock. The reasoning is sound as to actions of that nature because no liability exists against the stockholder for individual liability until the necessity for its collection arises. That liability does not attach until the assets of the corporation prove inadequate. In this case, however, the liability to pay the par value of all stock arose from the time the stock was received. The act of the officials in granting a bonus of stock was in violation of law and *ultra vires*. The statute of Maine provided that no payment should be deemed a payment within the purview of that chapter, unless bona fide made in cash or in some other matter or things at a bona fide and fair valuation thereof. Therefore, since the cause of action arises from an illegal issuance of the stock, the interest must be counted from that time. The failure to require payment for all stock issued no doubt materially contributed to the insolvency.

The decree of the chancellor is in all things affirmed.

STATE ex rel. WEBB v. BROWN, County Judge, et al.

(Supreme Court of Tennessee. Oct. 16, 1915.)

1. JUDGES ⇐22—COMPENSATION—SHALL.

Where relator was serving as judge of the juvenile court under Priv. Laws 1913, c. 277, creating the juvenile court, and providing that the judge thereof should serve without compensation, he was entitled to the salary prescribed by the Act of 1915, since by that act the Legislature performed its mandatory duty to provide a salary for such judge, under Const. art. 6, § 7, providing that judges "shall" receive a compensation, and did not increase the salary in violation of that section.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 75-88, 179; Dec. Dig. ⇐22.]

2. COUNTIES ⇐190—JUVENILE COURT—SALARY OF JUDGE—PAYMENT BY COUNTY.

The Act of 1915, providing a salary for the judge of the juvenile court of Knox county, does not violate the provision of Const. art. 2, § 29, that counties may be empowered to levy taxes for county purposes only, since the juvenile court is a county forum, serving a county purpose.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 303, 304; Dec. Dig. ⇐190.]

Appeal from Chancery Court, Knox County; W. D. Wright, Chancellor.

Action by the State, on the relation of D. C. Webb, against R. A. Brown, County Judge, and the County of Knox. From a decree in favor of relator, defendants appeal. Affirmed.

Johnson & Cox, of Knoxville, for appellant Brown. Jno. W. Green, Hugh M. Tate, and Maynard & Lee, all of Knoxville, for appellee.

WILLIAMS, J. This is a suit on relation of D. C. Webb, judge of the juvenile court of Knox county, seeking to compel, by mandamus, defendants Brown, the county judge, and the county of Knox to pay to relator the salary for the month of June, 1915, alleged to be payable to him, as such officer, according to law. The case was heard on bill of complaint and demurrer; the chancellor overruling the demurrer of the defendants.

The juvenile court was created by Acts (Private) 1913, c. 277, the relator being appointed to serve as the first occupant of the office of judge of that court.

At the next general election, in August, 1914, he was elected to that position by the qualified voters. At that time there was no provision made by statute for his compensation. On the contrary the act of 1913 provided that the judge of the juvenile court should serve without compensation.

The General Assembly at its 1915 session passed an act which prescribed that a salary of \$100 per month be paid said judge, and it was to procure the payment of that salary that the action was brought.

The grounds of the defendants' demurrer is indicated by what it said below.

[1] The first contention of the appellants for a reversal is that, since at the date of appellee's election and qualification the provision of the law was that the judge of that court should serve without compensation, it was not within the power of the Legislature to increase the compensation during the appellee's term of office, under the Constitution.

The section of the Constitution invoked by appellants (article 6, § 7) is as follows:

"The judges of the Supreme or inferior courts, shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected. They shall not be allowed any fees or perquisites of office or hold any office of trust or profit under this state or the United States."

The words providing for compensation differ from those used in clauses in relation to the same subject-matter in the Constitutions of some of the other states. The provision is not that the judges shall receive such compensation for their services as the Legislature may determine, but that they shall receive a compensation, the subsidiary provisions being that the same should be by way

of salary to be ascertained or fixed by the Legislature. To make more certain the form that the compensation should take, it was provided that the same should not be from fees or perquisites.

The thought uppermost in the minds of the members of the constitutional convention was to set apart the judges and to give to them independence in the discharge of their high duties. They were not to be dependent on the will or whim of the politicians or the lawmaking power in respect of a reward by way of an increase, or of punishment by way of a diminution of their compensation during their tenure of office; they were not to be dependent on fees to be paid by a party litigant. Deprived of holding any other office of trust under the state or nation, they were to be compensated for judicial service by those they serve—the people. "It is said by Mr. Story, quoting from the *Federalist*, that, next to permanency in office, nothing could contribute more to the independence of the judges than a fixed appropriation for their support." *The Judges' Salary Case*, 110 Tenn. 370, 389, 75 S. W. 1061, citing Story on the Constitution, § 1629.

It cannot be conceived that it was purposed by the language thus used to leave it within the power of the Legislature to prescribe that the regular or tenure judges of the state should serve without compensation since in such case the natural tendency would be towards the result that only men of means could afford to occupy places on the bench.

Speaking of the expression of the sovereign will in the fundamental law, it was said in *State ex rel. v. Burrow*, 119 Tenn. 376, 104 S. W. 526, 14 Ann. Cas. 809:

"The provisions of these solemn instruments are not advisory, or mere suggestions of what would be fit and proper, but commands which must be obeyed. Presumably they are all mandatory. Certainly no provision will be construed otherwise, unless the intention that it shall be unmistakably and conclusively appears upon its face" (citing *Cooley*, Const. Lim. 93).

Seldom, if ever, may the word "shall," as here used, be treated otherwise than as evidencing a mandate. *Cooley*, Const. Lim. 93; *Webb v. Carter*, 129 Tenn. 182, 239, 165 S. W. 426.

If this be true, the Legislature in the act creating the office of judge of the juvenile

court should have complied with the mandate, and provided a compensation for the occupant of the office of judge; how much should be allowed was within its discretion, provided it was some amount. Failing in that duty, the Legislature later performed it when the amendatory act was passed and a salary was thereby fixed. The compensation by way of salary was then created, not increased. There can be no increase of a quantity that has no existence.

The constitutional provision forbidding an increase or reduction of the compensation during the time for which Judge Webb was elected does not have application.

In *Mechem, Public Officers*, § 858, it is said: "Where, however, the salary or compensation has not been fixed at all at the time of the election or appointment, this provision does not prevent its being fixed after the term begins." *Rucker v. Supervisor*, 7 W. Va. 661; *Purcell v. Parks*, 82 Ill. 346; *State v. McDowell*, 19 Neb. 442, 27 N. W. 433; *Louisville v. Wilson*, 99 Ky. 598, 36 S. W. 944.

[2] The remaining contention of the defendant is that the Legislature exceeded its power when it prescribed in the amendatory act that the salary of the judge of the juvenile court should be paid by Knox county, the claim being that that official is a state officer, and can be paid for his services alone out of state funds, and that the contrary provision of the amendatory act violates article 2, § 29, of the Constitution, which relates to the Legislature empowering counties to levy taxes for county purposes only.

Without going here into a detailed analysis of the act, we hold that, though a court of record, the juvenile court so created is a county forum, and serves a county purpose. It provides for supervision of the homeless, dependent and delinquent children, the vagrants, beggars, waifs, truants, and incorrigibles of Knox county.

It has been held that the probate court of a county (Shelby), though a court of record, is a county court, created for well-recognized county purposes, the presiding judge of which may be paid for his services out of the county treasury. *Judges' Salary Cases*, *supra*. For stronger reasons, the act here under review validly provided for the compensation of the complainant out of county funds.

Finding no error in the decree of the chancellor, it is affirmed.

DAVIS et al. v. HALL et al. (No. 122.)
(Supreme Court of Arkansas. July 12, 1915.)
MORTGAGES \Leftrightarrow 86 — VALIDITY — SUFFICIENCY
OF EVIDENCE.

In a suit to cancel a deed of trust, plaintiff's evidence held insufficient to sustain the allegations of his complaint that he agreed to buy the realty, for which notes and the deed were given, only upon the express understanding that neither notes nor deed should be of any effect until plaintiff's sister had also signed the notes and executed the deed, and if she refused they should be destroyed and the transaction at an end.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 197, 1350, 1355, 1364; Dec. Dig. \Leftrightarrow 86.]

Appeal from Garland Chancery Court;
Jethro P. Henderson, Chancellor.

Action by Hamp Davis and another against W. H. Hall and another. Decree for defendants, and the named plaintiff appeals. Affirmed.

Rector & Sawyer, of Hot Springs, for appellant. Davies & Davies, of Hot Springs, for appellees.

SMITH, J. This suit was brought to cancel a certain deed of trust executed by appellant and his wife to appellee. Appellant's mother died seised of certain lots in the city of Hot Springs. She was survived by appellant and a daughter, named Flora Davis, and a grandson, named Mack Davis. On November 11, 1913, Mack Davis conveyed to appellee his interest in the lots owned by his grandmother and also his share of her personal property. The deed to the land recited that the consideration was \$2,000, although the consideration in fact paid for all the property was only \$1,000. After the purchase of the interest of Mack Davis in his grandmother's estate, appellee opened negotiations with appellant for the sale of this interest. The price agreed upon was \$3,000, to be divided into 15 equal payments of \$200 each, evidenced by notes bearing interest at the rate of 8 per cent., one of which notes matured every three months. There is no controversy about the price, nor about the terms of payment. The parties disagree, however, as to whether the sale of the lots was to be to appellant alone, or to him and his sister jointly.

Appellant contends that he agreed to purchase the property bought by appellee from Mack Davis, but that the agreement was upon the condition that Flora Davis would join with him in the purchase. A deed from appellee was prepared, in which both appellant and his sister Flora were named as grantees, and a deed of trust was prepared from appellant and his sister to appellee, which conveyed, not only the Mack Davis interest, but all of their interest, in the estate of their mother. However, the name of Flora Davis was stricken from both instru-

ments, and the determination of the circumstances under which this was done constitute the controlling question in the case. Appellant admits signing the notes, and, further, that he and his wife executed and acknowledged the deed of trust which they now seek to cancel; but they say that this was done upon the express understanding that neither the note nor the deed should be of any force or effect until Flora Davis had also signed the notes and executed the deed of trust, and that, if she refused so to do, the notes and deed of trust should be destroyed, and the transaction would be at an end.

Appellee's version of the transaction is that he purchased the interest of Mack Davis, and agreed to reconvey it to appellant upon the terms upon which the sale was subsequently made; that he suggested that appellant's sister join in the purchase, but that appellant at first protested, although he later consented that she might join with him in the purchase of the property; that Flora Davis declined to join in the purchase of the property, whereupon her name was stricken from both instruments, which were later executed and acknowledged and delivered.

Appellant denies that the deed to him was ever delivered or accepted by him, but says that his wife found it at her home on her machine, but that it was placed there without his knowledge or consent. There are some circumstances in proof which tend to corroborate appellant, and among these is the fact that appellee was apparently in a great hurry to close the deal, and the further fact that it is admitted that the trade was an improvident one.

The chancellor prepared a written opinion, in which he reviewed the evidence at length, and announced his findings of fact to be that no fraud had been practiced upon appellant in the transaction, and specifically found the fact to be that the execution of the deed of trust was not upon the condition that it should become effective as a conveyance only upon the execution of the same by Flora Davis.

A study of the evidence in the case does not lead to a satisfactory conclusion as to the truth about the transaction. Appellant has evidently made a very improvident bargain, although the evidence does not show the value of the property in controversy. Appellant does concede, however, that he agreed to pay the consideration recited in the deed of trust, and his only reason for not proceeding with his bargain is that his sister refused to consummate the deal. Appellant admits that two sets of papers were prepared; that the first did not allow him sufficient time in which to make the payments, and the deed of trust was rewritten on that account. It was developed in the proof that appellee had given appellant a bill of sale for the household furniture, and that there

had never been any offer to return that property, or the bill of sale therefor.

The notary public who took the acknowledgment corroborated the evidence of appellee in regard to the execution and delivery of the deed and deed of trust; but it was alleged in the pleadings, and is insisted in the argument, that the notary public conspired with appellee to defraud appellant by procuring the execution of the deed of trust in question. We think the evidence does not support that contention.

This deed of trust was recorded, and appellant now seeks to set it aside for the reason herein stated; but the proof does not sustain the allegations of his complaint, and the decree is therefore affirmed.

DICKERSON v. STATE. (No. 118.)

(Supreme Court of Arkansas. July 12, 1915.)

1. CONTEMPT — 52 — PROCEEDINGS — NOTICE.

An attorney's contempt in attempting to deceive the court by a false waiver of service, being one committed within the presence of the court, the written charge made upon the record, of which the attorney was notified and given an opportunity to answer, is sufficient.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 140-142; Dec. Dig. — 52.]

2. ATTORNEY AND CLIENT — 49 — DISBARMENT — PROCEEDINGS.

Kirby's Dig. §§ 450-466, fixing the procedure for disbarment, provides for the exhibition of definite charges against the offender and the fixing of a time for hearing, of which he shall be notified. An attorney, charged with contempt in offering to the court a false waiver of service, was ordered disbarred as part of the punishment for his contempt. *Held*, that the order of disbarment was unauthorized, though a contempt may be made the basis of independent prosecution, as the attorney was not notified of the charges.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 48, 66; Dec. Dig. — 49.]

3. ATTORNEY AND CLIENT — 56 — DISBARMENT PROCEEDINGS — OBJECTIONS.

An attorney, who was charged with contempt, cannot be said not to have objected to judgment of disbarment; it appearing he was not notified that disbarment would be sought.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 76, 79; Dec. Dig. — 56.]

Appeal from Sebastian Chancery Court; W. A. Falconer, Chancellor.

P. H. Dickerson was adjudged guilty of contempt, and as part of his punishment was disbarred, and he appeals. Affirmed, save as to the order of disbarment.

Appellant asks a review of the chancellor's decree adjudging him guilty of contempt of court and striking his name from the roll of attorneys permitted to practice in the chancery court of Sebastian county, in effect disbaring him from the practice in that court. The chancellor on March 31st entered of record in the chancery court a charge against P. H. Dickerson, appellant, John and Edith Garvey, and W. E. Martin "of conspiracy to obtain a divorce from Edith Garvey by

false affidavits and false testimony, and after reciting that she made affidavit to secure permission to sue as a pauper, when the testimony of her mother disclosed that she had paid said Dickerson a fee of \$25 to obtain the divorce, which money was furnished by Martin, who was living in adultery with her, and that they presented and filed in court what purported to be an affidavit of John Garvey, made in Ft. Smith, Ark., on March 29, 1915, in which affidavit John Garvey purported to waive service of summons on him, and agreed that the cause of Edith Garvey against him might be tried by the court at chambers at any time. It appears from the testimony produced that John Garvey was not in Ft. Smith at that time, and that said attorney, P. H. Dickerson, and the said Edith Garvey and W. E. Martin, offered said affidavit as true, and it was false, and not executed by John Garvey; that the said defendants and each of them have abused the process of this court, and are guilty of contempt therein and also for the reason above set out to permit the defendants to make defense." Each of them was notified on the 31st day of March, 1915, of the charge and given until April 1, 1915, to produce testimony and make a defense.

The cause was continued on motion of the defendant to April 5th, at which time defendant pleaded not guilty and asked for a continuance, which was denied. Testimony was introduced tending to substantiate the truth of the matter charged, and it was shown that appellant had filed in the chancery court the following purported affidavit:

"Sebastian Chancery Court, Ft. Smith District.

"Edith Garvey, Plaintiff, v. John Garvey, Defendant.

"Comes the above-named plaintiff and defendant and agrees that this cause now pending in Sebastian chancery court may be heard at chambers before Hon. W. A. Falconer, chancellor, in his chambers at Ft. Smith, Arkansas, and that the finding may be entered of record as same as if tried in regular term time. The defendant further agrees and does hereby waive service in the above-entitled cause, and that this cause may be tried at any time, and entered of record as though he, the defendant, had been served with regular service.

"[Signed] John Garvey, Defendant.
"....., Plaintiff.

"Subscribed and sworn to before me this the 29th day of March, 1915.

"[Seal] S. C. Reagan, Notary Public."

Pen and ink notation:

"Recommended as being correct person by P. H. Dickerson, same being a stranger to me. I make no charge for this work. S. C. Reagan."

It was shown also that John Garvey did not appear before the notary public and make the affidavit; that the jurat was attached by the notary upon Dickerson's statement that it would be all right and that Garvey had signed it. Dickerson did not deny that this was a fact, but insisted that the suit or complaint for divorce had never in fact been

filed in court, nor the alleged affidavit waiving service, and that it was kept among his own private papers after he had concluded not to bring the divorce suit at the time, that it might be used later on if it was determined to proceed with the suit, and that as a matter of fact it was signed by John Garvey, although he did not appear before the notary and swear to it.

The court found appellant "guilty of knowingly and fraudulently offering to the court a false waiver of service on the defendant," and fined him \$50, and ordered him committed to the county jail for 24 hours, and his name stricken from the roll of attorneys in the chancery court.

Covington & Grant, of Ft. Smith, and J. E. London, of Alma, for appellant. Jos. M. Hill, James F. Read, and Harry P. Daily, all of Ft. Smith, for the State.

KIRBY, J. (after stating the facts as above). Appellant insists that the court was without authority to strike his name from the roll of attorneys of the chancery court and disbar him from practice therein as part of the punishment inflicted for contempt and that the judgment is not supported by the testimony.

[1, 2] The contempt appears to have been one committed in the immediate view and presence of the court. The evidence discloses that when appellant, as attorney for Edith Garvey, made application to the chancellor to sue as a poor person, he was asked if Garvey was in town and told to notify him of the application. He later returned to the court, and without explanation presented the said affidavit showing the waiver of service. The testimony shows at best in his favor that the statement was written out at his dictation by a stenographer, and that Garvey's name was signed by the stenographer, a Miss Simmons, at the request of a man present, who Dickerson told her was Garvey. It was not dated at the time, which was some time before the 29th day of March, and was dated upon that day when presented to the chancellor, and appeared on the face of it to have been made and sworn to on that day.

If it be regarded a proceeding to punish for contempt not committed within the presence of the court, the written charge made upon the record of the court, of which he was notified and given an opportunity to answer, was sufficient, as held in *Carl-Lee v. State*, 102 Ark. 122, 143 S. W. 909. The statute authorizes the court to punish for criminal contempt by a fine and imprisonment, and provides that the persons punished shall still be liable to indictment for the offense, if it is an indictable one; "but the court before which a conviction may be had on such indictment shall, in forming its sentence, take into consideration the punishment before inflicted." Kirby's Dig. § 725.

Disbarment of an attorney is no part of the punishment prescribed by statute for any contempt of which he may be guilty, nor does his punishment for any such contempt prevent his being disbarred from practicing in any court, or all the courts, of the state, if such act is one warranting disbarment. The statute prescribes the proceeding for disbarment, which contemplates definite charges exhibited against the offender and a time for a hearing fixed, of which he shall be notified. Sections 450-466, Kirby's Digest. Such proceedings are not criminal, but civil, in their nature. They are not instituted nor intended for the purpose of punishment.

"The purpose of the proceeding for suspension and disbarment is to protect the court and the public from attorneys who, disregarding their oath of office, pervert and abuse those privileges which they have obtained by the high office they have secured from the court." *Wernimont v. State*, 101 Ark. 216, 142 S. W. 196, Ann. Cas. 1913D, 1156.

The accused is entitled to a trial by a jury in a proceeding to disbar if he requests it, and the judgment of suspension or removal operates as a removal or suspension from practice in all the courts of this state. The proceeding for the punishment of contempt of court charged herein is criminal in its nature, as distinguished from civil, and although the written charge against the accused, of which he was notified, and appeared and defended against, would have been sufficient as a charge in a disbarment proceeding, if it had notified the appellant that that was the purpose of it, it only put him on notice of, and required him to answer, a charge for contempt.

It was not intended that a proceeding to punish for contempt and one for disbarment of an attorney should be joined in the same charge, nor that disbarment or suspension from practice as an attorney and counselor at law should be inflicted as punishment for contempt of court, although courts have inherent power to punish for contempt, and those which grant licenses to attorneys have inherent power to revoke them. Our law does not contemplate that an attorney may be removed or suspended from the practice of his profession, unless upon written charges preferred and after notice and an opportunity to defend has been given. The punishment of appellant for contempt by fine and imprisonment would not have prevented his trial for disbarment upon the same charge, but he could not be tried at the same time, upon the one charge, and punished for contempt by fine and imprisonment, and removed from the practice of law or disbarred, without his consent.

[3] It cannot be said that he did not object to such proceeding, for there was no notice that he was on trial for disbarment, or that any such result would follow his conviction for contempt, and since the judgment of removal or suspension of an attorney in a disbarment proceeding, by a court

having authority to render it, operates while it continues in force as a removal or suspension from practice in all the courts of the state, no such judgment should be rendered, except upon a formal charge therefor in accordance with the statute. *Beene v. State*, 22 Ark. 156; *Nichols v. Little*, 112 Ark. 213, 165 S. W. 301.

The court erred in its judgment disbarring the attorney, and, being without authority to order his removal as punishment for contempt in the proceeding, that part of its judgment will be quashed, and otherwise it will be affirmed.

It is so ordered.

McLAUGHLIN v. BENSON, Pros. Atty., et al.
(No. 131.)

(Supreme Court of Arkansas. Sept. 27, 1915.)
CRIMINAL LAW — 1159—APPEAL—REVIEW—
SUFFICIENCY OF EVIDENCE.

In testing sufficiency of evidence on appeal, it is only necessary that there should be some substantial evidence upon which to base the verdict, since passing upon issues of fact by weighing the credibility of witnesses is peculiarly within the province of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. — 1159.]

Appeal from Franklin Chancery Court; T. H. Humphreys, Chancellor.

Suit by Neal McLaughlin against J. D. Benson, Prosecuting Attorney, and the Superintendent of the State Penitentiary. From a decree dismissing the complaint, complainant appeals. Affirmed.

See, also, 174 S. W. 234.

This is an appeal from the decree of the Franklin chancery court dismissing, for want of equity, the complaint of appellant filed in that court against the appellees, the prosecuting attorney of the Fifteenth judicial circuit, and the superintendent of the state penitentiary. By this suit the appellant sought to have the state, through its prosecuting attorney, to submit to a new trial of appellant's case and to restrain the execution of the judgment of the Franklin circuit court pronouncing a sentence of death against appellant.

Among other things, the appellant alleges that he was not guilty of the crime of rape of which he was convicted and for which he was sentenced to be electrocuted in the Franklin circuit court. He alleges that the verdict and judgment of that court were contrary to law and the evidence; that he had appealed from the judgment and was allowed 30 days to file his bill of exceptions; that the bill of exceptions would have shown errors in the rulings of the trial court in overruling his motion for a new trial which would have entitled him, on appeal to the Supreme Court, to a reversal of the judgment and a new trial of his case in the cir-

cuit court. He further alleged that the bill of exceptions was not filed within the time allowed by the trial court, and sets forth facts (which it is unnecessary to detail) showing that the failure to file the bill of exceptions within the time allowed was not on account of any negligence legally attributable to appellant, but that it was through the carelessness or negligence of those for whose conduct appellant was in no wise responsible, and that by reason of the fault and carelessness of others appellant was denied, on appeal to the Supreme Court, a hearing upon the exceptions which he had reserved at the trial and which, if considered by the Supreme Court, he says would have resulted in a reversal of the judgment and sentence of death against him and in the granting of a new trial. The sufficiency of the complaint was challenged by a demurrer, and its allegations were put in issue by the answer. Oral testimony was taken before the court and was reduced to writing, and was embodied in the bill of exceptions signed by the chancellor. There was also tendered with the complaint as an exhibit the bill of exceptions containing the evidence which was adduced on the trial of the cause before Hon. J. H. Evans, judge of the Franklin circuit court, and the bill of exceptions signed by the chancellor recites that:

"The plaintiff introduced in evidence the bill of exceptions filed with the complaint herein as a part of the evidence in this cause."

The bill of exceptions signed by the chancellor further recites:

"This is all the testimony introduced on the part of the plaintiff and all of the testimony introduced upon the trial of the cause by either party."

The chancellor found:

"That the said Neal McLaughlin, in perfecting and filing his bill of exceptions referred to in the complaint herein, did not use such degree of diligence as was demanded, so that the failure to obtain the filing thereof within the time decreed by the court in which said action was pending was not without fault of the said Neal McLaughlin in that behalf."

John D. Arbuckle and J. V. Bourland, both of Ft. Smith, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for appellees.

WOOD, J. (after stating the facts as above). The Attorney General, for appellees, contends that the chancery court was without jurisdiction to grant the relief sought in the complaint, while learned counsel for the appellant, on the other hand, maintain that the chancery court has such jurisdiction, and they have presented an elaborate brief and cited numerous authorities to support their contention. It is also insisted by the Attorney General that the chancellor was correct in finding that the failure to file the bill of exceptions within the time allowed by the trial court was on account of the fault of the

appellant, while counsel for the appellant strenuously contend that the chancellor erred in so finding. We find it unnecessary to determine either of these questions; for, if it be conceded that the chancery court had jurisdiction to grant the relief prayed, and that the chancellor erred in finding that the failure to obtain and file the bill of exceptions within the time allowed by the trial court was because of the fault or carelessness of the appellant, the record on this appeal nevertheless discloses that the decree of the chancery court dismissing appellant's complaint was correct and must be affirmed for another reason, to wit: The bill of exceptions, made an exhibit to appellant's complaint, which contains a statement of the evidence that was introduced before the chancellor, does not show any ground upon which the Supreme Court would have been authorized to reverse the judgment of the trial court had this bill of exceptions been filed within the time allowed by the trial court, and had this become a part of the record on appeal to the Supreme Court. This court on the appeal in the case of *McLaughlin v. State*, 174 S. W. 234, did not discover any error on the face of the record.

The present record does not show that the appellant had reserved any exceptions to the rulings of the circuit court in the trial of his case before that court that would have warranted this court in reversing the judgment of the trial court, even if the bill of exceptions had been filed within the time allowed for filing the same. While it is alleged in the complaint that the court erred in its ruling upon certain instructions, and that exceptions were saved to the court's ruling in the giving and refusing of instructions, these alleged instructions and rulings were not presented to the chancellor on the hearing of the present cause. Neither the instructions nor the trial court's rulings thereon were in evidence before the chancellor, and are not before us, and it is impossible therefore for us to determine whether or not the circuit court made any erroneous rulings at the trial which resulted in appellant's conviction of the crime of rape.

Counsel for appellant strenuously urge that the evidence as contained in the original bill of exceptions, and which was made a part of the evidence in the hearing of the present case before the chancellor, failed to sustain the verdict of the jury, and that a new trial should have been granted on account of the insufficiency of the evidence. We have carefully read the testimony as set forth in the original bill of exceptions contained in this record, and we are of the opinion that if this testimony had been in the record on the appeal from the judgment of the circuit court, and if the record on that appeal had shown

that an exception had been properly taken to the ruling of the court in refusing to grant appellant's motion for a new trial on the ground of the insufficiency of the evidence to sustain the verdict, still this court would not have reversed such ruling of the trial court. The evidence, in other words, that was taken in the trial of appellant before the circuit court is amply sufficient to sustain the verdict of the jury. It is unnecessary to set out and discuss this evidence in detail. The testimony of the prosecutrix at the trial before the circuit court showed that she met appellant on the path that she was traveling through the woods while returning from church to the place where she was then stopping, and that he threw her upon the ground and had sexual intercourse with her forcibly and against her will. She positively identified appellant as the one who had had such intercourse with her, and detailed the circumstances at the time and immediately thereafter, all in such manner as to convince the jury of appellant's guilt.

It was peculiarly within the province of the jury to pass upon the issue of fact. It was their province to weigh the credibility of the witnesses. In testing the sufficiency of the evidence here it is only necessary that there should be some substantial evidence upon which to base the verdict. This is the unvarying rule of this court. *Easley v. State*, 109 Ark. 130, 159 S. W. 36. This record shows evidence of a substantial character in support of the verdict. The appellant therefore did not disclose to the chancery court that he had any grounds to justify that court in granting the relief sought in his complaint. As early as *Leigh v. Armor*, 35 Ark. 123, we said:

"It is well settled that where a judgment is obtained in a court of law by fraud, accident, or mistake, unmixed with negligence on the part of the party against whom it is rendered, a court of equity has jurisdiction, on a showing of a meritorious defense or cause of action, to compel the party obtaining the judgment to submit to a new trial. But it is agreed that this power should be exercised with great caution, and the application of the doctrine is generally restricted, and is confined to cases which present peculiar circumstances, under the maxim that there must be an end of litigation."

See, also, *Kansas, etc., R. Co. v. Fitzhugh*, 61 Ark. 341-347, 33 S. W. 960, 54 Am. St. Rep. 211.

The above principles apply here. Appellant did not disclose any error in this record that would have justified the court of chancery (conceding that it had jurisdiction) in restraining the judgment of the law court and in compelling the state to submit to a new trial.

The decree is therefore correct and is affirmed.

BARRENTINE v. HENRY WRAPE CO.

(No. 147.)

(Supreme Court of Arkansas. Oct. 4, 1915.)

1. MASTER AND SERVANT §286 — ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

An employer allowed its employes to remain in its plant and on its grounds during the noon hour without any restrictions as to their conduct. Certain of the employes engaged in a sham battle with rocks upon such grounds, and plaintiff, who was not engaged in the rock throwing, but who was returning to his work, was struck and injured. There was evidence that it was known to the employer that the employes indulged in this practice, and that the superintendent and foreman had remonstrated with them, and ordered the practice stopped when they had seen it engaged in. The superintendent and foreman testified that they had no control of the employes during the time that the plant was not in operation. *Held*, that the employer's negligence was a question for the jury, as it could not be said as a matter of law, that the employer had no control of the employes upon its premises while the plant was not in operation, and the testimony as to its conduct in discouraging the practice of throwing stones on the premises, though it would have supported a verdict for the employer, did not, as a matter of law, show the exercise of ordinary care to free the premises of known dangers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. §286.]

2. APPEAL AND ERROR §927—REVIEW—DIRECTION OF VERDICT.

In determining on appeal the correctness of the trial court's action in directing a verdict, that view of the evidence which is most favorable to the party against whom the verdict is directed is to be taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. §927.]

3. TRIAL §139—DIRECTION OF VERDICT.

Where there is any evidence tending to establish an issue in favor of a party, it is error to take the case from the jury and direct a verdict against such party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. §139.]

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Action by James W. Barrentine against the Henry Wrape Company. From a judgment on a directed verdict for defendant, plaintiff appeals. Reversed and remanded.

J. N. Rachels, John E. Miller, and W. H. Yarnell, Jr., all of Searcy, for appellant. Brundidge & Neelly, of Searcy, for appellee.

KIRBY, J. This appeal is from a directed verdict. [1] This is the second suit for damages for personal injury alleged to have been caused by the negligence of appellee in failing to exercise ordinary care to protect appellant while upon its premises and in its plant as he was returning to his work. After going to dinner on the day of the injury he was returning to resume work at his place, and when within a few feet of his

place of employment, and shortly before the hour to begin, some of the other employes who had engaged in a sham battle with rocks upon the grounds threw a stone which struck him in the eye and put it out.

In the first suit the complaint was held insufficient upon demurrer, and the law relating to the liability was declared. *Barrentine v. Henry Wrape Co.*, 105 Ark. 485, 152 S. W. 158. It was there said:

"The master owes to his servants, while on his premises to perform service, and also to strangers who rightfully come upon the premises, the duty of exercising ordinary care to free the premises from known dangers, all dangers of which the master is informed. This, of course, includes dangers arising from negligent or willful acts of the servants. Though it is not essential to the master's liability that the negligent servant should be acting at the time within the scope of his authority, yet it is essential that the master should have control of him or the opportunity to control his actions before the liability attaches on account of his conduct. If the servant in committing the negligent act is not proceeding within the line of his duty, and is not at the time within the control of the master, then the latter is not liable."

The testimony tends to show that appellant was not engaged in the rock throwing which many of the other employes indulged in for diversion during the noon hour, as he was returning to the machine where he worked, and immediately before the time to begin he was struck by a stone or missile thrown by some of the others, inflicting the injury complained of, and also that it was known to the master that the employes indulged in such practice, and the superintendent and foreman had remonstrated with them and ordered the practice stopped when they had seen it engaged in. It was further shown that the men were allowed to remain in the plant and on the grounds during the noon hour without any restrictions as to their conduct; and the superintendent and foreman testified that they had no control of the employes during the time that the plant was not in operation, and, under these circumstances, there was a question for the jury to determine whether the master was negligent and failed to exercise ordinary care for the protection of appellant.

[2, 3] In determining on appeal the correctness of the trial court's action in directing a verdict for either party, the rule is to take that view of the evidence that is most favorable to the party against whom the verdict is directed, and where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury. *Williams v. St. L. & S. F. R. Co.*, 103 Ark. 401, 147 S. W. 93; *Phoenix Cement Co. v. Russellville Water & Light Co.*, 101 Ark. 22, 140 S. W. 996; *Curtis v. St. L. & S. F. R. Co.*, 96 Ark. 394, 131 S. W. 947, 34 L. R. A. (N. S.) 466, Ann. Cas. 1912B, 685.

It cannot be said that the testimony is undisputed, nor that different minds could not draw different conclusions from it relating to the question of the exercise of ordinary care by the master to protect the servant. It is true the superintendent and foreman both testified that they had no control of the employes on the grounds or premises during the noon hour, and that they were under no restrictions whatever, but it is also shown that the master knew of the habit indulged in by the employes of throwing stones upon the grounds; and, while there is testimony tending to show that they stopped the employes from doing this when they were seen to be engaged in it, it still remains a question for the jury to determine whether such conduct was the exercise of ordinary care required by law of the master. As a matter of law, it cannot be said that a master had no control of the servants upon his premises during the noon hour when the plant was not in operation, because he exercised none; and, although the testimony showing appellee's conduct in discouraging the practice of throwing stones upon the premises is amply sufficient to have supported a verdict in its favor, if one had been rendered, it is not sufficient to be declared, as a matter of law, the exercise of ordinary care to free its premises of known dangers.

The court erred in directing the verdict. The judgment is reversed, and the cause remanded for a new trial.

SCOTT v. McCRAW, PERKINS & WEBBER CO. (No. 67.)

(Supreme Court of Arkansas. June 21, 1915.)

1. FRAUDULENT CONVEYANCES — VOLUNTARY CHARACTER OF CONVEYANCE—SUFFICIENCY OF EVIDENCE.

In a creditors' suit to uncover a parcel of realty in the hands of the judgment debtor's wife, evidence held sufficient to show that the land which the debtor conveyed was originally purchased with the wife's money; title being taken in the husband's name.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 896-903; Dec. Dig. —300.]

2. FRAUDULENT CONVEYANCES — VOLUNTARY CHARACTER OF CONVEYANCE—SUFFICIENCY OF EVIDENCE.

In a creditors' suit to uncover a parcel of realty conveyed to the judgment debtor's wife by deed of trust, evidence held to support the chancellor's finding that the conveyance was voluntary and to put the property beyond plaintiff's reach.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 896-903; Dec. Dig. —300.]

3. FRAUDULENT CONVEYANCES — HUSBAND AND WIFE—EVIDENCE AS TO CONSIDERATION.

Though an insolvent husband justly indebted to his wife may validly appropriate his property to pay her in preference to his other creditors, where the wife, to establish her status as creditor, asserts that she loaned money to

her husband many years previous without written evidence of his agreement to repay her, her bare statements should be corroborated before accepted in support of the conveyance.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 896-903; Dec. Dig. —300.]

4. FRAUDULENT CONVEYANCES — DECREE OF SALE—PROPRIETY.

Where, in a creditors' suit to uncover realty of a judgment debtor conveyed to his wife, the court ordered the sale of the property which had been uncovered by its decree, such action was proper, since a chancery court, which acquires jurisdiction to set aside fraudulent conveyances, should not only grant the relief prayed for, but enforce the lien by ordering the land in controversy sold to satisfy the judgment.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 896-970; Dec. Dig. —313.]

5. FRAUDULENT CONVEYANCES — DECREE OF SALE—PROPRIETY.

Where, in a judgment creditors' suit to uncover realty in the hands of the debtor's wife, the order of sale of the property gave the debtor only five days to pay the judgment to escape sale, such decree was improper, as allowing an unreasonably short time.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 896-970; Dec. Dig. —313.]

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Suit by the McCraw, Perkins & Webber Company against S. A. Scott and another. Decree for plaintiff, and the named defendant appeals. Reversed in part, and affirmed in part.

Baldy Vinson, of Lake Village, and S. M. Wassell and Miles & Wade, all of Little Rock, for appellant. Riddick & Dobyns, of Little Rock, for appellee.

SMITH, J. Appellee was the plaintiff below, and alleged in its complaint that on the 27th day of March, 1914, it recovered a judgment against appellant, Dr. S. A. Scott, for the sum of \$2,303.29, with interest, and that the suit on which this judgment was obtained was filed on the 16th of June, 1913, and that in anticipation of the filing of this suit Dr. Scott had executed a voluntary conveyance to his wife to lot No. 10, in block No. 9, of Sheldon's addition to the city of Little Rock. The date of the deed to Mrs. Scott was October 21, 1913. Before the date of the submission of this cause the complaint was amended to allege that on the — day of June, 1913, appellant, Dr. Scott, had executed a deed of trust in favor of his wife to certain other property there described, and that this conveyance was a voluntary one, for the fraudulent purpose of enabling appellants to cheat, hinder, and delay appellee in the collection of its just demand against Dr. Scott. After appellee had recovered judgment against Dr. Scott in the original suit, he prosecuted an appeal to this court, and appellee prosecuted a cross-appeal, and we have only recently handed down an opin-

ion upon that appeal. See *Scott v. McCraw, Perkins & Webber Co.*, 177 S. W. 901.

Upon the trial of the cause brought to uncover the property alleged to have been fraudulently conveyed by Dr. Scott to his wife and for her use and benefit, the court found that the said deed and the deed of trust were voluntary conveyances executed for the fraudulent purpose of defeating appellee in the collection of its judgment, and it was there decreed that if said judgment was not paid within five days, together with the interest and all costs, that the property there uncovered should be sold by the clerk of the chancery court as commissioner named for that purpose. Appellants complain alike of the action of the court in decreeing said conveyances to be fraudulent, and of the court's action in decreeing a sale of said land by the commissioner named for that purpose, and it is now urged that in no event should said lands be sold by the commissioner of the court but that a sale thereof, if made at all, should be made under an execution duly levied upon said property.

[1] We think the court erroneously found that the deed from appellant, Scott, to his wife for the said lot No. 10, block 9, was fraudulent. The facts appear to be that Dr. Scott had but little, if any, property of his own at the time of his marriage, but that his wife acquired, through her father, a very valuable estate; that the health of appellant's wife had failed, and she was brought to Little Rock for treatment, whereupon the said lot, which adjoined the homestead, was purchased. The proof appears reasonably certain that the initial cash payment of one-third, made at the time of the purchase of this lot, was advanced by Mrs. Scott's father, and that it was intended that the title to the lot should be taken in her name. It also appears reasonably certain that the remaining payments were made with funds belonging to his wife, and he testified that, although these remaining payments were made after the deed had been taken in his own name, it was understood and agreed that when the purchase money had been paid, and the vendor's lien for the purchase money had been satisfied, he should then convey said lot to his wife, and that he did so convey it to her within ten days after the last of the purchase money had been paid.

[2] But the facts appear to be otherwise with reference to the lands described in the deed of trust, which recited that it had been executed for the purpose of securing an indebtedness of \$16,000 due by appellant to his wife. We think the chancellor's finding that this conveyance was a voluntary one, and was executed for the purpose of putting the property beyond the reach of appellee, is not contrary to the preponderance of the evidence. It was alleged and admitted that appellant, Scott, conveyed in this deed of trust all of his property, and if the conveyance is

a valid one it renders him wholly insolvent. Mrs. Scott owned extensive and valuable farming land in Chicot county, Ark., and the town of Eudora was laid off on her land, and appellant received large sums of money from the rent of these lands and from the sale of lots in the town of Eudora. Appellant bought and sold real property on an extensive scale, and while some of his investments proved to be profitable he lost money in most of them. During this time appellant, Scott, had accounts in several banks, some of which he kept in the name of his wife; but all of these accounts were subject to his check, and were drawn upon in the name of his wife by him, and no attempt appears to have been made to keep any separate account of the money received from the rent or sale of any of his wife's property, and there is nothing to indicate that the use which he made of his wife's money was intended as a loan, and no notes were ever given, nor was there other evidence that these transactions were loans, although the use of this money extended over a period of about nine years. The proof shows that on the 5th of June, 1913, an attorney representing appellee called on appellant, Scott, at his home in the city of Little Rock and demanded payment of the sum due appellee, but, failing to get satisfaction, notified appellant, Scott, that suit would be filed against him at once to collect the account. On the 10th of June thereafter the deed of trust conveying the property in question to Mrs. Scott was filed for record in Chicot county, and on the 18th day of June thereafter the same instrument was filed for record in Pulaski county; and while the proof does not show the value of the property so conveyed, it is admitted that it embraced everything owned by appellant, Scott.

[3] In the case of *Waters v. Merit Pants Co.*, 76 Ark. 254, 88 S. W. 879, it was said:

"It is settled by the decisions of this court that an insolvent husband, when justly indebted to his wife, may, without fraud, prefer her claim to that of other creditors, and make valid appropriation of his property to pay it, even though the result be to deprive other creditors of the means to satisfy their claims. But such transactions between husband and wife are viewed by the courts with suspicion, and the perfect good faith of the transaction must be established by proof. Where the wife asserts, as a consideration for conveyance of his property to her, a claim of debt against her insolvent husband for money loaned to him many years previous, no note or other written evidence of an agreement to repay being shown to have been executed, and the alleged debt having become stale by long lapse of time, as in this case, her bare statement should be corroborated by some other evidence of the existence of a valid debt, before the courts can accept it in support of the conveyance."

There is no evidence of this indebtedness, except that of appellant, and, as has been said, there was no note or other writing evidencing its existence. Appellant dealt with the property in question as his own, and it formed in part at least the basis of the cred-

it extended him. *Goodrich v. Bagnell Timber Co.*, 105 Ark. 90, 150 S. W. 406.

[4] Nor do we think any error was committed by the court in ordering the sale of the property which had been uncovered by the decree of the court. In the case of *Merchants' & Farmers' Bank v. Harris*, 113 Ark. 111, 167 S. W. 709, it was said:

"The chancery court, having acquired jurisdiction for the purpose of setting aside the fraudulent conveyance, should not only grant the relief prayed for in that respect, but should proceed to enforce the lien by ordering the land in controversy sold to satisfy the judgment in favor of appellant. The chancery court, having assumed jurisdiction for one purpose, will retain it for all, and grant all the relief, legal or equitable, to which the parties are entitled. See *Apperson v. Ford*, 23 Ark. 746; *Apperson v. Burgett*, 33 Ark. 328; *Cribbs v. Walker*, 74 Ark. 104 [85 S. W. 244]; *Dugan v. Kelly*, 75 Ark. 55 [86 S. W. 831]; *Dickinson v. Arkansas City Imp. Co.*, 77 Ark. 576 [92 S. W. 21, 113 Am. St. Rep. 170]."

[5] We think, however, that an unreasonably short time was allowed to appellant in which to pay the judgment, and that under the circumstances more than five days should have been allowed for this purpose, and that the decree of the court below must be reversed on that account. Likewise the decree, in so far as it adjudges the conveyance of the said lot No. 10, block No. 9, to have been fraudulent, is reversed, but as to the property described in the deed of trust the decree is affirmed.

The cause will be remanded, with directions to the court below to enter a decree in accordance with this opinion.

McCULLOCH, C. J., disqualified and non-participating.

MAYS v. BLAIR et ux. (No. 110.)

(Supreme Court of Arkansas. July 12, 1915.)

1. DEEDS \Leftrightarrow 6—CONVEYANCE OR EXECUTORY CONTRACT.

A written instrument stated that, in consideration of \$2,000 in cash and \$8,000 to be paid by a specified date, defendant thereby granted, bargained, sold, and conveyed to plaintiff, his heirs and assigns, certain described real estate; that it was understood and agreed that plaintiff, his heirs and assigns, should, within the time specified, have the right and option to pay the balance of the purchase price, and defendant thereby obligated himself to receive it and make a warranty deed, with complete abstracts certified up to date; that, should plaintiff fail to do so, all of his rights thereunder should be forfeited, and title should revert at once to the grantor, his heirs or assigns, without any other deed of conveyance or instrument of release being executed; that defendant thereby covenanted to forever warrant and defend the title; and that defendant's wife, for the consideration and purposes recited, thereby joined in the execution thereof and released and relinquished to plaintiff, his heirs or assigns, all of her claim to dower and homestead. Held, that this instrument, when considered as a whole, was an executory contract to convey, and not a deed of conveyance.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 6; Dec. Dig. \Leftrightarrow 6.]

2. VENDOR AND PURCHASER \Leftrightarrow 175, 334 — REMEDIES OF VENDOR — RECOVERY OF PURCHASE PRICE.

So long as a contract for the sale of land remains unexecuted by a conveyance, the purchaser may, as a general rule, recover back or detain the purchase money, if the vendor's title is not such as the purchaser under the contract is entitled to require.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 360, 959; Dec. Dig. \Leftrightarrow 175, 334; *Contracts*, Cent. Dig. § 1203.]

3. VENDOR AND PURCHASER \Leftrightarrow 130—SUFFICIENCY OF TITLE—RIGHT TO MARKETABLE TITLE.

A purchaser of land, before he is required to pay the purchase price, is entitled, unless stipulated to the contrary, to receive not only a good title, but one which is marketable.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 245, 246, 247; Dec. Dig. \Leftrightarrow 130.]

4. VENDOR AND PURCHASER \Leftrightarrow 130 — "MARKETABLE TITLE"—TITLE BY ADVERSE POSSESSION.

To be "marketable," within the meaning of that term as ordinarily understood, a title must be a clear record title, and title by adverse possession is not a marketable title, however perfect it may be.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 245, 246, 247; Dec. Dig. \Leftrightarrow 130.]

For other definitions, see *Words and Phrases*, First and Second Series, *Marketable Title*.]

5. APPEAL AND ERROR \Leftrightarrow 895 — TRIAL DE NOVO—QUESTIONS OF FACT.

Where an action to recover back payments under an executory contract for the sale of land on the ground that the vendor did not have a marketable title was instituted and tried in chancery with no question being raised as to that being the proper forum, the case came before the Supreme Court for trial de novo, with a presumption in favor of the chancellor's finding on every issue of fact, unless against the preponderance of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3645-3648; Dec. Dig. \Leftrightarrow 895.]

6. DEEDS \Leftrightarrow 38 — SUFFICIENCY OF DESCRIPTION—PART OF TRACT.

A description of land as all of the grantors' undivided one-third of one-ninth interest as heirs of L. in land described as part of a specified quarter section was not a good description since, the interest of the grantors being designated by other language, the word "part" was evidently used as descriptive of the area, and, as so used, was insufficient.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 65-79; Dec. Dig. \Leftrightarrow 38.]

7. VENDOR AND PURCHASER \Leftrightarrow 112 — REMEDIES OF VENDOR — RECOVERY OF PURCHASE PRICE.

Where lots to which a vendor's title was unmarketable formed a substantial part of the purchase, the purchaser could refuse to pay any more on the purchase price and demand the return of the amount already paid.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 199, 200; Dec. Dig. \Leftrightarrow 112.]

8. VENDOR AND PURCHASER \Leftrightarrow 78—PERFORMANCE OF CONTRACT — TIME AS OF THE ESSENCE.

A contract for the sale of land provided for payment of the balance of the purchase price on January 10, 1913. On that date the parties by agreement changed the contract so as to make such balance payable in installments, and

It was understood that the vendor should proceed with the work of getting an abstract of title and perfecting it. *Held*, that time was not of the essence of the performance of the contract by the vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121-125; Dec. Dig. ¶ 78.]

9. VENDOR AND PURCHASER ¶330—PERFORMANCE OF CONTRACT — CURING DEFECTS IN TITLE.

Where time was not of the essence of the performance of a contract by a vendor, and the vendor cured all defects in his title specially called to his attention, but the purchaser, instead of demanding that other defects be cured, arbitrarily broke off the negotiations and declined to go further with the trade, he could not recover the amount paid on the purchase price, as the vendor still had the right to perfect the title so as to make it marketable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 995; Dec. Dig. ¶ 339.]

10. VENDOR AND PURCHASER ¶334—REMEDIES OF VENDOR — RECOVERY OF PURCHASE PRICE.

A contract for the sale of land provided that, in consideration of \$2,000 in cash and \$8,000 to be paid by January 10th, the vendor thereby sold to the purchaser certain described real estate, that it was understood and agreed that the purchaser within such time should have the right and option to pay the balance of the purchase price, and the vendor thereby obligated himself to receive such price and make a warranty deed with complete abstracts, and that, should the purchaser fail to make such payment, his rights should be forfeited, and the title should revert to the vendor, and neither party should owe the other anything. *Held*, that the \$2,000 was a payment on the purchase price, and not paid for the purpose merely of getting an option, and hence, if the vendor failed to furnish a marketable title, the purchaser was entitled to recover such \$2,000, as well as any other payment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. ¶ 334; Contracts, Cent. Dig. § 1203.]

Appeal from Searcy Chancery Court; T. H. Humphreys, Chancellor.

Action by Ed Mays against George T. Blair and wife. From a judgment for plaintiff for an insufficient amount, he appeals. Reversed and remanded, with directions.

Bratton & Bratton, of Little Rock, for appellant. S. W. Woods and A. Y. Barr, both of Marshall, for appellees.

McCULLOCH, C. J. This is an action instituted by appellant, Ed Mays, to recover a portion of the contract price which he had paid to defendant George T. Blair on the purchase of 125 lots in the town of Leslie. The agreed purchase price was the sum of \$10,000, of which \$2,000 was paid in the beginning and \$1,000 paid subsequently. Appellant's claim is that the vendor broke the contract by failing to furnish a marketable title to the lots sold; and appellees, Blair and wife, claim that they furnished not only a perfect legal title, but a marketable title, and that appellant broke the contract by refusing to take the property and pay the bal-

ance of the purchase price, and that for that reason he should not be permitted to recover. The court rendered judgment in favor of appellant for the recovery of the \$1,000 paid subsequent to the sale, but denied recovery as to the \$2,000 paid in cash at the time the agreement was reduced to writing.

[1] The primary question in the case is whether or not the contract was an executed one, or whether it was executory; in other words, whether the instrument of writing executed by the vendor to the vendee was a deed conveying the title with covenants of warranty, or whether it was an executory contract to convey. Much depends in this case upon a solution of that initial question. In order to ascertain the exact legal meaning of the instrument, it will be set forth in full:

"Know all men by these presents that for and in consideration of the sum of \$2,000 to us cash in hand paid by Ed Mays, and the further sum of \$8,000 to be paid by January 10, 1913, Geo. T. Blair and C. A. Blair, his wife, do hereby grant, bargain, sell, and convey unto the said Ed Mays, and his heirs and assigns, the following described real estate lying in the county of Searcy, state of Arkansas, to wit: [Here follows description by lot and block numbers of the 125 lots forming the subject-matter of the transaction.] It is expressly understood and agreed that the said Ed Mays, grantee, and his heirs and assigns, shall within the time above named have right and option to pay the balance of the said purchase price, and the grantor herein obligates himself to receive the same and to make notations of the receipt of the same upon the margin of this conveyance, if presented to him for that purpose and upon the margin of the record thereof in the office of the recorder, and to make a warranty deed with complete abstracts certified up to date. And it is further understood and agreed that, should the grantee fail to do so, then all of his rights under this instrument of conveyance shall be forfeited, and the title shall revert at once to the grantor, his heirs or assigns, without any other deed of conveyance or instrument of release being executed, and grantor owes grantee nothing and grantee owes grantor nothing. The said Geo. T. Blair, grantor, hereby covenants with the said Ed Mays, grantee, heirs or assigns, that he will forever warrant and defend the title to the property above granted against the lawful claims of all persons whomsoever. And I, C. A. Blair, wife of the said Geo. T. Blair, for the consideration and purposes aforesaid, hereby join in the execution of this instrument with my said husband and release and relinquish to the grantee, his heirs or assigns, all of my claim to dower and homestead in and to the above-granted premises. Witness our hands and seals this 16th day of August, 1912."

The instrument was executed by Blair and his wife and duly acknowledged and filed for record. It will be observed that the instrument just set forth contains the usual form of granting clause, but it does not contain a formal habendum clause. The clause following the description of the property constitutes, in substance, a stipulation that the vendee shall within the time named pay the balance of the agreed purchase price, and that upon his failure to do so all his rights under the instrument are forfeit, "without any other deed of conveyance or instrument

of lease being executed," and without return of any part of the purchase money paid. On the other hand, the stipulation is that the vendor shall, when the payment is made, make indorsement on the record and execute "a warranty deed with complete abstracts certified up to date." We think that, according to the decision of this court in the case of *Kelly v. Dooling*, 23 Ark. 582, the deed, when considered as a whole, must be considered as an executory contract to convey, and not as a deed of conveyance. The instrument under consideration in the case just cited was very much like the one we are now considering, the chief difference being that the deed in that case contained an habendum clause, but there was other language which tended to show that the parties did not intend it as a deed of conveyance. Chief Justice English, speaking for the court, said:

"Looking at the whole instrument, and deriving the intention of the parties from all of its provisions construed together (*Sheppard's Touchstone*, 87), we think it can be regarded as nothing more than a bond for title or agreement to convey, on payment of the remainder of the purchase money, such instruments being in common use, in our system of conveyancing, where lands are sold upon credit, though it is not usual to find them so unskillfully drafted."

[2, 3] We will treat the instrument, then, as an executory contract to convey, for so it is according to the doctrine of this court announced in *Kelly v. Dooling*, *supra*. Now, the law is very well settled as to the respective rights of vendor and vendee in sales of land. "A purchaser of lands may," as is stated in a standard text-book on the subject, "so long as the contract remains unexecuted by a conveyance, as a general rule, recover back or detain the purchase money, if the title of the vendor be not such as the purchaser is, under the contract, entitled to require." *Maupin on Marketable Title to Real Estate* (2d Ed.) 586. It is equally well settled in the law that a purchaser under an executory contract is entitled, before he is required to pay the price, to receive not only a good title, but one which is marketable. He is entitled to receive "not only a title that he can hold against all adverse comers, but one that he can hold without reasonable apprehension of its being assailed, and one that he can readily transfer, if he desires, in the market." *Tupy v. Kocourek*, 66 Ark. 433, 51 S. W. 69. This subject was thoroughly reviewed by Judge Battle in the case of *Griffith v. Maxfield*, 63 Ark. 548, 39 S. W. 852, where it was said, quoting from *Sugden on Vendors*, p. 385, that under such circumstances "the title to the estate ought, like *Cæsar's* wife, to be free from suspicion." We went over this subject thoroughly in the recent case of *Leroy v. Harwood*, 178 S. W. 427, and the rule on this subject so often announced by this court was adhered to.

[4] There are no fixed rules for the determination of the question whether or not a title is a marketable one, as that has to be

decided upon the facts of each case. The better view, according to the authorities, is that title by adverse possession does not constitute marketable title which a purchaser of land is bound to accept. It must, in other words, be a clear record title in order to be "marketable" within the meaning of that term as ordinarily understood. It will be observed that the contract in this case provides that the vendor shall "make a warranty deed with complete abstract certified up to date." That language refers only to the abstract itself, and not to the quality of the title; but, aside from any particular language in the contract, there is an implied agreement, unless stipulated to the contrary, that the purchaser shall receive a marketable title. Such is the undoubted effect of our decisions on the subject, which seem to be thoroughly in accord with the general trend of authorities.

[5] The facts must therefore be looked to in order to determine whether a marketable title was furnished in this case. Appellant says that the title was not marketable; whereas appellees insist that the title is not only good, but is marketable. The action was instituted in chancery and tried there, and no question has been raised by the parties as to that being the proper forum. The case therefore comes to us for trial *de novo*, with the presumption in favor of the chancellor's finding upon every issue of fact unless it is found to be against the preponderance of the evidence. Nearly all of the lots—all but five full lots and four half lots—form a part of a tract of land which is referred to in the pleadings and proof as the Blair land. It was land entered from the government by one Samuel Leslie, and the title was acquired through mesne conveyances by one Joseph Blair, the father of appellee Geo. T. Blair. The other lots formed a part of a tract of land which is designated in the pleadings and proof as the Leslie land. That tract was also owned by Samuel Leslie, and he remained the owner until the time of his death. Appellees claim title under the heirs of Samuel Leslie. Now, the testimony establishes a perfect record title, which is a marketable title, as to the Blair land. That tract was set apart by decree of the chancery court to M. J. Blair, the tract so assigned being a portion of a certain forty acre subdivision, and it is properly and accurately described in the decree by metes and bounds. It contains 25 acres. Appellees claim under a deed from M. J. Blair to J. E. Blair, in which the vendor merely described the tract as "all of my one-third interest in section 23, township 14 north, range 15 west"; but, after the attorney who examined the abstract of title discovered this defect in the description and called attention to it, appellees procured a deed from M. J. Blair curing the defective description and containing a description by metes and bounds as set forth in the

decree referred to above. We entertain no doubt, therefore, about the title to the Blair land being perfect and such as came up to the implied contract of the vendor to furnish.

[8] The title to those lots which are carved out of what is known as the Leslie tract stands in a different attitude with respect to its completeness. There were nine children of Samuel Leslie. Some of the children died, and appellee Geo. T. Blair purchased from some of the heirs interests equal to nearly an undivided one-third of the whole tract. Each of the deeds contained the following description:

"All of our undivided one-third of one-ninth interest as heirs of Samuel Leslie, deceased, in the following described lands, situated in Searcy county, Arkansas, to wit: Part of the northwest quarter of the northwest quarter of section 26, township 14 north, range 14 west."

That was not a good description. *Adams v. Edgerton*, 48 Ark. 419, 3 S. W. 628; *Tatum v. Croom*, 60 Ark. 487, 30 S. W. 885. It is insisted that the word "part," in the description, refers to the interest, and not to the area conveyed. It might be a good description if that word could be so construed. The interest, however, is designated by the use of other language, and it is evident that the word "part" was used as descriptive of the area, and it is insufficient within the rule announced by this court in the above-cited cases and others.

[7] Two of the Leslie heirs bought the interests of the others, and in a partition suit brought by those two heirs against appellees a certain part of the tract was allotted to the latter in severalty, and it was described by metes and bounds. Appellees have been in possession of that part (and it is the part out of which these lots were carved), and fenced the same and remained in possession until the sale to appellant. A perfect title by limitation was acquired by appellees as against all claimants who were sui juris. When this defect was pointed out, appellees procured deeds from three married women among the heirs, describing the land by metes and bounds, so it appears from the record that they have a perfect title by limitation. The defective description in the deeds of the Leslie heirs to appellees prevents the title from being a marketable one, and appellant was not compelled to accept it. Those lots formed a substantial portion of the purchase, and, unless a marketable title be furnished, the appellant can refuse to pay any more on the purchase and demand return of the amount already paid.

[8, 9] That, however, does not necessarily mean that appellant has shown his right in this case to recover, for we think, under the testimony, his own conduct with respect to the transaction is such that he is not at this time entitled to demand a return of his money. The contract, it will be observed, provides for payment of the balance of the

purchase price on January 10, 1913. On that date the parties by agreement changed the contract so as to make the balance of \$8,000 payable in installments, \$1,000 of which was paid by appellant at the time. It was understood at that time that appellees should proceed with the work of getting the abstract of title and perfecting the title, and the chancellor found, correctly we think, that time was not of the essence of the performance of the contract. Appellees furnished an abstract of title which was submitted to an attorney by appellant for examination, and certain defects were pointed out. One of them was the defect in the description in the M. J. Blair deed, which was corrected at once by a new deed, as before stated. The other defect pointed out was that the three heirs of one of the Leslie children who, it is said, was insane, were married women, and that the statute of limitation did not run against them. When that defect was called to the attention of appellee Geo. T. Blair, he at once had that corrected by procuring deeds from the three married women, describing the land correctly by metes and bounds. When this was done, Blair went back to appellant for the purpose of closing the deal, and appellant, according to the testimony, refused to negotiate any further or to complete the purchase. It is evident that appellees were doing all that they could to fully comply with the undertaking to furnish a marketable title, and they did, in fact, cure all the defects which were specially called to their attention. If the other defects in regard to the description in the other deeds had been insisted upon, appellant would have been in the attitude to demand that those defects be cured, but, instead of doing that, he arbitrarily broke off the negotiations and declined to go further with the trade. Appellees still had the right, and have now the right, under the contract, to perfect the title so as to make it marketable.

[10] We think the court erred, therefore, in decreeing a return of the \$1,000 paid by appellant on the contract price. The court decided against appellant as to the \$2,000 on the ground that that sum was paid for the purpose merely of getting the option, but we think the court was in error as to that, and that, if appellant is entitled to recover anything at all, he should recover the full amount paid. The \$2,000 paid at the time of the execution of the contract was a part of the purchase price, and if appellees have failed to comply with their contract by furnishing a marketable title, appellant would be entitled to recover everything he had paid. There is nothing in the contract which gives appellees any right to retain any part of the purchase money in the event that they fail to comply with their contract.

The decree is therefore reversed, with directions to dismiss the complaint for want

of equity, unless appellant elects to complete the contract by tendering the purchase price, in which event appellees should be given a reasonable opportunity to perfect the title so as to make it marketable. If, then, the appellees fail to comply in that respect, appellant can assert his right for the return of the money.

The cause is therefore remanded for further proceedings, if necessary, in accordance with this opinion.

BLACK et al. v. YOUMANS. (No. 146.)

(Supreme Court of Arkansas. Oct. 4, 1915.)

SLAVES §25 — LEGALIZING COHABITATION — STATUTE.

Act Feb. 6, 1867 (Laws 1866-67, p. 99) § 3, legalizing the living together as husband and wife of all negroes and mulattoes and making their children legitimate, although never carried into the Code, is still in force, and where the child of such parties was recognized, he is capable of transmitting inheritances, since the statute does not become inoperative from long disuse, and vendees of his heirs take good title to the inherited property.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. §§ 114, 115; Dec. Dig. §25.]

Appeal from Lafayette Chancery Court; J. M. Barker, Chancellor.

Action by F. W. Youmans against Dolly Black and another. From a decree quieting title in plaintiff, defendants appeal. Affirmed.

R. L. Montgomery, of Lewisville, and Hal L. Norwood, of Little Rock, for appellants. Searcy & Parks, of Lewisville, for appellee.

KIRBY, J. This is a controversy about a 40-acre tract of land in Lafayette county, Ark. Tom Bridges, a negro, acquired it from the government by patent as a homestead, and died in possession in 1912, leaving him surviving his widow, Ellen Bridges, and sister, Dolly Black, who claimed to be his only heir. They conveyed the land on July 25, 1911, to R. L. Montgomery, who afterwards conveyed it to Burton, one of appellants. Appellee purchased the land from George Williams, a grandson of Tom, alleged to be the only heir of Viney Williams, the only child of Tom Bridges, and in this suit to cancel the deeds from Dolly Black and Montgomery to Burton as clouds upon the title recovered a decree below, from which this appeal is prosecuted.

It appears from the testimony that Tom Bridges, a slave, was married to Mandy Cryer, another slave, after the manner of slavery marriages, and lived with her as his wife until her death after emancipation, and that there was born to them an only child, called Viney, who was recognized by them as their child, and that George Williams, appellee's grantor, was the only child and heir of said Viney Williams. The testimony

shows, too, not only that Viney Williams was recognized as their child by her parents, but generally by all as the child of Tom Bridges and Mandy, who lived together during slavery as husband and wife, and after the War until Mandy's death, and, although there is testimony tending to show that old Tom ranged widely from his own fireside and was rather promiscuous in his attention to other women, and from some of these excursions other children were born, of which he was the reputed father, we are not able to say that the chancellor's finding is clearly against the preponderance of the testimony.

Section 3, Act Feb. 6, 1867, provides:

"That all negroes and mulattoes who are now cohabiting as husband and wife, and recognizing each other as such, shall be deemed lawfully married from the passage of this act, and shall be subject to all the obligations, and entitled to all the rights appertaining to the marriage relation; and in all cases, where such persons now are, or have heretofore been so cohabiting, as husband and wife, and may have offspring recognized by them as their own, such offspring shall be deemed in all respects legitimate, as fully as if born in lawful wedlock." Laws 1867, p. 99.

Said act, for some unknown reason, has not been carried into the Digests of the Statutes of Arkansas, but it has not been repealed, and the conditions requiring its passage for the protection of the children of slaves who could not legally marry, and the transmission of property acquired by them, have not passed, nor the reason therefor failed. Marriages between negroes falling within its provisions have been held valid, and children born of and recognized as their offspring by the parties have been held legitimate and capable of transmitting inheritances, and the statute has not become obsolete nor inoperative from long disuse. *Scroggins v. State*, 32 Ark. 205; *Gregley v. Jackson*, 38 Ark. 487.

Viney, the recognized child of this slave marriage, was legitimate, and her son, George Williams, inherited the land in controversy from his grandfather, Tom Bridges.

The decree is affirmed.

McDONALD v. CITY OF PARAGOULD. (No. 150.)

(Supreme Court of Arkansas. Oct. 4, 1915.)

LICENSES §14—ORDINANCE—CONSTRUCTION.

An ordinance by the city of Paragould requiring the payment of a license fee by persons operating vehicles "for the transportation of passengers for hire within the city limits" does not apply to the transportation of passengers from points within the city to points outside, and vice versa.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 25-29; Dec. Dig. §14.]

Kirby, J., dissenting.

Appeal from Circuit Court, Greene County; Wm. J. Driver, Judge.

Bill McDonald, Jr., was convicted and fined for violation of an ordinance of the

City of Paragould, and he appeals. Reversed.

The city of Paragould enacted an ordinance prescribing a license fee of \$15 and providing:

"Every person owning, keeping or running any hackney coach, automobile or any other vehicle or conveyance, for the transportation of passengers for hire within the limits of the city of Paragould, is hereby required to take out and procure a license from the city clerk for each hackney coach, automobile or other vehicle or conveyance so used."

Appellant resides in the city and owns and keeps an automobile therein upon which he had paid the state license, and which was used in carrying passengers for hire from within the city limits to the fair grounds outside thereof, and from the fair grounds back to different portions of the city, and from within the city limits to the town of Walcott, 12 miles distant, and from Walcott back into the limits of the city of Paragould. He at no time carried persons for hire from one point to another within the city limits. He refused to pay the license required by the ordinance and was convicted and fined for a violation thereof, and, upon appeal to the circuit court, was again convicted, and prosecuted this appeal from the judgment of conviction.

M. P. Huddleston and Robt. E. Fuhr, both of Paragould, for appellant. T. C. Shane, of Paragould, for appellee.

SMITH, J. (after stating the facts as above). The authority of the city to enact the ordinance under section 5450 of Kirby's Digest is not questioned, and there is no contention that the license fee required to be paid thereunder is unreasonable. It is contended only that the city is without power to regulate or restrict the operation of automobiles outside its limits, and that the business carried on by appellant was not within the limits of the city and subject to regulation by it under the terms of the ordinance.

It is argued in support of this contention that, if the city of Paragould, within which the passengers were collected and discharged in the business of carrying to and from the fair grounds beyond the city limits and to and from the other town, has the power to require the payment of any such license, each city or town through and into which the automobile might go upon its different trips would have a like power, and that the payment of a license to each of them would be so onerous and burdensome as to be absolutely prohibitive, and that only that municipality in which the business or occupation is wholly carried on or conducted has any such power.

There is no attempt upon the part of the

city to extend its jurisdiction beyond its territorial limits in the passage of the ordinance, and it has already been held that the owner of an automobile or motor vehicle shall not be required to obtain any other license or permit to use and operate the same than that required by Act 134 of the Acts of 1911. *Helena v. Dunlap*, 102 Ark. 131, 143 S. W. 138. But section 13 of said act expressly declares it shall not be construed "to affect the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor vehicles which are used within their limit for public hire."

The court is of opinion that the ordinance, properly construed, means only to require the owner or keeper of an automobile "for the transportation of passengers for hire within the limits of the city" to pay the license fee, and, since the appellant did not keep or operate his automobile for the transportation of persons for hire from and to points within the city, that he was not using it for transportation of passengers for hire within the limits of the city, in violation of the ordinance. The terms of the ordinance are satisfied by holding that license taxes are to be imposed only by that municipality in which the business or occupation is carried on or conducted. *Bennett v. Birmingham*, 31 Pa. 15; *Cary v. North Plainfield*, 49 N. J. Law, 110, 7 Atl. 42; *Commonwealth v. Stodder*, 2 Cush. (56 Mass.) 562, 48 Am. Dec. 679; *Gettysburg v. Zeigler*, 2 Pa. Co. Ct. R. 326.

Appellant's business not being conducted within the city limits, a refusal to pay the license did not constitute a violation of the ordinance, and the judgment is reversed, and the cause dismissed.

Mr. Justice KIRBY thinks the judgment should be affirmed, and dissents from the court's opinion. He is of opinion that the statutes authorize the passage of such an ordinance which, by its terms, necessarily includes the business of operating an automobile for the transportation of passengers for hire within the city limits, whether the journey of the passengers is begun and completed therein, or not. That since appellant took on his passengers at any place in the city designated by him or where persons desired to embark, and, returning from outside the limits, discharged passengers likewise, and kept his machine within the city where such business was conducted, that he was violating the ordinance in the conduct thereof; that the city not only had the authority to fix the license for the carrying on of business, as conducted by appellant, but has done so in the passage of the particular ordinance. *Arkadelphia Lumber Co. v. Arkadelphia*, 56 Ark. 370, 19 S. W. 1053.

McDANIEL, State Treasurer, v. HERRN.
(No. 156.)

(Supreme Court of Arkansas. Oct. 11, 1915.)

1. TAXATION ⚡895—**INHERITANCE TAXES—EXEMPTIONS**—"PROPERTY OR ANY INTEREST THEREIN"—"ESTATE."

Under Act 1909, Act 303, p. 906, § 3, providing that when property or any interest therein shall pass to certain heirs and descendants, the rate of inheritance shall be \$1 on every \$100 of the market value of such property received, provided that any estate which may be valued at a less sum than \$5,000 shall not be subject to any tax, the excess over such sum only being taxed, the \$5,000 is to be deducted only after the property or interest therein of the respective parties has been passed or distributed to or received by them and the tax imposed upon the remainder; the words "property or any interest therein" and the word "estate" being synonymous and referring to the property only after distribution.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1714-1721; Dec. Dig. ⚡895.]

For other definitions, see Words and Phrases, First and Second Series, Estate.]

2. STATUTES ⚡184—**CONSTRUCTION—LEGISLATIVE INTENT.**

In construing a statute the object to be attained thereby and the purpose of the Legislature in enacting it are to be considered. If the language used is susceptible of more than one construction, that meaning must be given to it which is in harmony with the purpose to be attained, rather than a construction which would tend to defeat it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 262; Dec. Dig. ⚡184.]

Appeal from Circuit Court, Sharp County;
J. B. Baker, Judge.

Action by Rufus G. McDaniel, State Treasurer, against T. I. Herrn, administrator, to collect inheritance taxes. From the judgment rendered, plaintiff appeals. Affirmed.

James Cochran died on the 26th day of May, 1911, leaving an estate value at \$23,816.65. Annie P. Cochran, his widow, received \$5,207.40. Mrs. Herrn, the daughter of Cochran, received \$9,304.62, and six children and one grandchild of W. D. Cochran, deceased, the son of James Cochran, deceased, received each the sum of \$1,329.23, or a total of \$9,304.62. This suit was brought by the appellant, as state treasurer, against the appellee, who was the administrator of the estate of James Cochran, to collect inheritance taxes. The case was begun in the probate court, and upon appeal to the circuit court, upon the above facts, that court found that the amounts received by Mrs. Cochran and Mrs. Herrn in excess of \$5,000 were subject to a tax under Act 303 of the Acts of 1909, and accordingly deducted from the amounts received from them, respectively, the sum of \$5,000, and rendered judgment in accordance with his holding, from which this appeal has been duly prosecuted. No question is raised here as to whether the interest of Mrs. Cochran as widow is subject to the tax.

Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for appellant.
T. I. Herrn, pro se.

WOOD, J. (after stating the facts as above). The above act provides that all property in this state which shall pass by will or by the intestate laws, or by sale or gift in possession to take effect after the death of the grantor or donor, shall be liable to a tax for the use of the state which shall constitute a lien on the property charged with the tax. Section 3 of the act is as follows:

"When the property or any interest therein shall pass to a grandfather, grandmother, father, mother, husband, wife, lineal descendant, brother, sister, or any adopted child, in every such case the rate of tax shall be one dollar on every hundred dollars of the clear market value of such property received; provided, that any estate which may be valued at a less sum than five thousand dollars (\$5,000) shall not be subject to any tax, the excess over such sum only being taxed."

[1] The sole question presented by this appeal is whether or not the \$5,000 specified in section 3 is to be deducted from the amount of the value of the entire estate as the property of the decedent and the tax imposed on the remainder, or whether the amount exempted is to be deducted only after the property, or interest therein, of the respective parties has been passed or distributed to and received by them; in other words, as to whether the tax is to be imposed according to the value of the property or interest therein of the respective individuals named as beneficiaries in the act after the property has been passed or distributed and received by them, or whether it should be imposed upon the classes on the value of the entire estate after deducting the \$5,000 exemption specified. Section 4 of the act provides:

"When the property or any interest therein shall pass to any uncle, aunt, niece, nephew, or any lineal descendant of the same, in every such case the rate of tax shall be two dollars on every one hundred dollars of the clear market value of such property received, in excess of the sum of \$2,000.00."

Appellant relies upon State v. Handlin, 100 Ark. 175, 139 S. W. 1112, as authority for his contention that the \$5,000 must be deducted from the value of the entire estate mentioned and passing under the statute before the same has been passed or distributed to those named as beneficiaries under the statute, and that the tax is to be imposed upon the remainder and paid by all the distributees or beneficiaries of the estate under the statute, regardless of whether they have received an amount in excess of \$5,000 or not. But no such question was raised or considered there. In that case we said:

"The only question presented by this appeal is the validity of the act of the Legislature approved May 17, 1907, amending the inheritance tax law. The constitutionality of the act is challenged; it being contended that it makes an arbitrary classification of estates and exempts from taxation estates of the third class exceeding \$50,000 in value."

In the case of *State v. Handlin*, supra, we held that the statute, which was very similar to the one under consideration, was a provision for an inheritance tax, and not for a tax on property: that it provided for a tax upon the privilege of the right of succession to property, and, as such, was not subject to the same test with respect to its equality and uniformity as taxes levied upon property. True, Mr. Justice Kirby, speaking for the court, said:

"The manifest intention of the act was to levy the taxes alike upon all property of the estate, determining the tax by the amount or value of property in the different classes in which it was divided, and it was not intended that estates above \$50,000 in value, passing to strangers, should escape payment of the tax."

The appellant relies upon this language of the opinion to support his contention that the tax must be levied upon the entire estate as of the property of the decedent, after deducting the amount of the exemption specified. But the above language of the opinion must be considered with reference to the question then before the court for decision, and, when so considered, it will be seen that it had no reference whatever to the issue now to be decided. The language used was merely by way of argument to show that the classification provided by the act for determining the amount of the inheritance tax to be paid did not render the act unconstitutional. The contention in that case was that the act was unconstitutional because under the classification therein provided estates exceeding in value the sum of \$50,000 were exempt from taxation, and that therefore the act violated the provision of the Constitution requiring that taxes shall be equal and uniform. The language quoted above was used in answer to that contention. In the latter part of the opinion in that case the court said:

"The statute, so construed, violates no equality provisions of the Constitution, and it, being a statute taxing privileges and not property, does not conflict with the uniformity provision. But it divides the value of estates passing to certain classes of persons into certain amounts, a reasonable classification for the purpose of laying or levying a progressive inheritance tax, and treats all persons within the classes designated alike and without discrimination, and is a valid enactment."

The words "property or any interest therein" and the word "estate," as used in the section above quoted, have reference to the property, or any interest therein, after it has been passed, transferred, or distributed to and received by the respective persons mentioned in the statute, whether they take as individual or corporate legatees or devisees, vendees, donees, or grantees, heirs, next of kin, etc.; and the amounts of \$5,000 and \$2,000 show the value of the estate for which an inheritance tax shall be imposed on the persons receiving the same, according to the respective classifications into which the statute divides them. This was declared to be the meaning of the words "estate" and "property" in an act passed in 1913, repealing the

act now under review. See Act 197 of the Acts of 1913. This is the correct interpretation of these words as used in the statute now under consideration.

There would be no ambiguity whatever about the statute were it not for the word "estate," used in section 3 of the act above in the clause, "provided that every estate," etc. But when the word "estate" as there used is considered in connection with the language of the remainder of the section and the language of section 4, it is clear that the term "estate" was used synonymously with the words "property or any interest therein." The words "estate" and "property" are frequently used as convertible terms; they are often synonymous in meaning, depending upon the context. See Funk & Wagnall's New Standard Dictionary of the English Language, "Estate," "Property."

[2] It is a well-established canon of interpretation that the object to be attained and the purpose of the Legislature are to be kept in mind in construing a statute. If the language used in a statute is susceptible of more than one construction, then the meaning must be given to it which is in harmony with the purpose to be attained rather than a construction which would tend to defeat it. 23 Am. & Eng. Enc. Law (1st Ed.) p. 319, and cases cited in note.

In *St. L. I. M. & So. Ry. Co. v. State*, 102 Ark. 205-208, 143 S. W. 913, 914, we quoted from *Green v. Weller*, 32 Miss. 650, as follows:

"The true sense in which words are used in a statute is to be ascertained generally by taking them in their ordinary and popular signification, or, if they be terms of art, in their technical meaning. But it is also a cardinal rule of exposition that the intention is to be deduced from the whole, and every part of the statute, taken and compared together—from the words and context—and such construction adopted as will effectuate the intention of the lawmakers." *Potter's Dwarrior on Stat.* 197, 201.

Now it was the manifest purpose of the lawmakers, as gathered from the language of the act under consideration, to exempt certain classes of individuals and the particular individuals coming within those classes from the tax imposed by the statute, unless those individuals received property, or an interest therein, of a greater value than the amount specified as exempting them from the tax. The purpose of the Legislature was not to tax all persons who might have property or who were beneficiaries of an estate under sections 3 and 4 of the statute, but to tax only those persons of the classes named who might receive property of the value of more than \$5,000 and \$2,000, respectively. But if the construction contended for by the state be correct, then every beneficiary in the class mentioned in section 3 would have to pay a part of the tax there imposed, regardless of whether the value of the property or interest therein which they received exceeded the sum of \$5,000. If such had been the in-

tention of the Legislature, it seems clear to us that it would have made some provision in the statute for prorating the tax among the several recipients of the entire estate of the decedent.

It follows that the judgment of the circuit court is correct, and it is therefore affirmed.

PASCHAL v. SWEPSTON et al. (No. 148.)
(Supreme Court of Arkansas. Oct. 4, 1915.)

1. DRAINS —14—ESTABLISHMENT OF DISTRICT—NOTICE—DESCRIPTION—VALIDITY.

Where the map and report showing the boundaries of a proposed drainage district fixed a starting point and described it so as not to enable an owner of land in the vicinity to ascertain whether or not his lands were included, this invalidated all the subsequent proceedings, though the calls, read in reverse order, would leave no uncertainty.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 5, 6; Dec. Dig. —14.]

2. BOUNDARIES —3—COURSES AND DISTANCES—MONUMENTS.

Where the descriptions of the boundaries of a tract are uncertain and conflicting, distances yield to courses, and courses to monuments.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. —3.]

Appeal from Crittenden Chancery Court; Chas. D. Frierson, Chancellor.

Action by E. P. Paschal against W. W. Swebston and others. Decree for defendants, and plaintiff appeals. Reversed and cause remanded, with directions.

Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, for appellant. Brown & Anderson, of Memphis, Tenn., for appellees.

KIRBY, J. This case presents a single question of law for the consideration of the court. The surveyor appointed by the county judge of Crittenden county to make a preliminary survey of certain territory for the purpose of forming a drainage district filed his map and report showing the boundaries of said district. Said district began at the northwest corner of section 9, township 8 north, range 6 east, and the last three calls in the north boundary line were as follows:

"Thence west four and three-quarters of a mile to the east bank of Big creek; thence in a southwesterly direction along the east, south, and west bank of Big creek to the northeast corner of the northwest quarter of the northeast quarter of section 7, township 8 north, range 6 east; thence west four and three-quarters of a mile to the point of beginning."

A notice was published, in which the last two calls of the boundary line were given as follows:

"Thence in a southwesterly direction along the east, south, and west bank of Big creek to the northeast corner of the northwest quarter of the northwest quarter of section 7, township 8 north, range 6 east; thence west four and three-quarters of a mile to the point of beginning."

This error was not discovered, and the district was established by the county court as called for in the report of the surveyor. It was later discovered that there was an apparent discrepancy between the boundary of the district as established and as advertised in the published notice. Appellant, who was one of the property owners in the district, thereupon filed his complaint in equity, alleging that this error and discrepancy between the published notice and the order establishing the district was fatal to the validity of the district. The commissioners demurred to the complaint, their demurrer was sustained, and this appeal has been duly prosecuted.

It is conceded that the publication of the notice is a jurisdictional requirement, and that the notice, as published, must contain a correct description of the district to be established. But it is urged that the error indicated is a patent one, shown to be wrong by the balance of the description, and that the description published is certain and complete and easily identifies the land of the district. In the establishment of the various kinds of improvement districts, jurisdiction is conferred by the publication of a notice in which the boundaries of the district are defined.

In the case of Voss v. Reyburn, 104 Ark. 298, 148 S. W. 510, which was a proceeding for the establishment of a street improvement district, the court there said that:

"The object of designating the boundaries of the district was to enable property owners included therein and affected thereby to easily ascertain what property was included in the district."

It was there held that, where an attempted publication of an ordinance creating an improvement district omitted two half blocks from the proposed improvement district, the variance was material and destroyed the validity of the attempted organization.

In the case of Norton v. Bacon, 113 Ark. 566, 168 S. W. 1088, it was held that the publication of a notice describing the land to be included in the proposed improvement district is jurisdictional, and that the county court has no authority to form a district until notice has been published in accordance with the terms of the statute, and that a variance between the description of lands to be included in a proposed road improvement district in the plat and in the notice was fatal and invalidated the formation of the district. In that case the published notice omitted 200 acres of land included within it, and it was there said:

"To exclude the territory from the plat would be to form a district of less territory than that included in the boundaries set forth therein; and, on the other hand, if we should include that territory in the district, it would be done without notice having been given to the owner as required by the statute. So we think that there is a fatal variance between the description of the lands embraced in the notice and

those included in the plat, and that this invalidates the formation of the district."

A very recent case is that of *McRaven v. Clancy*, reported in 171 S. W. 88. It was there held that the publication of an ordinance establishing an improvement district must be according to the statute, which is mandatory and compliance with which is jurisdictional, so that, one of the lots not being included in the publication, though lots on both sides of it, and owned by the same parties, were included, the district was not created.

[1] Does the description given measure up to the requirements of the cases quoted? The map filed with the report shows that Big creek runs near, but not to, the corner designated in the call found in the engineer's report, but in the notice as published the call is to the corresponding corner in the northwest quarter instead of the northeast quarter of the section. If this call controls the description in the published notice, the west half of the northeast quarter and the east half of the northeast quarter, which are embraced within the district, are omitted from the notice. It is urged that there are two fatal defects in the description, one of these being in the designation of an erroneous corner to which the line should run from the bank of Big creek, and that the other is the designation of a portion of the boundary in the following terms:

"Thence in a southwesterly direction along the east, south, and west bank of Big creek."

The map accompanying the engineer's report shows the course of Big creek, and if that creek was made the boundary of the district, the district would include lands lying east, south, and west of the creek, and that part of the description would therefore be reasonably certain if the point was correctly designated to which the boundary line should run from the bank of the creek. But this description does not show from what point the boundary line of the district departs from the bank of the creek, and because of that fact the error in the description of the point to which the line should run is material and fatal. Even though it be assumed that this line should be a straight one, it does not appear from which point on the bank of the creek the line should be drawn, and the point named is more than a half mile from the bank of the creek.

[2] It is settled by the decisions of this court that, in defining the boundaries of a tract of land, where the descriptions given are uncertain and conflicting, distances yield to courses, and courses to monuments. Here neither the course nor the distance from the bank of the creek to the fixed point is given, but, even though they were, they would have to yield to the location of the fixed point.

It is argued that, if the description in question was contained in a private contract between the parties, it would be sufficient, and we are cited to the case of *Central Irrigation District v. De Lappe*, 79 Cal. 351, 21 Pac. 825, in which the Supreme Court of California appears to take that view. We are not cited to any other case in the excellent briefs filed in this cause, but this case is not in harmony with our own cases on that subject. We are committed to the rule that the description contained in the published notice must be such that the landowner reading it may easily ascertain whether or not his lands are included, and a clear statement of the reason for the rule is contained in appellant's brief. Parties to a contract understand the subject with respect to which they are dealing, and any description which with certainty identifies it should be sufficient to bind them by any agreement they make with respect to it. To any proceedings of this character notice is the first information which the landowner has. He does not read the description contained in it with knowledge that his lands are the subject-matter with respect to which the notice is given, and his only information comes from the notice itself; and it is proper that this notice should be such as easily ascertains the subject of the notice. He should not be required to speculate as between pertinent clauses whether the courts will hold that the one or the other shall prevail, and he should not be penalized in case he undertakes such speculation for reaching the wrong conclusion.

Counsel for appellees urges that, if the calls defining the boundaries of this district were read in reverse order, there would be no uncertainty about the point intended to which the line should run from the creek. Even if this be true, that fact would not meet the objections which we have urged. As has been said, the landowner does not know in advance what lands are intended to be improved, and the district in question was defined by numerous calls of direction and distance to various fixed points, and the possibility that the boundary of the district might be correctly known by tracing the calls in reverse order is not sufficient to meet the requirement that a notice be published from which the landowner may easily ascertain whether or not his lands are included.

We conclude, therefore, that the published notice was insufficient because of the error indicated, and that the court was without jurisdiction in all proceedings had subsequent to that date.

The decree will therefore be reversed, and the cause remanded, with directions for the entry of a decree in accordance with this opinion.

SMITH et al. v. MINTER et al. (No. 160.)

(Supreme Court of Arkansas. Oct. 11, 1915.)

1. JUDGMENT \Leftrightarrow 391 — VACATION — PROCEEDINGS.

In order to vacate a judgment for fraud practiced by the successful party, it is necessary that the defense to the action be sufficiently alleged, and that such defense be adjudged a valid one.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 752; Dec. Dig. \Leftrightarrow 391.]

2. APPEAL AND ERROR \Leftrightarrow 907—REVIEW—PRESUMPTIONS.

In an action to set aside a judgment for fraud on the part of defendants' attorney in confessing it, in the absence of a bill of exceptions, it will be presumed that the court's finding that the attorney was authorized to confess judgment was sustained by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2916, 3673, 3674, 3676, 3678; Dec. Dig. \Leftrightarrow 907.]

Appeal from Circuit Court, Benton County; Jos. S. Maples, Judge.

Suit by Adelaide L. Smith and others against W. L. Minter and others to enjoin the collection of a judgment. From a judgment for defendants, plaintiffs appeal. Affirmed.

Appellants brought this suit to enjoin the collection of a judgment of the circuit court, rendered against them as sureties on the retaining bond of E. G. Nelson, in an unlawful detainer suit, and asked also for a vacation of the judgment for a fraud, alleging that the attorney for the defendant in the suit had confessed judgment without authority to do so, and that one of the sureties had been released and no judgment taken against her. A demurrer interposed was treated as a motion to transfer, and the cause was accordingly transferred to the circuit court. A motion was then made to dismiss upon the ground that the matter was res adjudicata, and upon a hearing the motion to dismiss was treated as one to vacate the former judgment, and the court held said judgment to be valid, and that no defense was attempted to be interposed now that did not exist and was known to the parties having the right thereto at the former adjudication. It further adjudged that, since one of the sureties on the bond had been released in the judgment rendered, the others should only be bound to the payment of two-thirds of the judgment, and reduced it accordingly. There was no bill of exceptions in the record.

W. N. Ivie, of Rogers, for appellants. Appellees, pro se.

KIRBY, J. (after stating the facts as above). [1] Appellants contend that the court erred in refusing to vacate the judgment and insist that the allegations to the complaint were sufficient and that a good defense was shown to exist. In order to vacate a judgment for fraud practiced by the successful party obtaining it, it is necessary, not only

that the defense to the action be sufficiently alleged, but that it shall be adjudicated that the defense to the action is a valid one, before the judgment is vacated or set aside; the court determining first whether the grounds to vacate exist, and then the validity of the defense alleged.

[2] The court found that all the interested parties had notice and opportunity to make defense, that the parties to the suit "were present each by his attorney of record, with full power to act, and that the judgment was a subsisting good and valid judgment." Testimony could have been introduced showing that the attorney consenting to the judgment was authorized to do so, and if appellant introduced any testimony tending to show a valid defense, it was not preserved by a bill of exceptions, and this court cannot review the question. In *London v. Hutchens*, 88 Ark. 467, 114 S. W. 919, the court said:

"The appeal is one from the order refusing to set aside the dismissal of his proceedings for vacation of the judgment for want of prosecution. * * * London had proceeded under the statute to have it set aside. * * * The record entry indicates that the court had evidence before it, and the presumption is always indulged, in the absence of evidence being brought here, that the evidence would sustain the action of the court."

In *Young v. Vincent*, 94 Ark. 115, 125 S. W. 658, it was said:

"Where the record does not contain the evidence adduced at the trial, every intendment is indulged in favor of the action of the trial court, and this court will presume that every fact susceptible of proof that could have aided appellee's case was fully established. The salutary rule of law is that every judgment of a court of competent jurisdiction is presumed to be right, unless the party aggrieved will make it appear affirmatively that it was erroneous."

In *Foohs v. Bilby*, 95 Ark. 302, 129 S. W. 1104, the court said:

"The motion to vacate the judgment under section 4431 [Kirby's Dig.], supra, was heard on evidence, and, the evidence which the court heard and on which it acted in setting aside the judgment in question not being brought into the record, we must presume that every fact necessary to sustain the finding and judgment of the court was proved that could have been proved."

"In the absence of a bill of exceptions, it will be presumed that the court's findings of fact were based on the evidence, where there is nothing in the record to rebut that presumption." *Swing v. Brinkley Car Works & Mfg. Co.*, 78 Ark. 198, 94 S. W. 54.

The allegations of the answer of the defendant, Nelson, in the first suit are not proof of the facts therein set up, and, as already said, the court in this proceeding found that the judgment attempted to be vacated was valid and subsisting, and that the attorney confessing it had authority to do so, and it must be presumed, in the absence of a bill of exceptions, that the court's findings of fact were based on the evidence; there being nothing in the record to rebut that presumption.

The judgment is accordingly affirmed.

ST. LOUIS & S. F. R. CO. v. STATE.
(No. 149.)

(Supreme Court of Arkansas. Oct. 4, 1915.)

1. RAILROADS — 9 — RAILROAD COMMISSION — ORDER — PETITION — SUFFICIENCY.

An order of the Railroad Commission of Arkansas, based upon a petition signed by 17 corporations and partnerships and 1 natural person, requiring one railroad to establish a connection with another is void, as not being signed by 15 bona fide citizens residing within the territory affected, within the direct terms of Acts 1907, p. 357, § 1, since "bona fide citizens," as there used, means permanent residents, as distinguished from mere sojourners, and refers to individuals, to the exclusion of corporations and copartnerships.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 12-19; Dec. Dig. ¶ 9.]

2. CITIZENS — 2 — CORPORATION.

A "citizen" ordinarily means only a natural person, and will not be construed to include a corporation, unless the general purpose and import of the statute in which the term is found seems to require it (quoting Words and Phrases, Citizen).

[Ed. Note.—For other cases, see *Citizens*, Cent. Dig. §§ 1, 13-16; Dec. Dig. ¶ 2.]

3. RAILROADS — 9 — RAILROAD COMMISSION — STATUTE — CONSTRUCTION.

It being presumed that the petition would not be signed without consideration of its proposed demands, the word "citizen" will not be construed to include corporations, in the absence of a provision in the act creating a means by which the assent of a corporation may be evidenced.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 12-19; Dec. Dig. ¶ 9.]

Appeal from Circuit Court, Washington County; Jos. S. Maples, Judge.

The St. Louis & San Francisco Railroad Company was convicted and fined for failure to obey an order of the Railroad Commission, and it appeals. Reversed.

Moore, Smith, Moore & Trieber, of Little Rock, W. F. Evans, of St. Louis, Mo., and B. R. Davidson, of Fayetteville, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

SMITH, J. An information was filed before a justice of the peace of Washington county, in which it was charged that the appellant railroad company had failed and refused to comply with order No. 3085 of the Railroad Commission of Arkansas, which said order required appellant to establish and maintain a joint interchange track at Fayetteville with the Kansas City & Memphis Railroad Company, and to do switching thereon. Judgment was rendered by default in the justice court, and an appeal was prosecuted to the circuit court, in which court a demurrer and an answer were filed. Various grounds of defense were set up in the answer, which we need not consider here; but, among other defenses, it was alleged that the order of the Railroad Commission upon which the prosecution was based was void, for the reason that no pe-

tition for such order, signed by 15 bona fide citizens residing within the territory affected by the petition was ever filed, and as we agree with appellant in this contention we have found it unnecessary to consider any of the other defenses set out in the answer.

Appellant's demurrer was overruled, but upon the trial before the court sitting as a jury considerable evidence was offered, at the conclusion of which the court found appellant guilty as charged, and this appeal is prosecuted from the judgment of the court imposing a fine against appellant.

[1] It is conceded by counsel for the state that, although there are 18 names signed to the petition, all these signers are corporations and copartnerships, except one; but it is argued that the provisions of the statute in regard to the number of signers is directory, and that the statute was substantially complied with when 15 names of individuals, corporations, and copartnerships were signed to the petition. Section 1 of Act 149 of the Acts of 1907, under which the Railroad Commission proceeded in making the order in question, provides that the Commission shall be empowered to hear and consider all petitions for train service, depots, stations, spurs, side tracks, platforms, and the establishment, enlargement, equipment, and discontinuance of the same upon the right of way of any railroad in this state: Provided, said petitions shall be signed by at least 15 bona fide citizens residing in the territory sought to be affected by said petitioners. In the case of *St. Louis, I. M. & S. R. Co. v. Bellamy*, 113 Ark. 384, 169 S. W. 322, it was decided that a petition "signed by at least 15 bona fide citizens residing within the territory sought to be affected by said petition" is essential to give the Commission jurisdiction" to act upon the matters mentioned in the act quoted from.

It has been many times decided that a corporation is not a citizen, within the meaning of the equal privileges and immunities clause of the federal Constitution; and this court has decided that section 18, article 2, of the Constitution of this state, containing the same provisions as those of the federal Constitution, does not apply to corporations. *C. R. J. & P. R. Co. v. State*, 86 Ark. 423, 111 S. W. 456. And while it is held that corporations are persons within the meaning of the fourteenth amendment to the federal Constitution, which provides that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law, it has been as often decided that corporations are not included in that portion of the same amendment which provides that no state shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States. A number of the cases so holding are cited in the opinion of this court in the case of *Chicago, R. I. & P. R. Co. v. State*, *supra*.

[2] A number of definitions of the word "citizen" are found in volume 1 of *Words and Phrases*, and we quote the following definition there given:

"'Citizen' ordinarily means only a natural person, and will not be construed to include a corporation, unless the general purpose and import of the statute in which the term is found seem to require it. *International & Life Assur. Ass'n v. Haight*, 35 N. J. Law, 279, 282."

In the case of *School Dist. No. 11 v. School Dist. No. 20*, 63 Ark. 543, 39 S. W. 850, the court considered the meaning of the word "citizen" as employed in the statute authorizing petitions for change of boundaries of school districts. The court, through Bunn, C. J., said that, from the common understanding of the meaning of the word "citizen," and from the fact that some other word than "citizen" is employed in the statutes authorizing these changes, whenever persons other than electors were included, the word "citizen," as there used, meant an "elector." It is not customary to speak of corporations or of copartnerships as *residing* in a particular locality. They must, of course, have their situs, or, as is sometimes said, their "domicile," in a particular locality; but it would not be said that they were residents of that locality.

Moreover, the use of the qualifying words "bona fide" is significant. Evidently the Legislature did not intend to burden the Railroad Commission with the consideration of petitions for the things authorized to be petitioned for unless at least 15 bona fide citizens residing in the locality to be affected were sufficiently interested to petition therefor. It is no doubt true that a corporation or a copartnership might be interested and greatly benefited by relief such as was prayed for in the petition in question; but these are questions which the Legislature apparently has left for the action of "citizens residing in the locality to be affected," which language we construe to mean permanent residents, as distinguished from mere sojourners, and as excluding corporations and copartnerships, and including only individuals. If corporations or companies were taken into account, the question of the authority of the officers signing the names of such corporations or companies would arise, where the statute did not provide what officers should sign for such companies or corporations.

[3] The presumption is not to be indulged that petitions will be signed upon mere presentation; but upon the contrary, the presumption of law must be that signers will not seek to put in motion the machinery of the law to require a railway company to

grant the relief prayed until the signer has concluded that the relief prayed for should be granted. If the rule were otherwise, the requirement of a petition would be futile. For a corporation to exercise this function would require investigation and consideration by its directors and a conclusion to be reached by them. No mere stockholder or officer of a corporation, upon his own initiative, would have the right to declare the corporate will. Some other officer or stockholder might be of a contrary opinion, and to avoid this conflict a corporation, if authorized to act at all, would have to act in some manner permitted by statute. But the Legislature having made no provision by which the assent of a corporation might be evidenced, but, upon the contrary, having used language which in its ordinary acceptation would refer only to individuals, we have concluded that the petition was not signed as required by law, and that the Railroad Commission was therefore without jurisdiction to make the order upon which this prosecution is based, and the cause will therefore be reversed and dismissed.

W. B. THOMPSON & CO. v. LEWIS. (No. 152.)

(Supreme Court of Arkansas. Oct. 11, 1915.)

1. FIXTURES — ANNEXATION — INTENT.

It will be presumed that the owner of land who attaches chattels thereto intends that they shall become a part of the realty, and the intention in attaching is the test of whether the chattel becomes an irremovable fixture.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 3, 6; Dec. Dig. —4.]

2. FIXTURES — SUBSEQUENTLY ACQUIRED FEE.

Although defendant had only a lease when he placed fixtures on the land, his leasehold estate merges in the fee which he afterwards acquired by purchase, so that fixtures already attached are thereafter irremovable.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 64, 65; Dec. Dig. —33.]

3. FIXTURES — ANNEXATION — INTENT — EVIDENCE — SUFFICIENCY.

Evidence held sufficient to show intention of owner that trade fixtures attached to the land should become a part of the realty.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 67-79; Dec. Dig. —35.]

Appeal from Circuit Court, Union County; Chas. W. Smith, Judge.

Action by W. B. Thompson & Company against S. J. Lewis. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

J. B. Moore and Geo. M. Le Croy, both of El Dorado, for appellant. S. J. Lewis, pro se.

McCULLOCH, C. J. Appellants obtained a judgment in the circuit court of Union county against appellee for debt due by contract, and sued out execution on the judgment, which was by the sheriff levied on a small tract or

parcel of real estate on which was situated a steam cotton gin plant. Appellee filed a schedule claiming the machinery in the gin plant as exempt from sale under execution. The circuit court allowed the claim of exemptions, and an appeal has been prosecuted to this court.

[1] The facts in the case are undisputed. Appellee leased the lot from one Bolding in the year 1903 and erected the gin plant, which consisted of a frame two-story building, and placed therein the machinery consisting of engine and boiler and gin stand and cotton press, together with necessary shafting and belting. The machinery was placed in the building in the customary way, the boiler resting upon the ground under the shed of the building, and is incased in what the witnesses termed a mud casing. The cotton gin and press are placed upon sills resting upon the surface of the lot. Appellee purchased said lot from Bolding in the year 1907, and Bolding conveyed the title in fee to him. Appellee has continued to own and operate the gin since that time.

Our conclusion is that the machinery constituting the gin plant did not constitute removable trade fixtures at the time of the levy of the execution and could not be claimed as exempt. This court, in the case of Choate v. Kimball, 56 Ark. 55, 19 S. W. 108, laid down the rules for ascertaining whether an article is a chattel or an irremovable fixture, the principal test being stated as follows:

"The intention of the party making the annexation to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation and the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for which the annexation has been made."

In the later case of Ozark v. Adams, 73 Ark. 227, 83 S. W. 920, we said that:

"Before the aforesaid rules can be applied the primary question is 'the relation of the parties.'"

And in that case the court approved the rule that:

"Where a chattel annexed to the soil is sold to the owner of the realty, that fact changes its prior personal character into an irremovable fixture."

The court cited with approval the case of Curtis v. Riddle, 7 Allen (Mass.) 185. The intention of the party who annexes the chattel being the real test whether or not it remains a chattel or becomes an irremovable fixture, the inference is strong, where the party attaching the fixture is the owner of the soil, that it was intended to become a part of the soil, and not a removable fixture, and all of the authorities hold that, under those circumstances, there must be strong evidence of a contrary intention manifested by some overt act or circumstance. Bemis v. First National Bank, 63 Ark. 625, 40 S. W. 127.

[2] Appellee was not the owner of the soil at the time he established the gin plant thereon, but by the purchase of the fee his leasehold estate in the soil became merged in the greater estate, and the principle announced in Ozark v. Adams, supra, applies.

Mr. Ewell lays down the rule, which appears to be overwhelmingly supported by the authorities, that:

"As against one who is the owner of the estate in fee as well as of the fixtures, they are part of the freehold and cease to be goods and chattels, and therefore may not be seized as goods and chattels by the sheriff under a fi. fa. as against the owner of the fee." Ewell on Fixtures (2d Ed.) p. 537.

Indeed, the same author lays down the rule that the owner of the fee cannot establish by parol his claim that fixtures attached to the soil are chattels for the purpose of requiring a levy thereon as that character of property. The learned author states the proposition as follows:

"Nor can the execution debtor by parol turn out as chattels for purpose of levy growing grass, fruit, or trees, or fixtures annexed to his land, nor without a severance, authorize the levy of execution thereon as chattels; and, if attempted to be done, the levy is void." Page 542.

[3] The machinery involved in this case was attached to the soil in the customary way in which that character of machinery was attached for use. The owner has, in fact, used the property since he became the owner of the soil, for a period of about eight years, so the conclusion is unavoidable, even if no conclusive presumption were to be indulged under those circumstances, that there was no intention to treat the machinery otherwise than as a part of the realty.

The circuit court reached the wrong conclusion in the case, so the judgment is reversed, and the cause remanded, with directions to quash the supersedeas.

FEDERAL REALTY CO. v. EVINS.

(No. 162.)

(Supreme Court of Arkansas. Oct. 11, 1915.)

1. VENDOR AND PURCHASER ⇐3—CONTRACTS—CONSTRUCTION.

A contract in which one party agrees to sell lands and lots at a stipulated price, and the other party agrees to pay the stipulated price, is a contract for the sale of land, and not creating an agency for the sale, although other provisions indicate that sales by the purchaser are contemplated by the contract.

[Ed. Note.—For other cases see Cent. Dig. § 100.

2. CONTRACTS ⇐3—TIONS OF PARTIES.

Where defendant's conduct is such as to justify plaintiff in imposing a lien for the cost of defending and conferring a judgment upon him to insist upon his claim without the payment of the same.

[Ed. Note.—For other cases see Cent. Dig. § 100.

3. CONTRACTS ¶10—SALE OF LAND—MUTUALITY.

A contract providing that one party shall pay purchase money for real estate as it matures by the terms of the contract, and that the other party shall execute deeds for the land at a rate stipulated in the contract, is not void for want of mutuality.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. ¶10.]

Appeal from Logan Chancery Court; William A. Falconer, Chancellor.

Action by the Federal Realty Company against Joseph Evins. From a judgment for plaintiff, defendant appeals. Affirmed.

Anthony Hall, of Paris, for appellant. J. T. Bullock, of Russellville, and R. C. Bullock, of Dardanell, for appellee.

SMITH, J. On the 3d of April, 1912, the parties to this litigation entered into a contract in writing for the sale of a tract of land containing 125 acres situated in the Northern district of Logan county. This tract of land had been platted into lots, and was known as Mt. Magazine, a summer resort. The consideration for this contract was the sum of \$6,000, and the provisions of the contract over which the parties are disagreed read as follows:

"Now, therefore, it is hereby agreed by and between the parties hereto, in consideration of the mutual stipulations and agreements to be kept and performed by the several parties hereto, as follows:

"(1) The first party agrees that for the purpose of this contract he hereby agrees to sell and deliver unto the said parties of the second part the aforesaid lands and lots at a stipulated price of \$6,000 to be paid in the manner hereinafter provided.

"(2) Five hundred dollars cash, the receipt of which is hereby acknowledged, and note for \$500 due August 10, 1912, said note to draw interest after maturity at 6 per cent., and said second parties shall continue to make payments to the party of the first part as lots are sold, and this contract shall continue in force for the period of five years from date hereof, provided parties of the second part have made payments of at least \$1,000 per year or upon the payment of the balance of the said \$6,000, together with interest upon deferred payment or payments at the rate of 6 per cent. after August 10, 1912, per annum, then said party of the first part or assigns is to deed to the party of the second part, any and all lands or lots which have not been previously deeded.

"(3) It is further agreed by and between the parties hereto that the party of the first part is to release by deed lots at the rate of \$30 each for all money received by him, such deed to be executed and delivered to the parties of the second part or any person designated by them; same to be executed and delivered within 15 days from date of payment."

Appellant was the party of the second part to this contract, and, pursuant to its terms, paid \$1,500, and the interest, on payments which had not been made at their maturity. After these payments had been made a controversy arose as to the respective rights and obligations of the parties under this contract. There was considerable correspondence, in which the respective contentions of

the parties were set out. This correspondence eventuated in a demand made by appellant in a letter dated February 7, 1914, as follows:

"Replying to yours of the 5th, this day received, would say that we refer to our last letter of January 21st, in which we inclose a deed for you to sign, and also our ultimatum of January 31st, and can only repeat that we will consider no other settlement at this time, either the deed to the 50 lots or the return of the \$1,500, or we will take action to protect our interests."

This letter was written in response to one from appellee under date of February 5th, in which appellee stated:

"I have concluded to meet your demands by releasing to you by deed sixty lots, upon the payment to me of the amount due (find statement inclosed), five hundred and forty-five (\$545.00) dollars. This will settle fully the first and second payments."

[1] It will thus be seen that appellant was contending for the execution and delivery to it of a deed containing 50 lots at the purchase price of \$30 each; whereas appellee offered to deed 60 lots provided appellant paid the balance due under the contract. It becomes necessary, therefore, to construe the contract set out above. Appellee contends it is an absolute sale of land to appellant; while appellant contends it is an agreement on its part to undertake the sale of said lands for appellee at a fixed price, and that the instrument cannot be construed as a contract for the sale of real estate, because there is no mutuality of obligation.

We think appellee correctly construed this contract. We find nothing in its terms to support appellant's contention that the writing set out constitutes a mere undertaking on the part of appellant to sell said lots for appellee at a fixed price, and this is the point upon which the parties disagree. We think this is clear, not only from the terms of the contract, but that this was the understanding of the parties thereto appears from their action under it. One thousand five hundred dollars were paid before there was a demand for any lots, and, while article 3 of the contract does give appellant the right to demand a deed for each \$30 of purchase money paid, article 2 of the contract requires appellant to make payments at the rate of \$1,000 a year, whether any lots are sold or not.

The court below construed the contract as we have done, and gave judgment against appellant for the \$1,500 of the purchase money then due, and declared this sum to be a lien upon the property in question, and directed its sale unless the same should be paid within the time fixed by the decree, provision being made in the decree for the retention by the commissioner of any sum of money received by him in excess of the sum adjudged to be due, this excess to be applied to the payment of the unpaid balance upon its maturity.

[2] Appellant, of course, is entitled to a deed to a lot for each \$30 of purchase money

paid, but it has no right to claim the benefit of the contract while refusing to discharge the obligations which are imposed upon it. Appellee offered to execute a deed to a sufficient number of lots to cover all of the purchase money which had been paid or was then due, and, as this was all he could be required to do, it cannot be said that he was in default.

[3] The contract is not void for the want of mutuality. *Johnson v. Wilkerson*, 96 Ark. 320, 131 S. W. 690. The obligation on appellant's part is to pay the purchase money as it matures, and upon appellee's part to execute deeds at the rate of one lot for each \$30 of purchase money paid.

We conclude, therefore, that appellant misconstrued this contract and its rights thereunder and committed a breach of the contract by its failure to pay the purchase money when due.

The decree of the chancellor will therefore be affirmed.

DEWEIN v. STATE. (No. 129.)

(Supreme Court of Arkansas. Sept. 27, 1915.)

1. CRIMINAL LAW §119—SANITY—TRIAL—CHANGE OF VENUE.

Where the issue of sanity at the time of the trial of a person convicted of crime and sentenced is to be submitted to a jury under a writ of error coram nobis after sentence, he is entitled to a change of venue as in other criminal cases.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 238-240; Dec. Dig. § 119.]

2. CRIMINAL LAW §121—CHANGE OF VENUE—DISCRETION OF COURT.

Where a petition for change of venue in a criminal case and its supporting affidavits are in the form prescribed by statute, the only inquiry open to the court is as to the qualifications of the supporting witnesses, and if they fulfill the requirement of Kirby's Dig. § 2318, as being credible qualified electors and actual residents of the county, not related to the defendant, the court has no discretion, and must grant the change.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 241; Dec. Dig. § 121.]

3. CRIMINAL LAW §135—CHANGE OF VENUE—AFFIDAVITS—WITNESSES—CREDIBILITY—INQUIRY.

In passing on the credibility of the supporting witnesses, on a motion for change of venue in a criminal case, the court may examine them as to their means of knowledge and as to the probability of the petitioner having a fair trial, but only for the purpose of ascertaining their credibility.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 253; Dec. Dig. § 135.]

4. CRIMINAL LAW §137—CHANGE OF VENUE—DETERMINATION OF MOTION—"REPUTABLE."

The statement of the court, in passing on a motion for change of venue in a criminal case, that "the witnesses are reputable citizens of Saline county, and in passing on the motion * * * only their knowledge of conditions will be considered," was not a finding that the witnesses were "credible" within Kirby's Dig. §

2318, relating to change of venue in criminal cases; the word "reputable" not being synonymous with "credible."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 253; Dec. Dig. § 137.]

For other definitions, see Words and Phrases, First and Second Series, Reputable.]

5. WITNESSES §311—CREDIBILITY—"CREDIBLE."

A "credible" person is one who has the capacity to testify on a given subject and is worthy of belief, and one who lacks knowledge on the subject under investigation is not a credible person to be accepted as worthy of belief in that particular inquiry.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1072-1075; Dec. Dig. § 311.]

For other definitions, see Words and Phrases, First and Second Series, Credible.]

6. CRIMINAL LAW §184—CHANGE OF VENUE—AFFIDAVIT—SUPPORTING WITNESSES—KNOWLEDGE—CREDIBILITY.

Evidence held to support the finding of the court that the supporting witnesses to an affidavit for a change of venue in a criminal case were, for want of knowledge, not credible persons within Kirby's Dig. § 2318.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 243, 251, 252; Dec. Dig. § 134.]

7. CRIMINAL LAW §137—CHANGE OF VENUE—SUPPORTING WITNESSES—CREDIBILITY—DISCRETION OF COURT.

Whether a supporting witness to an affidavit for a change of venue is credible is a question largely in the discretion of the trial court, depending on the facts of each particular case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 253; Dec. Dig. § 137.]

8. JURY §99—ISSUE OF SANITY—FORMER TRIAL—OPINION—EFFECT.

Where one convicted of murder secures, under a writ of error coram nobis, the trial of an issue as to his sanity at the time of his trial, veniremen who admitted the forming and expressing of an opinion as to defendant's guilt, but who declared that they had no bias or prejudice against him or any opinion on the question of his sanity, were competent to sit as jurors.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 438-443, 445-448; Dec. Dig. § 99.]

9. CRIMINAL LAW §570—ISSUE OF SANITY—EVIDENCE—SUFFICIENCY.

On the trial, under a writ of error coram nobis after sentence, of an issue as to the sanity at the trial of one convicted of murder, evidence held sufficient to sustain a verdict of sanity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1285-1288; Dec. Dig. § 570.]

10. CRIMINAL LAW §452—EVIDENCE—NON-EXPERT OPINIONS—INSANITY—ADMISSIBILITY.

The testimony of a nonexpert witness on the subject of insanity is admissible only after a showing of his association with the subject of the examination and his opportunity for observation and a statement of facts upon which his opinion is based.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1053-1055; Dec. Dig. § 452.]

11. CRIMINAL LAW §741—ISSUE OF SANITY AT TRIAL—PROVINCE OF JURY.

Whether the type of mental disease from which it was claimed defendant was afflicted was such as to preclude its discovery by nonexperts from ordinary observation was a question

for the jury on the trial of the issue of his sanity at the time of his trial for the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1138, 1221, 1706, 1713, 1716, 1717, 1727, 1728; Dec. Dig. § 741.]

Appeal from Circuit Court, Saline County; W. H. Evans, Judge.

Clarence Dewein was convicted of murder. Upon affirmance of the judgment he brought a writ of error coram nobis in the Saline circuit court, praying an inquiry into his sanity at the time of the trial. From a verdict and judgment establishing his sanity, petitioner appeals. Affirmed.

Chas. P. Johnson and Jones & Owens, of Little Rock, for appellant. Wm. L. Moose, Atty. Gen., and John P. Streepey, Asst. Atty. Gen., for the State.

MCCULLOCH, C. J. Appellant, Clarence Lee Dewein, was convicted in the circuit court of Saline county, Ark., on April 25, 1914, of the crime of murder in the first degree, and on appeal to this court the judgment of conviction was affirmed. 170 S. W. 582. The crime which he was adjudged to have committed consisted of the killing of one L. H. Thompson, an aged man, in the town of Benton, and the proof showed that it was committed by appellant and one Joe Strong, and that they killed Thompson for the purpose of robbing him of his money. Both of the men were convicted and sentenced to death by electrocution. Subsequent to the affirmance of the judgment by this court, appellant filed in the Saline circuit court a petition for a writ of error coram nobis, praying for an inquiry into the question of his sanity at the time of the trial, and that the judgment of conviction be set aside on the ground that he was insane at the time of the trial and without capacity to conduct his defense. The writ was duly issued by the judge of the circuit court, and at the next term there was a trial of the issue before a jury, which resulted in a verdict establishing appellant's sanity at the time of his conviction. An appeal has been duly prosecuted to this court.

[1] Appellant presented to the trial court a petition for a change of venue. The petition was in the form prescribed by statute and supported by the affidavits of two qualified electors of the county, who, it is claimed, were credible persons. The statute provides that a petition for a change of venue in a criminal case must be supported "by the affidavits of two credible persons who are qualified electors, actual residents of the county and not related to the defendant in any way." Kirby's Digest, § 2318. When the question of insanity of a convicted person is to be submitted to the jury on writ of error coram nobis, after conviction and sentence, the petitioner is entitled to a change of venue as in other criminal cases. Adler

v. State, 35 Ark. 517, 37 Am. Rep. 48. The supporting affiants were called before the court to testify on an inquiry as to their credibility, and they were examined and cross-examined at length. The court overruled the motion for change of venue, and in doing so the trial judge said that:

"The witnesses are reputable citizens of Saline county, and in passing upon the motion and in considering their testimony, only their knowledge of the conditions will be considered."

[2, 3] In a criminal case, when a petition for a change of venue and the supporting affidavits are in the form prescribed by statute, the only inquiry upon which the trial court may enter is as to the qualifications of the supporting witnesses; and if it be found that they come within the definition of the statute, as "credible persons who are qualified electors, actual residents of the county and not related to the defendant in any way," the court has no further discretion, and the order for a change of venue must be made. The court may, however, in order to pass upon the credibility of the supporting witnesses, have them called before the court and examined. That is not the exclusive method of passing upon the question, but it is the familiar one more often pursued in this jurisdiction. The court may inquire into the means of knowledge of the witnesses and as to the probability of the petitioner being able to obtain a fair and impartial trial, but only for the purpose of reaching a conclusion upon the credibility of the supporting witnesses.

[4, 5] It is insisted, in the first place, that the trial court found, as a matter of fact, that the witnesses were credible persons, and that his order overruling the motion for change of venue was inconsistent with that finding. The argument is based upon the statement made by the trial judge to the effect that the witnesses were "reputable citizens of Saline county"; but the remainder of the sentence uttered by the court at the time shows that this statement was not meant as a finding that the witnesses were credible persons within the meaning of the statute, for the judge said in the same connection that there was no question raised as to the credibility of the witnesses, "except as to their knowledge as to the condition of the minds of the inhabitants in the county." It is true that the word "reputable" is laid down by the lexicographers as synonymous with the word "credible," but the two words are not synonymous in the fullest sense, and cannot be treated as synonyms when considered in interpreting our statute on the subject of change of venue. A person may be of good repute in the community in which he lives, and yet, by reason of a reckless and inaccurate oath, based upon insufficient knowledge, fail to be a "credible" person within the meaning of the statute. A credible person is one who has the capacity to

testify on a given subject and is worthy of belief; and one who lacks knowledge on the subject under investigation is not a credible person to be accepted as worthy of belief in that particular inquiry. So we are of the opinion that the trial judge did not mean to declare a finding that the witnesses were credible persons within the meaning of the statute, and that we must test the correctness of the court's conclusion on that issue by a review of the record as presented to the judge upon the inquiry as to their credibility.

[8, 7] Now, the witnesses did not pretend to have a general knowledge of the state of the mind of the citizens of all portions of the county; nor did their knowledge extend to the state of mind of the people with reference to the issues to be presented on the trial. On the contrary, they appear to have rested their conclusions entirely upon the fact that there was a widespread belief in the minds of the inhabitants of the locality, of which the witnesses were advised, that appellant was one of the parties who had robbed and slain L. H. Thompson, and the supporting witnesses seem to have drawn the conclusion therefrom that those who shared that belief were necessarily prejudiced to the extent that appellant could not get a fair trial upon the issue as to his sanity or insanity at the time of the trial. Neither of the witnesses gave any evidence whatever of any widespread prejudice against appellant, further than the inference to be drawn from the fact of belief in the established participation of the appellant in the killing of Thompson. It did not necessarily follow that, because the belief was general that appellant had participated in the killing of Thompson, there existed in the minds of the inhabitants such prejudice as would prevent his obtaining a fair and impartial trial in the county. On the contrary, it is fair to assume that an acceptance of the adjudged fact of appellant's participation in the killing did not create in the minds of intelligent people such a prejudice as would prevent him obtaining a fair and impartial trial on the issue as to his sanity at the time of conviction. It is shown, too, that there was an effort made to secure a pardon, and that a large number of the prominent citizens of the county presented a protest against executive interference; but that protest, and the agitation which brought it about, was not shown to have been so general as to prevent appellant from obtaining a fair and impartial trial. Upon the whole we cannot say, from a perusal of the testimony, that the court erred in finding that the supporting witnesses to the petition for a change of venue were lacking in sufficient knowledge and rested their conclusions upon erroneous premises to the extent that they would not be deemed credible persons within the meaning of the statute. In pass-

ing upon a question of this kind, much is left to the fair discretion and judgment of the trial court, and each case must be determined by its own particular facts. *Ford v. State*, 98 Ark. 139, 135 S. W. 821. We fail to find that there is any abuse of the court's discretion in this case, and the order refusing the change of venue will not be disturbed.

[8] The next ground urged for reversal is that the court erred in passing on the qualifications of veniremen. There were numerous exceptions in that regard, and appellant exhausted all of his challenges, so that, if it be found that incompetent jurors were taken upon the jury, or that appellant was compelled to exhaust any of his peremptory challenges on incompetent veniremen, a reversal of the case must follow. It would serve no useful purpose to set out at length the testimony of the veniremen on their voir dire, but it is sufficient to say that the only question as to their competency relates to the matter of opinion on the question of the guilt or innocence of appellant on the original trial. Many of the veniremen stated that they had formed and expressed opinion as to the guilt of appellant's participation in the killing of Thompson, but all of them stated that they had no bias or prejudice against him or any opinion as to the question of his sanity at the time of the trial, and could give him a fair trial on that issue.

Now, the question under investigation at this trial did not relate to the matter of appellant's participation in the killing of Thompson, or even to the question of his sanity at the time the killing occurred, but the inquiry was to be confined solely to the question of appellant's sanity or insanity at the time of the original trial. Therefore an opinion formed and expressed by a venireman concerning the question of appellant's participation in the killing did not necessarily create such a prejudice as would prevent him from sitting as a juror; nor was it such an opinion as rendered him incompetent as a juror. All of the veniremen stated that, notwithstanding the opinions they had formed as to the original question of appellant's participation in the crime, they were open-minded as to his sanity or insanity at the time of the trial, and could give him a fair and impartial trial on that issue. They were therefore competent jurors, and the court did not err in overruling appellant's challenges.

[9] It is insisted, finally, that the testimony adduced in the trial established by overwhelming preponderance, if not beyond dispute, that appellant was suffering from mental disease which incapacitated him from knowing the difference between right and wrong, and that he was insane, not only at the time of the trial, but at the time of the killing of Thompson. Appellant was about 20 years of age at the time the killing oc-

curred, and the evidence adduced by his counsel tends to establish the fact that his weak mentality resulted from hereditary syphilis, and that he was mentally incapable from early childhood. There is a great mass of testimony along that line, consisting mainly of the testimony of experts who had treated appellant and examined him for the purpose of testifying in the case. The testimony was, in other words, abundant, and it is insisted by counsel for appellant that it was, in fact, undisputed, and that the testimony adduced by the state was incompetent and without any probative force. Appellant was born and reared in the state of Illinois, and had only been in Saline county a few months before the crime was committed. He was confined in jail from the time of his arrest up to the date of trial, and the witnesses introduced by the state testified with reference to their knowledge resulting from observation during the confinement in jail and during the trial of the cause, which lasted several days. There were quite a number of those witnesses, however, who testified that they observed appellant closely during the trial, and some of them while he was in jail, and they all expressed the opinion that he was sane. For instance, the sheriff of the county testified that he had observed appellant's conduct while confined in jail and watched him closely during the trial and observed his demeanor throughout the progress of the trial, and particularly while he was on the witness stand. He testified that appellant appeared to be a normal man and took care of himself quite well on the witness stand. Other witnesses who were present testified that appellant maintained himself well as a witness in his own case, even under the searching cross-examination to which he was subjected. One of the state's witnesses was a physician who had opportunities for observing the defendant's conduct while in jail, but it is not sought to qualify him as an expert witness.

[10] There is some conflict in the authorities as to the competency of nonexpert witnesses on the subject of insanity, and of the probative force of such testimony. This court is committed to the rule that, before the opinions of nonexpert witnesses on that subject can be made admissible in evidence, "the specific facts upon which the opinions are based must first be stated by the witnesses, or their testimony must show that such intimate and close relations have existed between the party alleged to be insane and themselves as fairly to lead to the conclusion that their opinions will be justified by their opportunities for observing the party." *Shaeffer v. State*, 61 Ark. 241, 32 S. W. 679. A further statement of the rule is found in the recent case of *Schuman v. State*, 106 Ark. 362, 153 S. W. 611, where we held that the testimony of nonexpert witnesses as to the sanity of the defendant was admissible only

"after a showing of their association with him, and their opportunity for observation, and a statement of facts upon which their opinions were based." The witnesses in this case who were permitted to testify gave a statement as to the circumstances under which they observed the conduct of appellant, and they undertook to describe the manner in which he conducted himself during the trial and while he was on the witness stand. They showed sufficient opportunity for observing the appellant and forming an opinion as to his mental capacity, which entitled their testimony to go to the jury. The weight of the testimony was, of course, a question for the jury, but we cannot say that the testimony of those witnesses was entirely without probative force.

[11] It is argued that the type of mental disease under which appellant labored was such as to make it impossible for a nonexpert to discover its presence by ordinary observation. But we think that was all a question for the jury to pass on, whether it was true that appellant was mentally incapacitated to the extent which the testimony of the expert witnesses tended to show, without it being observable by nonexpert witnesses who took careful note of appellant's actions and demeanor during the progress of the trial. There are numerous opinions of this court which deal with the question of insanity and mental incapacity, but we find none of them which warrant us in saying that the testimony of the witnesses introduced by the state in this case was without substantial force, and that the judgment should be reversed as being without any evidence to support it. We will not undertake to say where the preponderance of the evidence appears to us to be, for it is sufficient here if we find that there is evidence of a substantial nature that appellant was, in fact, sane at the time of the trial which resulted in his conviction of the crime of murder.

Being of the opinion that the evidence was sufficient to warrant the verdict, and that there was no error committed by the court in the progress of the trial or in overruling the motion for a change of venue, it becomes our duty to affirm the judgment; and it is so ordered.

J. R. WATKINS MEDICAL CO. v. HAYNES. (No. 27.)

(Supreme Court of Arkansas. May 31, 1915.)

CONTRACTS — 303 — PREVIOUS CONTRACT —
BREACH — COMPROMISE — BONDSMEN.

Where defendant contracted to furnish plaintiff with medicines to be sold exclusively by him in a given territory, and that, in view of the compromise of a claim by plaintiff against defendant for defendant's breach of a similar contract, defendant would continue to supply plaintiff with medicines as though the original contract were still in existence, and would require no other or additional bondsmen thereon, the refusal of one of the bondsmen to be bound

under the new contract justified the refusal of further performance by the company, since under the provision for security the defendant was entitled to the continuation of the bond as first executed, and had the right to require further security upon such refusal.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1409-1443; Dec. Dig. § 303.]

Appeal from Circuit Court, Randolph County; J. B. Baker, Judge.

Action by T. C. Haynes against the J. R. Watkins Medical Company. From a judgment for plaintiff, defendant appeals. Reversed, and cause dismissed.

This is a suit for damages for breach of the contract entered into between the parties thereto, for the alleged refusal of the appellant company to furnish medicines to be sold by the appellee in the prescribed territory, at the price designated and in accordance with the provisions of the contract. On February 27, 1914, the parties entered into a written contract, giving the appellee the exclusive right to sell the medicines and manufactured articles of the appellant company, in a designated portion of Randolph county, agreeing to fill all orders of appellee for medicines, etc. In March, the medical company attempted to cancel said contract and assigned the territory to another person. Appellee thereupon brought suit for breach of the contract, which was compromised and dismissed upon the payment by the medical company of the sum of \$275, "and the further promise," as alleged in the complaint, "on the part of appellant, that the contract that had been entered into between them on the 27th of February, 1914, should again become effective, and that appellant would not require of appellee any other bond or bondsmen, and that appellee was to have said territory mentioned in said original contract, all of which was to be effective and binding on the parties from the said 28th day of April, 1914, to the 1st of March, 1915." And it also alleged that appellant notified appellee that one of his bondsmen had withdrawn from the bond, and by reason thereof it could ship him no further goods until he executed a new bond, which he refused to do, and thereupon appellant refused to ship him any more goods or merchandise in accordance with the contract, which action constituted a breach thereof, for which damages were prayed. Appellee answered, denying the allegations of the complaint relative to breach of the contract.

The agreement of compromise was reduced to writing, and stipulates, after reciting the making of the first contract and the giving of the bond required by it, with certain sureties, naming them, the breach thereof and the amount paid in the compromise of the suit therefor; "and as a further condition and consideration of said compromise it is agreed that said contract entered into by and between said parties on February 27, 1914, be

and the same is hereby ratified, and in all things declared to be binding, and the said bond of the said Haynes is declared to be to the said company acceptable, and the said Haynes will not be required to make any new or additional bond, or give any additional bondsmen during the life of the said contract; and the said company agree that they will not permit one Glasco, who has heretofore had a contract for the said territory, to have any contract for any portion of said territory during the life of the said Haynes contract, nor to permit any one else to have contract for the said territory, nor any portion thereof during such unexpired term of the said Haynes contract."

The appellee testified about the making of the contract, the execution of the bond, with T. W. Campbell and C. A. Going as sureties, which was accepted by the company, the breach of the contract, the suit for damages and compromise thereof, and the stipulation for the further performance of the contract. He stated, also, that the company thereafter refused to send medicines and goods ordered in accordance with the contract, and read their letter of May 16, 1914, as follows:

"We have yours of the 14th, asking that we ship the sample case to you at Pocahontas, Ark. We are, however, unable to comply with your request, as we are in receipt of a communication from our Winona office, to the effect that one of your bondsmen has withdrawn from your contract. Of course, until that matter has been straightened out, we will be unable to make you any further shipments."

He replied to this letter on March 23d, as follows:

"I am in receipt of a letter from your Memphis office, stating that you will not ship me any sample case until things were straightened out, saying that one of my bondsmen had gone back on me. Now it was distinctly agreed between us that I was not to be required to make any further or additional bond, nor give any additional bondsmen, during the life of my year's contract. Now I am depending upon your complying with your contract in this particular. I ordered a sample case from you on the 29th day of April, and cannot, of course, go to work without the case. So I am waiting for you to ship this to me. Please let me know what you are going to do about it."

He admitted receiving their letter of May 21st, informing him of the receipt of a letter from his surety, C. A. Going, declining to be further bound by the bond executed, as the contract later entered into between the medical company and Haynes was a new one, executed without his knowledge or consent, and stating he would not be bound by anything further that should take place between the company and Haynes. This letter also states:

"You will observe that Mr. Going refuses to be further bound under the contract he executed as surety for you, which you will appreciate makes it necessary for you to arrange for a new contract before we can fill any more orders. Mr. Going's notice would release him from any obligation to pay for any goods furnished subsequent to the time it was received by us.

Please let us hear from you promptly as to what you wish to do in the matter."

He testified, further, that he refused to furnish any additional bondsmen; that he was unable to do any business whatever under the contract, because the company refused to send him the medicines ordered and the goods to be sold in accordance with its terms; that he was ready at all times to carry out the contract on his part, but was prevented by the company from doing so. He admitted that Mr. Going, his surety, had come to him and told him that he was released from the bond. The remainder of his testimony relates to his probable profits, and there was other testimony relative thereto.

The court instructed the jury, refusing to give appellant's instruction numbered 3, as requested, as follows, and struck out the last half thereof, over its objection:

"You are further instructed that in the contract sued on in this action, the words, 'said Haynes will not be required to make any new or additional bond, or give any additional bondsmen during the life of this contract,' refer to the bond as then existing, with all sureties on same intact.

"Therefore, should you find from the evidence in this case that, subsequently to the execution of the contract sued on, one of the sureties on said bond withdrew as such, then and in that event the defendant would have a right to require plaintiff to execute a new bond, and upon the failure of the plaintiff to do so, the defendant would have a right to refuse to ship goods to plaintiff until such new bond had been executed."

The court also told the jury, if they should find that appellee agreed with the medical company "not to require a new bond or bondsmen during the life of the contract sued upon in this case, that the Medical Company would be estopped from pleading that one of the sureties had withdrawn from the bond."

S. A. D. Eaton, of Pocahontas, for appellant. T. W. Campbell, of Pocahontas, for appellee.

KIRBY, J. (after stating the facts as above). The court erred in not giving the instruction as requested. The writing between the parties was unambiguous, and clearly expressed the terms of their contract, and they were bound by the stipulation of the compromise agreement relative to the continued performance of the contract after the compromise of the suit for the breach thereof. It expressly recognized the existence of the old contract as binding, and provided: "The said bond of the said Haynes is declared to be to the said company acceptable, and the said Haynes will not be required to make any new bond or additional bond, or give any additional bondsmen, during the life of the said contract," after reciting the execution of the first contract for a period expiring March 1, 1915, the designation of the territory in which the medicines and manufactured articles were

to be sold, the giving of the bond "in support of said contract," with the sureties, naming them, etc.

The stipulation in effect provided for a continuance of the first contract, under the terms of the bond by it required and executed, as though there had been no breach thereof, nor compromise of suit for damages. It was never contemplated that the contract should be made and performed, except in accordance with its terms and under the obligation of the bond required to be, and which was, executed by appellee, with the two sureties. There was no agreement to furnish any medicines or manufactured articles without bond, and the second writing merely declares that the old contract shall be continued with the bond as already executed. It was admitted that one of the sureties afterwards claimed to be released because the compromise agreement was executed without his knowledge or consent, and notified the medical company that he would no longer be bound upon the bond. It immediately informed appellee of this fact, and requested that he should furnish another surety, which he refused to do, claiming that it had no right to demand any other bond or surety under the terms of the compromise agreement. Of course, if appellee's contention had been correct, he was entitled to have the company continue to supply him with medicines and manufactured articles without the giving of other bond or surety; but, as already said, the stipulation of the compromise agreement is not susceptible to any such construction, and his contention cannot be sustained.

It was not contemplated that the medicines and manufactured articles should be furnished him without the bond given required by the terms of the contract, and while the medical company was willing to continue to perform the contract and rely upon the bond as first executed, and not to demand any other bond or security, the condition was immediately changed when the surety on this bond declined to be further bound and notified said company of that fact. It then had the right to require appellee to give further security, since that accepted by it had failed through no fault on its part, and it was never the intention of the parties that the medicine should be furnished without the security of a bond, and the writing clearly shows that it was the intention to retain such security, and only that no other would be required, so long as that furnished and accepted remained in force. In other words, the agreement, as clearly expressed in the language thereof, was that the old bond was satisfactory to the company, and no other would be required or demanded so long as it was effective. The company had the right, the surety thereon having refused to be further bound for appellee's performance of the contract, to

demand other security; and appellee, having refused to furnish it, was not in a position to recover damages for the failure of the company to furnish medicines and manufactured articles, which it had never agreed to do without a bond. The written contract being unambiguous, it was the court's duty to construe it, and the court erred in refusing appellant's said requested instruction numbered 3, a correct construction of the contract, which in effect asked a directed verdict. The testimony is undisputed, and the court should have directed a verdict in appellant's favor.

The judgment is reversed, and the cause dismissed.

YANCEY v. STATE. (No. 153.)

(Supreme Court of Arkansas. Oct. 11, 1915.)

1. HOMICIDE ⚡300 — INSTRUCTIONS — SELF-DEFENSE.

On a trial for homicide, the evidence for the state tended to show that defendant was drunk and threw or dropped his pistol on the floor; that S. threw defendant down, and drew the cartridges out of the pistol; that later defendant demanded the pistol, and, S. having denied having it, defendant precipitated a fight with him; that they were separated, and defendant and his friends left the house; that S. became angry and followed with a chair in his hand; but that, if he started in the direction of defendant at all, he had changed his direction and was going away from him when shot. Defendant's evidence tended to show that S. began the fight when he requested his pistol, and that after he had left the house S. followed, and was advancing on him with a chair and attempting to strike him when he fired. The court charged that, if defendant provoked or voluntarily entered into the difficulty, or was the aggressor, he could not plead self-defense. *Held*, that this presented the state's theory of the case, and was not erroneous because of the failure to charge that, if defendant in good faith sought to retire from the scene of the difficulty, and if deceased followed him out of the house and assaulted him, he would have a right to kill deceased, defendant having made no specific objection specifically calling the court's attention to this defect, and the court having fully and fairly submitted defendant's theory in instructions prepared by his own counsel.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. ⚡300.]

2. CRIMINAL LAW ⚡720 — ARGUMENT OF PROSECUTING ATTORNEY.

Where on a trial for homicide it appeared that defendant went home after shooting deceased, that he was given a check by his father, which he cashed with a neighbor the next morning without saying anything to the neighbor about having shot deceased, and that he at once left the country, the prosecuting attorney's statement in his argument that, no doubt, when defendant reached home after committing the murder, he was given a check by his father and advised by him that other crimes would be more healthful for him, was justified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. ⚡720.]

Appeal from Circuit Court, Phillips County; J. M. Jackson, Judge.

Clarke Yancey was convicted of murder in the second degree, and he appeals. Affirmed.

Andrews & Burke, of Helena, for appellant. Wallace Davis, Atty. Gen., and John P. Streepey, Asst. Atty. Gen., for the State.

HART, J. Clarke Yancey was indicted for murder in the first degree, charged to have been committed by shooting Luther Surman. He was tried, was convicted of murder in the second degree, and his punishment was fixed by the jury at imprisonment in the penitentiary for seven years. From the judgment of conviction, he has duly prosecuted an appeal to this court. The facts are as follows:

On the 27th day of February, 1915, Clarke Yancey shot Luther Surman at a dance at Trenton, in Phillips county, Ark. One shot entered just below the point of the shoulder blade and a little to the right side of it; and the other shot was lower down, just below the last rib. Surman died the day after the shooting as a result of his wounds.

[1] The circumstances attending the shooting, as testified to by witnesses for the state, are that the defendant Clarke Yancey came into the dance hall drunk, went into a room adjacent thereto, pulled out his pistol, and either threw or dropped it on the floor. Luther Surman then came in and threw the defendant down on the floor. He then threw the cartridges out of the gun onto the floor and handed the pistol to some lady present. Then he let the defendant up, and both of them went out of the room. A short time afterwards the defendant came to Surman in the dance hall and demanded his pistol of him. Surman denied having the pistol, and the defendant precipitated a fight with him. Surman got him down and was on top of him, and some of the defendant's friends then got on top of Surman. Other persons separated them, and the defendant and his friends went out of the house. Surman became angry, and finally followed them out, with a chair in his hand raised over his head. Some of the witnesses for the state testified that Surman was going in the direction of the defendant, and that the defendant snapped his pistol at him, and that when the pistol snapped Surman turned and started away from him. They stated that the defendant kept on snapping his pistol, and that after it snapped three times it began to fire; two bullets entering the body of Surman and resulting in his death. Other witnesses for the state testified that when Surman came out of doors with the uplifted chair he did not go in the direction of the defendant, but that, when the defendant saw him come around the house with the chair, going away from him, he immediately began to snap his pistol, and that after it snapped three times it fired twice; both bullets entering the body of Surman.

According to the testimony of the defendant and his witnesses, the defendant, when he first went into the room adjoining the dance hall, pulled his handkerchief out of his pocket, and in doing so accidentally threw his pistol on the floor; that Surman then threw him down and took the pistol away from him; that a little later the defendant requested Surman to give the pistol back to him; and that Surman then began a second fight. They testified that after they had been separated the second time the defendant left the house, and, with some boys who had come to the dance with him, started home, and that Surman then followed him out of the house, and was advancing on him with a chair and was attempting to strike him with the chair at the time he fired the fatal shots.

At the request of the state the court gave the following instruction:

"If you find from the evidence in this case that the defendant provoked or voluntarily entered into this difficulty with the deceased, then he cannot plead self-defense in justification of his acts; in other words, if you find from the evidence that the defendant was the aggressor, or that he voluntarily entered into the difficulty, then he cannot plead self-defense."

It is contended by counsel for the defendant that the court committed a reversible error in giving this instruction, on the ground that it was not justified by the facts. They contend further that the instruction was misleading, on the ground that the court did not tell the jury that, if they found from the evidence that the defendant in good faith sought to retire from the scene of the difficulty, and that the deceased followed him out of the house and assaulted him, he would have a right to kill deceased in his own defense.

According to the testimony of the state, the defendant was the aggressor throughout the difficulty; and according to the testimony of the defendant and his witnesses, the defendant had left the house to avoid further difficulty with the deceased, and was followed out of the house by the deceased, who attempted to strike the defendant with a chair, and the defendant then, in order to save his own life, shot the deceased.

The defendant's theory of the case was fully and fairly submitted to the jury in instructions prepared by his own counsel. The instruction as given by the court presented the state's theory of the case. It is not always practicable that a judge should attempt to so frame each paragraph of his charge to the jury as to make it cover all the elements of the evidence. If the defendant thought the instruction as given was misleading, because it did not contain the qualification now insisted upon, he should have made a specific objection to the instruction and have thus specifically called the court's attention to the defect in it. If he had done so the court doubtless would have added the qualification requested by him; for, as we have already

seen, it covered the defendant's theory of the case fully by instructions asked for by him. *Arnott v. State*, 109 Ark. 378, 159 S. W. 1105; *Bruder v. State*, 110 Ark. 402, 161 S. W. 1067.

[2] It is next contended by counsel for the defendant that the judgment should be reversed because the prosecuting attorney in his closing argument to the jury used the following language:

"No doubt, when this young man reached home after committing this murder, he was given a check by his father, and was advised by him that other climes would be more healthful for him."

We do not think counsel are correct in their contention in regard to this language. The record shows that the defendant went home after his difficulty with the deceased; that he was given a check by his father, which he cashed with a neighbor the next morning; that he did not say anything to the neighbor about having shot the deceased; and that he at once left the country. Under this state of the record the attorney for the state was justified in using the language in his argument to the jury.

We find no prejudicial error in the record, and the judgment will be affirmed.

ROSS & ROSS v. ST. LOUIS, I. M. & S. R. CO. (No. 163.)

(Supreme Court of Arkansas. Oct. 11, 1915.)

1. DAMAGES ⇐108—MEASURE OF DAMAGES—LOSS OF USE OF PROPERTY.

Where defendant railway company dumped burning cotton into a pool belonging to plaintiffs, used to supply water for their cotton gin mill, and thereby damaged the pool, plaintiffs' measure of damages was not the depreciation in value of the plant, but the cost of restoring the plant to its former condition, together with the usable value during the time they were deprived of the use of it.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 273; Dec. Dig. ⇐108.]

2. DAMAGES ⇐62—DUTY TO MINIMIZE DAMAGES.

Where the proper measure of damages for injury to a pool used by plaintiffs to supply their cotton gin with water is the loss of use of the pool and the cost of restoring it to its former condition, plaintiffs' action is not defeated by failure to restore the pool, for they were entitled to compensation for the injurious use of the pool, whether it was restored or not, and although they subsequently sold their plant, including the pool.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 119-131; Dec. Dig. ⇐62.]

Appeal from Circuit Court, Clark County; Geo. R. Haynie, Judge.

Action by Ross & Ross against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

At the trial of this cause in the court below appellants offered evidence tending to show that they were the owners of a large pool near the appellee's station at Okolona.

This pool was about 75 feet wide and 125 feet long, and of a depth ranging from 2 feet to 5 feet. This pool was used by appellants as the source of water supply in the operation of their gin. On the 9th of March, 1913, the cotton on the platform at appellee's station caught fire, and about 80 or 90 bales which had been lying on this platform were carried and thrown into appellants' pool. Appellee had given bills of lading for all of the cotton carried and thrown into this pool, except 3 bales which were owned by appellants. The cotton covered by the bills of lading was thrown into the pool upon the direction of the roadmaster of the railroad company in charge of that division, and there was also proof that appellee's station agent was present and assisted in directing the removal of the cotton. The cotton ignited on Monday, and continued to burn for some days notwithstanding the fact that it had been thrown into the pool, and on Wednesday following the fire the appellee's district claim agent appeared on the scene and requested appellants to permit the cotton to remain in the pool, and stated that the railroad company would be willing to pay a good rental for the use of the ground and damage to the pool, and that, when the fire had been extinguished, the railroad company would clean up the premises and pay any damages that had been sustained. The cotton was allowed to remain in the pool for three weeks, at the end of which time the portions of it which had not burned were taken out and the burned portions, together with the bagging and ties, were left in the pool.

Before the beginning of the next ginning season appellants sold their gin plant, which included the pool, and one of the appellants testified that the price received was \$500 less than would have been asked but for the damage done the pool, although he admitted that in making the trade nothing was said about the damaged condition of the pool. Appellants prayed judgment for this depreciation in the value of their plant. When appellants rested their case, the court gave a direction to the jury to return a verdict in appellee's favor, and this appeal has been prosecuted from the judgment of the court pronounced thereon.

McMillan & McMillan, of Arkadelphia, for appellants. E. B. Kinsworthy, R. E. Wiley, and T. D. Crawford, all of Little Rock, for appellee.

SMITH, J. (after stating the facts as above). [1] The court below did not consider the question of the measure of damages, as under its view there was no liability. But the right to recover damages, if such a right exists, cannot be defeated because appellants sought to apply an erroneous measure. We think this cause should have been submitted

to the jury upon the theory that appellee had used appellants' property and had damaged it in its use. The measure of such damages, however, would not be the depreciated value of the property, but would be the cost of restoring the property to its former condition, together with compensation for the usable value during the time appellants were deprived of its use, and if the proof upon a trial anew does not show that appellants were deprived of the use of the pool, then their recovery should be measured by the cost of restoring the pool to its condition before the cotton was placed in it. *Cavanagh v. Durgin*, 156 Mass. 463, 31 N. E. 643.

[2] It is now urged by appellee that no recovery should be permitted in this case because appellants did not clear out the pool and incurred no expense on that account, as they sold the entire property before the pool had been cleared out, and that any expense in that connection was incurred after the sale of the property by them. But we do not think that appellants' right of recovery can be defeated on that account. They were entitled to compensation for the use of the pool, whether they cleaned it out or not, and their right of recovery cannot be defeated because they did not incur this expense.

According to the evidence of appellants, they made a deduction in the purchase price of the property which far exceeded the cost of repairs, but they would have the right of recovery whether this was true or not, and the judgment of the court below will therefore be reversed, and the cause remanded for a new trial.

BARTON v. EDWARDS, County Judge, et al.
(No. 154.)

(Supreme Court of Arkansas. Oct. 11, 1915.)

1. EMINENT DOMAIN §75—COMPENSATION—CONSTITUTIONAL PROVISIONS.

Const. art. 12, § 9, providing that no property or right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner "in money" or first secured to him by a deposit of money, applies only to the exercise of the right of eminent domain by private corporations, and has no application to the exercise of that power by the state or subdivisions thereof.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 198, 199; Dec. Dig. § 75.]

2. EMINENT DOMAIN §75—COMPENSATION—CONSTITUTIONAL PROVISIONS.

Declaration of Rights, § 22, providing that private property shall not be taken, appropriated, or damaged for public use without just compensation therefor, does not require actual payment in money before the state or a county or municipality can exercise the right of eminent domain, especially as it does not employ the emphatic language used in article 12, § 9, relative to the exercise of such power by private corporations, that property shall not be appropriated until full compensation is made "in money," and payment in county warrants is a compliance with the Constitution, though such warrants are depreciated in value, as the Constitu-

tion, in prohibiting the taking of property without compensation, refers to the usual method of payment by the state, or its subdivisions, which, in the case of demands against a county, is by warrant on the treasury.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 198, 199; Dec. Dig. ☞ 75.]

3. EMINENT DOMAIN ☞ 75—COMPENSATION—CONSTITUTIONAL PROVISIONS.

Property taken for a highway is not taken without compensation, though the quorum court has made no specific appropriation for expenditure on roads, as the constitutional guaranty is answered by general laws affording means to the landowner of obtaining compensation, and the landowner has a clear remedy to compel the levy of an appropriation of funds to pay the damages assessed in his favor.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 198, 199; Dec. Dig. ☞ 75.]

Smith, J., dissenting.

Appeal from Craighead Chancery Court; Chas. D. Frierson, Chancellor.

Suit by P. C. Barton against R. L. Edwards, County Judge, and others. From a decree dismissing the complaint, plaintiff appeals. Affirmed.

Basili Baker and Horace Sloan, both of Jonesboro, for appellant. Jno. R. Turney, of Jonesboro, for appellees.

McCULLOCH, C. J. A public road was, by order of the county court, established through appellant's land in Craighead county, the proceedings for laying out the road being conducted in accordance with the statutes on that subject, and appellant was awarded the sum of \$575 as compensation for his damages. County warrants of that county are considerably below par, and appellant refused to accept a warrant, and insists that the county must in some way pay him his damages in money before the land can be taken for use as a public road. He instituted this action in the chancery court against the county judge to prevent the opening of the road before compensation is paid to him in money. The chancellor decided against appellant and dismissed his complaint for want of equity, and he insists here on appeal that the constitutional guaranty with respect to payment of compensation for property taken for public use has not been complied with.

[1] Counsel seem to rely upon two provisions of the Constitution:

First, section 9 of article 12, which reads as follows:

"No property, nor right of way, shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner, in money, or first secured to him by a deposit of money, which compensation, irrespective of any benefit from any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be prescribed by law."

That section was intended, however, to apply only to the exercise of the right of em-

inent domain by private corporations, and has no application to the exercise of that power by the state or subdivisions thereof. We held recently, in the case of *City of Paragould v. Milner*, 170 S. W. 78, that the provision just quoted has no application to condemnations by municipal corporations.

[2] The Declaration of Rights (section 22) announces the principle that the right of property is before and higher than any constitutional sanction, and that "private property shall not be taken, appropriated or damaged for public use without just compensation therefor." This provision of the Constitution is relied on by counsel for appellant in their contention that payment or a provision for payment in depreciated county scrip cannot be treated as compensation within the meaning of the language of the Constitution. It is argued that the words "just compensation" mean payment in money, and that nothing else will conform to the constitutional guaranty. The use of the word "compensation" alone implies payment in money, but the fact that the emphatic language used in section 9, art. 12, is not employed in the Declaration of Rights shows that the framers of the Constitution did not mean to require actual payment in money before the state or a county or municipality could exercise the right of eminent domain. The law was well settled to the contrary long prior to the adoption of the Constitution of 1874, and it is to be presumed that the framers of the Constitution used the word in the light of its interpretation by courts when used under similar circumstances. It has quite generally been held, under similar provisions of the Constitution, that payment need not precede the taking of the property.

Judge Cooley wrote as follows on that subject:

"When the property is taken directly by the state, or by any municipal corporation by state authority, it has been repeatedly held not to be essential to the validity of a law for the exercise of the right of eminent domain that it should provide for making compensation before the actual appropriation. It is sufficient if provision is made by the law by which the party can obtain compensation, and that an impartial tribunal is provided for assessing it. The decisions upon this point assume that, when the state has provided a remedy by resort to which the party can have his compensation assessed, adequate means are afforded for its satisfaction; since the property of the municipality, or of the state, is a fund to which he can resort without risk of loss." Cooley's *Constitutional Limitations* (7th Ed.) p. 813.

The same principle is announced in somewhat different language in many decisions. The Supreme Court of Wisconsin, in the case of *State ex rel. Burbank v. City of Superior*, 81 Wis. 649, 51 N. W. 1014, said:

"Where property is taken for a public use by a municipal or quasi municipal corporation, the taxable property thereof constitutes a fund to which the owner may resort in the way point;

ed out by law, and the existence of a method by which payment may thus be compelled satisfies the constitutional requirement."

The same doctrine has been announced by the New Jersey courts in the following language:

"But it is not necessary that compensation should precede the actual appropriation, where the property is taken by the state, or by a municipal corporation by state authority. It is sufficient that an adequate remedy is provided, which the party may resort to on his own motion to recover compensation." *Loweree v. City of Newark*, 38 N. J. Law, 161.

The same rule is announced in many decisions of the New York court of last resort, and the only exception found in the cases of that state is the case of *Sage v. City of Brooklyn*, 89 N. Y. 189, where the court, after stating the rule generally recognized, held that, where the owner was remitted to a fund not obtained by general taxation, but by taxation on benefits within a limited district, the constitutional guaranty was not satisfied.

There is, indeed, some authority for the position of counsel, and Mr. Lewis, in his work on *Eminent Domain* (volume 2, § 679), after stating the general rule, adds this exception:

"But, if it can be shown that the resources of a municipal corporation, from taxation or otherwise, are insufficient to enable it to make compensation in a reasonable time, an entry will be enjoined until security is given."

Only one case is cited in support of that statement, namely the case of *Keene v. Bristol*, 26 Pa. 46. We do not think that the rule stated by that author is in accord with sound reason on the subject, and we decline to adopt it. It would be an unsafe rule to say that the power of the state or its subdivisions, such as counties and municipalities, in the exercise of the right of eminent domain, is impaired by inability to make immediate payment, unless it is so expressed in the letter of the Constitution. There ought to be, and is, a presumption that the public purse will prove sufficient to meet all just demands, and that, unless the Constitution expressly provides for payment in money in advance of the taking of property, it is to be presumed that language such as is ordinarily found in the state Constitutions prohibiting the taking of property without compensation refers to the usual method of payment by the state or its subdivisions. The only way in which demands against a county can be paid is by a warrant on the treasury (*Rolfe v. Spybuck Drainage District*, 101 Ark. 32, 140 S. W. 988), and every citizen, in dealing with the state or county or municipality, must take chances on that method of payment. The county could not exercise its function if anything more should be exacted. It works a hardship in exceptional instances where county script is depreciated to require a citizen to accept compensation in depreciated warrants, but that

is one of the exceptional burdens which the citizen is expected to bear. County warrants are receivable for county taxes, and in this way the policy of the law is to give them the greatest facility for circulation. It is thought that by reason of the fact that warrants are thus receivable for taxes, and are payable out of funds found to be in the treasury when presented, the citizen is given satisfaction for any demand against the county, either voluntary or involuntary. The language of our Constitution was framed with reference to that method of payment, and it is to be presumed that its framers intended to express that meaning in the use of the words "just compensation," to be rendered to one whose property is taken for public use.

[3] It is further insisted that the award of damages is void, and that appellant cannot be accorded just compensation, for the reason that the quorum court has made no specific appropriation for expenditures on roads. It is sufficient to say, however, that the constitutional guaranty is answered by general laws which afford means to the landowner of obtaining compensation. There has been an assessment of his damages, and he has a clear remedy to compel the levy of an appropriation of funds to pay the award. This is sufficient to dispose of the case without undertaking to pass upon the question whether or not a specific appropriation of road funds is necessary under the constitutional amendment which authorizes the levying court to make an additional levy of three mills for road purposes, when a majority of the electors have voted in favor of it at the preceding election.

The decree of the chancellor is affirmed.

SMITH, J., dissents.

CALLOWAY v. STATE. (No. 139.)

(Supreme Court of Arkansas. Oct. 4, 1915.)

INDICTMENT AND INFORMATION \S 137 — GRAND JUROR—DISQUALIFICATION—EFFECT.

Under the express provisions of Kirby's Dig. § 2245, the validity of an indictment cannot be questioned on motion to quash, on the ground that a member of the grand jury which returned it was not qualified to act.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 480-487; Dec. Dig. \S 137.]

Appeal from Circuit Court, Miller County; Geo. R. Haynle, Judge.

Louis Calloway was convicted of murder in the second degree, and he appeals. Affirmed.

Wallace Davis, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

McCULLOCH, C. J. Appellant was convicted of murder in the second degree. There is no bill of exceptions in the record contain-

ing the proceedings during the trial; at least, the bill of exceptions is not authenticated in any manner and cannot be considered in the case.

There is, however, one question for consideration, which is brought up by a duly authenticated bill of exceptions. That relates to a motion to quash the indictment on the ground that a member of the grand jury was not a qualified elector of the county. The statute provides, however, that:

"No indictment shall be void or voidable because any of the grand jury fail to possess any of the qualifications required by law." Kirby's Dig. § 2245.

The statute is designed to cut off all inquiry concerning the validity of the indictment on the ground that the members of the grand jury were not qualified to act in that capacity. No objection appears, so far as is revealed by this record, to the grand jurors as they were being impaneled, but appellant raises the question of the qualifications of one of the jurors on a motion to quash the indictment. It is unnecessary for us to determine in this case what the effect would have been if objection had been made at the time of impaneling the grand jury. We simply follow the direction of the statute by holding that, on a motion to quash the indictment, its validity cannot be called in question on the ground that a member of the grand jury was not qualified to act.

Judgment affirmed.

WEBB v. VAN VLEET-MANSFIELD DRUG CO. (No. 144.)

(Supreme Court of Arkansas. Oct. 4, 1915.)

1. FRAUDULENT CONVEYANCES — 132 — PRESUMPTIONS — CONTINUANCE OF SELLER'S POSSESSION.

Though a husband continued in possession after sale of a stock of drugs to his wife, it cannot be held presumptively fraudulent for that reason, where the drugs were in the wife's building, and she objected to the levy of an attachment thereupon by the husband's creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 407-424; Dec. Dig. § 132.]

2. APPEAL AND ERROR — 1062 — REVIEW — HARMLESS ERROR.

In an action for damages for wrongful attachment, where it appeared that plaintiff, who claimed part of the goods attached and bought in the whole, made an extremely advantageous bargain, paying several times less for the whole of the goods than the part not claimed by her was worth, error in directing a verdict against plaintiff was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.]

3. ATTACHMENT — 365 — WRONGFUL ATTACHMENT—DAMAGES.

An attaching creditor cannot be held liable for wrongful acts of the sheriff not shown to have been done at his direction.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1328-1338; Dec. Dig. § 365.]

Appeal from Circuit Court, Randolph County; J. B. Baker, Judge.

Action by Nannie E. Webb against the Van Vleet-Mansfield Drug Company. From a judgment for defendant, plaintiff appeals. Affirmed.

T. W. Campbell and W. L. Pope, both of Pocahontas, for appellant. E. G. Schoonover, of Pocahontas, for appellee.

HART, J. [1] Appellant instituted this action against appellee to recover damages alleged to have been sustained by reason of appellee wrongfully causing an attachment to be levied on her property. Appellee answered and made a general denial of the allegations of the complaint. Nannie E. Webb, appellant in her own behalf testified substantially as follows:

"I own a storehouse at Biggers, Ark., in which was situated a stock of drugs owned by my husband, John T. Webb. On the 9th day of December, 1912, my husband executed to me a bill of sale for this stock of drugs and his household goods. The consideration recited in the bill of sale was \$100. The drugs sold to me were worth between \$700 and \$800; at least calculation they were worth between \$600 and \$700. Subsequently my husband bought drugs of about the same value of the Van Vleet Drug Company and placed them in the storehouse, where my drugs were. Later the Van Vleet Drug Company caused a writ of attachment to be issued against my husband, and the sheriff came to levy it upon the drugs in my storehouse. He failed to levy the attachment, because the drugs were mine. In about two weeks he came back and levied the attachment upon all the drugs in the storehouse. Subsequently the drugs were sold under the attachment, and I became the purchaser of them for the sum of \$114.50."

This was all the testimony introduced, and upon motion of appellee the court instructed the jury to return a verdict in its favor. This was error. The question of whether or not the bill of sale by John T. Webb to appellant, his wife, was fraudulent, should have been submitted to the jury.

It is true the husband remained in possession of the goods after the execution of the bill of sale, but appellant testified that she had bought the goods from him. It might also be inferred from her testimony that she protested against the levying of the attachment upon her drugs. Under these circumstances the continued possession by the husband of the drugs after the alleged sale was not conclusively fraudulent, but the question of whether or not the sale of the drugs was fraudulent should have been left to the jury.

[2] It does not follow, however, that the judgment must be reversed for this error. It is the settled rule of this court to reverse judgments only for errors that are prejudicial to the rights of appellants. Appellant testified that she purchased the whole stock of drugs at the attachment sale for \$114.50. She also testified that the property owned by her was worth at least between \$600 and \$700, and that the portion owned by her hus-

band was worth an equal sum. Only two months elapsed between the levying of the attachment and the sale to the appellant under it. By the sale she obtained title to the whole of the stock of goods. Thus she received back the drugs which she claimed were her own and the stock belonging to her husband which she said were equal in value to the portion of the stock claimed by her, and this she stated to be worth at least calculation between \$600 and \$700. Therefore it is plain that she was not prejudiced by the action of the court in directing a verdict against her.

[3] Again she claims that the judgment should be reversed because she owned the storehouse in which the drugs were situated, and that this was closed for a time of two months by reason of the levy of the attachment. This was done by the sheriff, and the record does not show that it was done by the direction of appellee. Therefore it is not responsible in damages to appellant on this account.

We find no prejudicial error in the record, and the judgment will be affirmed.

LEADER CO. v. LITTLE ROCK RY. & ELECTRIC CO. (No. 141.)

(Supreme Court of Arkansas. Oct. 4, 1915.)

1. ASSIGNMENTS ⇐19 — EXECUTORY CONTRACTS—CONTRACTS OF PERSONAL NATURE.

A contract between a company engaged in furnishing electricity, its successors or assigns, and a consumer, its successors or assigns, whereby the company agreed to furnish to certain specified premises all electric service required by the consumer, and the consumer agreed to pay therefor, did not create obligations personal in such a sense as to render the contract nonassignable within the rule that when rights arising out of contracts are coupled with obligations to be performed by the contractor and involve such a relation of confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and obligations cannot be assigned without the consent of the other party, as there was nothing on either part calling for the exercise of personal service.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 28-31; Dec. Dig. ⇐19.]

2. ASSIGNMENTS ⇐18 — EXECUTORY CONTRACTS—PROVISION AGAINST ASSIGNMENT.

Such contract was not rendered nonassignable by a stipulation on the back thereof that it was not transferable, as the inclusion of the parties' successors or assigns in describing the contracting parties imposed on the company the obligation to furnish the electric current for use on the premises specified, not only to the consumer, but to its assigns, and there were therefore two repugnant provisions and the first would control, and the last would be rejected, especially as the stipulation that the agreement was nontransferable was not in the face of the contract but printed on the back.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 25-27; Dec. Dig. ⇐18.]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Action by the Leader Company against the Little Rock Railway & Electric Company. From a decree dismissing the complaint, plaintiff appeals. Reversed and remanded, with directions.

Comer & Clayton, of Little Rock, for appellant. Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, for appellee.

MCCULLOCH, C. J. The plaintiff (appellant) is a domestic corporation engaged in the mercantile business in the city of Little Rock, and the defendant, also a domestic corporation, is engaged in the business of furnishing electricity in said city for commercial and domestic uses. This is an action instituted by the plaintiff to restrain the defendant from increasing the price of electricity furnished to plaintiff's place of business, and from shutting off the supply of current unless the plaintiff agrees to pay the increased rate. The chancellor sustained a demurrer to the complaint, and entered a decree dismissing the complaint for want of equity, from which decree the plaintiff has prosecuted this appeal.

Plaintiff bases its right to relief in this action upon a contract entered into between its assignor, Froug, Smulian & Co. (a copartnership), and the Merchants' Lighting Company, the assignor of the defendant. Froug, Smulian & Co. were engaged in the mercantile business in the building in Little Rock now occupied by the plaintiff, and entered into a contract with the Merchants' Lighting Company, which was then a competitor of the defendant and furnished light on the terms specified in the contract. The portion of said contract which is material in this controversy reads as follows:

"Agreement entered into this 10th day of October, 1913, between the Merchants' Lighting Company, of Little Rock, Ark., a corporation under the laws of the state of Arkansas, its successors or assigns, hereinafter called the 'Company,' and Froug, Smulian & Co., successors or assigns, hereinafter called the 'Consumer.'"

"The Consumer requests the Company, and the Company agrees, in consideration of the agreements of the Consumer hereinafter contained, and in accordance with its regular terms and conditions indorsed hereon, and which are hereby made a part of this contract, to furnish only to the premises at 222-224 Main street all electric service for lighting, fans and heating required by the Consumer, the present capacity being 10,000 watts, equal to ——— watts connected, for periods of two years from commencement of service hereunder, until Froug, Smulian & Co. shall, thirty (30) days before the expiration of any period, terminate this agreement by written notice, also have privilege of renewal same rate for three years.

"The Consumer shall pay the Company for such electric service, within ten (10) days from date of bills, at the rate computed on the following basis, viz."

The contract was on a printed form, leaving only space for the names of the consumer, and contained printed stipulations on the

back concluding with the following: "This agreement is not transferable."

It is alleged in the complaint that Froug, Smulian & Co. sold and assigned to the plaintiff the stock of goods, fixtures, accounts and other choses of action pertaining to the said business in the city of Little Rock, including said contract with the Merchants' Lighting Company, and that said Merchants' Lighting Company, had sold and assigned to the defendant all of its property and rights of all kinds, including said contract with Froug, Smulian & Co., and that the defendant assumed the performance of all of the contracts of said Merchants' Lighting Company. It is also alleged in the complaint that the plaintiff had tendered the amount due to the defendant under said contract, but that the defendant had refused to comply with the contract, and was about to shut off the current unless the plaintiff agreed to pay a largely increased rate.

Counsel for defendant insist that the plaintiff has no cause of action under said contract, for two reasons: First, that the character of the service contemplated in the contract is such that renders the contract non-assignable; and, second, that the contract is not assignable according to the express terms thereof. On the other hand, it is insisted by counsel for plaintiff that the contract establishes obligations which are not inconsistent with its assignability, and that the terms of the written instrument constituted a contract between the Merchants' Lighting Company and the successors and assigns of Froug, Smulian & Co., which was inconsistent with the subsequent stipulation that the contract should not be transferable, and that the latter stipulation was therefore void. Counsel have narrowed the controversy to those questions, and we do not undertake to decide anything else.

[1] We are of the opinion that the obligations created by the contract are not such as render it nonassignable. The obligations are not personal in the sense that it should be deemed to have been within the contemplation of the parties that there should be no assignment. The contract does not fall within the rule invoked by counsel for defendant that:

"When rights arising out of contracts are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should have been exercised and the obligations performed by him alone, the contract, including both his rights and obligations, cannot be assigned without the consent of the other party to the original contract." *Delaware County v. Diebold Safe & Lock Co.*, 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674; *Burck v. Taylor*, 152 U. S. 634, 14 Sup. Ct. 606, 38 L. Ed. 578.

The contract is one to supply electricity to be used in a certain building, for business

purposes, and there is nothing on either part which calls for the exercise of personal service. All that the consumer was required to do was to pay for the electricity. We conclude, therefore, that there is nothing in the nature of the contract which prevents it being assignable. Other courts have held similar contracts to be assignable. *Volgt v. Murphy Heating Co.*, 164 Mich. 539, 129 N. W. 701; *Minnetonka Oil Co. v. Cleveland Vitrified Brick Co.*, 27 Okl. 180, 111 Pac. 326; *Jenkins v. Columbia Land & Improvement Co.*, 13 Wash. 502, 48 Pac. 828.

[2] Now, as to the next contention that the stipulation on the back of the contract rendered the contract nontransferable, it will be observed that the face of the contract describes the contracting party as Froug, Smulian & Co. and its "successors or assigns, hereinafter called the Consumer." The use of the word "assigns" necessarily implies the right to assign the contract. In *Ft. Smith Light & Traction Co. v. Kelley*, 94 Ark. 462, 127 S. W. 975, we quoted with approval from *Thornton on Oil and Gas*, § 477, and certain other authorities, wherein the rule was laid down that "a grant to the company or its assigns is sufficient to authorize an assignment without further consent" of the other party to the contract. The use of the word necessarily means an obligation to furnish the electric current for use in the building named in the contract, not only to the parties named, but to their assigns. That interpretation of the language puts it in conflict with the stipulation printed on the back of the contract to the effect that the contract should not be transferable, and the case falls within the well-established rule that where there are two repugnant provisions in a contract, the first will control and the last will be rejected. The fact that this stipulation is printed on the back of the contract, and not in the face of it, calls especially for the application of the above rule. Here the parties have, in the face of the contract itself, expressly stipulated for the furnishing of electricity to the parties named and their assigns, and it must be presumed that the contracting parties did not intend to defeat the obligation of that contract by a subsequent stipulation that there should be no assignment.

There was an answer filed, setting up matter which it is claimed amounted to an abandonment and a forfeiture of the contract by Froug, Smulian & Co. But we are not at liberty to look to the statements of the answer, for the reason that the decision below was based entirely upon a demurrer to the allegations of the complaint.

Reversed and remanded, with directions to overrule the demurrer, and for further proceedings.

FROMHOLZ et al. v. McGAHEY et al.
(No. 145.)

(Supreme Court of Arkansas. Oct. 4, 1915.)

1. JUDGMENT \Leftrightarrow 822—CONCLUSIVENESS—VALIDITY OF DEED—ISSUES.

A judgment dismissing the complaint in an action brought in Nebraska against plaintiffs herein to set aside a deed to them, on the ground that the grantor was mentally incompetent and that it had been procured by undue influence, from which an appeal to the Supreme Court of that state was dismissed, was res judicata in an action for partition against the defendants, plaintiffs in the former action, so that their cross-complaint, setting out the same issue as to incompetency, etc., was properly dismissed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1454, 1488-1490, 1496-1500; Dec. Dig. \Leftrightarrow 822.]

2. JUDGMENT \Leftrightarrow 822—PLEA OF RES JUDICATA—SUFFICIENCY.

A certified copy of the judgment of the district court of another state, a certified copy of the amended and supplemental complaint and answer, and the mandate of the Supreme Court dismissing an appeal, were sufficient to sustain a plea of res judicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1454, 1488-1490, 1496-1500; Dec. Dig. \Leftrightarrow 822.]

3. EQUITY \Leftrightarrow 385—RECEPTION OF EVIDENCE.

In a suit for partition, with cross-complaint to which the plaintiffs set up a plea of res judicata, it was within the discretion of the chancellor to allow a copy of the answer in the former suit to be introduced after the cause had been submitted and taken under advisement.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 822-824, 833; Dec. Dig. \Leftrightarrow 385.]

Appeal from Lonoke Chancery Court; Jno. E. Martineau, Chancellor.

Partition by Gertrude H. McGahey and others against Bernhard Fromholz and another, with cross-complaint by defendants. Decree for plaintiffs, dismissing the cross-complaint, and defendants appeal. Affirmed.

Oscar E. Williams, of Lonoke, for appellants. Jones & Owens, of Little Rock, and W. J. Otjen, of Enid, Okl., for appellees.

HART, J. In 1909 Gertrude H. McGahey and Agatha Reisen instituted this action in the chancery court against Fred and Bernhard Fromholz, asking for a partition for certain lands in Lonoke county, which they claim that they with the defendants own as tenants in common. The defendants filed a cross-complaint against the plaintiffs, in which they ask for recovery of part of the proceeds of land in Nebraska which was sold by Gertrude H. McGahey. The facts are as follows:

In the year 1884 Fred W. Fromholz moved from Platte county, Neb., to Lonoke county, Ark., and died there in June, 1891. Prior to his death he had acquired about 500 acres of land in Lonoke county, and also owned 200 acres of land in Nebraska. He left surviving him his wife, Marie Fromholz, two

daughters, Agatha Reisen and Gertrude McGahey, and three sons, Fred, Ewald, and Bernhard Fromholz. The first three had become adults and left home before he moved to Lonoke county. The last two children, Bernhard and Ewald, were living with their parents in Lonoke county at the time their father died. By his will Fromholz devised to his wife his Nebraska land, to Ewald 120 acres of land in Lonoke county, and to Bernhard and Ewald the remainder of his land in Lonoke county. He also bequeathed to his wife and to his son Ewald certain personal property. He stated in his will that he had already made advancements to his three older children. Ewald died in Lonoke county in 1896. Prior to his death he conveyed his interest in the Lonoke county land to his brother Bernhard.

The widow lived with her son Bernhard in Lonoke county until 1901, when she went to another state to reside with her daughter Gertrude. In 1902 she conveyed by deed to her daughter Gertrude H. McGahey the lands in Nebraska which her husband had devised to her. In 1903 she executed another deed conveying the land to her daughter Gertrude. In the fall of 1904 a guardian was appointed for Marie Fromholz as an insane person, and suit was at once brought by him in the district court of Platte county, Neb., against Gertrude H. McGahey and Agatha Reisen. The object of the suit was to set aside the two deeds executed by Marie Fromholz to Gertrude H. McGahey conveying her 200 acres of land in Platte county, Neb. Marie Fromholz died in 1905. Fred and Bernhard Fromholz were substituted as plaintiffs. The allegations of the complaint were that Marie Fromholz, at the time she executed the deeds to her daughter Gertrude H. McGahey, was mentally incompetent to transact business, and that the execution of the deeds was procured by the undue influence of her said daughter. An answer was filed by the defendants, denying the allegation of the plaintiffs. A great deal of testimony was taken by both sides. The court found for the defendants, and the complaint of the plaintiffs was dismissed, at their cost. The decree recites that the cause came on for hearing on the 10th day of February, 1908, upon the amended and supplemental petition of the plaintiffs, upon answer of the defendants, and upon the evidence. An appeal was taken to the Supreme Court of the state of Nebraska by the plaintiffs, and the appeal was dismissed by the court.

The object of the action instituted by the plaintiffs against the defendants in Lonoke chancery court in 1909 was for the partition of the lands in Lonoke county; the plaintiffs, Gertrude H. McGahey and Agatha Reisen, claiming to own an interest therein as heirs of their deceased brother Ewald. As above stated, the defendants Bernhard

and Fred Fromholz filed a cross-complaint against the plaintiffs, and asked for a recovery of a part of the proceeds of the Nebraska lands, which had been sold by Gertrude H. McGahey. They sought to set aside the deeds from Marie Fromholz to Gertrude H. McGahey on account of the mental incompetency of Marie Fromholz and the undue influence practiced upon her by Gertrude H. McGahey at the time the deeds were executed. An answer was filed to the cross-complaint, in which Gertrude H. McGahey and Agatha Relsen denied the allegation of the cross-complaint and also entered a plea of *res adjudicata*. The court sustained the plea of *res adjudicata*, and dismissed the cross-complaint for want of equity. The cross-complainants have duly prosecuted an appeal to this court.

[1, 2] The decree of the chancery court was correct. The issue to be determined in the Nebraska suit was whether or not Marie Fromholz was mentally incompetent at the time she executed the deeds to the Nebraska lands to her daughter Gertrude H. McGahey, and whether or not said deeds were procured by undue influence exerted upon her by her said daughter. The same persons instituting that action filed a cross-complaint in the present suit, and the issues in the two suits were identically the same. To maintain the plea of *res adjudicata*, not only was a certified copy of the judgment of the Nebraska district court introduced, but also a certified copy of the amended and supplemental complaint and answer was introduced. The plaintiffs prosecuted an appeal to the Supreme Court of Nebraska and the court dismissed their appeal. The mandate of the Supreme Court was also introduced to sustain the plea of *res adjudicata* in the present suit. So it will be seen that the complete record of the Nebraska suit was introduced to sustain the plea of *res adjudicata* in the present action; that is to say, a certified copy of the judgment in the Nebraska suit, together with all the pleadings on which the judgment was founded, were produced at the hearing in the present suit. It will be noted that the judgment in the Nebraska suit recited that the cause was heard upon the amended and supplemental complaint, upon the answer, and upon the evidence. This was sufficient to sustain the plea of *res adjudicata*. *McCarthy v. Troll*, 90 Ark. 199, 118 S. W. 416, and cases cited; *Hallum v. Dickinson*, 47 Ark. 120, 14 S. W. 477.

[3] After the cause had been submitted to the chancellor and taken under advisement by him, the defendants to the cross-complaint asked that they be permitted to introduce a certified copy of the answer in the Nebraska suit, which was done. The action of the chancellor in this regard is assigned as error calling for a reversal of the decree. It was within the discretion of the chancellor

to allow a certified copy of the answer in the Nebraska suit to be introduced, and to set aside the submission of the cause for that purpose.

It follows that the decree will be affirmed.

JOHNSON v. STATE. (No. 142.)

(Supreme Court of Arkansas. Oct. 4, 1915.)

1. HOMICIDE \Leftrightarrow 228—EVIDENCE—CORPUS DELICTI.

Evidence that deceased, after he had retired for the night, was called from his bed and requested to go about 100 yards from his house, where several persons were waiting to see him, and that about two hours later he was found dead; that his left arm was stabbed, the muscle on it being cut and the arm broken above the elbow, and that there were other wounds on the left arm and side, and the body was badly cut and covered with blood, warranted the jury in finding that there was an unlawful killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 471-476; Dec. Dig. \Leftrightarrow 228.]

2. HOMICIDE \Leftrightarrow 268—EVIDENCE—QUESTIONS FOR JURY.

Under Kirby's Dig. § 1765, providing that, a killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on accused unless by the prosecution's proof it is sufficiently manifest that the offense only amounted to manslaughter, or that accused was justified or excused in committing the homicide, where an unlawful killing was proved, and defendant admitted that he was the one who "knifed" deceased, the court properly refused to direct a verdict of not guilty; there being no proof on the part of the state that the offense only amounted to manslaughter, or that accused was justified or excused in committing it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 562; Dec. Dig. \Leftrightarrow 268.]

3. CONSPIRACY \Leftrightarrow 48—HOMICIDE—EVIDENCE—QUESTIONS FOR JURY.

On a trial for homicide, evidence held to make a question for the jury as to the existence of a conspiracy between defendant and H., his brother-in-law, to attack deceased if he did not make a satisfactory explanation regarding alleged defamatory remarks concerning H.'s wife.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 108-111; Dec. Dig. \Leftrightarrow 48.]

4. CRIMINAL LAW \Leftrightarrow 423—EVIDENCE—ACTS OF CONSPIRATORS.

Where, on a trial for homicide, the evidence made a question for the jury as to whether there was a conspiracy between defendant and H. to attack deceased if he did not make a satisfactory explanation regarding alleged defamatory remarks by him, evidence that on the night of the killing H. had a pistol was relevant to the issue and competent either on direct or on cross examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 988-1001; Dec. Dig. \Leftrightarrow 423.]

5. CRIMINAL LAW \Leftrightarrow 778—HOMICIDE—INSTRUCTIONS—BURDEN OF PROVING MITIGATING CIRCUMSTANCES.

On a trial for homicide it was not error to charge in the language of Kirby's Dig. § 1765, relative to the burden of proving mitigating circumstances.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. \Leftrightarrow 778.]

6. HOMICIDE \Leftrightarrow 144—BURDEN OF PROOF—MITIGATING CIRCUMSTANCES.

Notwithstanding Kirby's Dig. § 1765, the burden on the whole case on a trial for homicide is on the state, and when evidence is introduced either on the part of the state or defendant which tends to justify or excuse defendant's act, if such evidence, in connection with other evidence in the case, raises a reasonable doubt of defendant's guilt, the jury must acquit.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 261; Dec. Dig. \Leftrightarrow 144.]

7. HOMICIDE \Leftrightarrow 300—INSTRUCTIONS—SELF-DEFENSE.

On a trial for homicide the court charged, in the language of Kirby's Dig. § 1798, that in ordinary cases of one person killing another in self-defense it must appear that the danger was so urgent and pressing that to save his own life, prevent great bodily injury, or prevent the commission of a felony the killing of the other party was necessary, and that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest. The court further charged, at defendant's request, that if, at the time defendant stabbed deceased, he had reasonable cause to apprehend great bodily injury at the hands of deceased, and if he had reasonable grounds to believe, and did believe, it necessary for him to use a knife as he did, and if he acted without previous fault or carelessness, the killing was justifiable, that it was not necessary that the danger should have been actual or real, but that it was sufficient if the defendant had reasonable cause to believe that he was in danger of death or great bodily harm, and that, if he acted under such belief, he would be justifiable. *Held*, that these instructions were not in conflict, but, when taken together, correctly declared the law, as the first instruction told the jury that it must appear that the danger was urgent and pressing, etc., without explaining to whom this must appear, while the second instruction explained that this must appear to defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. \Leftrightarrow 300.]

8. CRIMINAL LAW \Leftrightarrow 1043—APPEAL—RESERVATION OF GROUNDS OF REVIEW.

Where an instruction that, if the jury believed any witness had willfully sworn falsely to any material fact, they might disregard his whole testimony or believe what they regarded to be true, and disbelieve what they regarded to be false, was part of an instruction pointing out at some length the province and duty of the jury in weighing the evidence and passing upon the credibility of the witnesses, and which announced several propositions of law which were undoubtedly correct, defendant should have specifically called the attention of the trial judge to the portion of the instruction in question, and, not having done so, there was no error, as the court's language was probably the result of inadvertence or oversight.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. \Leftrightarrow 1043.]

Appeal from Circuit Court, Cleveland County; Turner Butler, Judge.

Kenneth Johnson was convicted of murder in the second degree, and he appeals. *Affirmed*.

On the night of April 22, 1914, Frank Armstrong was killed by appellant in Cleveland county, Ark. Armstrong, after a hard day's work, being very tired, had retired early. Carroll Hopson had heard that Arm-

strong had been making some derogatory remarks about his (Hopson's) wife. Hopson had married the appellant's sister. Hopson, in company with the appellant, Bud Miller, and Coot Childers, on the night of the killing, started to the home of Armstrong for the purpose of seeing him in regard to what he was reported to have said concerning Mrs. Hopson. When they got within 100 yards of the house all stopped, except Carroll Hopson. He went on up to Armstrong's house. He called to Armstrong, stating that he wanted to see him, whereupon Armstrong arose and dressed and went with Hopson to where others of the party were. This was about 9 o'clock at night. About two hours later Armstrong was found dead in the road near his home. His body was found lying near a thicket in a dense part of the woods. His left arm was stabbed, all the muscle on same being cut, and the arm was broken above the elbow. It was a smooth break. There was another wound also on the left arm, and a wound on the left side, and another wound on the ninth rib. The body was badly cut, and was covered with blood.

There was testimony to the effect that on the day after the killing appellant said that he went over to have a talk with Armstrong about remarks that Armstrong had been making about his (appellant's) people. He said: "I did not hit him but once." Again he said: "I thought that I hit him only once or twice." Appellant made further statements to the effect that Armstrong had "knifed" him, and that he had "knifed" Armstrong.

There was testimony on behalf of appellant tending to prove that he and Armstrong were good friends, and that they were neighbors; that Carroll Hopson, appellant's brother-in-law, told appellant on the night of the killing that he was going to see Armstrong to get him to quit talking about his wife; that appellant told Hopson that he would go with him, and did go; that he and Hopson and Miller and Childers went up near Armstrong's house, and when Carroll Hopson and Armstrong returned to where appellant and the others were waiting Hopson accused Armstrong of making statements about his wife. Armstrong denied having made the statements attributed to him, and there was some controversy over the matter, in which the appellant participated, and during the conversation appellant said, "Since you admit talking about my people, I want you to quit tagging after my children when you are passing my house, and I don't want you to come on my place any more." To this Armstrong replied, "You God damned little devil, you must think I am afraid of you," and started at appellant, whereupon the fight ensued, and shortly afterwards Armstrong said, "Take him off, boys; he has cut me to pieces." Appellant

then turned and walked away; said he was hurt and was going home. Appellant sustained a severe knife wound in his shoulder, which was about three inches in width under the surface, and as a result of which appellant was confined to his bed several days. Appellant stated that he did not go over there with murder in his heart or to abuse Armstrong, and was going to let the matter pass if Armstrong would quit talking about his sister. He thought because they were members of the same Woodmen lodge he could get him to quit talking the way he had been doing. An open knife was found sticking in the ground near Armstrong's head. The knife was a large-sized barlow.

The indictment charged appellant with the crime of murder in the first degree in the killing of Frank Armstrong. No objection is urged to the sufficiency of the indictment. Appellant was convicted of the crime of murder in the second degree, and was sentenced to 21 years in the state penitentiary. He duly prosecutes this appeal. Other facts will be stated in the opinion as we discuss the assignments of error which appellant urges as grounds for a reversal of the judgment.

H. S. Powell, of Camden, and Paul G. Matlock, of Fordyce, for appellant. Wm. L. Moose, Atty. Gen., and John P. Streepey, Asst. Atty. Gen., for the State.

WOOD, J. (after stating the facts as above). [1, 2] I. The appellant contends that the court erred in not instructing the jury, at the close of the evidence on behalf of the state, to return a verdict of not guilty. The court did not err in this ruling. The testimony on behalf of the state tended to show that Armstrong was killed on the night of April 22, 1914, and that he was killed by a knife in the hands of some third party. The identity of the appellant was established by his admission to the effect that on that night he had cut Armstrong with a knife. The circumstances adduced on the part of the state tending to show that Armstrong, after he had retired for the night, was called from his bed and requested to go to the place where he was killed, and the manner in which he was killed, as indicated by the numerous wounds he had received, were sufficient of themselves to warrant the jury in finding that there was an unlawful killing. The corpus delicti being thus established, and appellant having admitted that he was the one who "knifed" Armstrong, it then devolved upon him to prove circumstances of mitigation that justified or excused the homicide, there being no proof on the part of the state which made it sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide. Kirby's Digest,

§ 1765; Brock v. State, 101 Ark. 147-154, 141 S. W. 756.

[3, 4] II. Carroll Hopson, a witness on behalf of appellant, was asked on cross-examination, this question, "Do you know a negro named John Mosely?" and answered, "Yes." He was then asked, "What did you want with his pistol the day before the killing?" and answered, "I didn't have it." He further testified, in answer to questions, that Mosely did not get any pistol from him the day after the killing; that he did not have Mosely's pistol a day or two before the killing, nor any time that year. John Mosely testified, in rebuttal, that on the night that Armstrong was killed Carroll Hopson had his (Mosely's) pistol; that he brought it home the next morning. The appellant moved the court to exclude the testimony of John Mosely. The court overruled the motion. The court did not err in this ruling. The testimony of Mosely was competent as original evidence. It tended to establish the fact that on the night of the killing Hopson was armed with a pistol. Now, the jury were warranted in inferring that appellant and Hopson, on the night of the killing, had entered into a conspiracy to see Armstrong, and, in case he did not make satisfactory explanation in regard to the alleged defamatory remarks attributed to him concerning the wife of Carroll Hopson, to do him personal violence.

Hopson testified on cross-examination:

"I intended to go to see deceased, and if he made it right about talking about my wife I intended to drop it, and if he had not made it right I had not made up my mind as to what I was going to do."

Hopson further testified:

"Deceased had been doing some talking, and we wanted to see him about it."

And again:

"I knew the fight was about what deceased had said about my wife."

The appellant himself testified:

"Hopson came to my house that night and brought his wife and told me that he was going over to see deceased to get him to quit talking about his wife. I told him that I would go with him."

Although witness Hopson and the appellant, in their testimony, say that on the night of the killing they were on good terms with deceased, and disclaim any ill will towards him, and deny any intention of doing him any violence on the occasion, the above testimony, together with other facts and circumstances in evidence, were sufficient to warrant the jury in finding otherwise, and that their visit to the home of Armstrong on that occasion was not a friendly one. Therefore the court was warranted in admitting any evidence to prove that on the night of the killing Hopson had a pistol. The testimony was not concerning a collateral issue, but was relevant to the issue being tried, and therefore competent either on direct or on cross examination.

[5, 6] III. The court, at the request of the state, gave instruction No. 5, as follows:

"The killing having been proven, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve upon the accused, unless by proof upon the part of the prosecution it is sufficiently manifest that the offense amounted only to manslaughter, or that the accused was justified or excused in committing the homicide."

The above is taken from Kirby's Digest, § 1765. Speaking of an instruction in this language in *Cogburn v. State*, 76 Ark. 110, 112, 88 S. W. 822, 823, we said:

"This section of the statute, it will be seen, is a rule of law to be applied when the killing has been proved, and there is nothing shown to justify or excuse said act."

The court in the above case declared that there was no error in the giving of the above instruction. By reference to the facts stated in the opinion it will be seen that several witnesses for the state in that case testified that at the time of the shooting the deceased was making no hostile demonstration whatever toward the appellant, *Cogburn*, and several witnesses testified on behalf of the defendant that the deceased and another in company with him were making hostile demonstrations towards the appellant, and that the appellant shot the deceased, West, after West had fired at him with a pistol. The court in that case, while approving the instruction, condemned and held erroneous the argument of counsel for the state which misconstrued the meaning of the instruction, and which, in effect, told the jury that after the state had proved the killing the burden was upon the defendant to establish justification, and if the defendant failed to satisfy the jury by a preponderance of the evidence that the killing was justifiable, the jury should convict him; in other words, the explanation of the instruction given by the attorney was to tell the jury that after the state had established the killing the burden shifted to the defendant to show by a preponderance of the evidence that he was innocent of the crime.

In *Brock v. State*, 101 Ark. 147, 141 S. W. 756, remarks having the same effect were made in commenting upon language similar to that contained in the instruction under consideration. The court, in condemning these remarks, said:

"The remarks of the counsel, sanctioned by the court in its refusal to sustain an objection to them, were a misinterpretation of the instruction that had been given by the court, and were an incorrect statement of the law."

The court, however, in holding that the instruction itself was correct, used this language:

"The court correctly instructed the jury in the instruction that the burden rested upon the state to prove the crime charged, and that this burden did not at any time shift to the defendant. * * * The killing being proved, unless the evidence on the part of the state shows circumstances of mitigation, justification, or excuse, it devolves upon the appellant if he relies upon such circumstances to exonerate him, but the burden is still on the state

to show that the defendant is guilty of every grade or degree of crime included in the indictment. The burden, in other words, in a charge for murder, never shifts to the defendant, but always remains on the state."

An examination of the statements of fact in the above cases will discover that an instruction similar to the one under review is not erroneous when applied in cases where the evidence on the part of the defendant tends to show mitigation, justification, or excuse. The error for which the judgments were reversed in the above cases was caused by the remarks of counsel in placing a misleading and erroneous construction upon the language of the statute. In the case at bar no such error was committed, and the instruction itself is not calculated to mislead a jury, as learned counsel for appellant contend, but has only the meaning that was placed upon it in *Cogburn v. State*, supra, and *Brock v. State*, supra. In both cases the court clearly announces that under such an instruction in a charge for murder the burden of proof never shifts to the defendant to establish his innocence by a preponderance of the evidence on any phase of the testimony, but that, on the contrary, after all the testimony, both for the state and the defendant, has been adduced, the burden still remains on the state throughout the whole case to establish the crime charged beyond a reasonable doubt. As was said by Judge Riddick in *Cogburn v. State*, supra:

"While it is true, as our statute declares, that when the killing is proved the burden of showing circumstances that mitigate or excuse the crime devolves upon the accused, where there is nothing in the evidence on the part of the state that tends to mitigate, excuse, or justify the killing, still the burden on the whole case is on the state; and when evidence is introduced, either on the part of the state or the defendant, which tends to justify or excuse the act of the defendant, then if such evidence, in connection with the other evidence in the case, raises in the minds of the jury a reasonable doubt as to the guilt of the defendant, the jury must acquit."

[7] IV. The appellant contends that the court erred in giving instruction No. 12, as follows:

"In ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily injury, or to prevent the commission of the felony feared by him, the killing of the other was necessary; and it must also appear that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given."

In instruction No. 3, given at the instance of the appellant, the court told the jury, in effect, that if at the time the defendant stabbed the deceased he had reasonable cause to apprehend great bodily injury at the hands of deceased, and if at the time he had reasonable grounds to believe and did believe it necessary for him to use the knife as he did, and that he acted without previous fault or carelessness on his part, the

killing was justifiable; that it was not necessary that the danger to the appellant should have been actual or real; that it was sufficient if the defendant had reasonable cause to believe that he was in danger of death or great bodily harm; and that, if he acted under such belief, and not in a spirit of malice or revenge, he would be justifiable.

The instructions, taken together, correctly declared the law. Instruction No. 12 was a copy of the statute (section 1798 of Kirby's Digest), and announced a rule of law applicable in cases where self-defense is interposed. It told the jury, in general terms, that it must appear that the danger was so urgent and pressing, etc. But the instruction does not explain to whom it must appear.

Instruction No. 3 was a correct explanation of instruction No. 12 as to whom the danger must appear to be urgent and pressing, telling the jury, in effect, that it must so appear to the defendant.

There is no conflict between these instructions, but, on the contrary, when they are considered together, as they must be, they correctly declare the law in conformity with the decisions of this court in *Smith v. State*, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20, and *Magness v. State*, 67 Ark. 594, 50 S. W. 554, 59 S. W. 529.

[8] V. Appellant complains because in instruction No. 14 the court told the jury, in part:

"If you believe any witness has willfully sworn falsely to any material fact in this case, you may disregard his whole testimony or believe what you regard to be true and disbelieve what you regard to be false."

Instructions containing similar language were criticized in the cases of *Frazier v. State*, 56 Ark. 242, 19 S. W. 838, and *Taylor v. State*, 82 Ark. 540, 102 S. W. 367. But, while condemning instructions couched in this language, the court in neither of the above cases held that the giving of such an instruction would constitute reversible error.

In the case of *Frazier v. State*, notwithstanding the instruction, the court announced that:

As there was "absolutely no proof of venue, the judgment must be reversed, and the cause remanded."

And in *Taylor v. State*, after criticizing the instruction as not being an accurate statement of the law, says:

"But, while this instruction is not strictly correct, there is no objection to it, and the language was probably the result of inadvertence or oversight which did no harm."

In the instant case no specific objection was made to the instruction. The court's attention was not called to any particular

defects in it. As was said in the last of the above cases:

"The language used was probably the result of inadvertence or oversight which did no harm."

In the recent case of *Burgess v. State*, 108 Ark. 508, 158 S. W. 774, appellant's counsel contended that that case should be reversed because an instruction was given in that case which, in effect, told the jury:

"That if any part of the statement of the witness is willfully false, they may disregard it all, even though they believe portions of it to be true."

Answering this contention of counsel, the court said:

"The instruction does not authorize the jury to disregard any part of it believed to be true, but, if it is open to that construction, that fact should have been called to the attention of the court."

So we say here. The instruction was one concerning the province of the jury in weighing the evidence and in passing upon the credibility of the witnesses, pointing out somewhat at length the duty of the jury in that regard. While the instruction was not aptly framed, it announced several propositions of law which were undoubtedly correct and which have often been approved by the decisions of this court; and the particular proposition which appellant now claims was erroneous and prejudicial should therefore have been specifically called to the attention of the trial judge, and if this had been done there is no doubt but what the court would have framed the instruction so as to conform strictly to the rulings of this court in former decisions criticizing the particular verbiage to which objection is now here for the first time offered.

VI. Appellant, in his amended motion for a new trial, challenges the qualifications of two of the jurors, alleging that they had formed and expressed an opinion as to the guilt or innocence of the accused, and that they were biased and prejudiced against him, which they denied on their voir dire, and alleging that appellant had no opportunity to discover otherwise until after the verdict was rendered.

Appellant adduced affidavits tending to support the allegations of the motion, and testimony of the jurors was offered in rebuttal. We have carefully examined this evidence as set forth in the record, and cannot say that the court erred in holding that the jurors were qualified. It presented a question of fact for the trial court, and we do not feel authorized to disturb its finding. On this point the case is ruled by *Decker v. State*, 85 Ark. 64-72, 107 S. W. 182.

The record presents no prejudicial error, and the judgment is therefore affirmed.

OLIVER v. STATE. (No. 140.)

(Supreme Court of Arkansas. Oct. 4, 1915.)

1. CRIMINAL LAW — 404—EVIDENCE—IDENTIFICATION OF EXHIBITS — STOLEN PROPERTY.

Where, in a prosecution for burglary, the sheriff was permitted to testify that the sheriff of another county, in which defendant was arrested, told him he had found a pocket-knife on the defendant and that he would send it to him, that defendant asked the witness if he had the knife, that the witness did receive a knife from the other sheriff, and that the knife in evidence was the one, his testimony does not identify the knife so as to warrant its admission in evidence in corroboration of a witness who stated that knives were stolen in the burglary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. —404.]

2. CRIMINAL LAW — 1148—REVIEW—DISCRETIONARY ACTION.

Where defendant moves, under Kirby's Dig. § 2350, to discharge the sheriff and the special venire summoned by him for his prejudice and to designate some other person to summon a new venire, it is not an abuse of the discretion of the court to refuse the motion in the absence of any proof of prejudice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3050-3052; Dec. Dig. —1148.]

Appeal from Circuit Court, Calhoun County; Chas. W. Smith, Judge.

Jamie Oliver was convicted of burglary, and he appeals. Reversed and remanded.

Lamar Smead and H. S. Powell, both of Camden, for appellant. Wallace Davis, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

MCCULLOCH, C. J. Appellant was convicted under an indictment charging him with the crime of burglary by entering the storehouse of one D. R. Speer in the town of Tinsman, in Calhoun county. The evidence tends to show that the crime was committed jointly by appellant and Bruce Harper and Albert Earnest. Harper confessed and entered a plea of guilty, and the state relies upon his testimony mainly for the conviction of the other two parties accused of complicity in the crime. Earnest was convicted, and on his appeal we reversed the judgment on the ground that the testimony of the accomplice, Harper, was not corroborated by other testimony.

The indictment charges that appellant and the other persons accused entered the storehouse of Speer for the purpose of committing the crime of grand larceny, and that they did steal and carry away three coats, six pairs of trousers, and certain bolts of calico. The testimony adduced by the state also tends to show that, in addition to the articles mentioned in the indictment, some men's underwear and a lot of pocketknives were also stolen. The men's clothing was found by the officers secreted in a hollow log, upon information given to the officers by Harper.

Harper was arrested about a week after the burglary was committed, and about that time appellant Oliver left Tinsman and went to De Queen, Ark., where later he was arrested by the sheriff of that county and turned over to the sheriff of Calhoun county.

The state undertook to corroborate Harper, the accomplice, in several particulars. One way in which corroboration was sought was to prove that appellant had in his possession a number of pocketknives shortly after the burglary was committed. The deputy sheriff who went to De Queen after appellant, when he was in the hands of the sheriff of that county, exhibited to the jury a pocketknife which he stated was sent to him through the mail by the sheriff of Sevier county. He testified further that, while he was at De Queen, the sheriff of Sevier county told him in appellant's presence that he had taken a pocket-knife from appellant's person at the time of making his arrest, and would send it to him later through the mail. He also testified that appellant had since asked him whether the sheriff of Sevier county had sent the knife.

[1] All of this testimony was admitted in evidence over appellant's objection, and the ruling of the court in admitting it is assigned as error. We are of the opinion that the court erred in admitting this testimony, and that the error was prejudicial. The error consisted of the admission of the knife in evidence before the jury, as it was not identified by any witness as the one which was taken from the person of the defendant when he was arrested. It is true that the officer testified that the sheriff of Sevier county told him in appellant's presence that he had taken a knife from appellant's person and would send it, but that was not an identification of the knife. The exhibition of this knife to the jury as the one which was taken from appellant's person might have had some weight with the jury as a circumstance corroborating the accomplice, Harper, when he stated that he, together with Earnest and appellant, had stolen a lot of pocketknives from the store of Speer. It does not appear that there was any attempt in any other way to identify this knife as one of those taken when the store was burglarized; but it may have been a new and unused knife, so that the jury might have improperly inferred from it that it was a knife that was stolen when the house was burglarized, and that the fact that it was found on appellant's person was a circumstance sufficient to corroborate the testimony of the accomplice. Therefore we are of the opinion that the introduction of the testimony was not only erroneous, but it was prejudicial and calls for a reversal of the judgment.

It is also insisted that the verdict is not supported by sufficient evidence in the corroboration of the testimony of the accomplice; but we have concluded not to pass

upon that question, inasmuch as the testimony may be different on another trial of the cause. The state relies upon appellant's possession of several pocketknives shortly after the commission of the burglary, and also the circumstances under which he left Tinsman about the time that Harper was arrested, as circumstances sufficient to corroborate. But, as before stated, the testimony may be to some extent different on the next trial of the case, and we will not undertake to determine whether those circumstances, as they now appear in the record, are sufficient to corroborate the accomplice.

[2] It is also insisted that the court erred in overruling appellant's motion to discharge the veniremen specially summoned as jurors, and also to discharge the sheriff of the county and to designate some other person to summon the jury for the trial of the case. It was alleged in the motion that the sheriff had summoned the special venire and that he was prejudiced against appellant and was giving assistance to the prosecution in the effort to procure a conviction in the cause.

The statute provides:

"The court may, for sufficient cause, designate some other officer or person than the sheriff to summon jurors, the officer or person designated being first duly sworn in open court to discharge the duty faithfully and impartially." Kirby's Digest, § 2350.

A trial court is clothed with discretion in such matter, and unless an abuse is shown in the exercise of such discretion this court will not disturb the action of the trial court. *Holt v. State*, 91 Ark. 576, 121 S. W. 1072. The allegations of the motion amount only to a statement of the conclusion that the sheriff is prejudiced against appellant, and no proof was offered to substantiate the charge. We cannot say, therefore, that there was any abuse of discretion by the court.

For the error indicated, the judgment is reversed, and the cause remanded for a trial.

EICKHOFF v. CITY OF ARGENTA et al. (No. 143.)

(Supreme Court of Arkansas. Oct. 4, 1915.)

1. MUNICIPAL CORPORATIONS ⇨385—STREETS—CHANGING GRADE—LIABILITY.

While cities and towns have power to fix and change the grades of streets under the express provisions of Kirby's Dig. §§ 5456, 5475, 5485, they will be liable for damages caused by a change in the grade of streets to abutting owners, who have made improvements with reference to the established grade.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 925-928; Dec. Dig. ⇨385.]

2. MUNICIPAL CORPORATIONS ⇨265 — IMPROVEMENT DISTRICTS—POWERS AND LIABILITIES.

Improvement districts in cities and towns are quasi governmental agencies, having no powers or liabilities, except those conferred or

imposed by statutes, and those necessarily implied from those named.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 711, 713-715; Dec. Dig. ⇨265.]

3. MUNICIPAL CORPORATIONS ⇨269 — "STREET."

Under the generic term "street" is included all parts of the way, roadway, gutters, and sidewalks.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 718-724, 733; Dec. Dig. ⇨269.

For other definitions, see Words and Phrases, First and Second Series, Street.]

4. MUNICIPAL CORPORATIONS ⇨404 — IMPROVEMENT DISTRICTS—CHANGE OF STREET GRADE—COMPLAINT.

In an action against an improvement district of a street for damages to plaintiff's property by changing the grade of a street, a complaint which fails to allege that the district was created for the purpose of grading the street in front of plaintiff's buildings is fatally defective.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 989-991, 993-999; Dec. Dig. ⇨404.]

5. MUNICIPAL CORPORATIONS ⇨400—STREETS—CHANGE OF GRADE—LIABILITY.

Under Kirby's Dig. § 5672, requiring that street improvements shall be made with reference to the grades of the street as fixed by ordinances of the city, liability for damages to property occasioned by grading the street according to the established grade as altered is upon the city, and not upon the improvement district.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 962-964; Dec. Dig. ⇨400.]

6. MUNICIPAL CORPORATIONS ⇨747 — IMPROVEMENT DISTRICT—STREETS—GRADING—LIABILITY.

The improvement district, being a public quasi corporation, created to carry out the duty of the city in regard to improving streets, is not liable for damages resulting from changing the grade of a street, even if its agents and servants do the work contrary to the grade as fixed by the city ordinance; such acts being ultra vires and void, or else acts of negligence on the part of its agents for which the district is not liable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1570-1577; Dec. Dig. ⇨747.]

Appeal from Circuit Court, Pulaski County; W. G. Hendricks, Judge.

Action by George Eickhoff against the City of Argenta and Street Improvement District No. 11 of Argenta. From a judgment on demurrer, dismissing the suit as to defendant district, plaintiff appeals. Affirmed.

The appellant sued the city of Argenta and street improvement district No. 11 of that city, which we will hereafter designate as the district, alleging that he was the owner of certain lots in the city of Argenta on which there were six store buildings, fronting on East Washington avenue for a distance of 140 feet. The lots are particularly described in the complaint. It was alleged that the buildings were erected with reference to the then street grade as established by the city; that the city was a city of the first class, and that the district was a corporation

duly organized under the laws of the state of Arkansas. It was alleged that along the front of the property described there was a sidewalk space, on which was laid a concrete pavement, with a concrete curb, which were in good condition, and which the plaintiff had laid at a great expense; that the pavement and curb had been laid on the grade established by law; that the defendants unlawfully broke the concrete pavement and curb into pieces and hauled it away; that they then lowered the earth along the sidewalk to a depth of two feet, leaving the front entrances of the stores 18 inches or 2 feet above the sidewalk; that the unlawful acts of the defendants, in the manner set forth, had cut off the necessary ingress and egress to and from the store buildings, and had thus greatly lessened the usable value of the same, to the damage of plaintiff in the sum of \$14,750, in addition to the value of the concrete walk and curb, which defendants destroyed, of the value of \$224, for all of which the plaintiff prayed judgment. The district demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer and dismissed the complaint as to the district. The plaintiff duly prosecutes this appeal.

Vaughan & Akers, of Little Rock, for appellant. Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, for appellees.

WOOD, J. (after stating the facts as above). [1] Cities and towns have the power to fix and change the grades of their streets. These powers are expressly conferred upon them for the public good. Sections 5456, 5475, 5495, Kirby's Dig. Under the statute and our decisions, where abutting owners have made improvements with reference to the established grade of the streets, thereafter if the grade is changed to the damage of abutting owners, the city is liable for such damage. Kirby's Digest, §§ 5495-5497; Fayetteville v. Stone, 104 Ark. 136, 148 S. W. 524; Dickerson v. Okolona, 98 Ark. 206, 135 S. W. 363, 36 L. R. A. (N. S.) 1194; Jonesboro v. Pribble, 112 Ark. 554, 166 S. W. 576.

[2] Improvement districts in cities and towns are quasi governmental agencies. They have no powers, except those expressly conferred by statute, and those necessarily implied from the powers expressly given. They are under such duties, and are subject to such liabilities, only as are imposed by statute. Board of Improvement of Sewer District No. 2 v. Moreland, 94 Ark. 380, 127 S. W. 469, 21 Ann. Cas. 957.

[3] "Under the generic term 'street' is in-

cluded all parts of the way, the roadway, the gutters, and the sidewalks." Elliott on Roads and Streets, p. 17; Little Rock v. Fitzgerald, 59 Ark. 494, 28 S. W. 32, 28 L. R. A. 496.

[4] Now, the complaint, while alleging that the improvement district was "organized and existing under and by virtue of the state of Arkansas," nowhere alleges that it was created for the purpose of grading Washington avenue in front of appellant's buildings. In this particular the complaint is fatally defective, and fails to state a cause of action against the district, even if the district were liable in damages to abutting owners by reason of the grading of the street.

[5, 6] But, as already observed, the district itself could not be liable for damages that accrued in grading a street according to the established grade, because the statute requires that:

"All such improvements shall be made with reference to the grades of streets and alleys as fixed, or may be fixed, by ordinances of said city." Section 5672, Kirby's Digest.

The liability, therefore, for the taking or damage to private property for the public use, to wit, the grading or changing the grade of a street, is on the city, not on the improvement district. The improvement district itself would not be liable for damages to abutting owners for the grading of streets, even if their officers, servants, and agents violated the law by doing the work contrary to the grade as fixed by the city ordinances. For all such acts would be ultra vires, and torts pure and simple, or else acts of negligence on the part of the officers, servants, and agents, for which these public quasi corporations are not liable. Improvement Dist. v. Moreland, supra. See, also, Wood v. Drainage Dist. No. 2 of Conway County, 110 Ark. 416, 161 S. W. 1057, and Jones v. Sewer Imp. Dist., 177 S. W. 888.

Appellant relies upon *McLaughlin v. City of Hope*, 107 Ark. 442, 155 S. W. 910, 47 L. R. A. (N. S.) 137. That was a suit against the city of Hope for damages to certain lands beyond the city limits, caused by the discharge of the sewage of the city into a stream running through the lands. The court held that the city had the power to turn the sewage into the stream, and that its act in so doing was tantamount to a taking or damaging of the property for a public use, and that the damages should be assessed as if the act of the city were a proceeding to acquire the property under the power of eminent domain. See, also, *City of El Dorado et al. v. Scruggs*, 113 Ark. 230, 168 S. W. 846. These cases are not applicable here.

It follows that the judgment is correct, and must be affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. NUNLEY.
(No. 159.)

(Supreme Court of Arkansas. Oct. 11, 1915.)

1. CARRIERS \Leftrightarrow 218—CARRIAGE OF LIVE STOCK—NOTICE.

A provision in the contract, requiring a shipper of stock to give written notice of injuries to the nearest station agent, or other agent of the carrier, may be waived by the company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. \Leftrightarrow 218.]

2. CARRIERS \Leftrightarrow 228 — CARRIAGE OF LIVE STOCK—ANIMALS—EVIDENCE.

In an action for injuries to live stock, evidence held to warrant a finding that written notice of the injury was waived.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. \Leftrightarrow 228.]

3. CARRIERS \Leftrightarrow 228 — CARRIAGE OF LIVE STOCK—ACTIONS—EVIDENCE.

In an action for injuries to a shipment of live stock, evidence of injuries held sufficient to support verdict.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. \Leftrightarrow 228.]

4. CARRIERS \Leftrightarrow 230 — CARRIAGE OF LIVE STOCK—ACTIONS—BURDEN OF PROOF.

Where an action for injuries to a shipment of live stock was tried on the theory that the injuries occurred after the shipment reached the point of destination and the shipper left the car, a charge that the burden of proving all the facts of the injury was upon the shipper was properly refused; this not being a case of where the shipper was bound to have complete knowledge.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 961, 962; Dec. Dig. \Leftrightarrow 230.]

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Action by John Nunley against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John Nunley sued the St. Louis, Iron Mountain & Southern Railway Company to recover damages to a car of live stock shipped over defendant's line of railroad. The facts are as follows: On January 14, 1914, John Nunley shipped a car load of horses and mules from Russellville, Ark., to Argenta, Ark. He accompanied the shipment and rode in the caboose. The stock were in good condition when they left Russellville, and arrived at Argenta some time after midnight on the day of shipment. John Nunley testified that when the train arrived at Argenta the car load of live stock was switched onto a side track; that he and the conductor went forward and examined the live stock, and found that they were in good condition; that the next morning he found that the car had been moved about a mile to where the stockyards were situated; that the stock had been unloaded in the yards; and that one of the mules was dead and others injured. He put in a claim for damages for the mule killed for \$100 and for the others injured, as follows:

"One mule, \$75, one mule, \$30, one mule, \$25, one mare, \$25 and one pony, \$15."

Nunley testified also that several other head of stock were injured for which he put in no claim for damages. He testified that as soon as he discovered that the animals had been injured he went to the depot at Argenta and notified the man in charge there that his stock had been injured, and that the person in charge directed him to a building in Little Rock where he should go to put in his claim for damages; that he went over to Little Rock and employed an attorney, and that he and the attorney then went to the building where he had been directed by the station agent; that a young man in charge of the office to which he had been directed to go entered into negotiations with him looking towards a settlement of his damages; that the young man went over to Argenta with him and his attorney to examine the injured stock; that the young man told him the company would pay him damages for the injury to them; that subsequently he returned to the same office and was told by another person there that the dead mule had not been injured by the railroad, but had died of colic, and that the other stock had not been injured. A witness testified in behalf of the plaintiff that he saw the stock before they were shipped, and that they were in good condition at the time of shipment, and that the plaintiff brought back several head of the stock with him and that they appeared to be badly injured. Another witness who lived in Argenta testified that he saw the stock after they were unloaded, and stated that several of them were badly injured. He described specifically some of the injured stock, and placed the damage at as large or a greater amount than that testified to by the plaintiff. Another witness testified that he had been in the stock business and had shipped a great many head of stock, and and that he examined the horses and mules in question after they had been unloaded from the car, and that quite a number of them had been injured. He said that he did not think from the appearance of the injuries that they were received by the animals fighting, and that they did not appear to be injuries which resulted from their kicking or biting each other. On the part of the railroad company the conductor in charge of the train testified that there were not any unusual jars or jolts on the way, and said that he did not examine the stock after the train arrived at Argenta. The agent whose duty it was to adjust and settle claims of this sort admitted that the plaintiff came to him for settlement of the claim, and said that he stated to him that one of the mules had died of colic, and that none of the other mules had been injured. He testified that he was the only person in his office authorized to adjust and settle claims of this sort, and

that the only other person employed in the office was a young man who was a stenographer, and that he did not have authority to settle damage claims. A veterinary surgeon who had been employed by the claim adjuster to examine the stock testified that he cut open the dead mule, and that the mule had died of colic. He also stated that he had examined the remainder of the stock, and that none of them was injured. Another witness for the railroad company testified that he was in a car with stock of his own from Russellville to Argenta, that the plaintiff's stock were in a car near to the one in which he rode, and that he heard the plaintiff's animals biting and fighting each other on the way down. He admitted, however, that there was some switching after the train arrived at Argenta, and that he did not know what occurred there. The jury returned a verdict for the plaintiff in the sum of \$170, and the defendant has appealed. Other facts will be referred to in the opinion.

E. B. Kinsworthy and W. G. Riddick, both of Little Rock, for appellant. Carmichael, Brooks, Powers & Rector, of Little Rock, for appellee.

HART, J. (after stating the facts as above).

[1] There was a clause in the bill of lading which required the plaintiff to give written notice of any claim for damages for injury to his stock while in transit, and it is the contention of the railway company that the judgment must be reversed because the plaintiff failed to give the written notice of his intention to claim damages for the alleged injury to his stock. This court has held that the provision of the contract requiring that the shipper give written notice of the place and nature of the injuries to the nearest station or other agent of the carrier may be waived by the railway company. The reason given therefor is that the object of requiring notice of the place and nature of the injuries is to give the carrier an opportunity for a full and fair investigation of such injuries when and where it will be most certain, easy, and expeditious. The notice is required to be in writing, so that the nature of the shipper's grievance may be definitely and clearly stated. *St. L., I. M. & S. Ry. Co. v. Jacobs*, 70 Ark. 401, 68 S. W. 248; *St. L. & S. F. R. Co. v. Vaughan*, 88 Ark. 138, 113 S. W. 1035; *St. L. S. W. Ry. Co. v. Grayson*, 89 Ark. 154, 115 S. W. 933; *St. L., I. M. & S. Ry. Co. v. Shepherd*, 113 Ark. 248, 168 S. W. 137.

[2] In the present case it is insisted that there is not sufficient testimony to warrant the jury in finding that the written notice was waived by the railroad company, but we cannot agree with the contention of counsel in this respect. It is true the agent whose duty it was to settle claims of this sort testified that there was no one in his office who had authority to settle such claims except himself, and stated that he denied liability

to the plaintiff the first time he talked to him. This agent also stated that where an animal was killed or died in transit it was his custom to have a veterinary surgeon examine the dead animal to ascertain the cause of its death if possible, and also to examine the remainder of the shipment to see if any of the other stock were injured. On the other hand, the plaintiff testified that as soon as he discovered that his stock had been injured he went to the station agent and gave him verbal notice of the injury and of the fact that he would claim damages therefor. The station agent directed him to a certain office in Little Rock where he might put in a claim for damages. He went over to Little Rock and employed a lawyer, and with his lawyer went to the office to which he had been directed by the station agent. He there met a young man in charge of the office, who entered into negotiations with him looking to an adjustment of his claim, and who actually went over to Argenta and examined the injured stock for that purpose. This person admitted the liability of the railroad company and promised to settle the loss with the plaintiff. Though the claim agent testified that the young man did not have authority to adjust the loss, we think, under the circumstances, that the jury were warranted in finding that he did have such authority. He was left in charge of the office by the person whose duty it was to settle such claims, and actually entered into negotiations looking to a settlement of them. Though the claim agent testified that he always sent a veterinary surgeon to examine live stock for injuries, still the jury might have inferred that he sent the veterinary surgeon in question because his office had been notified that the stock had been injured and of the plaintiff's intention to claim damages.

[3] It was next contended by counsel for the defendant that there is not sufficient testimony to warrant the verdict or the amount thereof. We do not agree with them in this contention. The contract provided that the amount of damages to be recovered for a dead animal should not exceed \$100. Under this clause of the bill of lading, though the mule killed in transit was worth more than \$100, the plaintiff was limited in his recovery to that amount. According to the plaintiff's testimony, the injuries to the other stock amounted to \$170, and the jury returned a verdict in his favor for that amount. It is evident, therefore, that the jury did not allow him anything for the dead mule which the testimony of the veterinary surgeon showed to have died of colic, and that he was given a verdict only for the injured stock. The plaintiff's testimony as to the amount of the damages sustained by the stock is corroborated by other witnesses. Though the witnesses did not take up each head of the stock in detail and state the amount of the damage, they did state that several head of

the stock were injured, and in the ones they did undertake to testify specifically about they placed the damage at as much or a greater amount than that testified to by the plaintiff.

There was a dispute between the witnesses as to how the stock received their injuries, and this dispute was settled in favor of the plaintiff.

On the one hand, the conductor of the train testified that there were no unusual jolts or jars to the train while it was in transit from Russellville to Argenta. He also denied that he examined the stock after the train arrived at Argenta, but in this he is flatly contradicted by the plaintiff. The plaintiff testified that he and the conductor examined the stock after the train arrived at Argenta, and stated that the stock were then in good condition. He did not claim any damages for injuries alleged to have been sustained during the trip from Russellville to Argenta. On the other hand, he bases his right of action solely on the fact that the injuries to the stock were received after the train arrived at Argenta. The testimony shows that some switching was done with the car after it was set on the side track, and that when the plaintiff next saw the stock in the stockyards the next morning they were injured as testified to by him. Although the railroad company introduced testimony tending to contradict the plaintiff in this respect, we think there was sufficient testimony to warrant the jury in finding that the stock were injured after the train had arrived in Argenta, and before the plaintiff saw them the next morning. The jury might have inferred that they were injured while the car was switching around in the yards at Argenta or while being unloaded by the railroad company. A witness for the plaintiff had testified that he had had considerable experience in shipping stock, and that the injuries to the stock were not from biting or kicking.

[4] Finally it is contended by counsel for the railroad company that the court erred in refusing to instruct the jury that the burden of proof was upon the plaintiff to prove all the material allegations of the complaint. They contend that the court should have given this instruction because the plaintiff accompanied the shipment of stock, and on that account was in a position to know in what place and in what manner they received their injuries, and that therefore the burden of proof was upon him. We do not deem it necessary to decide this question. As we have already seen, the plaintiff based his right of action solely on the ground that the stock received their injuries after the train had arrived in Argenta, and after he had left the train. He testified positively that he and the conductor examined the stock after the train had arrived at Argenta, and that they were then in good condition. The record

shows that the case was tried on this theory, and that counsel for the railroad company were not misled in regard thereto. Under these circumstances it cannot be said that the rule contended for by counsel for the defendant as to the burden of proof obtains, even if it is the correct rule.

The judgment will be affirmed.

DAVIDSON v. MAYHUE et al. (No. 157.)
(Supreme Court of Arkansas. Oct. 11, 1915.)

1. ATTACHMENT ~~336~~—WRONGFUL ATTACHMENT—ASSESSMENT OF DAMAGES.

Under Kirby's Dig. § 381, declaring that in actions of attachment in which the defendant shall procure a discharge the court trying the attachment shall assess the damages and render judgment against plaintiff and his sureties, judgment for wrongful attachment in an action for rent where crops were attached should be rendered in the attachment action, for not only is the statute mandatory, but the jury must there determine the amounts in issue.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1339-1342, 1379½; Dec. Dig. ~~336~~.]

2. ATTACHMENT ~~343~~ — ACTIONS ON SEPARATE BONDS—CONSOLIDATION—EFFECT.

Where two attachments for rent begun in justice court were consolidated on appeal to the circuit court on defendant's motion, the separate actions were discontinued, and the consolidated action left alone, so that no separate action on the attachment bonds could be maintained.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1233, 1235-1237; Dec. Dig. ~~343~~.]

Appeal from Circuit Court, Independence County; Dene H. Coleman, Judge.

Action by W. L. Davidson against Maggie Mayhue and another. From a judgment for defendants, plaintiff appeals. Affirmed.

This suit was instituted by the appellant against the appellees February 23, 1915. The complaint alleged that Maggie Mayhue instituted attachment suits against W. L. Davidson before a justice of the peace, one suit being for the sum of \$200 and the other for the sum of \$220, money alleged to be due for rent on certain lands for the year 1912; that attachments were issued and a bond executed in each case by Maggie Mayhue, with W. A. Mayhue as surety, the bonds being in double the amount sued for; that on the 9th day of November, 1912, there was a trial in each case, and the attachments were sustained, and judgment rendered against Davidson for the respective amounts claimed; that Davidson took an appeal to the circuit court; that in the circuit court, on motion of Davidson, the two cases were consolidated and tried as one case; that judgment was rendered, upon the issues, in favor of the defendant in the attachment suits (who is plaintiff here), dismissing the attachments, with judgment for costs, etc.; that Maggie Mayhue, plaintiff in the attachment suits, and her bondsman, W. A. Mayhue, are liable to the plaintiff, Davidson, by reason of the wrongful attachment proceedings, in the sum

of \$980, setting out the items constituting the damages. The prayer was for judgment in favor of plaintiff against Maggie Mayhue and W. A. Mayhue in the sum of \$980, with interest, costs, etc.

The defendants demurred to the complaint, alleging that it did not state facts sufficient to constitute a cause of action, and setting up that plaintiff was estopped from maintaining the action because the issue as to the damages which he alleged occurred by reason of the attachment suits should have been determined in those suits. The court sustained the demurrer and plea in bar of the action, and, the plaintiff refusing to plead further, the court rendered judgment dismissing his complaint and for costs in favor of the defendants. The plaintiff duly prosecutes his appeal to this court.

Samuel A. Moore, of Batesville, for appellant. Ira J. Mack, of Newport, for appellees.

WOOD, J. (after stating the facts as above). [1] The court did not err in dismissing appellant's complaint. Section 381 of Kirby's Digest provides:

"In all actions of attachment in which the defendant shall recover judgment for the discharge of the attachment, the court or jury trying said attachment shall assess the damages sustained by the defendant by reason of such attachment, and the court shall render judgment against the plaintiff and his sureties in the attachment bond for the amount of such damages and cost of the attachment."

The statute contemplates that the court or jury, trying the question as to whether or not the writ of attachment should have been issued, must also, in the event that it is decided there were no grounds for the attachment, assess the damages that the defendant may have sustained by reason of the attachment. This court, so far as we are advised, has never before decided that this provision of the statute is mandatory. Soon after the passage of the above statute, however, this court, in the case of Holliday Bros. v. Cohen, 34 Ark. 707, speaking of the practice that should obtain under it, had this to say:

"There is, however, such an analogy between the acts of 1875 (the statute now under review) and 1867 that the impression is strong in the profession, and upon our minds, that the Legislature meant to return to the policy of the latter act, * * * and to leave it with the court, through proper instrumentalities, to settle in one suit the whole of the litigation, arising not only out of the original cause of action, but also out of the bonds executed in its progress. We think it, therefore, within the equity and spirit of the act, as a matter of practice, that the defendant should have the right, when the plaintiff shall fail to bring his suit to final trial, or may fail otherwise, to have a jury summoned on his own behalf, to assess the damages which may have accrued to him from a wrongful attachment in the action, and which had been dissolved. It is certainly unreasonable, and a bad practice, which may lead to great injustice, to have an assessment of damages, judgment, and execution in favor of defendant, upon an interlocutory trial, when in the end the plaintiff may recover

a larger sum on his debt, and find the defendant insolvent. One trial should settle all, and damages may be set off when fixed, and a final judgment rendered on one or the other side for a balance."

In the recent case of *Rodgers v. Cades*, 103 Ark. 187, 146 S. W. 507, we held:

"When an attachment was dissolved, and there was evidence tending to prove that defendant sustained damages by reason thereof, it was error to refuse to permit the jury to assess whatever damages defendant sustained by reason thereof."

The complaint in the present case shows that:

"A judgment was rendered upon the issues in favor of the defendant Davidson, and dismissing the attachment, with costs."

It appears from the complaint in this case that the original suit of appellee Maggie Mayhue against the appellant, Davidson, in which the attachment was issued, was for rents, setting up the amount. The complaint also sets forth that the crops on the leased ground had been taken and sold under the attachment proceedings. Since the judgment was rendered in favor of the defendant, the court or jury trying the issues of that case, as they should have been tried under the law, must have found that the amount of the proceeds of the crop sold under the attachment and the damages accruing by reason of its issuance were at least equal to the amount claimed for rents. Upon no other theory could a judgment have been rendered "upon the issues in favor of the defendant"; and since the judgment was so rendered, the allegations of the present complaint show that the plaintiff had no cause of action, for the plaintiff below was the defendant in the attachment suit, and the damages which he now sets up as arising by reason of the wrongful issuance of the attachment were in issue in the original suit in which the attachment was sued out.

As judgment was rendered in favor of the defendant in the attachment suit (appellant here) upon the issues in that case, as shown by the appellant's complaint, and as the issue of the amount of damages to the defendant in the attachment suit (appellant here) was one of the issues to be determined in that case, appellant cannot prosecute another suit and obtain judgment on the same issue. *Ederhelmer v. Carson Dry Goods Co.*, 105 Ark. 488-493, 152 S. W. 142. Appellant's complaint in the present suit nowhere alleges that the issue of damages accruing by reason of the wrongful issuance of the attachment was not determined in the original suit in which the attachment was issued. The allegation of the complaint, to the effect that "a judgment was rendered upon the issues in favor of the defendant," shows directly to the contrary.

But even if appellant's complaint had alleged that the damages to him growing out of the wrongful attachment had not been determined in the suit in which the attachment was issued, still a complaint containing such

allegations would have been fatally defective, for the provision of the statute that "the court or jury trying said attachment shall assess the damages sustained by the defendant by reason of such attachment" is mandatory. While the question as to whether or not the statute under consideration was mandatory or directory was not the issue before the court in the case of *Holliday Bros. v. Cohen*, supra, the language of the court in commenting upon the proper practice to be followed under the statute as quoted above indicates clearly that the court was of the opinion that the better practice would be to follow the statute as if its provisions were construed as being mandatory, and not merely directory. We so hold now. See, also, *Rodgers v. Cades*, supra. The Legislature couched its enactment in terms that in their natural and ordinary signification are mandatory in meaning, and we can conceive of no good reason why the language should not be so construed. On the contrary, from an economic viewpoint and to end litigation, it serves a wise and useful purpose to have the court or jury trying the issue of the attachment to assess the damages that may have accrued to the defendant by reason of its wrongful issuance.

[2] II. The allegations of the complaint show that when the original cases, originating in the justice court, had reached the circuit court on appeal, appellant moved to have the same consolidated and tried as one case.

"The effect of consolidating actions at law is to unite the causes as if the issues had been originally embraced in one action. The separate actions are discontinued and the consolidated action alone left. There can be no procedure in either of the actions consolidated, and the case is to be tried as if there had been an actual consolidation in the declaration, with one plea and a single issue." 8 Cyc. 600.

The allegations of the complaint show that the suit was for rent of land for a single year, amounting to the sum of \$420. It appears from this that one suit should have been brought in the first place in the circuit court, and the conduct of the appellant in moving their consolidation in the circuit court was tantamount to saying that there was only one cause of action, which should have been embraced in one suit in the circuit court in the first instance, which he now treats as so brought. See *Lochridge Dry Goods Co. v. Daniels Transfer Co.*, 171 S. W. 863.

The judgment is in all things correct, and it is therefore affirmed.

SANFORD-DAY IRON WORKS v. MOORE.

(Supreme Court of Tennessee. Oct. 30, 1915.)
MASTER AND SERVANT — LIABILITY FOR INJURIES — CONFORMITY TO CUSTOMARY USAGE.

A defense conclusive in character is not made out by a showing on the part of an em-

ployer that, in respect to appliances or places of work furnished by him, he has conformed to the usage obtaining among employers of like character in the district, and though proof of conformity to customary usage makes a prima facie case of nonliability when nothing else appears, this case is subject to be rebutted by proof that the appliance where set for use, or the place of work, was one so inherently and flagrantly dangerous that it must have been obviously so to the employer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.]

Certiorari to Court of Civil Appeals.

Action by J. R. Moore against the Sanford-Day Iron Works. A judgment for plaintiff was reversed by the Court of Civil Appeals, and both parties petition for certiorari. Judgment of the Trial Court reversed, and cause remanded.

Fowler & Fowler and A. Y. Burrows, all of Knoxville, for plaintiff. Webb & Baker, of Knoxville, for defendant.

WILLIAMS, J. The Sanford-Day Iron Works, a body corporate, engaged in the foundry and machinery business in Knoxville, appealed in error from a judgment for personal injuries rendered by the circuit court in favor of Moore, one of its employes, to the Court of Civil Appeals, where the judgment was reversed for several errors in the charge of the trial judge, only one of which will be treated of in this opinion, the other points made by the parties under their respective petitions for certiorari being disposed of orally and in a memorandum for judgment handed down with this opinion.

The employé, at the time of his injuries, was engaged in work as an assistant to one Flora at a forging hammer which was operated by means of a shaft, pulley, and belt, the shaft being located about 20 feet above the floor. About 10 months before the accident the belt began to run off of the pulley, and Moore was directed at times, when the regular hand for that purpose was not conveniently near, to ascend and replace it, a ladder being used for that purpose. The replacement of the belt was usually done by Moore while the shaft was revolving. At a distance of from 20 to 28 inches from the pulley was a hanger, which was held in place by a collar in which for the security of the collar was a setscrew. This screw had a square head, and projected above the surface of the collar about one-half inch or an inch.

On the day of the injury, Moore was on the ladder engaged in readjusting the belt, when, after it was placed on the pulley, it immediately flew off, knocking him against the rapidly revolving shaft and the setscrew. This screw caught his clothing, and he was wound around the shaft and his body bruised and mutilated.

The injured employé testified that he had never observed the setscrew and did not know

it was there; he having always made the adjustment of the belt while the shaft was revolving.

There was also evidence offered tending to show that projecting setscrews were still in use in well-regulated shops in the district, especially on overhead shafting, but there was also adduced evidence in behalf of the employé that such projecting screws were not in general use by prudent operators, and in well-regulated plants of like character, at the time the shaft in question was installed, and that they had been discarded and counter-sunk screws adopted for use in lieu, due to the greater safety of the latter.

The trial judge instructed the jury in part in the following language:

"You will bear in mind in this connection that the law did not require that the defendant use the very latest and most approved setscrew, unless it was necessary to do so in order to make said place reasonably and ordinarily safe. It was sufficient if defendant used such setscrew as was ordinarily in use by well-equipped plants and machinery of similar character, provided the same was ordinarily safe."

Upon an assignment of error of the Iron Works attacking this portion of the charge because of its last and qualifying phrase, the Court of Civil Appeals held that the charge was erroneous, saying:

"We think the unbending test of plaintiff in error's negligence in using said projecting setscrew in its machinery, at the time of the accident, was the ordinary usage of the business."

That court quoted from the case of *Kilbride v. Carbon, etc., Co.*, 201 Pa. 552, 51 Atl. 347, 88 Am. St. Rep. 829, the language of which, on the point under discussion, was taken from the earlier and leading case of *Titus v. Bradford, etc., R. Co.*, 136 Pa. 618, 20 Atl. 517, 20 Am. St. Rep. 944, where it was said:

"All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of implement or nature of the mode of performance of any work, 'reasonably safe' means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community."

It is in behalf of the Iron Works contended that this court adopted the principle that conformity to the common usage in the par-

ticular line of business is the unbending test of nonculpability, thus announced in these Pennsylvania cases, in *Chattanooga Machinery Co. v. Hargraves*, 111 Tenn. 476, 482, 78 S. W. 105, when it quoted the substance of the above excerpt from *Kilbride v. Carbon, etc., Co.*, supra. It should be noted, however, that it was the plaintiff in that case who was claiming negligence on the part of the defendant company and who was seeking to prove that the employer company had not been reasonably careful in that it had failed to practice a method of testing the appliance that was in general use in well-regulated machine shops, and that was practiced by experienced and prudent machinists. The court merely held that evidence of such customary usage was competent to be adduced by the plaintiff. It was not ruled that same would be conclusive on the point of defendant's negligence in favor of the plaintiff. It is one thing to say that an employer may be found to be negligent if he fail to conform to a customary usage, and another thing to say that if he conforms he is thereby conclusively acquitted of culpability. The phrase now presented was not dealt with in the *Hargraves Case*.

The Pennsylvania rule on the point has, however, been adopted in a number of jurisdictions. The earlier and some recent cases are cited in 3 *Labatt, Master and Servant* (2d Ed.) § 940.

The doctrine that conformity to common usage when established is conclusive in the employer's favor has been denied and combatted by the courts in several other jurisdictions, and it is believed that an increasing number of tribunals, as they rule the point, are aligning themselves in opposition to that view. The protestant view is expressed in the case (involving a projecting setscrew) of *Geno v. Fall Mountain Paper Co.*, 68 Vt. 568, 35 Atl. 475, where this language was used:

"It would hardly be a defense for an employer to say that a certain machine upon which an employé had been injured was one of a kind in common use, if the employer was compelled as a prudent man to admit its use was, in his own judgment, dangerous.

"Common use' and 'the care of a prudent man' are not necessarily equivalent terms. That a machine is in common use is at the most a circumstance bearing upon the question of negligence.

"A machine might be of a kind in common use, or even the best in use, and yet its safety in respect to its position or setting in a mill be questionable. In this case, even if the setscrew with a projecting head had been the most approved kind and in universal use, it could not be held as a matter of law that its employment, for that reason, would shield the defendant from liability."

The same fundamental principle was announced by the Supreme Court of the United States in *Wabash R. Co. v. McDaniels*, 107 U. S. 461, 2 Sup. Ct. 938, 27 L. Ed. 605, where Mr. Justice Harlan wrote:

"And to say, as matter of law, that a railroad corporation discharged its obligation to an employé—in respect of the fitness of coemployés

whose negligence has caused him to be injured—by exercising, not that degree of care which ought to have been observed, but only such as like corporations are accustomed to observe, would go far towards relieving them of all responsibility whatever for negligence in the selection and retention of incompetent servants. If the general practice of such corporations in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed, such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due, or reasonable, or proper care, and therefore not ordinary care within the meaning of the law."

See, also, *Texas, etc., R. Co. v. Behymer*, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. Ed. 905.

Mr. Labatt in the work above referred to vigorously opposes the Pennsylvania rule at section 947, where other cases in accord with his views are collected, saying:

"In spite of the imposing array of authorities which have adopted the doctrine explained in sections 940 et seq., the present writer has no hesitancy in saying that, in his opinion, the cases just cited embody the correct principle," etc.

Among the later cases so holding are *Prattville Cotton Mills v. McKinney*, 178 Ala. 554, 59 South. 496; *Winkler v. Power, etc., Co.*, 141 Wis. 244, 124 N. W. 273.

In our opinion the sounder view is that maintained by the cases denying the rule of application to the full extent laid down in the *Titus Case*; that is, holding that a defense conclusive in character is not made out by a showing on the part of an employer that in respect to appliances or place of work furnished by him he has conformed to the usage obtaining among employers of like character in the district. The contrary rule, said to be "unbending," lacks that flexibility that is required to reach a just result in certain cases, of which this one is a type.

The doctrine is too absolute in that it denies a jury the right to find the common usage to be an obviously negligent one; and, in effect, the right to find that such other employers are not in that respect men of ordinary care and prudence, which may be the truth. The fact may be that the customary usage has its basis on motives of economy, self-interest, or a reckless disregard of the subordinate, and not on consideration for the safety of the employé. Is supineness on the part of an isolated employer to be denounced while the same supineness if only it be found in aggregate is to be vindicated?

The rule that tends to cause vigilance in the protection of human life is to be preferred over one that tends to encourage concerted indifference.

While the point has not been passed on in any of our cases involving the relation of master and servant, it was said in *Railroad v. Wade*, 127 Tenn. 154, 153 S. W. 1120, Ann. Cas. 1914B, 1020, which was a case that involved the measure of care to be observed by

a railway towards a licensee in its switching operations:

"It is proper to prove the customary way of doing such things in the business in hand, but such evidence is not controlling. It is competent only to throw light on the question, since a customary way may be a negligent way."

We believe that proper rules may be formulated for cases such as this, as follows:

When such proof of conformity to customary usage is made by an employer, there is made a *prima facie* case of nonliability, nothing else appearing.

This case is, however, subject to be rebutted by the plaintiff employé showing by proof that the appliance where set for use or the place of work was one so inherently and flagrantly dangerous as that it must have been obviously so to the employer.

The Court of Civil Appeals, however, as above indicated, passed on other assignments of error in favor of the Iron Works, and properly remanded the case for another trial. Without entering into a discussion here of its action in those respects, we approve the last-named rulings. The trial on remand will be in conformity to those rulings and to what is said in this opinion on the matter segregated for discussion.

SHARP v. CINCINNATI, N. O. & T. P. RY. CO.

(Supreme Court of Tennessee. Oct. 8, 1915.)

1. EXECUTORS AND ADMINISTRATORS — 11 — JURISDICTION TO APPOINT — EXISTENCE OF "ASSETS" — "CHATTEL" — "GOODS AND CHATTELS" — "ESTATE" — "GOODS, CHATTELS, OR ASSETS OR ANY ESTATE, REAL OR PERSONAL" — "CHOSE IN ACTION."

Under Shannon's Code, § 3935, providing that letters of administration may be granted upon the estate of a nonresident by the county court of any county where deceased had any goods, chattels, or assets or any estate, real or personal, at the time of his death, or where the same may be when the letters are applied for, or where any suit is to be brought, prosecuted, or defended in which the estate is interested, an administrator may be appointed in the county in which the decedent was wrongfully killed, though the cause of action for the wrongful death is the only asset in the county, and there are no technical assets. Since the word "chattels" includes not only personal property in possession, but choses in action, the term "goods and chattels" is of very wide signification, and includes choses in action. The term "choses in action" includes rights of action for tort. The word "assets," as used in the administration statutes, though usually meaning items subject to payment of the debts of the decedent, is not wholly limited to this meaning, but has been applied to money collected by an administrator as damages for the wrongful killing of an intestate. The word "estate," though in its primary and technical sense referring only to an interest in land, as used with reference to a decedent's property, has acquired a wider application in a popular sense and refers to the entire mass of decedent's property, both real and personal, while the words "goods, chattels, or assets or any estate, real or personal," include every kind of property of any nature whatsoever, and

are not limited to technical assets subject to the payment of debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 25; Dec. Dig. ¶11.]

For other definitions, see Words and Phrases, First and Second Series, Chattel; Goods; Chose in Action; Assets; Estate.]

2. EXECUTORS AND ADMINISTRATORS ¶11—JURISDICTION TO APPOINT—STATUTORY PROVISIONS—“ESTATE.”

The word “estate,” as used in Shannon's Code, § 3935, subd. 4, authorizing the appointment of an administrator of the estate of a nonresident in any county where any suit is to be brought, prosecuted, or defended in which the estate is interested, means the whole legal entity which may be the subject of devolution on the legatees, devisees, heirs, or distributees of a decedent, under the laws of a state or government, which, under such laws, may be attacked or defended, or to obtain which, a suit may be brought.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 25; Dec. Dig. ¶11.]

3. DEATH ¶10 — ACTIONS FOR CAUSE OF DEATH—NATURE.

The right of action for wrongful death given by Shannon's Code, § 4025 et seq., is that which the deceased would have had if he had lived, and the recovery is in right of the deceased.

[Ed. Note.—For other cases, see Death, Dec. Dig. ¶10.]

4. DEATH ¶8 — ACTIONS FOR WRONGFUL DEATH—LAW GOVERNING.

A right of action for wrongful death is governed by the laws of the state where the injury occurred.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 12, 36, 52, 121, 133; Dec. Dig. ¶8.]

5. STATUTES ¶231 — REVISIONS AND COMPILATIONS—CONSTRUCTION.

Though the substance of Shannon's Code, § 3935, relative to the jurisdiction to appoint administrators of the estates of nonresidents was enacted prior to the Code of 1858, with which the right of action for wrongful death originated, it having been made a part of that Code along with the sections giving the right of action for wrongful death, they must be construed together as if they had originated with the Code, as that Code was a single enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 312; Dec. Dig. ¶231.]

Buchanan, J., dissenting.

Certiorari to Court of Civil Appeals.

Proceeding by the Cincinnati, New Orleans & Texas Pacific Railway Company for the revocation of letters of administration granted to Joseph Sharp on the estate of Charles B. Wilson. A judgment revoking the letters was affirmed by the Court of Civil Appeals, and the administrator brings certiorari. Reversed.

E. G. Foster, of Huntsville, and Pickle, Turner & Kennerly, of Knoxville, for plaintiff. H. M. Carr, of Harriman, for defendant.

NEIL, C. J. This case was originally brought in the county court of Scott county to revoke the letters of administration previously granted to petitioner Joseph Sharp, as administrator of Charles B. Wilson. A

judgment was granted in the county court revoking the letters, and on appeal to the circuit court this judgment was affirmed, and subsequently on appeal to the Court of Civil Appeals was there again affirmed. The case has now reached us in regular course under the writ of certiorari.

The ground of recall in the several courts was that the decedent was a nonresident of this state, and had no assets in Scott county, and the county court was therefore without jurisdiction to grant letters of administration upon this estate.

Wilson was killed in Scott county, Tenn., in an accident on the line of the defendant railroad company, alleged to have been due to the negligence of the railway company. The railway company is a corporation of the state of Ohio. It is alleged that deceased was a citizen of the state of Kentucky. He left no assets or property in Scott county except the cause of action arising from his alleged wrongful death. The action of the Court of Civil Appeals in revoking the letters is assigned as error.

[1] The question is whether a county court of this state has jurisdiction to appoint an administrator for the estate of a nonresident who died as the result of an injury which was tortiously inflicted upon him in the county in which administration is sought, where it appears the decedent left no other property or estate in that county, except the right of action for the wrongful death.

The solution of this question depends upon the construction of section 3935 of Shannon's Code (Code of 1858, § 220³), which reads as follows:

“Letters testamentary or of administration may be granted upon the estate of a person who resided, at the time of his death, in some other state or territory of the Union, or in a foreign country, by the county court of any county in this state:

“(1) Where the deceased had any goods, chattels, or assets, or any estate, real or personal, at the time of his death, or where the same may be when said letters are applied for.

“(2) Where any debtor of the deceased resides.

“(3) Where any debtor of a debtor of the deceased resides, his debt being unpaid when the application is made.

“(4) Where any suit is to be brought, prosecuted, or defended, in which said estate is interested.”

The word “chattels,” used in the first subsection, includes not only personal property in possession, but choses in action. Cyc. Law Dict.

In Cyc. the word “chattels” is thus defined:

“Every species of property, movable or immovable, which is less than a freehold.” Volume 7, p. 122.

So of the term “goods and chattels.” This expression is of very wide signification, and, among many other things, includes choses in action as well as those in possession. 20 Cyc. 1268-1270. The term “choses in action” includes rights of action for tort. Cyclopedic

Law Dict. 149; *Pitts v. Curtis*, 4 Ala. 350; *McKee v. Judd*, 12 N. Y. 622, 64 Am. Dec. 515.

The word "assets," as used in our administration statutes, usually means items subject to payment of the debts of the decedent. *Agee v. Saunders*, 127 Tenn. 680, 157 S. W. 64, 46 L. R. A. (N. S.) 788. Still it is not wholly limited to this meaning, but has been applied to money collected by an administrator as damages for the wrongful killing of an intestate, since the administrator owes a duty to distributees as well as to creditors. This court said on the subject, in *Glass v. Howell*, 70 Tenn. (2 Lea) 50, 52:

"It is argued that the right of action for damages resulting in the death of an intestate is not assets with which an administrator is officially chargeable. But this is directly in conflict with the statute which expressly provides that the right of action for injuries resulting in death shall survive and pass to the personal representative. Code, § 2291. It is true he may decline to sue, in which case the next of kin may use his name by giving security for costs. Code, § 2292. The reason is that there may be no assets with which to pay costs, and the personal representative may decline to actively proceed without security, and as, by the statute, the recovery inured to the next of kin, free from the claims of creditors, the next of kin were authorized to sue in his name, upon indemnifying him against costs. If he acted, and received the fund, it would undoubtedly be as administrator."

Furthermore, there are many estates which owe no debts, and still it is proper to have an administrator to take charge of all of the personal property, realize on it, and divide the proceeds among the distributees.

Of the word "estate" it is said:

"While in its primary and technical sense the term estate refers only to an interest in land, yet by common usage it has acquired a much wider import and application, being applied to personal property as well as realty, and in its most extreme sense signifying everything of which riches or fortune may consist." 16 Cyc. 599, 600.

In the notes to the text it is said:

"The word 'estate' is *genus generalissimum* and includes all things real and personal. *Thornton v. Mulquinne*, 12 Iowa, 549, 79 Am. Dec. 548; *Bridgewater v. Bolton*, 6 Mod. 106; 1 Salk. 236; *O'Neil v. Carey*, 8 U. C. & C. P. 339."

The word "estate," as used with reference to a decedent's property, has acquired a wider application in a popular sense and refers to the entire mass of the decedent's property, both real and personal. *Harrison v. Lamar*, 33 Ark. 824.

Finally, in our own case of *Gourley v. Thompson*, 34 Tenn. (2 Sneed) 387, 393, it is said:

"The word 'estate,' unqualified or unrestricted, is always construed to embrace every description of property, real, personal, and mixed."

Taking together all the words referred to as used in subsection 1, viz., "goods, chattels, or assets, or any estate real or personal," we think it was the intention of the Legislature to include every kind of property of any nature whatsoever and that they cannot be limited merely to technical assets subject to the payment of debts.

[2] Subsection 4, as if to remove any ambiguity that might reside in the very extensive expressions already referred to, specifies that administration may be had in any county where any suit is to be brought, prosecuted, or defended in which "said estate" is interested. By the word "estate," as used in this latter subsection, is meant the whole legal entity which may be the subject of devolution on the legatees, devisees, heirs, or distributees of a decedent under the operation of the laws of a state or government, and which, under such laws, may be attacked or defended, through forms prescribed by law, or to obtain which a suit may be brought.

[3] We think there is no doubt that the right of action which arose in the present case to the estate of Wilson by reason of his wrongful death was a part of his estate, and that an administrator could be properly appointed in Scott county, where he was killed, to recover therefor. It has been abundantly held in this state that the right of action under the Code sections referred to is that which the deceased would have possessed if he had lived, and the recovery is in right of the deceased. *Davidson Benedict Co. v. Severson*, 109 Tenn. 572, 613-623, 72 S. W. 967, inclusive, and cases cited; *Stuber v. Railroad*, 113 Tenn. 305, 87 S. W. 411.

[4] The injury having occurred in this state, the right of action would be governed by the laws of this state. The universal rule is that this right of action is governed by the laws of the state where the injury occurred. *Nashville & Chattanooga R. R. Co. v. Eakin*, 46 Tenn. (6 Cold.) 582; *Nashville & Chattanooga R. R. Co. v. Sprayberry*, 56 Tenn. (9 Heisk.) 852, 856; *Id.*, 67 Tenn. (8 Baxt.) 341, 35 Am. Rep. 705; *Hobbs v. Memphis & Charleston R. R. Co.*, 56 Tenn. (9 Heisk.) 873; *Railroad v. Foster*, 78 Tenn. (10 Lea) 351; *Whitlow v. N. C. & St. L. Ry. Co.*, 114 Tenn. (6 Cates) 344, 84 S. W. 618, 68 L. R. A. 508; *Erickson v. Pacific Coast S. S. Co. (C. C.)* 96 Fed. 80; *Cowen v. Ray*, 108 Fed. 320, 47 C. C. A. 352; *Van Doren v. Pa. R. R. Co.*, 93 Fed. 260, 35 C. C. A. 282; *Leman v. Baltimore & O. R. R. Co. (C. C.)* 128 Fed. 191; *Davidow v. Pa. R. R. Co. (C. C.)* 85 Fed. 943; *In re Coe's Estate*, 130 Iowa, 307, 106 N. W. 743, 4 L. R. A. (N. S.) 814, 114 Am. St. Rep. 416, 8 Ann. Cas. 148; *Louisville & Nashville R. R. Co. v. Whitlow's Adm'r.*, 105 Ky. 1, 43 S. W. 711, 41 L. R. A. 614; *Id.*, 114 Ky. 470, 43 S. W. 711, 41 L. R. A. 614.

If not permitted to be sued on in this state, it probably could not be made the subject of an action anywhere, because each state enforces such rights of action accruing in any other state only through comity, and when the state in which the injury occurred does not recognize it as giving a right of action, there is nothing on which comity could rest. We should then have the singular result that the estate of no human being kill-

ed in this state by wrongful act, if the person was a nonresident at the time he was killed, could enforce a right of action against the wrongdoer anywhere unless the deceased left in this state some property other than the right of action for this wrongful death. This would create an exception to our statute allowing recoveries for death caused by wrongful act not warranted by anything in the statute itself; the statute being general in its terms.

That statute reads as follows:

"4025. The right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children or to his personal representative, for the benefit of his widow or next of kin, free from the claims of creditors.

"4026. The action may be instituted by the personal representative of the deceased; but, if he decline it, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit, on giving bond and security for costs, or in the form prescribed for paupers. The personal representative shall not, in such case, be responsible for costs, unless he sign his name to the prosecution bond.

"4027. The action may also be instituted by the widow in her own name, or, if there be no widow, by the children.

"4028. If the deceased had commenced an action before his death, it shall proceed without a revivor. The damages shall go to the widow and next of kin, free from the claims of the creditors of the deceased, to be distributed as personal property."

The provisions of the Code of 1858 on the subject were these:

"2291. The right of action, which a person who dies from injuries received from another, or whose death is caused by the wrongful act or omission of another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death; but shall pass to his personal representative for the benefit of his widow and next of kin, free from the claims of his creditors.

"2292. The action may be instituted by the personal representative of the deceased; but if he decline it, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit, on giving bond and security for costs, or in the form prescribed for paupers. The personal representative shall not in such case be responsible for costs, unless he sign his name to the prosecution bond.

"2293. If the deceased had commenced an action before his death, it shall proceed without a revivor. The damages shall go to the widow and next of kin, free from the claims of the creditors of the deceased, to be distributed as personal property."

In 1903 an act was passed (chapter 317) which provided:

"That no suit now pending or hereafter brought for personal injuries or death from wrongful act in any of the courts of this state, whether by appeal or otherwise, and whether in an inferior or superior court, shall abate or be abated, because or on account of the death of the beneficiary or beneficiaries for whose use and benefit said suit was brought, and that such suit shall be proceeded with to final judgment, as though such beneficiary or beneficiaries

had not died, for the use and benefit of the heirs at law of such deceased beneficiary."

It is perceived that the right of action given is general, for the benefit of the widow, children, and next of kin, without respect to whether residents or nonresidents. Accordingly it has been held that a widow residing in a foreign state might bring her suit in this state to recover for the death of her husband wrongfully caused here. *Chesapeake, Ohio & Southwestern Railroad Co. v. Higgins*, 85 Tenn. (1 Pick.) 620, 4 S. W. 47. But the right of the widow and children to sue directly was first conferred by Acts 1871, c. 78, § 2, embodied in Shannon's Code, § 4027. Prior to that time, under the sections of the Code of 1858 quoted, the action could be brought only by the administrator. *Bledsoe v. Stokes*, 60 Tenn. (1 Baxt.) 312, 314; *Flatley v. Memphis & Charleston Railroad Co.*, 56 Tenn. (9 Helsk.) 230, 233, 234; *Traford v. Adams Express Co.*, 76 Tenn. (8 Lea) 96, 99; *Loague v. Railroad*, 91 Tenn. (7 Pick.) 458-460, 19 S. W. 430; *Holston v. Coal & Iron Co.*, 95 Tenn. (11 Pick.) 521, 522, et seq., 32 S. W. 486. If plaintiff's contention be sound, then it must follow that prior to the act of 1871 there could be no recovery at all for the wrongful killing of a nonresident in this state, unless, as appeared in *Anderson v. Louisville & N. R. Co.*, 128 Tenn. 244, 159 S. W. 1086, there was found on his body, or otherwise in some county of this state, some personal property, even though small and comparatively inconsiderable, so that an administrator could be appointed. It would likewise follow, on the same theory, that after the act of 1871 a foreign widow and children could sue for the injury, but in case there were neither widow nor children, but other next of kin, these latter could have no remedy, because they could not sue without an administrator, and none could be appointed here, because no technical assets could be found here; that is, no property subject to debts. We should thus have imported into the statute, by construction, the new and important condition that, while the widow and children might recover regardless of the existence of technical assets in this state, there could be no recovery for the benefit of the next of kin other than children, unless there could be found in this state at least a few dollars' worth of property liable for debts. A theory leading to such a result cannot be sound.

The error resides in the assumption that no administrator can be appointed here unless there be technical assets. This theory ignores the fact that the duty of taking possession of property, realizing on it, and paying to distributees rests on the administrator as well as the payment of debts, and that this duty exists even though there be no debts. It fails to accord the proper meaning to the broad terms "goods" and "chattels," and improperly confines the term "estate"

to assets subject to the payment of debts. As we have already shown, the term "assets" has a broader meaning under the statute we are considering.

We are referred to the case of *Railroad v. Herb*, 125 Tenn. 408, 143 S. W. 1188, as in conflict with what we have herein held. That case, so far as concerns the facts in decision, is not in conflict, since it appears that the injury which was the subject of that action occurred in Kentucky. However, the construction therein given to Shannon's Code, § 3935, is in conflict with the construction herein given, and we cannot adhere to it. We may add that *Railroad v. Herb*, is in conflict with two prior decisions of this court concerning the right of action for injuries resulting in death where the injuries occurred in a foreign state. *Railroad v. Foster*, supra, and *Whitlow v. Railroad*, supra. These cases are not referred to in *Railroad v. Herb*. In the case of *Railroad v. Foster* the action was brought by the administrator. It does not appear from the opinions in the cases where these administrators were appointed, but they must have been appointed in some county in Tennessee, since, under the rule well established at the time in this state, a foreign administrator was not permitted to sue. It does not distinctly appear in the *Whitlow Case* whether plaintiff was the administrator, but it is to be inferred from the Alabama statute quoted in the opinion that such was the case. In the *Sprayberry Case*, supra, suit was brought by a husband and father for the wrongful death of his wife and children, occurring in the state of Mississippi.

The three cases last referred to are in harmony with the great weight of authority elsewhere. The cases are so numerous that we shall not attempt to cite them. The rule is practically uniform in the states of the Union that suits will be entertained on rights of action for wrongful injuries causing death occurring in foreign states unless the statutes of the foreign states are penal in their nature, or contain provisions in conflict with the public policy of the state in which they are sought to be enforced. In some of the states the foreign administrator is permitted to sue,

but generally an administrator is appointed in the state of the forum, as has always been the practice in Tennessee.

[6] It is suggested that Shan. Code, § 3935 (Code of 1858, § 2203), copied supra, was taken from Acts 1831, c. 24, and Acts 1841-42, c. 69, and at that time the right of action for personal injuries resulting in death died with the injured party, and therefore they could not have been intended to cover a cause of action such as that sued on in the case before us, originating with the Code of 1858, and that for this reason such a claim could not be treated as assets. The argument is not sound. It is true the substance of the section was in the original acts referred to, but this section was made a part of the code of 1858, along with the sections giving the right of action for wrongful death, and therefore they must be construed together, just as if they originated with the Code. The whole Code of 1858 was itself a single enactment, and went into effect as a whole on the 1st day of May, 1858. The title and enacting clause are as follows:

"An act to revise the statutes of the state of Tennessee.

"Be it enacted by the General Assembly of the state of Tennessee, that the General Statutes of the state of Tennessee shall be as follows."

Then follows the whole Code as one act or body of laws. *Chapman v. State*, 2 Head (39 Tenn.) 36, 41; *Brien v. Robinson*, 102 Tenn. 157, 167, 52 S. W. 802; *State v. Runnels*, 92 Tenn. 320, 323, 324, 21 S. W. 665; *Trust Co. v. Weaver*, 102 Tenn. 66, 69, 50 S. W. 763; *Whitworth v. Hager*, 124 Tenn. 355, 360, 140 S. W. 205.

"While the court will presume, in doubtful cases, that it was not the intention of the compilers of the Code to change, but only to revise or compile, the old statutes, still, where the meaning of the Code is clear, by reason of its express terms, or as a matter of necessary implication, its provisions are the law of the state, without regard to the old statutes which may have been the basis of its provisions, and which it in express terms repeals." *Padgett v. Ducktown*, etc., *Iron Co.*, 97 Tenn. 690, 694, 695, 37 S. W. 698.

The result is the judgment of the Court of Civil Appeals is reversed.

BUCHANAN, J., dissents.

**HOWARD v. NASHVILLE, C. & ST. L.
RY. CO.**

(Supreme Court of Tennessee. Oct. 19, 1915.)

1. EXECUTORS AND ADMINISTRATORS — JURISDICTION TO APPOINT—EXISTENCE OF ASSETS.

An administrator may be appointed to bring an action for wrongful death wherever the defendant may be found, though the decedent was a nonresident and left no assets in the state other than such right of action, and though he sustained the injuries causing his death in another state, as the right of action itself is property and is transitory, and exists wherever the defendant may be found.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 25; Dec. Dig. ¶11.]

2. COURTS — JURISDICTION — TRANSITORY ACTIONS—ACTIONS FOR WRONGFUL DEATH.

A right of action for wrongful death is transitory and may be enforced against the defendant wherever he may be found, provided it is not contrary to the policy of the forum and is allowed by the state wherein the injury occurred, except in those cases controlled by federal statutes.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 14, 16, 22-31; Dec. Dig. ¶7.]

3. COMMERCE — LIABILITY FOR INJURIES—STATUTORY PROVISIONS.

The federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 85 [U. S. Comp. St. 1913, §§ 8857-8865]) in the cases to which it applies is necessarily supreme.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 5; Dec. Dig. ¶8.]

Buchanan, J., dissenting.

Certiorari to Court of Civil Appeals.

Proceeding by the Nashville, Chattanooga & St. Louis Railway Company to revoke letters of administration granted to Mrs. Mollie Howard on the estate of her deceased husband. A judgment revoking said letters was reversed by the Court of Civil Appeals, and the Railroad Company brings certiorari. Judgment of the Court of Civil Appeals affirmed.

Thompson, Williams & Thompson, of Chattanooga, for plaintiff. Brown, Spurlock & Brown, of Chattanooga, for defendant.

NEIL, C. J. In the early part of the year 1915, plaintiff's husband being engaged in the service of defendant, received at Bridgeport, Ala., an injury from which he died eight hours later, in Chattanooga, Tenn., to which place he had been at once removed, on the happening of the injury. The deceased was a resident of the state of Alabama at the time he was hurt. A few days after his death plaintiff, his widow, appeared before the county court of Hamilton county, Tenn., and applied for and obtained letters of administration on his estate. She then brought an action against the defendant to recover damages for the alleged wrongful death. She filed her declaration containing several counts, one of these under the federal Employers' Liability Act, and one under the

Alabama statute. This latter statute is substantially like our own on the same subject, but confers the right of action only on the administrator of the deceased. After the filing of the declaration the defendant moved the court to compel the plaintiff to elect between the right of action claimed under the federal Employers' Liability Act and that claimed under the Alabama statute. Before this motion was acted on, however, the defendant filed a petition in the county court of Hamilton county, praying that the letters of administration be recalled, on the ground that the decedent left no property or estate in Tennessee that could furnish a basis for the appointment. The plaintiff answered the petition, claiming that there existed certain small items of property, and the right of action against the railroad company for the wrongful death. The existence of the small items referred to was denied and contested, but we deem it unnecessary to incumber the record with a further reference to these matters. We shall assume that the deceased left no property, except the right of action against the railway company for the alleged wrongful death. The county court held that this could not be treated as a basis for administration in Tennessee, if unaccompanied by technical assets subject to the payment of the debts of the deceased, and therefore entered a judgment recalling the administration previously granted. On appeal to the circuit court of the county this judgment was affirmed. The case was then appealed to the Court of Civil Appeals, and that court reversed the circuit court. The case was then brought to this court by the writ of certiorari. The defendant is a railroad chartered in Tennessee, and runs from Nashville, in Davidson county, Tenn., to Chattanooga, in Hamilton county, Tenn., but for a short distance passes through a part of Alabama, and in so doing through the town of Bridgeport, in that state. The defendant had at the time, and now has, a depot and offices in Chattanooga.

On these facts the question arises which we are to decide.

[1] In the case of *Joseph Sharp, Adm'r, v. C. N. O. & T. P. Ry. Co.*, 179 S. W. 375 (Knoxville, September term, 1914), in which an opinion was filed at the present term, we had before us the question whether an administrator could be lawfully appointed in this state for a nonresident killed here who left no property except his right of action against the railway company that caused his wrongful death. In the opinion filed it was settled both on reason and authority that such jurisdiction existed. In the case before us the question of jurisdiction is presented on a different state of facts. The intestate was a nonresident, received the injury that caused his death in a foreign state, Alabama, was brought to Hamilton county, Tenn., soon after the injury, and died within

eight hours thereafter. He left no property (as we assume for the purposes of the present discussion), except his right of action against the railway company for causing his wrongful death.

[2] Is there any fundamental difference in the two cases? We think not. Such a right of action is transitory, and may be enforced against the defendant wherever he may be found. This must be understood, of course, with the qualification that such action is not contrary to the policy of the forum, and with the further qualification that the right of action is that allowed by the state where in the injury occurred, save only such cases as are controlled by the federal Employers' Liability Act or other federal act. Subject to these conditions, such rights of action are permitted by comity in nearly all of the states of the Union. The extension of the comity seems to depend on the question whether the same or a substantially similar right of action is recognized by the laws of the forum, subject to the distinction, however, that where the laws of the foreign state are penal in their nature, comity will not be extended to them.

It is generally necessary, as a preliminary to the bringing of such actions, that an administrator be appointed in the state where the suit is to be brought; that is, the statutes creating the liability generally provide for its enforcement by an administrator. At this point the question arises whether it is essential that any property be found in such state, other than the right of action for the wrongful death, as a basis for the appointment of an administrator. In some cases where it is assumed, if not held, that the finding of such other property is essential, it has been held that the finding of an insignificant amount of property would suffice, \$3 or \$4, old clothing, or some other trifle. This fact shows the artificial and highly technical and wholly unsubstantial character of such a rule. And it is unreasonable and unnecessary. As pointed out in *Sharp v. Railway Co.*, supra, and other cases, the right of action itself is property; and it is transitory, and exists wherever the defendant may be found, and an administrator may be there appointed to collect it as in the case of debt. As shown in *Sharp's Case*, it is not material that such right of action is not available for the payment of the debts of the deceased. If it be the administrator's duty to sue on the demand, it is not material that the law requires him to pay the amount recovered to the widow and children or next of kin, instead of to creditors. It is just as much his duty to sue in the one case as in the other; and it is just as much the duty of a probate court, county court, or other court having jurisdiction of such matters to appoint an administrator for this purpose or when only this purpose is to be served as it is to appoint when the administrator will

have assets of both kinds to deal with—that is, assets for the payment of debts and assets devoted solely to the distributees of the intestate. Any other view must rest on the inherently false basis that the administrator is appointed solely for the benefit of creditors, or to realize assets devoted in whole or in part to them, to the ignoring of those which belong solely to distributees.

[3] Furthermore, such a rule would make it impossible, in very many instances, to enforce the federal Employers' Liability Act. That act can be put in motion only by an administrator. Suits must be brought. There is no provision in the federal laws for the appointment of administrators. These must be appointed by the state tribunals. That act is as much a law of each state as if enacted by the Legislatures of all the states, and it is as much the duty of the state courts to enforce it. *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. In the cases to which it applies that law is necessarily supreme, being a law of the federal government. The right of action so given, being in its nature transitory, must apply to the defendant wherever found in these United States, since it proceeds from supreme power, and is not by its terms limited to any special locality.

Now, let us suppose a case in which it appears a man has been killed under such circumstances as to clothe his widow, and children or next of kin with the right to a recovery under that act, in a suit to be brought by the administrator of the decedent. The decedent left no other property except this right of action. Can any one suppose that a county court or probate court would be permitted to nullify this act of Congress by refusing to appoint an administrator on the ground that the decedent owned no other property except the right of action given him or his estate by the Congress? Take another case. In the same probate court an application for administration is made on the estate of a man who left \$5 and the right of action referred to. Administration is granted on his estate, and denied on the other. Can the courts sanction such discrimination?

Or let us take this Alabama act. It likewise can be made effective only through suit by an administrator. Ought the right of action thereby given, which is equally property, as in the case of the other, and also transitory, and litigable wherever the defendant may be found—ought this right to be destroyed because the decedent was so unfortunate as to own no other property? Will it be said that the right could be enforced in Alabama? But the same difficulty would perhaps be found there. Or let us suppose he had been killed in Alabama, not by a railroad company, but by some man of wealth whose home was in Tennessee, and

to which state he returned after the homicide. Could the wrongdoer defeat justice through heading off the appointment of an administrator on the ground that the decedent owned no property in Tennessee, except the right of action, and thus permanently prevent the bringing of an action against him?

The foregoing questions, with the inevitable answers they suggest, show the unsoundness of the view that administration can be denied solely because the decedent left no other property than his right of action against the wrongdoer.

And so are the authorities. *Brown v. Railroad Co.*, 97 Ky. 228, 30 S. W. 639; *Findlay v. Railroad Co.*, 106 Mich. 700, 64 N. W. 732; *Hutchins v. Railroad Co.*, 44 Minn. 5, 46 N. W. 79; *Reiter-Connolly Mfg. Co. v. Hamlin*, 144 Ala. 192, 219, 40 South. 280; *Washington Asphalt Block & Tile Co. v. Mackey*, 15 App. D. C. 410; *Western Union Telegraph Co. v. Lipscomb*, 22 App. D. C. 104; *Appeal of Jenkins*, 25 Ind. App. 532, 58 N. E. 560, 81 Am. St. Rep. 114; *Missouri Pac. Railroad Co. v. Bradley*, 51 Neb. 596, 71 N. W. 283; *Boston, etc., R. Co. v. Hurd*, 108 Fed. 118, 47 C. C. A. 615, 56 L. R. A. 193; *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848, 40 N. W. 401, 2 L. R. A. 67; *Re Mayo*, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660; *Jordan v. Chicago, etc., R. Co.*, 125 Wis. 581, 104 N. W. 803, 1 L. R. A. (N. S.) 885, 890, 110 Am. St. Rep. 865, 4 Ann. Cas. 1113; *Vance v. Southern Ry. Co.*, 138 N. C. 460, 462-464, 50 S. E. 860; *In re Lowham's Estate*, 30 Utah, 436, 85 Pac. 445; *Richards v. Riverside Iron Works*, 56 W. Va. 510, 49 S. E. 437; *Fickelsen v. Wheeling Electrical Co.*, 67 W. Va. 335, 67 S. E. 788, 27 L. R. A. (N. S.) 893, 898; *Fann v. N. C. R. Co.*, 155 N. C. 136, 71 S. E. 81; *Southern Pac. R. Co. v. De Valle Da Costa*, 190 Fed. 689, 111 C. C. A. 417; *Rivera v. Atchison, T. & S. F. Ry. Co.* (Tex. Civ. App.) 149 S. W. 223; *Gulf, G. & S. F. R. Co. v. Beezley* (Tex. Civ. App.) 153 S. W. 651; *Eastern Ry. Co. of New Mexico v. Ellis* (Tex. Civ. App.) 153 S. W. 701. And see *Hartford & N. H. R. Co. v. Andrews*, 36 Conn. 214; *Bruce v. Cincinnati R. Co.*, 83 Ky. 174; *Anderson v. R. Co.*, 210 Fed. 689, 127 C. C. A. 277 (C. C. A. 6th Circuit).

That an action of the kind we have under examination is transitory and may be brought in any jurisdiction, if the statute giving the action is not inconsistent with the statutes or public policy of the forum, is shown not only by our own cases, cited in *Sharp v. Railroad*, supra, but the rule is quite general. *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439; *Stewart v. Baltimore & Ohio R. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. And see the note appended to *Dougherty v. American McKenna Process Co.*, Ann. Cas. 1913D, 570, 571, and the cases there cited.

In *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 South. 53, and *Knight v. West Jersey R. Co.*, 108 Pa. 250, 56 Am. Rep. 200,

it was held that the right of action would be entertained where the defendant was found, although both plaintiff and defendant were citizens of the same foreign state. The same rule was announced in *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. Rep. 859. This latter was a case between a citizen of Illinois and a corporation of that state for an injury inflicted in Illinois. In *Nelson, Adm'r, v. Chesapeake & Ohio R. Co.*, 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583, it was held that a recovery, in an action for death, brought by a duly appointed administrator, under an administration proceeding based on a statute of another state, giving a right of action to an administrator, but not providing that such administrator must be appointed in such other state so giving the right of action, will be a complete bar to an action in the latter state for the same wrong.

In the case of *Re Lowham's Estate*, supra, it appeared the death occurred in Wyoming. The administrator was appointed in Utah, and suit brought there; no other asset or property of the estate appearing except the right of action for the wrongful death. In *Fickelsen v. Wheeling Electrical Company*, supra, the facts, so far as they concern the present question, were that the intestate was killed in the city of Bridgeport, in the state of Ohio, by a current of electricity from the wires of the Bridgeport Electrical Company. Asserting and believing that the Wheeling Electrical Company, operating in Wheeling, W. Va., owned and controlled the poles and wires of the Bridgeport Company, the plaintiff applied for administration in Ohio county, in the state of West Virginia, was appointed administrator there, and brought suit there to recover for the wrongful death. The defendant filed a plea contesting the jurisdiction of the county court in West Virginia to appoint an administrator, since the death occurred in the state of Ohio. Responding to this objection, the court said:

"As the defendant company had its habitat in Ohio county [West Virginia], we think the demand against it was property of the estate of the deceased, so as to confer such jurisdiction"—citing *Richards v. Riverside Iron Works*, supra.

In *Southern Pacific Co. v. De Valle Da Costa*, supra, decided by the Circuit Court of Appeals of the First Circuit, it appeared that the intestate was at the time of his death a servant of the defendant, a Kentucky corporation; that a statute of that state gave a right of action for wrongful death to be brought by an administrator; that the intestate was killed on the high seas in a vessel belonging to the defendant by negligence of his employer while in the service of the latter. It appeared that administration was taken out in Massachusetts, where the defendant was found; that the estate of the intestate had no other property than the right of action for the wrongful death; that a plea in abatement was filed denying the

validity of the grant of the letters of administration; that upon the trial of this plea it was stipulated as follows:

"That unless the right of action against the defendant is assets in this jurisdiction, the deceased having no other property here, and not having been at the time of his death a resident of Massachusetts, the plea in abatement is to be sustained; but, if such right of action is assets sufficient to give jurisdiction to the probate court to appoint an administrator here, the plea in abatement is to be overruled; and the case is submitted to the court for a ruling on the matter."

It was held that the administrator was properly appointed in Massachusetts, and the action rightly instituted there. In the course of the opinion the court said:

"If the statute which gives the right provides for a suit by the personal representative, a question arises whether it is a personal representative appointed by the courts of the state wherein death was caused, a personal representative appointed at the decedent's domicile, or a personal representative appointed in the jurisdiction where the defendant is sued. * * * Though a defendant's liability may be clear, whatever course may be taken in an attempt to enforce this liability, there arise objections supported by good authority which imperil the substantial rights of those for whose benefit the liability was imposed. If administration be taken out in the place of the domicile of the deceased, objection is made that only the state which gives the right of action can appoint a legal representative with authority to enforce that right of action. If a legal representative is appointed in such state, it is objected in the state wherein suit is brought that the authority of an administrator has the territorial limits of the state of his appointment. If suit is brought in the state of defendant's residence, a twofold objection may be made, that the administrator should have been appointed either at the decedent's domicile or in the state whose statute creates the right of action. * * * The right to administration is recognized whenever there are assets within the jurisdiction. Is a death claim assets for the purpose of the appointment of an administrator?"

"The enactment of a statute giving an action for death, and requiring that it shall be brought by a personal representative, we think, should be regarded as a conclusive recognition of the right of administration to enforce such a claim. If a statute designates the personal representative of the deceased as the proper plaintiff, to limit the right to cases in which the deceased left assets other than the right of action would introduce an unreasonable and arbitrary distinction. To hold that suit might be brought in the state of Massachusetts for causing death of the deceased if the deceased left property in the state, but that it could not be brought if he had no property, would be to make a distinction in favor of persons who have estates against persons who have no estates—to deny the remedy to those most in need of it. * * *

"We think, further, that either the court of the state wherein the cause of action accrued or the court of the state wherein the defendant resides should recognize the right of action for wrongful death as a sufficient basis for the grant of letters of administration."

This case was followed in *Rivera v. Atchison, T. & S. F. Ry. Co.*, supra, in which it appeared that the deceased was killed in New Mexico, and in *Gulf, C. & S. F. Ry. Co. v. Beezeley*, supra. In both instances the administrator was appointed in Texas, and the action brought under the federal Employ-

ers' Liability Act. The same is true of *Eastern Ry. Co. of New Mexico v. Ellis*, supra.

In *M. P. R. R. Co. v. Lewis*, 24 Neb. 848, 40 N. W. 401, 2 L. R. A. 67, it appeared that the deceased was killed in Kansas, the administrator was appointed in Nebraska, and the suit brought in the latter state under the Kansas statute. It was held that the suit was well brought.

In *Dennick v. Central R. R. Co.*, 103 U. S. 11, 26 L. Ed. 439, the facts were that the decedent was killed in a railway accident in New Jersey, the administrator was appointed in New York, and the action brought in the latter state. The New Jersey statute giving the cause of action provided that actions based on it should be brought by an administrator. It was objected in the case that an administrator could not be appointed in New York and bring suit there. The court held that the right of action was transitory, and the administrator might be appointed and the suit brought in any jurisdiction where the defendant might be found.

We are referred to the case of *L. & N. R. R. Co. v. Herb*, 125 Tenn. 408, 143 S. W. 1139, as an authority in opposition to the views herein expressed. As pointed out in *Sharp v. Railroad*, supra, the fundamental misconception in *Railroad v. Herb* was in the view that nothing could authorize the appointment of an administrator in this state except the existence of technical assets, capable of appropriation to the payment of debts, and specifically in holding that the existence of a claim for wrongful death would not alone justify such appointment. It is clear from the discussion in *Sharp v. Railroad*, supra, and from the discussion and authorities in the present case, that we must recede from the views entertained in *Railroad v. Herb* on the point just referred to.

It results that the Court of Civil Appeals committed no error in reversing the trial judge, and in dismissing the proceedings instituted in the county court of Hamilton county to recall the administration previously granted in that court. The judgment of the Court of Civil Appeals will therefore be affirmed.

We observe in the record a motion to compel the plaintiff to elect between the right of action claimed under the federal Employers' Liability Act, and that claimed under the Alabama statute. In what we have said as to the supremacy of the federal law we are not to be understood as expressing an opinion on this subject, as it does not come before us on the present hearing, and we find authorities on both sides of the question. Cases cited in notes 218 and 219, p. 79, of 47 L. R. A. (N. S.), parts of an extensive note on the federal act, under *Lamphere v. Oregon R. & Nav. Co.*, 47 L. R. A. (N. S.) 48-84.

BUCHANAN J., dissents.

JACKSON et al. v. THORNTON et al.

(Supreme Court of Tennessee. Oct. 30, 1915.)

1. BASTARDS — EVIDENCE — PRESUMPTION OF LEGITIMACY.

The presumption of the legitimacy of a child born during wedlock is indulged, though antenuptial conception is made to appear.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 4, 5; Dec. Dig. —3.]

2. BASTARDS — EVIDENCE — PRESUMPTION OF LEGITIMACY.

The presumption of the legitimacy of a child born during wedlock is weakened and may be overcome by a less weight of evidence where antenuptial conception is shown.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 4, 5; Dec. Dig. —3.]

3. BASTARDS — EVIDENCE — PRESUMPTION OF LEGITIMACY.

Though antenuptial conception is shown, clear, strong, and convincing testimony must be adduced to overcome the presumption of the legitimacy of a child born in wedlock, and a mere preponderance is not enough, nor may testimony of mere rumor and suspicion among neighbors touching the paternity of the child overcome the presumption.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 4, 5; Dec. Dig. —3.]

Appeal from Chancery Court, Jefferson County; H. N. Cate, Special Chancellor.

Action by William Jackson and others against Cal Thornton and others. From a judgment for defendants, complainants appeal. Affirmed.

Walsh & Ely and J. Arthur Atchley, all of Knoxville, for appellants. C. T. Rankin, of Jefferson City, for appellees.

WILLIAMS, J. Complainants sue to recover land, claiming to be the heirs at law of one Houston Jackson. Defendants claim under a deed executed by Fred Jackson, who, they contend, was the only child and heir of Houston Jackson.

The legitimacy of Fred Jackson is the sole question for determination.

Houston Jackson was a colored man, and intermarried with a young colored girl, Rachael Gentry. Fred Jackson was borne by Rachael after the marriage. This fact is clearly established. The proof tends to show that the child was born three or four months after the marriage, and there is proof indicating that he was begotten by a white man in whose family the mother had worked as a servant girl just before her marriage, and while she was being courted by Houston Jackson.

The proof as to the paternity of the child is so mixed as to make the case turn on the presumption as to legitimacy raised by the law in favor of the legitimacy of one born in wedlock, as we have found that Fred Jackson was.

The earlier rule of the common law was that the presumption of legitimacy growing out of birth during wedlock was so far con-

clusive as that it could be overcome only by proof of impotence on the part of the husband or his absence from the realm ("beyond the four seas") during the period when the child must in the course of nature have been begotten; but the hardship worked by that rule led to its modification by the courts of nearly, if not quite, all jurisdictions, including this court. *Cannon v. Cannon*, 7 Humph. (26 Tenn.) 410.

[1] The authorities differ on the point as to whether if it be made to appear, as here, that conception antedated the nuptials, the presumption is then weakened. All the authorities agree that the presumption of legitimacy continues to be indulged in such case.

[2] Some of the courts hold that the presumption in such case must arise from the fact of the marriage, and not from sexual intercourse assumed to result from the marriage, and that the presumption of legitimate birth is therefore so far weakened as that it may be overcome by a less weight of evidence. *Wilson v. Babb*, 18 S. C. 59; *Wright v. Hicks*, 15 Ga. 171, 60 Am. Dec. 687.

In other cases it is held that antenuptial conception does not weaken the presumption of legitimacy arising from birth after the marriage. *Dennison v. Page*, 29 Pa. 42, 79 Am. Dec. 644; *McCulloch v. McCulloch*, 69 Tex. 682, 7 S. W. 598, 5 Am. St. Rep. 96; *Wallace v. Wallace*, 137 Iowa, 37, 114 N. W. 527, 14 L. R. A. (N. S.) 544, 126 Am. St. Rep. 253, 15 Ann. Cas. 761. We think the better rule is that laid down in the first line of cases.

[3] But, even so, we hold that, in respect of the weight of the evidence required to override the presumption, clear, strong, and convincing testimony must be adduced by him who alleges illegitimacy. A mere preponderance in his favor is not enough; nor may testimony of mere rumor and suspicion among neighbors touching the true paternity of the child avail to overcome the presumption. *Scott v. Hillenberg*, 85 Va. 245, 7 S. E. 377; *Bethany Hospital Co. v. Hale*, 64 Kan. 367, 67 Pac. 848; 8 Enc. Ev. 171.

The proof introduced by complainant is largely of that character. The chancellor properly held it not sufficient to the award of relief to complainants. Affirmed.

BIVENS v. STATE.

(Supreme Court of Tennessee. Oct. 23, 1915.)

FISH — PRESERVATION — STATUTES — IMPLIED REPEAL.

Acts 1897, c. 57, made it unlawful to explode dynamite in any stream, lake, or pond, and made any violation a felony. Acts 1907, c. 488, made it unlawful to kill or wound by the use of dynamite any fish in any stream, lake, river, or pond, and made any violation a misdemeanor. Defendant was convicted under a presentment under the 1897 statute. Held, that the 1897 act was impliedly repealed by that of

1907, so that no conviction under it could be sustained.

[Ed. Note.—For other cases, see *Fish*, Cent. Dig. §§ 17, 18; Dec. Dig. ¶9.]

Appeal from Circuit Court, Monroe County; S. C. Brown, Judge.

Bert Bivens was convicted of dynamiting a stream inhabited by fish, and he appeals. Reversed.

J. D. Penland, of Madisonville, and E. E. Ivins, of Athens, for appellant. The Assistant Attorney General, for the State.

WILLIAMS, J. The plaintiff in error was tried and convicted under a presentment for dynamiting a stream inhabited by fish, which presentment was under and closely followed the language of Act 1897, c. 57, which provided that it shall be unlawful for any person to use, procure, cause or assist in procuring the explosion of any dynamite or any other explosive material whatever in any stream, lake or pond in this state.

The second section of that act made its violation a felony punishable by imprisonment in the penitentiary for not less than one year, or more than three years.

The jury found the accused guilty, but his punishment was in the judgment fixed to be a fine of \$200, and imprisonment in jail for six months. This punishment was evidently meant to be that provided for by a later act now to be outlined.

The General Assembly, by Act 1907, c. 489, p. 1649, enacted a comprehensive statute for the protection and preservation of fish in this state, section 2 of which, in substance, provided: That it shall be unlawful for any person to kill or wound any fish in any of the streams, lakes, rivers or ponds in this state by dynamite, giant powder, etc.; and declaring a violation to be a misdemeanor, and, providing that upon conviction, a fine of \$200 and imprisonment of not less than six months nor more than one year should be the punishment.

In this court, the able Assistant Attorney General insists that, while this judgment, as to the punishment, was erroneous, it may and should be corrected in this court by the entry of a judgment here calling for the punishment fixed by the act of 1897—imprisonment for not less than one year in the penitentiary.

This is resisted by counsel for plaintiff in error, who insist that their client was presented for a violation of the earlier act, specifically, and not for killing or wounding fish, that the act of 1907 operated to repeal that act by implication, and that the presentment cannot be referred to the later act. Therefore, it is urged, no conviction of the accused can be upheld.

It does appear that the act of 1897 made the use by explosion of dynamite in any stream of water a felony, while the statute

passed 10 years later made the killing or wounding of any fish by the use of dynamite a misdemeanor. May both acts stand, or was the earlier impliedly repealed by the later act?

As noted, the act of 1907 prescribed a comprehensive system for the protection of fish, inclusive of the protection thereof from being killed by dynamite. If both acts stand, we have the anomalous condition that for the explosion of dynamite that does not effect the death or wounding of fish a punishment for a felony is prescribed, whereas for a consummation of such attempt by an actual killing or wounding of fish a punishment for a misdemeanor is stipulated. We cannot impute such a result as one purposed by the Legislature. Rather does it seem that by the later act, outlining a general and amplified system, the entire subject was intended to be covered, with result that the earlier statute was repealed by implication. We so hold.

The presentment not being under the act of 1907, or for the killing or wounding of fish, the result is that a conviction cannot be sustained by us. The presentment charged nothing denounced as an offense by any existing statute.

Reversed.

STANDARD KNITTING MILLS v. HICKMAN.

(Supreme Court of Tennessee. Oct. 30, 1915.)

1. MASTER AND SERVANT ¶155—LIABILITY FOR INJURIES—FAILURE TO WARRANT.

An employé, working on a mangle, as she stepped down from the platform on which she worked to go back of the machine, slipped on a place where a scrubwoman had just put soapy water. Though she had worked on the mangle only a few hours, it, and the floor about it, were in view of her accustomed working place, and she knew that the scrubwoman mopped the floor about twice a week, and knew also the route taken by the scrubwoman as she passed the mangle. Her attention had been directed to the machine, which was so hot that it would burn one's hand, but on leaving the machine she had nothing to do but keep away from the machine. *Held*, that the danger of slipping was so simple and obvious that it was not incumbent on the employer to warn her of the danger, and it was immaterial that she had been absorbed in her work, as she was relieved of this tension when she stepped down and away.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 310; Dec. Dig. ¶155.]

2. MASTER AND SERVANT ¶185—LIABILITY FOR INJURIES—UNSAFE "PLACE" TO WORK.

The word "place," within the rule requiring an employer to furnish a safe place of work, means the premises, or some part of the premises, where the work is done, and does not comprehend mere negligent acts of fellow servants rendering the place dangerous for the time being, as by way of some transient peril.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 335-421; Dec. Dig. ¶185.]

For other definitions, see *Words and Phrases*, First and Second Series, *Place*.]

Appeal from Circuit Court, Knox County; Von A. Huffaker, Judge.

Action by Jessie Hickman against the Standard Knitting Mills. A judgment for plaintiff was affirmed by the Court of Civil Appeals, and defendant appeals. Reversed, and motion for peremptory instructions sustained.

Maynard & Lee and Jourolmon & Welcker, all of Knoxville, for appellant. Harris & Beeler, of Knoxville, for appellee.

WILLIAMS, J. [1] Jessie Hickman, a young woman aged 18 years, was engaged in running a mangle or ironing machine in the mill of plaintiff in error, at the time she was injured. Her duties were to put unfinished underwear between heated rollers in the machine, and after a dozen garments were so placed, her duty was to go behind the machine, collect the ironed garments that had passed through, and place them where they were to be further worked on by other employés.

While engaged in feeding the garments in the machine, she stood fronting the machine on a platform, which was about 4 or 5 inches above the floor level, from which she stepped to the floor in going to the rear of the machine.

The usual place of work of the employé had been at a table, folding the finished garments for boxing, but in the same room where the mangle stood. She had been changed to the mangle at the commencement of work at 7 o'clock in the morning, before the injury at 12:45 in the afternoon. She had had no previous experience at the mangle, save a few minutes on two previous occasions. The mangle and the floor about it were, however, in view of her accustomed working place.

About twice a week a scrubwoman customarily mopped the floor of the room to remove oil and dirt; that she did so was known to the plaintiff employé, who knew also the route taken by the scrubwoman as she passed the mangle.

The plaintiff, after putting through the machine a dozen garments just after the noon hour, stepped down from the platform to go back of the machine, when she slipped on the floor at a place where the scrubwoman had just put soapy water, and received the injuries for which this suit was brought.

She testifies that no one had warned her, and that she did not look to see, nor did she know, that the water was standing where she stepped; that while the floor was being mopped by the scrubwoman plaintiff had her attention directed to the machine, which was so hot that it would burn one's hand if touched against its metal rollers. When she got off of the platform she "had nothing to do but to keep away from the machine, and was not bothered for lack of light."

The rear of the machine could have been

reached by going from plaintiff's standing place around the other end where the floor is not shown to have been wet at the time, though the usual route was the one taken by plaintiff. The scrubwoman was yet at work near the machine when plaintiff fell, and while not right at the spot, she was at plaintiff's side at that end of the mangle; she had not gone away and left the soapy water on the floor.

The theory of plaintiff for a recovery is that the place of work was unexpectedly made dangerous, and that she, without experience at that place of work, was given no warning of the dangerous situation.

The Court of Civil Appeals sustained this theory. We are asked to review its judgment and to rule that the facts made a case for a directed verdict of nonliability on the part of the employer.

In our opinion the trial judge and that court should have sustained the motion for such peremptory instructions, on the ground that the danger was so simple and obvious as that the employé could, at a glance, observe and comprehend for herself, and so obvious as that it was not incumbent on the employer to give her warning. Plaintiff knew that the floors were cleaned by mopping them with soapy water at intervals, and also the direction the colored woman took, in doing so, as the latter passed the machine in question.

In the case of *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236, 61 S. W. 53, the plaintiff employé complained of an injury caused by a hole in the floor at his working place, where he had been employed only five days. The court held that any such danger was obvious; and, denying the right to recover, said:

"It was not incumbent on the defendant to prove that the plaintiff had knowledge of a defect which was plain and obvious. * * * It does not require experience to see a hole in the floor, and as these were necessary for the drainage of the floor, it was one of the risks * * * assumed, and was so simple and obvious that experience was not an element to be considered in determining the question of liability, nor was it such as was incumbent on the defendant to instruct about."

See, also, *Brewer v. Tennessee Coal, etc., Co.*, 97 Tenn. 615, 37 S. W. 549; 3 *Labatt, Master & Servant* (2d Ed.) §§ 1000, 1144, citing *Ferguson v. Phoenix Cotton Mills*, supra; *Cudahy Packing Co. v. Marcan*, 106 Fed. 645, 45 C. C. A. 515, 54 L. R. A. 258; *Omaha Packing Co. v. Sanduski*, 155 Fed. 897, 84 C. C. A. 89, 19 L. R. A. (N. S.) 355; *Kline v. Abraham*, 178 N. Y. 377, 70 N. E. 923.

In *Thompson v. Norman Paper Co.*, 169 Mass. 416, 48 N. E. 757, it appeared that a beam on which the plaintiff employé slipped and fell was wet, and had been made more slippery by the placing thereon of soda ash, which was used for cleaning purposes. The common use of soda ash in the mill was known to the employé, but according to his

testimony he did not know it had been used in the particular place. The negligence averred was in the failure to warn the plaintiff that the soda ash had been so used. The court held that the case should have been taken from the jury, saying:

"Plainly it would have been unreasonable to require his employers to have some one at hand to notify him that the beam was wet, and that soda ash had been used. * * * The superintendent was warranted in assuming that the plaintiff would use his eyes, and in supposing that he would know that soda ash might have been employed."

See, also, *Kleinst v. Kunhardt*, 160 Mass. 230, 35 N. E. 458.

In accord with the above is the case of *Gouldie v. Foster*, 202 Mass. 226, 88 N. E. 663, applying the rule to a laundry floor made slippery by an accumulation of starch saturated with water. The plaintiff was held to have assumed the risk of a slippery floor.

In *Hattaway v. Atlanta Steel, etc., Co.*, 155 Ind. 507, 58 N. E. 718, a floor was made slippery by oil being spilled thereon, over which sawdust was thrown to absorb the oil, and the plaintiff knew of the practice. Plaintiff was injured by slipping thereon while using the floor in the prosecution of his work; but the court held the employer not liable, on the ground that the condition was fully exposed to view and the risk an obvious one.

The plaintiff's attitude for a recovery is not changed by reason of any absorption in or a diverting of her attention to any dangers about her. The danger was that of having a hand burned by or caught between the rollers of the mangle, and that absorbed the plaintiff only while she stood placing the garments between the rollers. She was re-

lieved of tension when she stepped down and away. As plaintiff herself phrased it: "I had nothing to do but to keep away from the machine." She was just leaving the place that was ordinarily dangerous, and she was not injured by the rolls of the mangle.

Moreover, it would seem that if such were not the normal (or, to reverse the phrase, not the fairly fixed abnormal) condition of the floor, but that the slipperiness was caused by the neglect of the scrubwoman, this was the fault of a fellow servant, and the plaintiff cannot recover. *Murphy v. American Rubber Co.*, 159 Mass. 266, 34 N. E. 268; *Omaha Packing Co. v. Sanduski*, supra.

[2] The defect was no more a structural one than would have been a negligent leaving on the floor of her mop by the scrubwoman. The theory of plaintiff is based upon a misconception or confusion of terms. The word "place," within the meaning of the rule that requires an employer to furnish a same place of work, means the premises, or some part of the premises, where the work is done, and does not comprehend mere negligent acts of the fellow servants that render the place dangerous for the time being, as, for example, by way of some transient peril. *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460; *Herman v. Port Blakely Mill Co.* (D. C.) 71 Fed. 853; *Haskell, etc., Co. v. Przedziankowski*, 170 Ind. 1, 83 N. E. 626, 14 L. R. A. (N. S.) 972, 127 Am. St. Rep. 352; 3 Words and Phrases, Second Series, 1038.

For failure to sustain the motion for peremptory instructions interposed by the defendant, the judgment of the Court of Civil Appeals is reversed. Judgment here sustaining that motion.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. MAYFIELD WATER & LIGHT CO.

(Court of Appeals of Kentucky. Oct. 27, 1915.)

CONTRIBUTION —5—JOINT TORT-FEASORS—RIGHT TO CONTRIBUTION.

Through the negligence of an electric company in allowing the insulation to wear off of one of its wires, and that of a telephone company in stringing its wires too low, a connection between the light wire and the telephone wire was formed, resulting in the death of a telephone lineman, whose administratrix recovered from the light company. *Held*, that the negligence of both was concurrent, and the light company could not enforce contribution against the telephone company.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 6-9; Dec. Dig. —5.]

Appeal from Circuit Court, Graves County.

Action by the Mayfield Water & Light Company against the Cumberland Telephone & Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed.

Wheeler & Hughes, of Paducah, and Brutus J. Clay, of Atlanta, Ga., for appellant. Stanfield & Stanfield, of Mayfield, for appellee.

TURNER, J. In May, 1912, Lemuel Magness, an employé of the Cumberland Telephone & Telegraph Company, was killed in Mayfield, Ky., by an electric current transmitted to the wire of the telephone company from the wires of the Mayfield Water & Light Company; the latter being a corporation engaged in furnishing electricity to the citizens of that place. His personal representative instituted an action against the two companies jointly, wherein it was alleged that he came to his death by reason of certain joint concurrent negligence upon the part of said two corporations. The defendants in that action filed separate answers, and, the issues being completed, a trial was had which resulted in a directed verdict for the telephone company and a judgment and verdict for the plaintiff against the water and light company. The plaintiff therein appealed from the action of the court in directing a verdict for the telephone company, and the judgment was affirmed upon the ground that Magness had, as an employé of the telephone company, assumed the risk of which he had full notice. *Magness' Administratrix v. Cumberland Tel. & Tel. Co.*, 156 Ky. 330, 160 S. W. 1061.

The water and light company accepted the verdict and judgment in the circuit court against it and satisfied the same, and thereafter brought this action against the telephone company for indemnity by reason of the payment thereof.

The substance of the petition is that for many years prior to 1912 the plaintiff had maintained its poles and wires on Seventh street, in Mayfield, and that some time before 1912 the defendant had negligently and carelessly strung one of its telephone wires leading into the residence of one Stephenson in

such close and dangerous proximity to its heavily charged electric wires as to cause said telephone wire to come in contact therewith and thereby transmit the current of electricity through the telephone wire which resulted in Magness' death, and that said negligent act of the telephone company was the direct, proximate, and efficient cause of Magness' death.

In the original action the charge of negligence against the water and light company was that at the point where they came in contact with the telephone wire the electric wires were not sufficiently or at all insulated, and that the insulation thereon was old and worn off, and that it had negligently failed to repair the same. The judgment of the circuit court in the damage action against the water and light company must be deemed conclusive of its negligence in this respect; so that we have a plaintiff confessing its negligence which contributed to bring about the death of a citizen demanding indemnity of a defendant whose concurrent negligence also contributed to that event. The only question necessary to determine upon this appeal is whether the demurrer to the plaintiff's petition should have been sustained.

We have here one party conclusively shown to have been negligent, by the judgment of the court, in failing to have its electric wires insulated, and another party shown to have been negligent in placing its telephone wire in dangerous proximity to the heavily charged electric wires, and it is apparent that their concurrent acts of negligence, each separate and distinct from the other, brought about the death of Magness. If the electric wires had been properly insulated, the contact of the telephone wire with them would not have transmitted the electric current, and Magness would not have been killed. On the other hand, if the telephone wire had not been carelessly strung so near to the electric wires that it might come in contact with them, Magness would not have been killed. The separate acts of negligence of neither of the defendants would have brought about this result, but their two separate and distinct acts of negligence, concurring one with the other, at the time and place, did bring it about.

The appellee, of course, recognizes the general rule that there can be no indemnity between tort-feasors, but bases its right of recovery upon an exception to that rule which has been recognized in this state. The case of *Blocker v. City of Owensboro*, etc., 129 Ky. 75, 110 S. W. 369, 33 Ky. Law Rep. 478, was where in the erection of a building certain obstructions were permitted to remain on the sidewalk by the owner of the building which resulted in an injury to a pedestrian, and it was held that, although the person injured by the obstruction in the street might recover against the city alone, or against both

the city and the person who placed the obstruction there, yet as between the wrongdoers the city might, after satisfying the judgment, be entitled to indemnity from the person who placed the obstruction in the street.

In *City of Georgetown v. Groff*, 136 Ky. 662, 124 S. W. 888, the same principle is laid down.

In *Pullman Company v. C., N. O. & T. P. Ry. Co.*, 147 Ky. 498, 144 S. W. 385, a brakeman of the railway company was injured by reason of a defective brake staff on a car which had been constructed for it by the Pullman Company, the defective brake staff being painted over. The brakeman recovered a judgment against the railway company, and it brought suit, after paying the judgment, against the Pullman Company for indemnity; the court there permitting a recovery because the Pullman Company was primarily negligent and created the danger and painted over the defective brake staff, so that the defect could not be easily discovered by inspection.

In all of these cases it will be observed that the primary and efficient cause of the injury was the negligence of one party, and that the other party was held liable to the injured party for negligence of a lesser degree and of a different character. In those cases there was no concurrent negligence of equal degree, and the distinction between them and cases of this character was pointed out by the court in the last-named case, wherein it said:

"This was not a case of concurrent negligence by two wrongdoers. The negligence of the railroad company consisted simply in its failure to discover the prior negligence of the Pullman Company. The railroad company did not create the danger; it simply used the car for the purpose for which it was intended. In *Union Stockyards Company v. C., B. & Q. R. Co.*, 196 U. S. 217 [25 Sup. Ct. 228, 49 L. Ed. 453, 2 Ann. Cas. 525], neither company had created the danger. Each was alike negligent in inspection. In that case it could not be said that the defendant's negligence was primarily the cause of the trouble. The same is true of the other cases relied on by appellant."

The facts of this case bring it within the rule laid down in *City of Louisville v. Louisville Ry. Co.*, 156 Ky. 141, 160 S. W. 771, 49 L. R. A. (N. S.) 350. That was a case in which a man driving along a street of Louisville in a wagon ran into a hole in the street and was thrown out of the wagon onto an adjacent railway track where a street car ran over and killed him. A judgment was entered for damages against the city, and it instituted its action against the railway company for contribution upon the ground that they were each equally negligent, and their concurrent negligence had caused the man's death. After a review of the authorities, this court, in denying a recovery to the city, said:

"The negligent act of each was the violation of a duty it owed to the public. Operating concurrently, the two negligent acts brought about the result. They were each equally remiss in the performance of their duties to the public.

That being true, when either appeals to the public, through its courts, for redress against the other, it will be denied, and they will be left where they are found. The machinery of the courts will not be put in motion to relieve one wrongdoer from the consequences of his wrongful act against another wrongdoer equally guilty. No citizen has a right to invoke the aid of the courts for redress when it is necessary for him in stating his complaint to say that he and another, by reason of a breach of public duty upon the part of each of them, have caused injury or death to another citizen; and it matters not that their several breaches were separate and distinct from each other, and that neither participated in or was connected with the breach of the other, if the two breaches concurred to bring about the result."

The recent case of *Owensboro Ry. Co. v. L. H. & St. L. Ry. Co.*, 165 Ky. 683, 178 S. W. 1043, was an action by the railroad company against the city railway company for indemnity or contribution because of a judgment rendered against the railroad company in favor of one who had been injured by a live wire which a train of the railroad company had run into and caused to fall. In the action for the injury the negligence alleged against the street car company was that it allowed this wire to swing so low as to render it unsafe and dangerous, and the negligence alleged against the railroad company was that it ran its train against this live wire and broke it when it knew it was sagging low and in a dangerous condition. The court in that case went fully into the authorities on the subject, and held that their negligence was concurrent, and that there could be no contribution between them, following the rule laid down in *City of Louisville v. Louisville Ry. Co.*, supra.

In the case at bar it cannot be said that the primary negligence or the efficient cause is chargeable more to one than to the other. Their separate negligent acts concurred to bring about the death of Magness, and without the negligence of either the negligence of the other would not have had that result.

Under such circumstances there can be no recovery, and the demurrer to the petition should have been sustained.

The judgment is reversed for further proceedings consistent herewith.

RUTLEDGE et al. v. WIGGINGTON et al.
(Court of Appeals of Kentucky. Oct. 26, 1915.)

1. WILLS §70—VALIDITY—LAW GOVERNING.

The validity of a will, as to personal property, is determined by the law of the testator's domicile at the time of his death, and, as to real property, by the law of the jurisdiction wherein it is situated.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 184-186; Dec. Dig. §70.]

2. WILLS §115, 132—VALIDITY—ATTESTATION.

Under Ky. St. 1900, § 4828, providing that, if a will is not wholly written by the testator, the subscription shall be made, or the will acknowledged, by him in the presence of at least

two credible witnesses, who shall subscribe the will with their names in the presence of the testator, a will wholly in the handwriting of the testatrix was valid, while a will written by some one else and attested by only one witness was not valid.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 280-283, 341; Dec. Dig. ¶¶ 115, 132.]

Appeal from Circuit Court, Bullitt County. Proceeding between Wylie B. Rutledge and another and E. Z. Wiggington and others for the probate of a will. From a judgment admitting one of two wills to probate, Wylie B. Rutledge and another appeal. Affirmed.

T. C. Carroll, of Shepherdsville, for appellants. J. R. Zimmerman, of Shepherdsville, for appellees.

CLAY, C. Georgia A. Wiggington, a resident of Bullitt county, Ky., died on December 27, 1911. There survived her two sons, E. Z. Wiggington, J. L. Wiggington, one daughter, Cora Oliver, and two grandchildren, Wylie B. Rutledge and Marguerite Rutledge, children of Mary Rutledge, formerly Mary Wiggington, deceased.

On January 21, 1909, Georgia A. Wiggington, while temporarily residing in the state of Tennessee, wrote a holographic will. On November 26, 1911, she had prepared another will, which she signed in the presence of one witness only. The two wills in question were offered for probate in the Bullitt county court, but both were rejected. On appeal to the Bullitt circuit court, the will of January 21, 1909, was adjudged to be the last will and testament of the testatrix and ordered to be probated. The infant defendants, Wylie B. Rutledge and Marguerite Rutledge, appeal.

While there is some evidence that the testatrix was a resident of Tennessee, the weight of the evidence is to the effect that, while she would occasionally make visits to her grandchildren, who were residents of Tennessee, she maintained her permanent residence or domicile in Bullitt county. On this issue of fact we see no reason to disturb the finding of the circuit court.

[1] The validity of a will, as to personal property, is determined by the law of the testator's domicile at the time of his death (Varner v. Bevil, 17 Ala. 286; Murdoch v. Murdoch, 81 Conn. 681, 72 Atl. 290, 129 Am. St. Rep. 231; Knight v. Wheedon, 104 Ga. 309, 30 S. E. 794; Dibble v. Winter, 247 Ill. 243, 93 N. E. 145; Davis v. Upson, 209 Ill. 206, 70 N. E. 602; Yore v. Cook, 67 Ill. App. 586; Evansville Ice, etc., Co. v. Winsor, 148 Ind. 682, 48 N. E. 592; Patterson v. Ransom, 55 Ind. 402; Hussey v. Sargent, 116 Ky. 53, 75 S. W. 211, 25 Ky. Law Rep. 315), and, as to real property, by the law of the jurisdiction wherein it is situated (Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13; Doe v. Pickett, 51 Ala. 584; Varner v. Bevil, supra; Murdoch v. Murdoch, supra; Readman v. Fergu-

son, 13 App. Cas. 60; Frazier v. Boggs, 37 Fla. 307, 20 South. 245; Crolley v. Clark, 20 Fla. 849; Knight v. Wheedon, supra; Dibble v. Winter, supra; Amrine v. Hamer, 240 Ill. 572, 88 N. E. 1036; Evansville Ice, etc., Co. v. Winsor, supra; Lucas v. Tucker, 17 Ind. 41; Calloway v. Doe, 1 Blackf. 372; Lynch v. Miller, 54 Iowa, 516, 6 N. W. 740; Williams v. Jones, 14 Bush, 418). Here the domicile of the testatrix and the real estate are located in this state.

[2] Under our statute a will, to be valid, must be wholly in the handwriting of the testator, or it must be subscribed or acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in his presence. Kentucky Statutes 1909, § 4828. The will of January 21, 1909, is wholly in the handwriting of the testatrix, and is therefore valid under the statute. The will of November 26, 1911, written by some one else, is attested by only one witness, and is not valid.

It follows that the trial court did not err in adjudging the former will to be the last will and testament of the testatrix and in ordering same to probate.

Judgment affirmed.

TUSSEY et al. v. HALE et al.

(Court of Appeals of Kentucky. Oct. 26, 1915.)

EJECTMENT ¶86—BURDEN OF PROOF—TITLE.

The plaintiffs, in an action of ejectment, who claimed under a patent to a boundary of land containing 1,500 acres, which recited, "There being 1,000 acres of a prior claim in this survey," could not recover without showing that defendants were occupying land within the exterior lines of the patent, and without the exclusion; there being no merit in the contention that the words quoted did not amount to an exclusion.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 238-245; Dec. Dig. ¶¶ 86.]

Appeal from Circuit Court, Floyd County.

Action by William Tussey and others against George Hale and others. From a judgment on a directed verdict for defendants, plaintiffs appeal. Affirmed.

C. B. Wheeler, of Ashland, for appellants. Smith & Combs, of Hindman, and James Goble, of Prestonsburg, for appellees.

NUNN, J. In March, 1843, a patent was issued to one Jonathan Tussey, granting to him a certain boundary of land in Floyd county, said to contain 1,500 acres. The boundary was set forth in detail, but recited, "There being 1,000 acres of a prior claim in this survey." The appellants are the children and heirs at law of Jonathan Craig Tussey. They testify that he went by the name of Craig Tussey, but signed his name Jonathan Tussey. They sued in ejectment to recover the land in question, claiming that their father was the patentee, and that he

died intestate as the owner of same, and that it descended to them, and that they are now the owners of it. After hearing the evidence in their behalf the court peremptorily instructed the jury to find for the defendants, and the plaintiffs appeal. The ruling of the court is justified by the record.

It is clear that the patent was issued to Jonathan Tussey, the grandfather, instead of Jonathan Craig Tussey, the father, of appellants. There is nothing in the pleadings or proof to show transfer or descent of the land to Craig Tussey.

While the outside boundary of this survey called for 1,500 acres, yet it recognizes the existence of a prior claim within the boundary amounting to 1,000 acres. Appellants, in order to dispossess the appellees, must have shown that the appellees were occupying the land within the exterior lines of the Tussey patent and without the exclusion. The proof failed to bring appellants' case within either of these requirements, and particularly is this true with reference to the exclusions.

We see no merit in appellants' contention that the words quoted from the patent do not amount to an exclusion. *Madison v. Owens*, Litt. Sel. Cas. 281; *Kirk v. Williamson*, 82 Ky. 161; *Guthrie v. Lewis*, 1 T. B. Mon. 142; *Le Moyne v. Anderson*, 123 Ky. 584, 96 S. W. 843, 29 Ky. Law Rep. 1017.

The judgment is affirmed.

SWANN'S ADM'X v. CINCINNATI, N. O. & T. P. RY. CO.

(Court of Appeals of Kentucky. Oct. 26, 1915.)

APPEAL AND ERROR — 1099 — REVIEW — SUBSEQUENT APPEALS — EVIDENCE.

Where, in an action in damages by an administratrix for alleged wrongful death of decedent, evidence on the new trial after appeal is substantially the same as on the first trial, the court will not review an order directing a verdict in accordance with the decision on the first appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.]

Appeal from Circuit Court, Boyle County. Action by M. B. Swann's administratrix against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for defendant on directed verdict, plaintiff appeals. Affirmed.

See, also, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915C, 27; 149 Ky. 141, 147 S. W. 889.

Robt. Harding, of Danville, O'Rear & Williams, of Frankfort, and John W. Rawlings and Emmet Puryear, both of Danville, for appellant. Chas. H. Rodes and Nelson D. Rodes, both of Danville, and John Galvin, of Cincinnati, Ohio, for appellee.

HANNAH, J. M. B. Swann, a construction foreman in the employment of the Cin-

cinnati, New Orleans & Texas Pacific Railway Company, was struck and killed by the Carolina Special, a fast passenger train operated by the railway company, on February 9, 1911, at Williamstown. An action to recover damages for the alleged negligent killing of Swann was brought by his administratrix in the Boyle circuit court, and the judgment therein recovered was reversed by this court, upon the ground that a verdict should have been directed for defendant. *C., N. O. & T. P. Ry. Co. v. Swann's Administratrix*, 149 Ky. 141, 147 S. W. 889.

That action on its remand to the trial court was dismissed without prejudice, and another was brought seeking a recovery of damages for the death of Swann, in virtue of the provision of the act of Congress known as the Employers' Liability Act. Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665). A judgment therein recovered was reversed by this court, and the case remanded with directions that if the evidence upon another trial was substantially the same as that introduced on the previous trials, the jury should be peremptorily instructed to find for the defendant. *C., N. O. & T. P. Ry. Co. v. Swann's Administratrix*, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915C, 27.

The facts are fully stated in the former opinions. It is unnecessary to review them here in detail. For the purposes of this opinion, it is sufficient to say that Swann was superintending a force of men engaged in digging a pit for a water column in the yards of the railway company at Williamstown, and while performing this service was struck and killed by the train above mentioned. A recovery was denied upon the ground that it was his duty to keep himself advised of the time of the arrival of trains, so that he might have the track clear of tools and materials used in the work he was superintending, and that those in charge of the train which struck him owed him no duty of reducing the speed of the train, or of having it under control, or of giving warning of its approach, or of keeping a lookout for him.

Upon the return of the case, it was again tried, and at the conclusion of all the evidence the trial court directed a verdict for the defendant. The plaintiff appeals.

Appellant contends that the evidence introduced on this last trial presented the case in a different light from that of the former trials, in that it is claimed that the testimony on the last trial showed that it was not the duty of Swann to keep advised of the time of the arrival of trains. We are unable to agree with this contention. As we view it, the evidence is substantially the same as on the previous trials, and shows beyond cavil that such was Swann's duty, and that he belonged to that class of employees to whom those operating a train owe no duty until the discovery of their peril.

We have been unable to find any substantial change in the evidence in this or in any other respect; and such being the fact, under the opinion of the court on the former appeal, the trial court was right in directing the verdict for the defendant.

Judgment affirmed.

ELSEY v. PEOPLE'S BANK OF BARDWELL.

(Court of Appeals of Kentucky. Oct. 28, 1915.)

1. PRINCIPAL AND SURETY — DISCHARGE OF SURETY—SURRENDER OF COLLATERAL SECURITY.

A surety on a note was discharged, where the holder without the surety's consent surrendered to the maker collateral held by it as security for such note, regardless of the value of the collateral.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 244-268; Dec. Dig. § 115.]

2. PRINCIPAL AND SURETY — DISCHARGE OF SURETY—SURRENDER OF COLLATERAL SECURITY.

Defendant was a surety on the note of his brother, held by a bank of which another brother was director and president. Defendant was also a director in the bank, and for a time clerk of the directors' meetings, and the maker of the note was also for a time a director. The cashier of the bank, without defendant's consent, surrendered to the maker of the note certain collateral held by the bank as security for the note. *Held*, that the relationship of defendant or his brothers to the bank could not revive his liability, after he had been once released by the surrender of the collateral, even though by the exercise of ordinary care he could have ascertained that the collateral had been surrendered.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 244-268; Dec. Dig. § 115.]

3. TRIAL — INSTRUCTIONS—CONFORMITY TO EVIDENCE.

Instructions which there was no proof to sustain should not have been given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 598-612; Dec. Dig. § 252.]

4. PRINCIPAL AND SURETY — DISCHARGE OF SURETY—SURRENDER OF COLLATERAL SECURITY.

That under the express provisions of Ky. St. § 581, a bank had no authority to take its own stock as collateral security for a loan did not prevent its surrender of such collateral security to the maker of a note held by it from discharging the surety on the note.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 244-268; Dec. Dig. § 115.]

Appeal from Circuit Court, Carlisle County.

Action by the People's Bank of Bardwell against J. L. Elsey and another. From a judgment for plaintiff, the defendant named appeals. Reversed.

John B. Kane, of Bardwell, for appellant. T. M. Collins, of Bardwell, and Robbins & Robbins, of Mayfield, for appellee.

MILLER, C. J. In 1906 A. G. Elsey bought five shares of the capital stock of the People's Bank of Bardwell for \$725. For the

purpose of raising the money to pay for the stock, A. G. Elsey executed his note to the People's Bank for \$750, and attached the certificate for the five shares to his note as collateral security therefor, and had his brother, the appellant, J. L. Elsey, sign the note as surety. J. L. Elsey refused to sign the note unless his brother would pledge the five shares to the bank as collateral security on the note, and that was done. The loan was made by Bodkin, the president of the bank. The note was renewed several times by the same parties, and reduced from time to time until the final renewal on July 11, 1907, when the note amounted to \$540. It was again renewed in the same way, for 12 months, and the five shares of bank stock, which had been attached to the previous renewals, were again attached to this last renewal, as collateral security.

Some time during the year 1909 A. G. Elsey, without the knowledge of J. L. Elsey, persuaded Young, the cashier of the People's Bank, to surrender to A. G. Elsey the stock certificate, thus leaving the note with no security except J. L. Elsey, and depriving him of the protection of the bank stock as collateral. A. G. Elsey pledged the stock certificate to a bank at Cairo, Ill., as collateral for \$750, which he borrowed from that bank. When A. G. Elsey's note to the Cairo bank matured, he sold the bank stock to another brother, A. F. Elsey, and applied the proceeds to the payment of his note for \$750 due the Cairo bank. During this time the People's Bank was indebted to the Alexander County National Bank of Cairo, and had pledged the note of A. G. Elsey and J. L. Elsey for \$540, above mentioned, as collateral security for its indebtedness to the Alexander County National Bank.

When the note was returned by the latter bank to the People's Bank, and J. L. Elsey was called upon to renew it, he found that the stock certificate had been surrendered by the People's Bank three years or more before, and he refused to renew the note for that reason. As a consequence of that refusal, this suit on the note was filed on November 8, 1913, by the People's Bank against A. G. Elsey and J. L. Elsey. Six months later, on May 11, 1914, the People's Bank was declared insolvent, and was placed in the hands of the state banking commissioner, who proceeded to liquidate its affairs. By order of court he was made a party plaintiff in this action.

A. G. Elsey did not answer; but, by his separate answer, J. L. Elsey alleged his suretyship upon the note sued on, that he had been released from liability thereon by reason of the plaintiff's surrender of the stock certificate, which it held as collateral security to secure the payment of the note, without his knowledge or consent, and that the bank stock was worth \$165 per share.

The first paragraph of the reply traversed the allegations of the answer, except the allegation of suretyship upon the part of J. L. Elsey. The second paragraph of the reply alleged that J. L. Elsey bought the stock from A. G. Elsey after he had received it from the bank, and sold it to another brother, A. F. Elsey, that J. L. Elsey applied the proceeds from the sale to the payment of the joint liabilities of himself and his co-defendant, A. G. Elsey, and that he thereby received the full benefit of the value of the five shares of stock. The third paragraph of the reply alleged that A. G. Elsey was a stockholder in the People's Bank, and that, after the note had been signed, A. G. Elsey attached the stock to the note; that this arrangement was made between the defendants, A. G. Elsey and J. L. Elsey, without the plaintiff requiring the same to be done; and that, under section 581 of the Kentucky Statutes, the plaintiff was without authority to take its capital stock as collateral security for the loan, evidenced by the note sued on. By a fourth paragraph of the reply the plaintiff alleged that it was insolvent at the time the note was executed and delivered to it in 1906; that on account of bad loans and mismanagement the value of its stock was greatly impaired, and that it was virtually worthless; that the bank was placed in the hands of the banking commissioner, as above recited; that for the purpose of paying its depositors, and other liabilities, it would be necessary to enforce the statutory double liability of the stockholders; and that by reason of these facts the stock was worthless at the time it was pledged to the plaintiff.

A general demurrer to the second paragraph of the reply was overruled, but a like demurrer to the third and fourth paragraphs was sustained.

By an amended reply, the plaintiff enlarged the third paragraph of its original reply by alleging that J. L. Elsey was a director in the People's Bank at the time A. G. Elsey sold and transferred the bank stock to A. F. Elsey on the books of the bank, and J. L. Elsey knew, or by the use of ordinary care could have known, that A. G. Elsey was about to have said stock transferred to A. F. Elsey, who was then the president of the plaintiff, and that J. L. Elsey assented to the same, and that the transfer was made by and through the collusion of the defendants A. G. Elsey, J. L. Elsey, and A. F. Elsey, to defraud the plaintiff. It further amended the fourth paragraph of the original reply, by alleging that J. L. Elsey was a director, and A. F. Elsey was president, of the plaintiff bank at the time the note sued on was executed; that the defendant J. L. Elsey knew, or by the exercise of ordinary diligence could have known, that A. G. Elsey was about to have said stock transferred on the books of the bank to A. F. Elsey; and that, when the transfer was made, J. L. El-

sey was a stockholder and director of the plaintiff, and assented thereto.

The allegations of the amended reply were controverted of record. A trial with the aid of a jury resulted in a verdict and judgment for the bank, and J. L. Elsey appeals.

[1] 1. Appellant first insists that his motion for a directed verdict in his favor should have been sustained, because there was no proof even tending to show that he had ever consented to the surrender of the bank stock, but, on the contrary, that the only proof upon that subject was to the effect that he not only did not consent to the surrender of the bank stock, but disavowed it, and refused to pay the note, and claimed his release as surety thereon immediately upon learning of the surrender of the stock. Young, the cashier and manager of the bank, testified that in 1909 he turned over the bank stock to A. G. Elsey, at his request, and that J. L. Elsey was not present. The only other proof relating to this specific transaction is that of J. L. Elsey, who swears that he did not know the bank stock had been surrendered until the note was presented to him for renewal, and that he declined to renew it, and claimed his release because the collateral had been surrendered.

The question as to what act of the creditor will discharge the surety was carefully and ably considered by Chief Justice Robertson in the early case of *Sneed's Ex'r v. White*, 3 J. J. Marsh. 525, 20 Am. Dec. 175, where, speaking in general terms, he stated the rule as follows:

"Any act of the creditor, which entitles the principal obligor to indulgence, after the debt shall have become due, according to the terms of the original contract, will, in equity, discharge a surety who has not consented to the indulgence; and his consent cannot be inferred from his silence, or neutrality, but must be evidenced by some positive act. This principle of equity is undeniably established by abundant authorities; and it is just and rational. The creditor should not be allowed, by any act of his, or by any new contract with the principal debtor, without the concurrence of his surety, to modify the original contract, affect the rights, or change the attitudes and relations, of the parties."

In that case *Sneed* had caused an execution to be levied upon the property of *Pearson*, the principal debtor, and by *Sneed's* order the sheriff stayed the execution for a few days, without the consent of *White*, who was *Pearson's* surety. In applying the general rule above set forth to the facts of that case, Chief Justice Robertson further said:

"A stay of execution by the creditor, after a levy of it on the property of the principal debtor, will exonerate his surety, if the lien resulting from a levy be extinguished and the surety did not approve the indulgence. This is in perfect accord with the general principle which has been defined; for, by releasing the property levied on from the lien, the creditor increases the risk of the surety. It is not material whether the property so exempted was sufficient to discharge the whole debt or not. It is the fact that the creditor interfered, and thereby increased the risk of the surety, and not

the extent of injury resulting from his act, which will relieve the surety from his liability in equity. To make the right to relief depend on the degree of injury would, in the language of Lord Loughborough, in *Rees v. Barrington*, 'lead to a vast variety of speculations upon which no sound principle could be built.'

The principle announced in *Sneed's Ex'r v. White*, supra, has been approved and followed by this court in a long and unbroken line of decisions. See *Sparks v. Hall*, 4 J. J. Marsh. 36; *Ross v. Clore*, 3 Dana, 189; *Tudor v. Goodloe*, 1 B. Mon. 323; *Dills v. Cecil*, 4 Bush, 579; *Preston v. Henning*, 6 Bush, 556; *Calloway v. Snapp*, 78 Ky. 563; *Struss v. Masonic Savings Bank*, 89 Ky. 61, 11 S. W. 769, 12 S. W. 266, 11 Ky. Law. Rep. 333; *Gano v. Farmers' Bank*, 103 Ky. 508, 45 S. W. 519, 20 Ky. Law. Rep. 197, 82 Am. St. Rep. 596; *Mayes v. Lane*, 116 Ky. 566, 76 S. W. 399, 25 Ky. Law. Rep. 824; *Broughton v. Saylor*, 129 Ky. 185, 110 S. W. 866, 33 Ky. Law. Rep. 611.

In *Struss v. Masonic Savings Bank*, supra, the principal debtor procured the bank to surrender a note upon which his brother was surety, by giving a mortgage to the bank upon property which he fraudulently represented was free from incumbrances, when in reality it was heavily mortgaged. After the discovery of the fraud by the bank, it waited five months, and then surrendered the note, released the mortgage, and sued to cancel the fraudulent transaction and hold the surety for the debt. In holding that the surety was released, Judge Pryor, in speaking for the court, said:

"The question arising in such a state of case is not whether the surety in fact has been injured, but has the laches of the bank been such as would have deprived the surety of his right to protect himself, if such circumstances existed as would have enabled him to do so? It must be recollected that the doctrine already announced, where the fraud or forgery has been committed by the principal, without any participation in the transaction by the surety, the latter is not released, is restricted by the further rule that, if the transaction between the creditor and the principal debtor is such that causes loss to the surety, such as surrendering a security to which he is entitled, the surety is nevertheless released. The surety stands upon the letter of his contract, and the chancellor will not start out in pursuit of equities that will relieve the creditor from an injudicious agreement in order to hold the surety bond for the debt. A mistaken judgment by the bank caused a new agreement in this case to be made by its chief officers, by which the period for payment of a debt then due was extended for five years, and a mortgage on realty taken to secure the payment, not only of the debt upon which the appellant was the surety, but of unsecured paper owing by the principal debtor to the bank. He was then on the eve of insolvency, and notified the bank of his purpose to make an assignment on the next day. The bank, after being advised, accepted a conveyance of the debtor's own land that it knew was constructively fraudulent, with a view of securing, not only the debt in controversy, but other debts on which there was no security, and after knowledge of the fraud, and after lulling the surety into perfect security, so far as the present indebtedness is concerned, for near five months, then seeks the aid of a court of equity to relieve it from the fraud of the principal debt-

or. The opportunity of the surety to secure himself has been lost, and it is not necessary to inquire under such circumstances whether the surety could in fact have obtained indemnity."

The rule above announced is carried even further by some of the states, including Kentucky, Pennsylvania, and Delaware, which hold that a general deposit of the principal in a bank holding his note, with an indorser or surety thereon, is a means of satisfaction or a security in its hands, which the creditor bank must hold and apply to the payment of the note, on pain of releasing the surety or indorser, thus holding that to permit the withdrawal of the funds of the principal on general deposit at the maturity of the note is in practical effect the same thing as surrendering to the principal a collateral security for the debt, and effects a discharge of the surety. *Bank of Taylorsville v. Hardesty*, 91 S. W. 729, 28 Ky. Law. Rep. 1285; *Pursifull v. Pineville Banking Co.* 97 Ky. 154, 30 S. W. 203, 17 Ky. Law. Rep. 38, 53 Am. St. Rep. 409; *Faulkner v. Cumberland Valley Bank*, 14 Ky. Law. Rep. 923; *Fordsville Banking Co. v. Thompson*, 82 S. W. 251, 26 Ky. Law. Rep. 534; *Burgess v. Deposit Bank of Sadleville*, 97 S. W. 761, 30 Ky. Law. Rep. 178; *Planters' State Bank v. Schlamp*, 124 Ky. 295, 99 S. W. 216.

2. In some jurisdictions, however, where the creditor surrenders possession of a collateral security, he must account for it, and the surety is released *pro tanto*, only. But in this jurisdiction the surety is released from all liability, it being immaterial whether the property was sufficient to discharge the whole debt or not. It is the fact that the creditor interfered, and thereby increased the risk of the surety, and deprived him of his right of subrogation, and not the extent of injury resulting from his act, that relieves the surety. This is the effect of the Kentucky cases, beginning with *Sneed's Ex'r v. White*, supra. In *Royster v. Heck*, 14 Ky. Law. Rep. 267, before the Superior Court, the bank released to Royster, the principal debtor, certain of his property, "more than enough in value to pay off and discharge in full all of his liabilities," upon which property it had a lien, in consideration of Royster's conveying to the bank certain other property. The court said:

"Did the contract release Heck as surety on the notes? Of this there can be no question. The bank had a lien upon the land released to Royster, and a creditor is not entitled to relinquish any hold which he has actually acquired on the property of the principal, which might have been made effectual for the payment of the debt, nor must he deal with the debtor or the security which he holds upon the debtor's property to the prejudice of the surety, unless he intends to release him from further liability. There is no better settled principle of law than that, when two persons are respectively liable to the creditor for the same debt, one as principal and the other as surety, an absolute release of the principal releases the surety. In many of the states the surety is released *pro tanto* or entirely, according to the value of the security released; but in this state any

agreement or active interference by an obligee, whereby the surety may [be] injured, releases him absolutely, and it is not material whether the property so exempted was sufficient to discharge the whole debt or not. This was held in *Sneed's Ex'r v. White*, 3 J. J. Marsh. 525 [20 Am. Dec. 175], and has been followed by the Court of Appeals and this court since that time."

A petition for a rehearing having been filed, calling the court's attention to the fact that it had misquoted the record in saying that the surrendered property was more than sufficient to pay the debt, Judge Barbour delivered the following response:

"The court, in its former opinion, did not quote the answer correctly in saying that it was there alleged that the property surrendered by the bank to Royster was sufficient to pay the debt. That, however, is not material. The answer does allege that, by the terms of the agreement, Royster himself and his property were released and discharged from liability on the bank debt. It matters not what amount or property was released, as was held by the Court of Appeals in the case cited in the opinion. Either the discharge of Royster or any part of his property from liability released the surety. Petition overruled."

The apparent inconsistency in some of the expressions of this court, which say the surety is released where the creditor releases property of the principal "sufficient in value to pay the debt," or some equivalent expression which might be construed to mean that the surety would be released pro tanto only in case the released property was of less value than the debt, are, in reality, strictly in line with the rule above stated, when read in connection with the pleadings in those cases. Since the surety would be released in either case, whether the released property was sufficient or insufficient to pay the debt, the pleader would naturally use the broader term relating to the released property; and the court, in discussing the case, would follow the language of the answer. But in every case it was held that the release was a full, and not merely a pro tanto, release of the surety. It appears, therefore, that, J. L. Elsey's position as surety having been changed without his consent, he was relieved of all liability upon the note sued on.

[2] Plaintiff insists, however, that the general rule above announced should not be applied in this case, because appellant was a director in the People's Bank from 1908 until its close in May, 1914, that during most of that time he was clerk of the directors' meetings, that A. F. Elsey was director and president of the bank from 1908 to its close, and that A. G. Elsey was a director in the bank from July, 1907, to July, 1908. In view, however, of the facts as above stated, we do not see how the relationship of J. L. Elsey, or his brothers, to the bank, could revive the liability of J. L. Elsey after he had been once released by the surrender of the collateral without his knowledge or consent. It may have been true that, by the exercise of ordi-

nary care, J. L. Elsey could have ascertained that the collateral had been surrendered; but it was the surrender of the collateral by Young, without J. L. Elsey's knowledge or consent, that operated to release him. Upon the evidence before us, therefore, the appellant's motion for a peremptory instruction should have been sustained.

The second instruction directed the jury, in case it believed that the five shares of bank stock had been surrendered by the bank without the knowledge or consent of J. L. Elsey, that it should credit J. L. Elsey's liability on the note sued on with the actual value of the stock at the time of its surrender. Appellee would sustain the instruction upon the idea that the stock was really worthless when surrendered in 1909. That is doubtless true. But it had a market value during all those years, and even down to the time immediately before its suspension in May, 1914, the stock was selling on the market at from \$120 to \$160 per share. But, under our view of the case, any instruction relating to the value of the stock, and directing a credit upon the note sued on for the value of the collateral, was improper, since J. L. Elsey was entitled to no credit therefor in case he consented to its surrender, and he was wholly relieved in case he did not so consent.

[3] 3. It is further objected that the third instruction told the jury that if they believed from the evidence that J. L. Elsey subsequently bought the shares of bank stock from A. G. Elsey, and sold the same to A. F. Elsey, and that the proceeds of said sale were applied to the satisfaction of J. L. Elsey's liability, or that if J. L. Elsey assented to the transfer of said bank stock from A. G. Elsey, or that J. L. Elsey knew that A. G. Elsey was about to transfer said stock, and the defendant J. L. Elsey assented thereto, the law was for the plaintiff. The ground of the objection to this instruction is that there is no proof to sustain it, and, as the objection was well taken, the instruction should not have been given.

The same criticism applies to instruction F, upon the charge of fraud.

[4] 4. The circuit court properly sustained the demurrer to the third paragraph of the reply, by which the bank sought to avoid its liability for surrendering the collateral, by alleging that the bank was without authority, under section 581 of the Kentucky Statutes, to accept its own stock as collateral security for a loan made by it. It is true that section 581, supra, provides that no bank shall take as security for any loan or discount any part of its capital stock. This section of our statute is a substantial copy of section 5201 of the Revised Statutes of the United States, enacted by Congress for the regulation of national banks; and under said section 5201 it was held in *First National Bank*

of *Xenia v. Stewart*, 107 U. S. 676, 2 Sup. Ct. 778, 27 L. Ed. 592, that after the contract has been executed and the stock disposed of the prohibition against the validity of the transaction could only be urged by the government, and that, both parties being equally the subjects of legal censure, they will be left by the court where they have placed themselves. See, also, *Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188, and *Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443.

Judgment reversed, for further proceedings consistent with this opinion.

BARRET'S EX'R et al. v. BARRET et al.
(Court of Appeals of Kentucky. Oct. 26, 1915.)

1. WILLS §692—POWERS OF APPOINTMENT—“EXCLUSIVE POWER OF APPOINTMENT”—“NONEXCLUSIVE POWER OF APPOINTMENT.”

Powers of appointment to a class are “exclusive” when there is granted to the donee of the power the right to exclude entirely any members of the designated class, and “nonexclusive” when no such right of selection or exclusion is granted.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1654; Dec. Dig. §692.]

For other definitions, see Words and Phrases, First and Second Series, Exclusive Power.]

2. WILLS §692—POWER OF APPOINTMENT—EXECUTION—VALIDITY.

When a power of appointment to a class is nonexclusive, the exclusion of any member of the designated class in making the appointment invalidates the attempted exercise of the power.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1654; Dec. Dig. §692.]

3. WILLS §692—POWER OF APPOINTMENT—EXECUTION—VALIDITY.

The donee of a nonexclusive power of appointment to a class must give each member of the class a substantial share of the fund fairly proportioned to the amount for distribution; failure to do this constituting the appointment an illusory appointment and invalidating the attempted execution of the power.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1654; Dec. Dig. §692.]

4. WILLS §692—POWERS OF APPOINTMENT—EXCLUSIVE OR NONEXCLUSIVE POWER.

Where a testator gave property to a trustee in trust for a son during his life and provided that upon his death it should pass as the son might direct by last will to his wife and heirs at law, and that, in the absence of a will, it should pass to his widow and his heirs at law according to the law of descent and distribution of Kentucky, the power was nonexclusive, as a power of appointment is nonexclusive where there is no express power of selection or exclusion given the donee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1654; Dec. Dig. §692.]

5. WILLS §692—EXECUTION OF POWER OF APPOINTMENT—VALIDITY.

Under the illusory appointment doctrine, where a will directed that upon the death of a son of the testator a trust fund should pass as he might direct by last will to his wife and heirs at law, the son did not appoint to his brothers and his sister, his heirs at law, a substantial share in the fund by giving them each \$1,000 and to his widow \$147,000, since, while the amount given each of the brothers and the sister was a substantial sum of money, its rela-

tion to the whole of the amount to be distributed pursuant to the power was controlling.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1654; Dec. Dig. §692.]

6. WILLS §692—EXECUTION OF POWER OF APPOINTMENT—VALIDITY.

The illusory appointment doctrine under which the donee of a nonexclusive power of appointment to a class must give each member of the class a substantial share of the fund to be distributed is the law of this state.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1654; Dec. Dig. §692.]

7. WILLS §692—POWER OF APPOINTMENT—EXECUTION—ESTOPPEL.

A testator gave property in trust for his son during his life, and provided that upon his death it should pass as he might direct by last will to his wife and heirs at law, and, in the absence of a will, to his widow and heirs at law, according to the law of descent and distribution of Kentucky. The son left no children, and gave to each of his brothers and his sister \$1,000, and \$147,000 in trust for his widow for life, with a power to dispose of it by will. The widow devised this amount in trust, one half of the income to go to her mother during life, and the other half to be divided between her brother and her sister during life, and upon their death the principal of the whole estate to be divided per stirpes among their issue. The brothers and sister of the donee of the power received the \$1,000 given each of them, but after the death of the widow brought an action to recover one-half of the estate, paying into the court the money so received. *Held*, that they were not estopped to question the validity of the execution of the power of appointment; they having been under a misapprehension as to their legal rights when they accepted the amount given them by the donee's will, and the alleged injury or prejudice to the widow from their acceptance of such amounts, in that she might otherwise have made a different disposition of her estate, being too speculative to render an estoppel operative.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1654; Dec. Dig. §692.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by A. Hite Barret and others against Gertrude K. Barret's executor and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Helm Bruce, Bruce & Bullitt, and Grover G. Sales, all of Louisville, for appellants. Humphrey, Middleton & Humphrey, of Louisville, for appellees.

HANNAH, J. Thomas L. Barret died in 1896 domiciled in Louisville, Ky. He had five children, A. Hite Barret, Theodore L. Barret, Virgie Barret Bridges, Irwin T. Barret, and Lewis Barret. By his will, after making a few minor bequests, he devised the bulk of his property to a trustee, directing that it be divided into five equal parts, one part to be held in trust for each of the above-mentioned children. In the case of each of the four sons it was provided that his part should be held for his benefit during life, with power in the trustee to pay over the principal or any part thereof if, in the judgment of the trustee and an advisory committee nominated by the will, it was deemed

wise to do so; and it was further provided that at the death of each of said sons "the share, as it then exist, shall pass as he may direct by last will, to his wife and heirs at law, and in the absence of a will, to his widow, if he leaves one, and to his heirs at law in the same proportion as if he had died owning the same in fee simple, according exactly to the law of descent and distribution as it then be in force in the state of Kentucky."

The trustee never paid over to Lewis Barret any part of the principal of his share, which at his death amounted to \$150,000. He died in 1910, survived by his widow, Gertrude Ketcham Barret, no children having been born to them. In the meantime one of the brothers, Irwin T. Barret, had died intestate, and that portion of the estate held for him was distributed, one half to his widow, and the other half to his brothers and sister. By will Lewis Barret appointed to his sister, Virgie Barret Bridges, and to his brothers A. Hite Barret and Theodore L. Barret the sum of \$1,000 each; the remaining \$147,000 he devised to a trustee for the use and benefit of his widow for life, with the power to dispose of the estate by will.

In 1913 the widow, Gertrude K. Barret died, leaving a will devising the \$147,000 appointed to her by her husband, Lewis Barret, to a trustee for the use and benefit of her mother, Mrs. Elizabeth Ketcham, her brother, James B. Ketcham, and her sister, Grace Ketcham. This action was thereupon instituted in the Jefferson circuit court by A. Hite Barret, Theodore L. Barret, and Virgie Barret Bridges against Gertrude Ketcham Barret's executor and trustee under the will and the beneficiaries thereunder as above mentioned, to require the executor and trustee to turn over to them one-half of the estate in its possession. The plaintiffs, having theretofore received and accepted the \$1,000 so appointed to each of them by the will of Lewis Barret, paid the same into court. The court below having rendered a judgment in accordance with the prayer of the petition, the defendants are here upon appeal.

This action was brought upon the theory that the will of Lewis Barret did not constitute a valid exercise of the power of appointment granted to him by the will of his father, Thomas L. Barret, which provided that his share, "as it then exist, shall pass as he may direct by last will, to his wife and heirs at law"; that the power of appointment thus granted was a nonexclusive power; that, being such, the donee, in order to execute the power in a valid manner, must have appointed to each member of the designated class a substantial share of the fund subject to the power; that the appointment of only \$1,000 to the heirs at law of the donee of the power and of \$147,000 to the widow was such that the appointments to the heirs were merely illusory; and that therefore, the will of Lewis Barret was void

for failure to conform to the power of appointment in execution of which it was made, and his heirs at law should take as if no will had been made by him.

[1, 2] 1. Powers of appointment to a class are "exclusive" or "nonexclusive"—"exclusive" when there is granted to the donee of the power the right to exclude entirely any members of the designated class; and "non-exclusive" when no such right of selection or exclusion is granted. In the case of "non-exclusive" powers, the exclusion of any member of the designated class in making the appointments will invalidate the attempted exercise of the power.

[3] 2. And, as a corollary of the rule of the invalidation of a nonexclusive power by the exclusion of a member of the designated class of appointees, there has been developed the further doctrine that the donee of a nonexclusive power must not only not exclude any member of the designated class, but he must also give to each a substantial share of the fund to be appointed, the failure to do which constitutes it an illusory appointment, and invalidates the attempted execution of the power in the same manner as does an entire exclusion of such member of the designated class. Under the illusory appointment doctrine, a nonexclusive power cannot be legally exercised except by giving to each appointee a beneficial interest in the fund, fairly proportioned to the amount for distribution; and the appointment of a nominal share to a beneficiary is illusory. 31 Cyc. 1137.

[4] 3. So, as the ultimate question of law in this connection is whether the will of Lewis Barret is void under the illusory appointment doctrine, the first inquiry is whether the power granted to him by the will of his father was an exclusive or nonexclusive power.

In *McGaughy's Adm'r v. Henry*, 15 B. Mon. 383, it was said, upon the authority of *Kempe v. Kempe*, 5 Ves. Jr. 850, 31 Eng. Rep. Reprint, 891, that the power of appointment is nonexclusive where there is no express power of selection or exclusion.

In *Degman v. Degman*, 98 Ky. 717, 34 S. W. 523, 17 Ky. Law Rep. 1310, a power of appointment was conferred upon the donor's widow to dispose of the property devised "among my children as she may think best." This was held to be a nonexclusive power.

And in *Clay v. Smallwood*, 100 Ky. 212, 38 S. W. 7, 19 Ky. Law Rep. 50, a daughter of the testator was given the power to dispose of one-half of the estate to the donor's "other children as she may direct." This was likewise held to be a nonexclusive power.

In *Levi v. Fidelity Trust & Safety Vault Co.*, 121 Ky. 82, 88 S. W. 1083, 28 Ky. Law Rep. 40, the widow of the testator was given the power to "will or distribute to her relations and to my relations any property, real or personal, as she may choose or desire them to have," the testator further stating:

"I am satisfied that she will act justly in this matter." This was held to be an exclusive power.

A consideration of the foregoing cases and of the rule that, where there is no express power of selection or exclusion, the power of appointment is nonexclusive, is sufficient, we think, to demonstrate that the power granted under the will of Thomas Barret was a non-exclusive power.

[6] 4. The power of appointment conferred upon Lewis Barret by the will of his father being, therefore, a nonexclusive one, we are confronted with the question whether the appointments made by him to his brothers and his sister were illusory; that is, whether Lewis Barret appointed to his brothers and sister a substantial share in the fund when he gave to them the sum of \$1,000 each, and to his widow the remaining \$147,000. It seems to us that the mere statement of the proposition carries with it the answer that the sums so appointed were not sufficient to constitute a substantial compliance with the requirements of the illusory appointment doctrine. True it is that \$1,000 is a substantial sum of money in itself; but the question here is, as we think, its relation to the whole of the amount to be distributed pursuant to the power. Viewed from that standpoint, or even from the standpoint of that disposition of the estate which would have been effected had Lewis Barret failed to exercise the power of appointment of which he was the donee in virtue of his father's will, it may readily be seen that the sense of proportion is grossly violated by such an execution of the power. So, if the illusory appointment doctrine is the law in Kentucky, as contended by appellees and denied by appellants, the will of Lewis Barret was clearly not a valid execution of the power of appointment here involved.

[8] 5. It may be conceded that the illusory appointment doctrine, although it originated in England, has been the subject of much criticism by able English jurists, and that it was abrogated in 1830 by Lord St. Leonard's Act (1 Wm. 4, c. 46), and that in 1874, by Lord Selborne's Act (37, 38 Vict. c. 37), the distinction between exclusive and nonexclusive powers was practically abolished. In *McGibbon v. Abbott*, L. R. 10 App. Cas. 653, the English Privy Council, in referring to the course of decision in respect of this doctrine, said that it had been swept away by the Legislature as fraught with inconvenience and mischief.

It seems to us however, without desiring to lay ourselves open to a charge of the undue assumption of superior powers of discrimination, that a careful review of the English authorities will produce the conviction that the mischief arose, not from any fault of the illusory appointment doctrine, or of the rules establishing the distinction between powers exclusive and nonexclusive, but rather because of a too liberal construction of

certain powers of appointment as nonexclusive, when, in point of fact, the evident intention of the testator was to grant an exclusive power. In its real and proper sense, the illusory appointment doctrine does not involve the substitution of the opinion of the chancellor for the discretion vested in the donee of the power, in respect of the extent of the appointments made in execution thereof; for, where the power is nonexclusive, then of necessity the donee of the power has no discretion except such as is involved in a distribution of the estate to the appointees after the giving to each of the class a substantial share, and with that discretion the doctrine mentioned does not interfere. But an unlimited, uncontrolled discretion on the part of the donee of the power in respect of the value of the shares so distributed to the appointees would be nothing more and nothing less than the abolition of the distinction between exclusive and nonexclusive powers; and that is a distinction which this court will not abolish. To do so would be to take from the testator the right to require that the donee of the power of appointment shall recognize all the members of the designated class of appointees in the execution of the power.

On the other hand, so long as the distinction between powers exclusive and powers nonexclusive is preserved, so long as there is such a thing as a nonexclusive power, it inevitably follows that the illusory appointment doctrine must likewise be preserved. Otherwise the donee of a nonexclusive power, while not permitted to exclude entirely any member of the designated class of appointees, might just as effectually do so by means of an illusory appointment. It is manifest, therefore, that the enforcement and maintenance of the distinction between powers exclusive and nonexclusive of necessity raises the doctrine of illusive appointments, requiring that, where the power of appointment to a class is nonexclusive, it must be executed according to its terms, and that the donee of such a power shall not be permitted to thwart the intention of the donor of the power, under the guise of an illusory appointment entirely out of proportion to the estate appointed.

It has been said that the doctrine is founded upon no principle, and that it is an arbitrary one, subject to no restraint or limitation. But in this we do not concur, for it is grounded upon the principle that, where a testator and donor of a power of appointment has confided to the donee thereof a nonexclusive power to dispose of the estate to the members of a designated class, the donee must fairly and reasonably execute the power and justify the confidence reposed in him, and that equity will nullify any attempt to betray the trust thus created. Nor is the doctrine an arbitrary one, subject to no restraint or limitation; for, if the appointments made in execution of the power are fairly and reasonably proportioned to the estate so

distributed, there is a valid execution of the power, notwithstanding that the members of the designated class are not made equal in the distribution. If such a rule is arbitrary, then most, if not all, of the rules of equity possess the same attribute.

It may be conceded that in the Kentucky cases heretofore mentioned the illusory appointment doctrine was not directly involved. In *McGaughey's Adm'r v. Henry*, supra, it was stated to be "the rule," but recognized as not therein applicable. In *Degman v. Degman*, supra, it was again stated to be "the well-settled doctrine," though in that case the direct question was the effect of exercising the power in securing to the donee thereof a personal benefit, rather than the making of an illusory appointment. And in *Clay v. Smallwood*, supra, it was also stated "to be a well-recognized rule in equity," though in that case there was involved an entire exclusion of one of the members of the designated class; the power of appointment being nonexclusive. If an analysis of these cases leaves any doubt, however, that the illusory appointment doctrine is the law of this state, we have no hesitation now in adopting it as a competent rule in the testing of the execution of nonexclusive powers.

It follows, therefore, that the will of Lewis Barret is void for failure to conform to the power of appointment in execution of which the will was made.

[7] 6. But it is contended by appellants that, as appellees accepted the \$1,000 appointed to each of them by the will of Lewis Barret, they are now estopped from questioning the failure to conform to the power of appointment given to him by the will of his father; this contention being based upon the well-known doctrine that one cannot take under a will and at the same time contest its validity.

We find but little merit in this contention in the instant case. The appointments so made to, and accepted by, appellees, were manifestly illusory. The money received was in reality their own, and we have been unable to see anything in the acceptance thereof that would render inequitable their present attack upon the validity of the Lewis Barret will because of his failure to properly exercise the power of which he was the donee. Estoppel rests largely upon injury or prejudice to the rights of him who asserts it; and appellants have not been injured by the temporary acquiescence of appellees. It is argued, however, that had Mrs. Gertrude K. Barret, by an assertion upon the part of appellees of their present attack upon the will of Lewis Barret, advised Mrs. Barret that she had but one-half of the \$150,000 to dispose of by will, she would have made a different disposition of it. She devised the \$147,000 in trust, one half of the income to

go to her mother during life, and the other half of the income to be divided between her brother and her sister during life, the whole of the income to be divided between them in the event of the death of her mother, and upon the death of her brother and sister the principal of the estate to be divided per stirpes among their issue. But this alleged injury or prejudice seems to us entirely too speculative to bring it within the class of detriments which render an estoppel operative.

In this state the doctrine of estoppel by acquiescence or by acceptance of benefits under a will has not been freely applied. *Deppen's Trustee v. Deppen*, 132 Ky. 755, 117 S. W. 352; *Smith v. Smith*, 6 Ky. Law Rep. 453; *Pinkston v. Pinkston*, 13 Ky. Law Rep. 206; *Brown v. Brown*, 58 S. W. 993, 22 Ky. Law Rep. 840.

In *Kasey v. Fidelity Trust Company*, 131 Ky. 604, 115 S. W. 737, this court undoubtedly recognized by implication the right of one to contest a will notwithstanding a previous acceptance of benefits thereunder. In that case, however, the contesting beneficiary was the sole heir at law of the testator, and had given to the executor express written authority to pay certain special legacies, and had herself accepted the property devised to her. The court held that under this state of facts she could not contest the will for mental incapacity of the testator, especially without returning what she had received.

In the well-considered case of *Stone v. Cook*, 170 Mo. 534, 78 S. W. 801, 64 L. R. A. 287, it was said:

"The sum of the matter then is that, as a general rule, one who has received a benefit under a deed, will, or other instrument cannot thereafter contest its validity; but the general rule is subject to this qualification: That, if the benefit was received without a knowledge of his right to elect between the benefit so conferred and of his right to the property outside of the deed, will, or other instrument, or if he was induced by fraud or deception to accept the benefit conferred by the instrument, he may revoke the election and contest the validity of the instrument and claim under the law, provided that innocent third persons will not suffer by a revocation, and provided that there has been no unreasonable delay in exercising the right of revocation, and provided he pay into court the benefits received."

It is here conceded that appellees accepted the \$1,000 each, and under a misapprehension as to their legal rights. No one has suffered by their acceptance of the appointments. There has been no unreasonable delay in asserting their rights, and they have paid into court the sums so received by them. They are thus brought within the rule of the case mentioned, and are not estopped to contest the validity of the exercise of the power of appointment vested in Lewis Barret by the will of his father.

The judgment is therefore affirmed.

NANTZ v. HURST.

(Court of Appeals of Kentucky. Oct. 26, 1915.)

USURY — § 32 — LOAN OR FORBEARANCE OF MONEY.

Giving a note in consideration of a conveyance of land is not a transaction for the loan or forbearance of money, as regards the rate of interest being usurious.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 75-77; Dec. Dig. § 32.]

Appeal from Circuit Court, Owsley County.

Action by H. C. Nantz against T. H. Hurst. From an adverse judgment, plaintiff appeals. Reversed, with directions.

H. C. Eversole, of Annville, for appellant.
E. E. Hogg, of Booneville, for appellee.

NUNN, J. In this action to recover on a note executed in consideration for a conveyance of land, and to enforce a purchase-money lien for the payment thereof, the court erred in adjudging that the stipulated interest in excess of 6 per cent. was usurious. In the meaning of the statute it was not a transaction for the loan or forbearance of money. *Gruell v. Smalley*, 1 Duv. 358; *Tousey v. Robinson*, 1 Metc. 663; *Eddy v. Northup*, 23 S. W. 353, 15 Ky. Law Rep. 434; *McCann's Ex'r v. Bell*, 79 Ky. 113; *Watts v. National Building & Loan Ass'n*, 102 Ky. 29, 42 S. W. 839, 19 Ky. Law Rep. 1007; *Berry v. Walker*, 9 B. Mon. 464.

The judgment is reversed, with directions to enter judgment for the amount of the note and interest sued on, and enforce the lien on the land described in the judgment.

LOUISVILLE & N. R. CO. v. BELL.**SAME v. JONES.**

(Court of Appeals of Kentucky. Oct. 26, 1915.)

1. CARRIERS — § 319 — CARRIAGE OF PASSENGERS—ACTIONS—DAMAGES.

Where a passenger is disturbed by the drunken obscenities of another passenger, she is entitled to such damages as would fairly compensate her for the humiliation, mortification, annoyance, and mental anguish.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1338-1345; Dec. Dig. § 319.]

2. CARRIERS — § 284 — CARRIAGE OF PASSENGERS—DUTY OF CARRIER.

A carrier of female passengers impliedly stipulates that he will protect them against general obscenity and immodest conduct.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1125, 1127-1135, 1173, 1222; Dec. Dig. § 284.]

3. CARRIERS — § 284 — CARRIAGE OF PASSENGERS—DUTY.

In view of Ky. St. § 806, providing for the punishment of any person who while riding on a passenger train shall, to the annoyance of other passengers, use obscene or profane language, or behave in an improper manner, and section 1342b, prohibiting drinking on trains, and providing for the punishment of persons found thereon in an intoxicated condition, it is the duty of a conductor of a railroad train, where he was notified that a negroess was drunk

and using profane and obscene language, either to remove her at the next station, or to have her arrested; and, in case of failure, the railroad company is liable to other passengers disturbed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1125, 1127-1135, 1173, 1222; Dec. Dig. § 284.]

4. CARRIERS — § 317 — CARRIAGE OF PASSENGERS.

Where a drunken passenger by profanity and vulgarity annoyed others, evidence of her conduct after it had been called to the attention of the conductor, or the conductor in the exercise of reasonable care could have discovered it, is admissible in an action for damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295, 1297-1305; Dec. Dig. § 317.]

5. CARRIERS — § 319 — CARRIAGE OF PASSENGERS—ACTIONS—DAMAGES.

Where a drunken negroess used vile, profane, and obscene language in the presence of other negroesses, an award of \$500 in favor of such other negroesses who complained to the conductor in charge of the passenger train cannot be held excessive, not in itself indicating passion or prejudice.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1338-1345; Dec. Dig. § 319.]

Appeal from Circuit Court, Bell County.

Separate actions by Pearl Bell and Helen A. Jones against the Louisville & Nashville Railroad Company. From judgment for plaintiffs, defendant appeals. Affirmed in each instance.

Benjamin D. Warfield, of Louisville, and C. W. Metcalf, of Pineville, for appellant.
James M. Gilbert, of Pineville, and Charles E. Herd and L. F. De Busk, both of Middlesboro, for appellees.

CARROLL, J. The appellees, Pearl Bell and Helen A. Jones, colored women, brought separate suits against the appellant railroad company to recover damages on account of the misconduct of another colored woman in a coach in which these appellees were riding. The suits were heard and disposed of together in the lower court, and there was a judgment in favor of each of the appellees for \$500.

For cause of action the appellees in their petitions charged, in substance, that while they were passengers on a train of the appellant company a colored woman who was drunk and boisterous was permitted to get on the train at Middlesborough and go into the coach in which they were sitting; that during the time she was in this coach as a passenger she was continually drunk, using vulgar and indecent language, and acting in a very disorderly, obscene manner, all of which occurred in the presence of these appellees; that although the conductor in charge of the train came into the coach in which the appellees and this offensive colored woman were riding soon after the train left Middlesborough, and not only saw that she was drunk and disorderly, but had his attention called to her conduct by some of the passen-

gers, he did not either put the woman off the train, take her out of the coach, or attempt to induce her to cease her offensive misconduct. The answer was a traverse of the averments of the petition.

The evidence on behalf of appellees showed that Willie Curry, the disorderly woman, boarded the train at Middlesborough, the station at which the appellees took passage; that when she came in this car she was drunk and disorderly and using abusive language, which disorderly conduct and use of obscene language continued until she left the train. Witnesses also described the manner in which this Curry woman acted, and repeated the vulgar and obscene language used by her, which embraced almost every form of obscenity and indecency that a drunk, vile negro woman could be guilty of.

The appellee Helen Jones was asked and answered these questions:

"Q. At the time that Mr. Worsham, the conductor of the train, came in, what was Willie Curry doing, and what was her condition? A. Sitting with her head thrown back and hat thrown off her head, cursing and going on when he was in there. Q. Cursing when Mr. Worsham was in there? A. Yes, sir. Q. How close was Mr. Worsham to her when this cursing was going on? A. Passed right down the aisle. She was sitting opposite from me—passed between us. Q. Was anything said to Mr. Worsham about it? A. Yes, sir; Mrs. Bell called to him. Q. Do you know what she said to him? A. No, sir; when she said something to him he said: 'There is nothing to her; she is just drunk.' Q. Who said that? A. The conductor. Q. What did he do? A. Did not do anything; went out. Q. Did he notice her? A. Looked at her and kinder smiled. Q. He looked at her and smiled; made no effort to put her off? A. No, sir; none at all. Q. Did he make any effort to stop her from cursing? A. No, sir. Q. Say anything to her when she was cursing? A. Did not say anything to her at all. He started to go to her to get her ticket, and Steve Gilbert said he had her ticket."

Pearl Bell, after testifying in substance the same as Helen Jones, said that when the conductor came into the car shortly after the train left Middlesborough—

"he passed me at first. I called him three or four times. Helen Jones pulled his coat, and I told him that that woman was behaving herself very badly. Would like for him to do something, for I would hate to report him. He said, 'She is only drunk; would not do any harm,' and smiled and went out of the coach."

Other witnesses gave, in effect, the same evidence as these two women.

The conductor who was the only witness for the railroad company, in the course of his testimony said:

"All I know about the case is that I was conductor of the train, and immediately after the train left Middlesborough I proceeded with my duties of collecting the tickets, and I found a man in there, a colored man, that had three tickets for two ladies and one for himself. At the time I took up these tickets in the colored car I did not hear any indecent language or see anything out of the ordinary. After I got down the road towards Pineville somewhere, Pearl Bell called my attention to this lady. She said her conduct was unbecoming, or words to that effect. I went back to where the lady was, and started to say something, but there was a man

with her said he would take care of her and see that she kept quiet, and I went on out. Q. Was she using any obscene language while you were in there? A. No, sir; did not hear her use any obscene language. Q. Was she having her person exposed there, or doing anything in a lascivious way while you were in there? A. No, sir. Q. Was there anything about her conduct there that led you to believe that she would do anything of that kind while you were out of the car? A. Nothing whatever in her conduct that indicated that she was of a violent nature and would insult people, or anything like that. Q. Did you know she was under the influence of liquor by the way she was acting? A. I thought so; seemed to be in a jolly nature. I see that every day, and consequently did not pay much attention."

It further appeared that on a former trial of the case he testified that Mrs. Bell called his attention to the fact that this woman had been acting in an indecent way and using vulgar language, and also that there were 12 stations between the place where the woman got on and where she got off, and that one of these stations was Pineville, the county seat of Bell county, but that he did not take any steps to put the Curry woman off the train at any of these stations, or notify the peace officers at Pineville of her misconduct.

Steve Gilbert, the colored man to whom the conductor referred as the man who told him he would try to keep the woman quiet, said that he did not tell the conductor he would keep her quiet, because he knew he could not do it.

On this evidence counsel for the railroad company asked the court to instruct the jury that if they found for the plaintiffs, the measure of damage was the price they had paid for their tickets. But the court refused to give this instruction, and instructed the jury:

"If you shall believe from the evidence that at the time the defendant's conductor came into the passenger coach occupied by the plaintiff and the woman Willie Curry, the said Willie Curry was in such a drunken condition and that her conduct, appearance, or condition was such as was reasonably calculated to induce the said conductor to anticipate, or have reasonable grounds to believe, that her talk or conduct in said coach was or would be annoying or disturbing to the plaintiff or other passengers thereon, and that thereafter the said Willie Curry, in the hearing of the passengers in said coach, including the plaintiff, used obscene, vulgar, or indecent language, or exposed her person in an indecent manner in the presence of the plaintiff, and that the plaintiff was damaged thereby, then the law is for the plaintiff and you ought to so find."

And advised them as follows as to the measure of damages:

"If you find for the plaintiff, under the instructions herein, you will find for her such a sum in damages as you may believe from the evidence will fairly and reasonably compensate her for the humiliation, mortification, annoyance, discomfort, and mental pain, if any or either, suffered by her, not to exceed, however, the sum of \$3,000, the amount claimed in the petition."

The grounds relied on for reversal are:
(1). That the court erred in not instructing

the jury to find for the defendant; (2) in refusing to give the instruction offered in behalf of the railroad company; (3) for error in admitting incompetent evidence; (4) because the damages are excessive; (5) and because the verdict is not sustained by sufficient evidence.

[1] No objection is made, or could be made to the instructions given, as they submitted correctly the law of the case to the jury. The instruction offered was properly refused, because if the plaintiffs were entitled to recover, the measure of damage was that set out in the instruction given by the court.

[2, 3] Nor did the court err in refusing to direct a verdict for the railroad company, as there was ample evidence to take the case to the jury. In *Hutchinson on Carriers* (3d Ed.) §§ 980, 982, 984, the duty of a carrier to protect its passengers from violence, obscenity, or disorderly and annoying conduct on the part of other passengers, and its liability if it fails to perform this duty, is well stated as follows:

"980. His passengers have the right to demand of him that a fellow passenger whose indecent and ungentelemanly conduct renders him an object of serious annoyance to them, or whose condition or manner gives reasonable ground for apprehending personal injury from his recklessness or violence, shall be removed or be so guarded or confined that they may be free from the annoyance or the danger. And even without any such demand or suggestion from his passengers, it is a duty he owes to them, when the circumstances known to him are such as to create a reasonable apprehension of disorderly conduct or a breach of the peace upon his conveyance, which may alarm or endanger his passengers, to be vigilant and prompt to suppress it when it occurs. And if, aware of the disturbance, he fail to use all the means in his power to suppress it, he will be liable for any damages which may ensue from it to an innocent passenger. The passenger, from the time he enters his vehicle, has the right to claim the protection of the carrier from the insults and violence of others, whether entering it as passengers or not, and the law exacts from him the prompt employment of all the means at his command to protect the passenger against such outrages, either by quelling the disturbance or by the expulsion of those engaged in it, if necessary. * * * In order that such omission may constitute negligence, there is involved the essential element that the carrier or his servants had knowledge, or with proper care could have had knowledge, that the wrong was imminent, and that he had such knowledge or the opportunity to acquire it sufficiently long in advance of the infliction of the wrong upon the passenger to have prevented it with the force at his command."

"982. The contract of carriage as to female passengers embraces an implied stipulation that the carrier will protect them against general obscenity, immodest conduct, or wanton approach. * * * But this rule is also subject to the usual exception that the carrier is not liable for assaults on female passengers made under such unusual circumstances that the carrier could not possibly have foreseen them."

"984. If a drunken and disorderly man is on the carrier's vehicle, it will not do to say, after a passenger has been subjected to insult or injury, that the carrier's servants did not know or could not have foreseen that the particular individual who was insulted or injured was in

danger of such insult or injury, if they were apprised, or with proper care could have known of circumstances which indicated that some one would be injured unless the disorderly passenger or stranger were ejected or controlled."

In *Louisville & Nashville R. R. Co. v. Ballard*, 85 Ky. 307, 3 S. W. 530, 9 Ky. Law Rep. 7, 7 Am. St. Rep. 600, the court, in the course of the opinion, in discussing the duty of a carrier to protect passengers, said:

"As to female passengers, the rule goes still farther. Their contract of passage embraces an implied stipulation that the corporation will protect them against general obscenity, immodest conduct, or wanton approach." *Illinois Central R. R. Co. v. Winslow*, 119 Ky. 877, 84 S. W. 1175, 27 Ky. Law Rep. 329; *Illinois R. Co. v. Laloge*, 113 Ky. 896, 69 S. W. 795, 24 Ky. Law Rep. 693, 62 L. R. A. 405; *Kinney v. L. & N. R. R. Co.*, 99 Ky. 59, 34 S. W. 1066, 17 Ky. Law Rep. 1405.

These authorities, which are in harmony with the body of the law on this subject, sufficiently illustrate the duty of the carrier to protect passengers from violence, as well as from vulgarity, obscenity, indecency, and annoyance on the part of other passengers, and its liability if it fails to perform this duty; and for the purpose of enabling carriers through their servants to perform with more diligence and effectiveness the duties of care and protection indicated, it is provided in section 1342b, of the Kentucky Statutes, that:

"1. Any person who shall, in or upon any railroad locomotive, passenger coach, interurban car, street car, or in or upon any vehicle commonly used for the transportation of passengers, or in or upon any common carrier, or in or about any railroad depot, station, ticket office, waiting room, or platform, drink any intoxicating liquor of any kind; or if any person shall be drunk or disorderly in or upon any railroad passenger coach, interurban car, street railway, or in or upon any vehicle commonly used for the transportation of passengers, or in or upon any common carrier, * * * such person or persons shall be deemed to be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than ten * * * nor more than fifty dollars, or imprisoned not less than ten nor more than thirty days, or both so fined and imprisoned in the discretion of the court or jury. * * *

"3. It shall be the duty of every railroad conductor of a steam, interurban or street railway, and station, depot, or ticket agent of said railway when he sees any person violating the provisions or any of them of section one of this act, to at once notify the nearest or most convenient sheriff, constable, town marshal or policeman, of the county in which the offense is committed, * * * and it shall thereupon be the duty of the officer so notified to arrest without delay any such person without any other evidence of his guilt."

It is further provided, in section 806 of the statutes, that:

"If any person whilst riding on a passenger or other train, shall, in the hearing or presence of other passengers, and to their annoyance, use or utter obscene or profane language, or behave in a boisterous or riotous manner, * * * he shall be fined for each offense not less than twenty-five nor more than one hundred dollars, or imprisoned in the county jail not less than ten nor more than fifty days, or both so fined and imprisoned; and it shall be the duty of the conductor in charge of any train upon which

there is a person who has violated the provisions of this section either to put such person off the train, or to give notice of such violation to some peace officer at the first stopping place where any such officer may be."

In *C. & O. Ry. Co. v. Crank*, 128 Ky. 329, 108 S. W. 276, 32 Ky. Law Rep. 1202, 16 L. R. A. (N. S.) 197, *Com. v. Marcum*, 135 Ky. 1, 122 S. W. 215, 24 L. R. A. (N. S.) 1194, *L. & N. R. R. Co. v. Byrley*, 152 Ky. 35, 153 S. W. 36, *Ann. Cas. 1915B*, 240, *C. & O. Ry. Co. v. Gatewood*, 155 Ky. 102, 159 S. W. 660, and *C. & O. Ry. Co. v. Pruitt*, 157 Ky. 133, 162 S. W. 781, we have given to these sections of the statutes a liberal construction to promote the purpose of their enactment, which was to protect well behaved and orderly passengers from violence, indignity, or insult at the hands of other passengers, and to place in the power of the carrier adequate means to protect its passengers without subjecting itself to liability if it acts with reasonable prudence and discretion.

It is also settled by these authorities, and is pointed out in the instructions given, that liability does not attach to the carrier for acts of violence, indecency, obscenity, or disorder on the part of a fellow passenger until the conductor, or other railway employees charged with the duty of looking after the safety, care, and comfort of the passengers, know, or have reasonable grounds to believe, that the obnoxious passenger will be guilty of violent, offensive, obscene, or disorderly conduct; or the appearance, manner, or conduct of the offending passenger is calculated to put a reasonably prudent person on notice that he may be guilty of this character of conduct. The carrier does not insure its passengers against the violence or misconduct of their fellow passengers. Its duty and corresponding liability begins when it knows, or has reasonable grounds to believe, that some action upon its part is necessary to protect the passengers in its care from assault or indignity at the hands of other passengers. But when the servants of the carrier discover, or in the exercise of reasonable care could discover, that a passenger is disorderly, or obscene, or is committing acts that may endanger the safety of other passengers, or that are offending the peace and quiet of other passengers, it is their duty to take such action as is authorized by the statute to remove from the car the offending passenger, or, if this is not practicable at the time, to take such other steps as may be required for the safety and protection of the other passengers.

Applying now these rules to the facts of this case, we find that, although the conductor saw the drunken condition of this Curry woman and had his attention called to her misbehavior, he merely remarked, with a smile, that she was drunk and passed out of the coach. This was not a compliance with the duty of the carrier to the other

passengers. He should have either ejected this woman from the coach at the next station—and there were several stations between the place where his attention was called to her condition and conduct and the place at which she left the train—or he should have notified the peace officers at Pineville; but he did neither.

[4] It is complained that evidence of this Curry woman's misconduct after the conductor's attention was called to the situation, and before she left the train, was not admissible in evidence. What this woman did or said before the attention of the conductor was directed to her, or before, in the exercise of reasonable care, he could have discovered her drunken condition or misconduct, would not have been competent evidence, unless it was brought to the notice of the conductor, but her misbehavior and misconduct after his attention was directed to her condition, or after it could have been discovered by the exercise of reasonable care, was admissible in aggravation of damages. Well-behaved passengers are entitled to damages commensurate with all the indignity and humiliation they have suffered on account of the misbehavior and misconduct of disorderly and offensive passengers after the carrier has been apprised of the situation and has failed to take steps to remedy it, and evidence of such indignity and humiliation may be heard by the jury for the purpose of awarding such reasonable damages as the circumstances justify.

[5] It is further said that the verdict is excessive. But relief on this ground must be denied. In cases like this, as in many others, that come before us, there is no way of measuring with reasonable certainty what ought to be assessed, and so, as we have often said, unless the amount is so excessive as to appear to have been awarded under the influence of passion or prejudice, or is so disproportionate to the injury complained of as to seem at first blush, unreasonable, we do not feel at liberty to interfere with the finding of the jury.

The judgment in each case is affirmed.

BOSWORTH, Auditor, v. STATE UNIVERSITY et al.

(Court of Appeals of Kentucky. Oct. 27, 1915.)

1. STATUTES \S 110½—SUBJECTS AND TITLES—PURE FOOD LAW.

The title to Laws 1908, c. 4 (Ky. St. \S 1905a), being "An act for preventing the manufacture and sale of adulterated or misbranded foods, drugs, medicines and liquors, and providing penalties for violation thereof," and providing by section 11 that the agricultural experiment station shall receive \$7.50 each for analysis of food and drugs made by it and for the discharge of other duties in connection therewith, provided the total expense from all sources shall not exceed in any one year \$30,000, is void under Const. \S 51, providing that no law enacted by the General Assembly shall relate to more

than one subject, and that shall be expressed in the title, since the subject of such section is not expressed in the title, and is a distinct and separate subject foreign to that covered by the other sections of the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 139, 161-163; Dec. Dig. Ⓒ110½.]

2. STATUTES Ⓒ20—FOOD AND DRUG ANALYSIS—CONSTRUCTION.

Laws 1908, c. 4, § 11 (Ky. St. 1915, § 1905a, subsec. 11), providing that the agricultural experiment station shall receive from the state \$7.50 for food and drug analysis "provided the total expense from all sources shall not exceed in any one year \$30,000," does not constitute a system of fees, but is an appropriation of \$30,000 with the establishment of a scale by which it is granted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 21-24, 27; Dec. Dig. Ⓒ20.]

3. STATUTES Ⓒ105—ACTS OF THE LEGISLATURE—SUBJECT EXPRESSED IN TITLE—CONSTRUCTION.

In view of Const. § 46, providing that appropriations must receive the vote of a majority of all members of each house, adherence to the requirements of section 51, providing that "no law enacted by the General Assembly shall relate to more than one subject and that shall be expressed in the title, * * *" is of the utmost importance, in order that the General Assembly may be fully informed when voting on an act carrying an appropriation, and the taxpayers advised after its passage as to the meaning of its provisions.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 117, 118; Dec. Dig. Ⓒ105.]

4. STATUTES Ⓒ64—PARTIAL INVALIDITY—EFFECT.

Where the subject in the body of an act foreign to the title thereof is capable of separation from the act without affecting the otherwise valid portions, such invalid subject will be condemned and the remainder allowed to stand.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. Ⓒ64.]

Appeal from Circuit Court, Franklin County.

Application for mandamus by the State University and another against H. M. Bosworth, Auditor, to compel payment of certain moneys. From a judgment granting the writ, the defendant appeals. Reversed.

James Garnett, Atty. Gen., and Overton S. Hogan, Asst. Atty. Gen., for appellant. J. R. Bush, of Lexington, for appellees.

SETTLE, J. The appellee, State University, suing for the benefit of the Kentucky Agricultural Experiment Station, and the latter in its own behalf, by petition filed in the Franklin circuit court against the appellant, H. M. Bosworth, auditor of public accounts of Kentucky, prayed that that officer be required by writ of mandamus to issue his warrant on the treasurer of the state for the payment to appellees of \$8,460.56, the amount alleged to be due the Agricultural Experiment Station for 1,435 analyses of food and drug products at \$7.50 each, made by it under section 1905a, Kentucky Statutes, during the year 1914. The entire claim presented for the 1,435 analyses in question was \$10,762.50, but, as \$2,301.94 of the amount had been paid

by the treasurer upon a warrant from the auditor, there remained unpaid the \$8,460.56 mentioned, which the auditor refused to pay. It is alleged in the petition that it is the purpose of appellees to expend this \$8,460.56 in constructing and equipping, on the State University grounds at Lexington, Ky., a cold storage plant and abattoir for the use of the Experiment Station, and that they had, in fact, contracted to have the work done at that price.

The auditor filed a general demurrer to the petition upon the grounds: (1) That the act under which the analyses were made by the Agricultural Experiment Station, or so much thereof as authorized the work and attempted to make an appropriation therefor, is unconstitutional, and therefore void; (2) that, if constitutional, the act does not authorize the use of the money claimed by appellees for the constructing or equipping of a cold storage plant or abattoir upon the University grounds or elsewhere. The circuit court overruled the demurrer, to which appellant excepted. He thereupon filed an answer, which, in addition to attacking the constitutionality of the act, and denying the right of appellees to expend the amount in controversy in constructing a cold storage plant and abattoir, denied the necessity for such plant or abattoir, and also denied the authority of appellees to construct it at all at the expense of the state, or that they had contracted to have the work done at the price of \$8,460.56, or any other sum. The affirmative matter of the answer was controverted of record.

After the taking of depositions and submission of the case, the circuit court adjudged the appellees entitled to the relief prayed and granted the mandamus. The auditor complains of that judgment; hence this appeal.

[1] Neither the demurrer nor answer makes any question as to the number of analyses made by the Agricultural Experiment Station, as to the correctness of the analyses or the competency of the persons by whom they were made. The paramount question to be determined is the one first presented by the demurrer and answer, viz.: Is the act, under which the amount in suit is claimed from the state, or so much thereof as seems to authorize the payment of the claim, constitutional? The act was passed by the General Assembly in 1908 (see Acts 1908, p. 10), and is contained in chapter 53a, § 1905a, Kentucky Statutes (Carroll's Edition 1915). It is entitled:

"An act for preventing the manufacture and sale of adulterated or misbranded foods, drugs, medicines and liquors, and providing penalties for violations thereof."

The one section of the act, 1905a, contains 14 subsections.

Subsection 8 makes it the duty of the director of the Kentucky Agricultural Experi-

ment Station, or, under his direction, the head of the division of food inspection of the station, to make or cause to be made examinations of samples of food and drugs manufactured or on sale in this state at such time and place and to such extent as he may determine.

Subsection 9 requires him to make report as to adulterated or misbranded foods or drugs to certain officers named therein, for the prosecution of the person or persons guilty thereof.

Subsection 10 requires that he make an annual report to the Governor upon adulterated food or drug products, and for the submission of such annual reports to the General Assembly at its regular sessions, and, in addition, for the issue from time to time of bulletins giving the results of such inspections and analyses as are made by him.

Subsection 11, which is the one here particularly involved, provides:

"Said Experiment Station shall receive seven dollars and fifty cents (\$7.50) for the analysis or examination of any sample of food or drug taken or submitted in accordance with this act, and expenses for procuring samples of food and drugs and in making inspections into the condition of and wholesomeness and purity of the food produced, manufactured or sold in food factories, grocery stores, bakeries, slaughtering houses, dairies, milk depots or creameries, and all other places where foods are produced, prepared, stored, kept or offered for sale; for studying the problems connected with the production, preparation and sale of foods; for expert witnesses attending grand juries and courts; clerk hire and all other expenses necessary for carrying out the provisions of this act: Provided, the total expense from all sources shall not exceed in any one year thirty thousand dollars (\$30,000.00).

"The board of control of said Experiment Station shall furnish to the auditor of public accounts an itemized statement of the expenditures of money under this act. The expenditures reported to the auditor shall be paid by the commonwealth to the treasurer of the Experiment Station upon the written request of the board of control of the said Experiment Station, and the auditor for the payment of the same is directed to draw his warrant upon the treasurer as in all other claims against the commonwealth."

It is insisted for appellant that subsection 11 of the act violates section 51 of the Constitution of the state, which provides:

"No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title. * * *"

In the numerous decisions of this court interpreting section 51, Constitution, and applying its provisions, the following general rules appear to have been announced: First, the general manner in which the subject of an act is to be accomplished need not be expressed in the title (*Collins v. Henderson*, 11 Bush, 75; *Commonwealth v. Bailey*, 81 Ky. 396); second, stating the subject-matter of the act, with unnecessary detail in the title, does not render the act unconstitutional (*Allen v. Hall*, 14 Bush, 86); third, if all the provisions of an act relating to the same subject are naturally connected, and are not foreign to the subject expressed in the title,

it is sufficient (*Burnside v. Lincoln County Court*, 86 Ky. 423, 6 S. W. 276, 9 Ky. Law Rep. 685; *Johnson v. City*, 121 Ky. 594, 89 S. W. 672, 28 Ky. Law Rep. 569; *Diamond v. Commonwealth*, 124 Ky. 418, 99 S. W. 232, 30 Ky. Law Rep. 855; *McGlone v. Womack*, 129 Ky. 274, 111 S. W. 688, 33 Ky. Law Rep. 811, 17 L. R. A. (N. S.) 855; *Mark v. Bloom*, 141 Ky. 474, 133 S. W. 208; *Commonwealth v. Starr*, 160 Ky. 260, 169 S. W. 743); fourth, the title cannot be used to extend or restrain the provisions in the body of the act. It must be fairly expressive of the context in the body of the act, and is to be read in connection with it in determining the meaning of the act (*Commonwealth v. Cain*, 14 Bush, 525; *Commonwealth v. Barney*, 115 Ky. 475, 74 S. W. 181, 24 Ky. Law Rep. 2352; *Joyce v. Woods*, 78 Ky. 388; *Wiemer v. Commissioner of Sinking Fund*, 124 Ky. 377, 99 S. W. 242, 30 Ky. Law Rep. 523; *Thompson v. Commonwealth*, 159 Ky. 8, 166 S. W. 623).

The meaning and object of section 51, Constitution, is thus well stated in *Thompson v. Commonwealth*, 159 Ky. 8, 166 S. W. 623:

"The purpose of the constitutional provision was to enable persons reading the title of an act to get a general idea of what the act treated of or contained, and it has come to be a recognized legislative practice for members and others interested in legislation to read the title of acts and gather therefrom in a general way at least the subject-matter of the act, and under the authority of this constitutional provision members of the Legislature, as well as the public interested in legislation, have the right to rely on the title as indicating the subject-matter of the act and to assume that the act contains no legislation that is not embraced in a general way by the subject expressed in the title."

It is not to be overlooked that section 46, Constitution, declares that:

"Any act or resolution for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all the members elected to each house."

And section 230 provides:

"No money shall be drawn from the state treasury, except in pursuance of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published annually."

[2] Manifestly, the \$30,000 mentioned in section 11 of the act under consideration is an appropriation in the meaning of sections 46 and 230, Constitution, *supra*. The \$7.50 allowed by the section as compensation for each analysis that may be made is only a means or scale by which it is to be ascertained when the limit of the annual appropriation of \$30,000 is reached. Therefore the provision as to compensation for analyses does not constitute a system of fees, but merely establishes a scale by which the \$30,000 is granted. The compensation for analyses and other expenses, for the payment of which the act provides, cannot in any one year exceed the \$30,000 appropriation for such year. It is patent from the evidence appearing in the record that the authorities in charge of the Experiment Station have always treated the \$30,000 as an

appropriation, and, further, that they have, ever since the act in question became effective, each year drawn the entire \$30,000 from the state treasury.

We now come to the consideration of the main question: Does the act conform to the requirements of section 51, Constitution? Comparison of the contents of the body of the act with its title will demonstrate that, in so far as the provisions of subsection 11 are concerned, it does not do so. In other words, all of the provisions of the act, except those contained in subsection 11, are embraced and covered by the title, because they each and all relate to and are naturally and directly connected with the subject expressed in the title; that is, they define what shall constitute an adulteration or misbranding of foods and chemicals, provide the means of detecting and preventing same, designate the offenses that may be committed under the act, and prescribe the penalties therefor. Subsection 11, however, attempts to bring into the act and make a part thereof various provisions which are foreign to the subject expressed in the title. These provisions relate to the making of compensation to the Experiment Station for analyses or examinations of samples of food or drugs, paying the expenses attending the procuring of such samples, the cost of clerk hire, attending grand juries and trials in prosecutions of offenders against the law, and, finally, providing an annual appropriation of \$30,000 for defraying all such items of cost and expense.

The phraseology of the title, "An act for preventing the manufacture and sale of adulterated or misbranded foods, drugs, medicines and liquors, and providing penalties for violations thereof," does not even suggest to the average mind that the body of the act provides for the expenditure of the money of the Commonwealth, required by the eleventh subsection, or an intimation that such subsection provides for an annual appropriation of \$30,000. Being utterly silent as to the expenditures required and the appropriation made by this subsection, the title of the act, when introduced and put upon its passage in the Legislature, could have conveyed to the mind of the average legislator no other meaning or information than that its only subject was to make it an offense for any person to manufacture or sell adulterated or misbranded foods, drugs, medicines, or liquors, and prescribe the penalties therefor. The ostensible object of the act, being the protection of the public, made it so attractive to the members of the General Assembly, and the necessity for its passage so apparent, that the mere reading of its title was well calculated to induce them to give it their support, without taking time to examine the body of the act and thereby obtain an understanding of its numerous provisions; whereas, if the title

of the act had given any intimation that it contained an appropriation of \$30,000 to be paid by the state annually for an indefinite number of years, it would at least have been understandingly considered and voted on. But the title gave no intimation of the appropriation that lay concealed as far down in the body of the act as its eleventh subsection, to reach which ten other subsections, dealing with totally different matters, must first be read. Being thus preceded and hedged about by other provisions that appear to be germane to the subject expressed in the title, the appropriation contained in subsection 11, which is not even remotely referred to in the title or necessarily connected with the subject therein expressed, was so disguised as to render its presence in the body of the act well-nigh undiscoverable without a reading of the entire act.

The situation here presented is one that section 51 of the Constitution was intended to prevent, and which could have been prevented by the addition to the title of the act of another sentence, indicating that the act contains an appropriation of \$30,000 per annum to meet the expenses of carrying out its provisions. There can be no doubt that the act in question relates to two subjects, viz: (1) The preventing of the manufacture and sale of adulterated or misbranded foods, drugs, medicines, and liquors, and to provide penalties for so doing; (2) an appropriation from the revenues of the state of \$30,000 per annum. It is equally free from doubt that only the first of these subjects is expressed in the title of the act, as the Constitution provides. It may also be remarked that the first subject to which the act relates appertains to the criminal or penal laws, and the second alone to an appropriation of the state's money.

[3] As section 46, Constitution, provides that any act or resolution for the appropriation of money or the creation of debt shall not become a law unless on its final passage it has received the votes of a majority of all the members elected to each house, it would not be wide of the mark to say that adherence to the requirements of section 51, Constitution, is of the utmost importance, in order that the members of the General Assembly may be fully informed in voting upon an act carrying an appropriation, and the taxpayers of the state advised, after its passage, as to the meaning of its provisions.

In *Ragland, etc., v. Anderson*, 125 Ky. 141, 100 S. W. 865, 30 Ky. Law Rep. 1199, 128 Am. St. Rep. 242, we said:

"It is for the courts to measure the acts of the General Assembly by the standard of the Constitution, and if they are clearly and unequivocally in contravention of its terms, it becomes the duty of the judiciary to so declare. Of course, if the question as to whether or not the legislation is inimical to the Constitution be doubtful, it will always be decided in favor of the constitutionality of the law. But where the

matter is plain that the Constitution has been violated, then the courts cannot escape the duty of so declaring whenever the matter is brought to their attention. And no matter how distasteful it may be for the judiciary to review the acts of a co-ordinate branch of the government, their duty under their oath of office is imperative." *Varney v. Justice*, 86 Ky. 596, 6 S. W. 457, 9 Ky. Law Rep. 743; *Marbury v. Madison*, 1 Cranch (U. S.) 137, 2 L. Ed. 60.

In *McCreary, Governor, v. Speer*, 156 Ky. 783, 162 S. W. 99, we also said:

"It is true our Constitution contains no provision to the effect that all its provisions are mandatory; but we deem this immaterial for the reason that this court had held before the adoption of the present Constitution that all the provisions of a Constitution are mandatory; and the Constitution must be presumed to have been adopted with this understanding of its meaning. Since the adoption of the Constitution the court has steadily maintained the same rule." *Prison Commissioners v. Spencer*, 159 Ky. 255, 166 S. W. 1017.

In *Burton v. M. & B. Turnpike Co.*, 162 Ky. 787, 173 S. W. 144, we further said:

"In *Hyser v. Commonwealth*, 118 Ky. 410 [76 S. W. 174, 25 Ky. Law Rep. 608], it was said: 'This court has repeatedly announced, in effect, that no provision of a statute directly or indirectly relating to the subject expressed in the title, having a natural connection therewith, and not foreign to the same, should be deemed within the inhibition of section 51 of the Constitution.' This broad, liberal rule was approved in the early leading case of *Phillips v. Cincinnati & Covington Bridge Co.*, 2 Metc. 219, and again in *Collins v. Henderson*, 11 Bush, 74; *Hoke v. Commonwealth*, 79 Ky. 567; *Commonwealth v. Bailey*, 81 Ky. 895; *Burnside v. Lincoln County Court*, 86 Ky. 423, 6 S. W. 276; *Conley v. Commonwealth*, 98 Ky. 125, 32 S. W. 285, 9 Ky. Law Rep. 635; and *Eastern Kentucky Coal Lands Corporation v. Commonwealth*, 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138, 32 Ky. Law Rep. 129, 33 Ky. Law Rep. 49. In recognizing this rule, however, this court, in *Thompson v. Commonwealth*, 159 Ky. 12, 166 S. W. 624, further said: 'But in no instance has this rule been extended so as to legalize legislation that departs so radically from the title of the act as do the sections here under consideration. Here the title of the act limited the scope of the legislation to the appropriation of money for the benefit of the Houses of Reform, and this limitation in the title reasonably and naturally conveyed the meaning that the body of the act was confined to the appropriation of money, and no other subject.'"

[4] It is our conclusion that so much of the act under consideration as is included in subsection 11 of section 1905a is violative of section 51 of the Constitution, and therefore void. This conclusion does not, however, render invalid the remaining subsections of the act, which seem to be germane to the subject expressed in the title, as it is manifest that subsection 11 can be eliminated from the act without to any extent affecting the subject-matter of the germane parts; the rule in such case being as stated in *Wiemer v. Commissioner of Sinking Fund*, 124 Ky. 377, 99 S. W. 242, 30 Ky. Law Rep. 523:

"When a subject foreign to the title is introduced into the body of an act, if it is so separate and distinct from the remainder of the subject-matter of the legislation that it may be omitted

without affecting the otherwise valid portions, then the unconstitutional part will be omitted and the remainder allowed to stand." *Jones v. Thompson*, 12 Bush, 394; *Fuqua v. Mullen*, 13 Bush, 467; *Thompson v. Commonwealth*, 159 Ky. 8, 166 S. W. 623; *Burton v. M. & B. Turnpike Co.*, 162 Ky. 787, 173 S. W. 144.

The conclusion we have reached renders unnecessary the decision of the other question urged in the brief of appellant's counsel; and as the salutary object of the act cannot fully be carried out without the appropriation made invalid by the elimination of subsection 11 thereof, it is assumed that the General Assembly will at its approaching session so amend the act as to make the needed appropriation, and at the same time allow its application to the erection of the cold storage plant and abattoir desired by appellee.

For the reasons indicated, the judgment is reversed, and cause remanded, with directions to the lower court to sustain the demurrer to the petition and dismiss the action.

JORDAN et al. v. CROMWELL et al.
(Court of Appeals of Kentucky. Oct. 26, 1915.)
JUDGMENT \Leftrightarrow 461 — EQUITABLE RELIEF —
FRAUD—EVIDENCE.

Evidence in a suit to have a judgment for sale by way of partition set aside for fraud in procuring it held to show no fraud, but abandonment of an agreement for division through disinterested persons.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 892, 893, 895; Dec. Dig. \Leftrightarrow 461.]

Appeal from Circuit Court, Hickman County.

Suit by heirs of Nace Cromwell against F. E. Jordan. From part of the judgment defendant Jordan appeals, and from part of it plaintiff Mattie Vaughn appeals. Reversed in part, and affirmed in part.

Joe W. Bennett, of Clinton, Robbins & Robbins, of Mayfield, and M. T. Shelbourne, of Bardwell, for appellants. J. Kelly Smith and R. B. Flatt, both of Clinton, for appellees.

CARROLL, J. On May 9, 1912, the appellant Jordan brought a suit in equity against the heirs of Nace Cromwell, nine in number, to have sold as indivisible a tract of land containing 34 acres. The petition set out that Jordan had purchased the one-ninth interest each of Mattie Vaughn and Charles Cromwell in this piece of land and had obtained deeds therefor, and so these two heirs were not made parties to the suit. The prayer of the petition was for a sale of the land and a division of the proceeds between the seven heirs, who each owned one-ninth, and Jordan, who owned, as he alleged, two-ninths. Charles Cromwell, who had not been made a party to the suit, came into court on his petition to be made a party, and filed an answer in which he denied that he had sold his

interest to Jordan, averring that the deed made to Jordan was intended to be and should be treated as a mortgage to secure the payment of \$20 that he owed Jordan. He further denied that the land was indivisible, and said that it could be divided without impairing the value of any interest. Mattie Vaughn also filed her petition to be made a party, which was taken as her answer, and denied that she had sold to Jordan her interest in this land, averring that so much of the deed as purported to convey this interest was a fraud and without consideration. She also said that the land was susceptible of advantageous division. These pleadings, which were made answers, were filed in October, 1912, and a few days afterwards Jordan filed separate replies to the answers, thus completing the issues, as the other heirs did not file answers, although they were summoned.

In December, 1912, Charles Cromwell and Mattie Vaughn, as well as others in their behalf, testified in the case by deposition, and other witnesses also gave their depositions in Jordan's behalf.

In May, 1913, the case was submitted, and the court adjudged that the land could not be divided; that Jordan was the owner of the one-ninth interest of Mattie Vaughn; that the deed made by Charles Cromwell to Jordan should have the effect of a mortgage to secure him in the payment of \$20, and interest; that the costs of the action, including an attorney's fee, should be paid out of the proceeds of the sale of the land, which was ordered to be sold as a whole on account of its indivisibility.

In October, 1913, and before the order of sale was executed, the nine Cromwell heirs filed their petition in equity asking that the judgment rendered in May be vacated and set aside on the ground that it was procured through fraud. This petition further set up the fact that Mattie Vaughn had not sold her interest to Jordan, and that the land was susceptible of division, and, further, that the purported deed of Charles Cromwell to Jordan was, in fact, a mortgage.

The ground of fraud relied on was that some time in May, 1912, and before the suit was brought by Jordan, an agreement in writing was entered into between Jordan and the Cromwell heirs, in which it was set out that:

"We have agreed that we will have three disinterested men divide Sarilda Cromwell's dower, and that F. E. Jordan is to pay all costs in the suit filed yesterday. Said division is to be made Tuesday, May 7, 1912; said men to be as follows: M. B. Willey, Joe Eberhard, and Fred Scott."

It was averred that the Cromwells were ignorant colored people, and, resting in the belief that the land would be divided under the agreement, none of the heirs, except Mattie Vaughn and Charles Cromwell, gave any attention to the suit. They further said that it was also agreed that Jordan would

dismiss the suit he had brought and pay the costs thereof, but by mistake this provision was not inserted in the written agreement. There were other averments showing the value of the land and that Jordan desired it to be sold in a body, that he might purchase it for a sum greatly less than its real value, as they were not able to become the purchasers.

Jordan filed an answer in this suit, and evidence was taken on the issues made, and the court adjudged that the land was susceptible of division; that Jordan owned the interest of Mattie Vaughn therein and had a lien against the interest of Charles Cromwell to secure the payment of \$20, and interest. Commissioners were appointed to divide the land, and the cost was adjudged to be paid by the parties according to their interests. From so much of the judgment as ordered the land divided, Jordan appeals, and from so much of it as adjudged that Jordan owned the interest of Mattie Vaughn, she appeals. It will be observed that the only difference between the first and the second judgment is that the first judgment directed that the land be sold and the proceeds divided, while the second judgment directs the land to be divided, and the first judgment allowed an attorney fee of \$100, and the second judgment did not allow any attorney fee.

It seems to us that the first judgment is conclusive upon all the parties to this suit. There is no substantial reason shown in the suit brought to vacate the judgment why it should be set aside, nor does the evidence taken in support of this last suit furnish any reason for disturbing the former judgment. Precisely the same issues were made in the first suit that were made in the last suit, and, while it is true that all of the Cromwell heirs did not file answers in the first suit, the two answers that were filed set up distinctly the identical defense that the heirs who had been summoned in the first suit but did not answer asserted in this last suit. The only new matter at all is that in relation to the agreement between Jordan and the heirs that the land should be divided, but the first suit was filed several days after this agreement was entered into, and the fact that some of the heirs defended the first suit on the ground that the land could be divided without referring in any way to this agreement shows very clearly that the written agreement was abandoned by all parties. Reading between the lines, there appear certain things that would persuade us to hold that the land was susceptible of division, but we do not feel authorized on mere suspicion to vacate a judgment duly entered upon issues made by the parties.

Counsel for Mattie Vaughn points out that the original deed executed by her to Jordan shows that some fraud was practiced by Jordan in the insertion in this deed of her

conveyance of her interest in the dower, but the original deed is not in the record, and the decided weight of the evidence shows that the conveyance of this interest to Jordan was in the original deed at the time it was signed and acknowledged.

We think the court erred in modifying the first judgment. Wherefore the second judgment entered is reversed on the appeal of Jordan and affirmed on the appeal of Mattie Vaughn, and on a return of the case the court will set aside the second judgment and direct the execution of the first judgment.

FISCAL COURT OF MERCER COUNTY v. GIBBS.

(Court of Appeals of Kentucky. Oct. 27, 1915.)

OFFICERS \S 100 — COMPENSATION — ALTERATION DURING TERM.

Where the fiscal court, before the election of a county clerk, fixed his compensation as clerk of the fiscal court at \$500 per annum, it could not, after election, reduce the compensation for any year of his term of office, since such compensation forms part of his salary as county clerk within the protection of Const. § 161, providing that the compensation of a county officer shall not be changed after his election or during his term of office, and section 235, providing that the salaries of public officers shall not be changed during the term for which they are elected.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152-157; Dec. Dig. \S 100.]

Appeal from Circuit Court, Mercer County.

Action by H. L. Gibbs against the Fiscal Court of Mercer County. From a judgment for the plaintiff, defendant appeals. Affirmed.

R. W. Keenon, of Harrodsburg, for appellant. Emmet Puryear, of Danville, for appellee.

HURT, J. H. L. Gibbs, the appellee, was elected clerk of the Mercer county court, for the term beginning on the first Monday in January, 1914, and continuing for four years thereafter. Kentucky Statutes, § 1835, provides as follows:

"The clerk of the county court of each county shall, by virtue of his office, be clerk of the fiscal court. He shall attend its sessions and keep a full and complete record of all its proceedings, with a proper index. For his services the fiscal court shall annually make him a reasonable allowance, to be paid out of the county levy."

It is the duty of the county court clerk to act as the clerk of the fiscal court, just the same as it is his duty to perform any other services required of the county court clerk by the laws of the state.

Previous to the election of appellee, at a regular session of the fiscal court, a resolution was adopted fixing the salaries of the county judge, county attorney, school superintendent, and the county court clerk, as clerk of the fiscal court, for the term beginning on the first Monday in January, 1914.

This action was taken by the fiscal court on the 18th day of October, 1913. The salary or compensation to the county court clerk, for his services as clerk of the fiscal court, was fixed at the sum of \$500 per year. The appellee was inducted into office on the first Monday of January, following, and thereafter the fiscal court, at a session held on the 12th day of September, 1914, undertook to change the salary or compensation of the county clerk for his services as clerk of the fiscal court by the adoption of a resolution allowing him only the sum of \$100 for his services as clerk of the fiscal court for the year 1914. The appellee objected to the resolution and from it prayed an appeal to the circuit court. The case was there tried upon an agreed state of facts, which consisted substantially of what has been heretofore stated in this opinion, as the facts of the case, and upon that state of facts and the copies and orders of the fiscal court adjudged that the order appealed from, which was made on the 12th day of September, 1914, was void, for the reason that the salary of the clerk of the fiscal court was fixed by an order previous to his election, for the term of four years, and that the fiscal court had no authority to change that compensation during the present term of the appellant in his office. The appellant objected to this judgment and excepted, and prayed an appeal to this court, which was granted.

The compensation provided by law for the services of the clerk of the county court is the fees, which he is authorized by law to collect for the various services, which he is called upon to render, and which fees are fixed by statute, and the amount to be allowed and paid to him for the services rendered by him as clerk of the fiscal court. All of it constitutes the compensation of his office. His term of office is four years. The duties which he may be called upon to render as clerk of the fiscal court may be greater and more onerous during one year of his term than another. The same may be said of the duties performed by the county judge, the county attorney, the county treasurer, and the superintendent of schools. Section 161 of the Constitution provides that the compensation of a county officer shall not be changed after his election or appointment or during his term of office, and section 235 of the Constitution provides that the salaries for public officers shall not be changed during the term for which they were elected. The reason for these constitutional restraints upon the power to change the compensation or salary of an officer after his election or during his term of office lies in the fact that if there was not such a restraint, it would induce a continuous campaign, upon the part of an officer and his adherents, to secure an increase in his compensation beyond a just and reasonable sum, by the exercise of the

influence of his official position and association upon those having authority to make the increase; and, upon the other hand, it would induce the enemies, which he might accumulate by a strict performance of his duties or his political adversaries, to take revenge upon him by decreasing his compensation to a sum below what was just and reasonable, or to such a limited sum as to compel his abandonment of the office.

In *Commonwealth et al. v. Addams*, 95 Ky. 590, 26 S. W. 582, 16 Ky. Law Rep. 135, construing section 161 of the Constitution, this court said:

"So, by these express provisions of the organic law, it was evidently intended to prevent any interference with the salary or compensation of a public officer during his term of office."

Where the duty devolves upon the fiscal court of a county to fix the compensation or salary of any county officer, it is the duty of the fiscal court, by an order entered before the election of the officer, to fix the salary for each of the years during the term for which he holds the office, and when such order has been made fixing the salary of a county officer for the ensuing years of his term, previous to his election, the fiscal court has no power to change his compensation, and to make it either greater or less, after his election. *Piercy v. Smith*, 117 Ky. 990, 80 S. W. 201; *Breathitt County v. Noble*, 116 S. W. 777; *City of Louisville v. Wilson*, 99 Ky. 599, 36 S. W. 944, 18 Ky. Law Rep. 427; *Marion County v. Kelly*, 112 Ky. 831, 56 S. W. 815, 22 Ky. Law Rep. 174; *Barrett v. City of Falmouth*, 109 Ky. 151, 58 S. W. 520, 22 Ky. Law Rep. 667; *Jefferson County v. Waters*, 114 Ky. 48, 70 S. W. 40, 24 Ky. Law Rep. 816; *Butler County v. James*, 116 Ky. 575, 76 S. W. 402, 25 Ky. Law Rep. 801; *McNew, etc., v. Commonwealth, for Use, etc.*, 123 Ky. 119, 93 S. W. 1047, 29 Ky. Law Rep. 540; *Fox v. Lantrip*, 162 Ky. 178, 172 S. W. 133; *Hurt v. Morgan County*, 166 Ky. 364, 179 S. W. 255.

For the reasons stated, the judgment appealed from is affirmed.

WILSON et al. v. MARSEE et al.

(Court of Appeals of Kentucky. Oct. 28, 1915.)

1. DEEDS 100, 101 — CONSTRUCTION — EX-TRANEOUS CIRCUMSTANCES.

Where the meaning of an expression in a deed is not clear, evidence of the surrounding circumstances and of the subsequent acts of the parties construing the deed is admissible.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 233, 239; Dec. Dig. 100, 101.]

2. LOGS AND LOGGING 3—CONVEYANCES—RESERVATIONS OF TIMBER — "FREE CONCOURSE TO TIMBER."

Where a deed, given pursuant to a bond for a deed which reserved timber rights, declared that the grantor should have "free concurrence to the timber," and the grantees for a long time

acquiesced in the grantor's removal of the timber, the grantors are entitled to an estate in the timber and the right to go upon the land for the purpose of removing it.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. 3.]

3. APPEAL AND ERROR 1033 — REVIEW — HARMLESS ERROR.

Where defendants were entitled to the whole of timber on land, plaintiffs cannot complain that the judgment awarded them only a one-half interest.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4062-4062; Dec. Dig. 1033.]

Appeal from Circuit Court, Bell County.

Action by W. C. Wilson and others against Thomas Marsee and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

D. K. Rawlings, of London, for appellants. Patterson & Ingram, of Pineville, for appellees.

CLAY, C. In the year 1880 William J. Marsee was the owner of a tract of land in Bell county, which he contracted by title bond to convey to Jerry Turner. Turner assigned the bond to W. C. Wilson. Before making a deed to the land, William J. Marsee died, leaving three children, Amanda Marsee, Thomas Marsee, and John F. Marsee. After William J. Marsee's death his property was divided, and that part of the property in controversy in this action fell to his two children, Thomas and Amanda, who, for the purpose of carrying out their father's contract, executed and delivered to Madaline Turner and the heirs of Jeremiah Turner a deed to the property. The habendum clause of the deed is as follows:

"To have and to hold the same forever, with the condition that Thomas Marsee and Amanda Marsee have free concurrence to timber."

The evidence shows that the title bond contained substantially the same provision. In 1882 William C. Wilson bought the land by title bond and has been in possession of the land ever since. From the time of the conveyance, up to within three or four years of the filing of this suit, Thomas Marsee has exercised the right of going on the land and hauling timber therefrom. During that time he has frequently cut timber and made it into boards, staves, and slats, and on a number of occasions he would employ Wilson to assist him in this work and pay him therefor. In the year 1911 W. C. Wilson brought this action against Thomas Marsee to quiet his title to the land in question. Later other plaintiffs joined with him in the action, and Amanda Marsee was also made a defendant. The defendants pleaded title to the timber under and by virtue of the deed above referred to. On final hearing the chancellor held that the defendants acquired by the deed an undivided one-half of all the timber of every kind and character standing and growing upon the tract when the deed was

executed, and that they are now owners of an undivided one-half of all the timber still remaining on the land. He further adjudged that the plaintiffs were the owners of the other undivided one-half. Plaintiffs appeal.

[1, 2] The case turns on the meaning of the words "free concurrence to timber." Plaintiffs contend that these words are meaningless and confer no rights on the defendants. It may be conceded that the word "concurrence" is inaptly used, but the courts will not defeat the intention of the parties to a contract because of the misapplication or misuse of a particular word. Where the language employed is uncertain in its meaning, it is proper to consider the nature of the instrument, the situation of the parties executing it, and the objects which they had in view. *Davis v. Hardin*, 80 Ky. 672; *Tanner v. Ellis*, 127 S. W. 995. Here the grantors were conveying a certain tract of land. They desired to retain certain rights in the timber. To express these rights, they made use of the language referred to. It being evident that something was intended by the language employed, it should be given a meaning that will carry out such intent. Furthermore, the subsequent acts of the parties, showing the construction they have put upon the agreement, may be looked to, and are entitled to great weight in determining what the parties intended. *Jacoby v. Nichols*, 62 S. W. 734, 23 Ky. Law Rep. 205; *District of Columbia v. Gallaher*, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. Ed. 526. Though plaintiff W. C. Wilson claims to have objected to the defendants' using the timber, it is manifest that if he made any protest at all it was within a comparatively short time before the bringing of this action, for he himself admits that on numerous occasions he was not only present when the defendants cut and removed timber from the land, but actually assisted them in such work and received from them compensation therefor. Considering the language in the light of the circumstances of the parties and of their subsequent conduct, we think it clear that the defendants intended to and did reserve a certain interest in the timber, with the right to go upon the land for the purpose of removing it.

[3] But plaintiffs contend that defendants are entitled either to all of the timber or to none of it, and that the judgment is therefore erroneous, because it divides the timber equally between the plaintiffs and defendants. In view of the fact that defendants' right to the timber is not limited in the deed, we think they are entitled to at least one-half thereof, and plaintiffs cannot complain because, under the judgment of the court, the defendants were given less than they were entitled to.

Judgment affirmed.

COMMONWEALTH v. McCAULEY'S EX'R.
(Court of Appeals of Kentucky. Oct. 27, 1915.)

1. APPEAL AND ERROR §1170 — REVIEW — HARMLESS ERROR.

In view of Civ. Code Prac. § 134, prohibiting reversal for harmless errors, a judgment which is a correct decision will not be disturbed because based on an erroneous reason.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4068, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. §1170.]

2. DEEDS §143 — CONSTRUCTION — INTERESTS CONVEYED.

Where a landowner conveyed property, reserving a life estate and power to revoke the deed at any time before death, the grantee took a defeasible fee in remainder, and, where there was no revocation before death, the property passed to him regardless of the grantor's will.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 453-455, 465-468; Dec. Dig. §143.]

3. TAXATION §861 — INHERITANCE TAXES — STATUTE.

Ky. St. § 4281a, subsec. 1, which became effective June 13, 1906, imposes taxes upon all property which shall pass by will or by the intestate laws of the state from any person who may die seized or possessed thereof or which shall be transferred by deed, grant, sale, or gift made in contemplation of death. Eleven years prior to the enactment of the statute a landowner conveyed property to another by a deed reserving a life estate to herself and power to revoke. The power was not executed, but she did not die until after the inheritance tax law went into effect. *Held*, that the law had no retroactive effect, and, as the grantee's interests were fixed before the grantor's death, no tax could be collected.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1676; Dec. Dig. §861.]

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Action by the Commonwealth of Kentucky, by a revenue agent, against Winifred McCauley's executor, begun in county court and appealed to circuit court. From a judgment there for defendant, plaintiff appeals. Affirmed.

Matt J. Holt and A. Scott Bullitt, both of Louisville, for the Commonwealth. Lee Hamilton and Strother & Hamilton, all of Louisville, for appellee.

SETTLE, J. This is an appeal from a judgment of the Jefferson circuit court, chancery branch, First division, dismissing a proceeding instituted by a revenue agent to recover an inheritance tax claimed to be due the commonwealth from the estate of Winifred McCauley, deceased, under section 4281a, Kentucky Statutes. The proceeding was commenced in the Jefferson county court, and upon being there dismissed was appealed to the circuit court, with the result stated. The dismissal in the county court was based upon the ground that the estate was not liable for the inheritance tax claimed. The dismissal of the appeal in the circuit court was adjudged under article 2, ch. 116, § 6, Acts 1912, on the ground that the

proceeding was pending in that court on July 1, 1912, and had been pending therein since July 6, 1909, and that for more than 90 juridical days prior to July 1, 1912, no steps had been taken by the officer instituting the same.

[1] It is insisted for appellee that, although the circuit court may have erred in adjudging the dismissal of the proceeding upon the ground indicated, yet if, on consideration of the whole record, the judgment was authorized upon a different ground, and for that reason is found to be correct, it should not be reversed on this appeal. This rule has been recognized by us in the following cases: *Commonwealth v. Campbell*, 128 Ky. 252, 107 S. W. 797, 32 Ky. Law Rep. 1131; *Fritz v. Tudor*, 1 Bush, 28; *Cornell Wind Engine & Pump Co. v. Breed*, 13 Ky. Law Rep. 365; *Harrisons v. Baker*, 1 J. J. Marsh. 318; *Clark v. Boyd*, 6 T. B. Mon. 293—and is expressly sanctioned by a provision of section 134, Civil Code, which declares:

"The court must, in every stage of an action, disregard any error or defect in the proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

It follows from what has been said that, if the estate left by Winifred McCauley is not liable for the inheritance tax attempted to be recovered by the revenue agent, the judgment of the circuit court dismissing the proceeding, though rested upon a different and erroneous ground, should be affirmed.

[2] Winifred McCauley died October 20, 1906, leaving a will whereby she devised to P. M. J. Rock, a Catholic priest, her entire estate. At the time of her death she owned a life estate in certain lots in the city of Louisville, and, in addition, personal property admittedly of less value than \$500, which exempts it from the inheritance tax. Consequently the only matter in controversy is as to whether the real estate is subject to the tax. The testatrix by deed of May 25, 1895, conveyed to P. M. J. Rock the lots in question, subject to a life estate retained in and to the whole by the grantor, and reserved to the latter the power to revoke the deed at any time before her death, which power of revocation, it is admitted, was never exercised by her. So the title conveyed Rock by the deed was a defeasible fee in remainder, which vested immediately upon the delivery to the grantee of the deed, subject to be defeated by a revocation of the deed by the grantor. As the power of revocation was never exercised by the grantor, the life estate retained by her in the property ceased at her death, which left Rock its sole owner. The will left by Winifred McCauley became effective as of the date of her death, but, although it made Rock the sole devisee of all the estate of which she died possessed, his title to the real estate passed to him under the deed, and not by the devise contained in

the will. Not even the life estate which the testatrix had reserved in the deed went to him by the will, because that ceased with her death.

[3] The act under which the inheritance tax is claimed by the appellant was approved March 15, 1906, and became effective June 13, 1906, more than 11 years after the execution and delivery of the deed in question. The act (section 4281a, subsec. 1) declares:

"All property which shall pass, by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, or any interest therein, or income therefrom, which shall be transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor or bargainer, or intended to take effect in possession or enjoyment after such death, to any person or persons," etc.

It is the manifest meaning of this language of the act that the inheritance tax is to be imposed as to property that may become subject thereto after the act becomes effective. The act therefore cannot be given a retroactive effect. This question seems to have been settled in *Winn, Sheriff, etc., v. Schenck, etc.*, 110 S. W. 827, 33 Ky. Law Rep. 615. In that case a will was made in 1899 by a son, devising to his mother one-half of his entire estate, under a contract made at the time with his mother to keep a valid will at all times devising to her son's godson one-half of the property she received from the former, which will she made and under which the godson received the property so devised by the mother. The mother died after the inheritance tax law of 1906 was enacted in this state. Upon this state of case we held that, as at the time the contract between the son and mother was made there was no inheritance tax law in force in this state, the property received by the godson under the will of the mother was not subject to the payment of such tax. In the opinion it is said:

"We have been unable to find any case directly in point, nor are we referred to any such, but questions somewhat similar have arisen in other jurisdictions where the inheritance tax laws have been longer in force. In the case of *Nathaniel H. Emmons v. Shaw*, 171 Mass. 410 [50 N. E. 1033], the Supreme Court of Massachusetts passed upon a question somewhat similar. There one Thomas B. Wales had devised certain property to his son, George W. Wales, for life, subject to his disposition by will, but, in the event that he died intestate, with further limitations as to the fee. The son disposed of the property by will under the power, and, an inheritance tax law having been adopted after the death of his father, but before his death, an effort was made to collect the tax from his property. The court declined to enforce it, and in so doing said: 'What is done under a power of appointment is to be referred to the instrument by which the power is created, and operates as a disposition of the estate of the donor.' And the Supreme Court of New York, in the case of *In re Lansing's Estate*, 182 N. Y. 238 [74 N. E. 882], in passing upon a similar question, held that, where property was devised by a man to his daughter for life, and after her to her heirs at law, with the power to devise the

remainder by will in such manner and under such limitations as she might desire, and the daughter, in the exercise of this power, devised the property to her own daughter absolutely, the daughter's will operated to transfer nothing that was not given to the heir at law by the grandfather's will, and, as at the time the will of the grandfather took effect there was no law imposing a transfer tax, the property was not subject to said tax. So with the case at bar. At the time that the contract was entered into between Clarence R. Greathouse and his mother, which secured to appellee one-half of the estate of Clarence R. Greathouse, there was no inheritance tax in force in this state, and consequently the trial court did not err in holding that the property which appellee received was not subject to the payment of said taxes."

It is apparent from the facts of the instant case that from the time of the delivery to him of the deed from Winifred McCauley appellee's interest in the real estate from which it is sought to collect the inheritance tax was liable to execution under a judgment against him for debt, subject to the grantor's life estate and power of revocation. As his title to the several parcels of real estate was acquired by the deed of May 25, 1895, and not under the will subsequently made by the grantor, and the authority under which appellant claims the right to collect such tax was not conferred by statute until after the execution and delivery of the deeds—in fact, 11 years thereafter—the property cannot be made liable for its payment, unless the statute be given a retroactive effect, which should not be done. Furthermore, as the judgment of the circuit court dismissing the proceeding would have been authorized upon this ground, it is unnecessary to consider whether its dismissal was justified on the ground upon which that court actually rested it.

Wherefore the judgment is affirmed.

GRAVES' COMMITTEE et al. v. LYONS.

(Court of Appeals of Kentucky. Oct. 27, 1915.)

1. APPEAL AND ERROR ⇐358—PERFECTION OF APPEAL—MODE.

As an appeal can only be granted by the inferior court or by the clerk of the Court of Appeals, a party to a proceeding to sell the land of an incompetent who did not except to the order of sale and was not granted an appeal either by the lower court or the clerk of the Court of Appeals has no standing, and her name as an appellant will be stricken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1932-1935; Dec. Dig. ⇐353.]

2. APPEAL AND ERROR ⇐515—NECESSITY.

In an equity cause, where a review of the testimony is desired, it must be incorporated in the record by proper bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2322-2325; Dec. Dig. ⇐515.]

3. APPEAL AND ERROR ⇐553—BILL OF EXCEPTIONS—SUBSTITUTE.

Under Civ. Code Prac. § 337, subd. 2, regulating preparation of bills of exception, a stenographer's transcripts of the evidence not approved by the court and made part of the record at the

term or during time thereafter allowed cannot be treated as a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461, 2462, 2465-2471; Dec. Dig. ⇐553.]

4. APPEAL AND ERROR ⇐671—REVIEW—QUESTIONS PRESENTED.

Where the record does not contain the evidence, the only questions are whether the pleadings and proceedings are sufficient to support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. ⇐671.]

5. APPEAL AND ERROR ⇐708—REVIEW—QUESTIONS PRESENTED.

Where exceptions to confirmation of a judicial sale are heard on evidence, the matter will not be reviewed on appeal, where the evidence is not in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2048; Dec. Dig. ⇐708.]

6. JUDICIAL SALES ⇐31—PROCEEDINGS—EXCEPTIONS.

Though written exceptions to judicial sale were not traversed in writing, they are not admitted, and the exceptor is not entitled to have them sustained for that reason.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59-67; Dec. Dig. ⇐31.]

Appeal from Circuit Court, Shelby County.

Action by S. L. Kerr, committee of W. L. Graves, an imbecile, against W. C. Lyons, Florence Ragsdale Graves, and another. The first-named defendant cross-petitioned, and from an order confirming a sale of the incompetent's lands, his committee appeals, and Florence Ragsdale Graves was named as an appellant. Affirmed on the committee's appeal, and that of the last-named appellant dismissed.

Beard & Rives, of Shelbyville, for appellants. Beard & Pickett, of Shelbyville, for appellee.

HURT, J. This was a suit by S. L. Kerr, committee of W. L. Graves, an imbecile, against W. L. Graves, his wife, Florence Ragsdale Graves, and W. C. Lyons, a creditor of the Graves. The action was instituted for the sale of certain real estate which was owned by W. L. Graves to pay his indebtedness. A guardian ad litem was appointed to defend the action for W. L. Graves, and he filed a report, in which he alleged that he could make no affirmative defense for him. An order was entered in the case referring the cause to the master commissioner of the court to receive and hear proof of claims against the estate of the imbecile, and to report same. The appellee, W. C. Lyons, filed an answer, which he made a cross-petition against W. L. Graves and Florence Ragsdale Graves, and set up a note for the sum of \$2,000, which he alleged had been executed to him by W. L. Graves and Florence Ragsdale Graves, and a mortgage to secure the payment of the note upon the lands sought to be sold, and claimed a prior lien thereon for the amount of his debt, and asked that a suffi-

ciency of the land be sold for that purpose of applied to the payment of his debt. A summons upon the cross-petition was issued and served upon W. L. Graves and Florence Ragsdale Graves. Florence Ragsdale Graves never appeared in the suit in any way. A reply was filed to the answer and cross-petition by the committee of W. L. Graves. No personal judgment was rendered against W. L. Graves, nor his committee, nor Florence Ragsdale Graves upon the note in favor of Lyons, but the note was filed, as other debts against Graves, with the commissioner, and allowed and reported by the commissioner, and the report confirmed to the extent of \$1,950, with interest from the execution of the note. A judgment was rendered directing a sale of the land for the satisfaction of the debts, which made a total sum of about \$3,500, and further adjudged that Lyons had a prior lien upon the land for the satisfaction of his debt. No exceptions were taken to this judgment by any one. Thereafter, in pursuance of this judgment, the land was sold at decretal sale, when the appellee became the purchaser, at the sum of \$2,525, and it was so reported. The property was appraised before the sale at the sum of \$2,600. The committee of W. L. Graves filed exceptions to the report, which were to the effect that the price at which the land was sold was inadequate and less than its value; that the purchaser was a creditor to the sum of \$2,200, and previous to the sale had induced bidders and prospective bidders for the land not to bid for it, and by his representations had prevented one bidder who would have bidden \$3,000 for the land from bidding at all; and that rumors had been circulated, the authors of whom were unknown, to the effect that the purchaser at the sale would not acquire a good title to the land, and on account of the last two named grounds it was alleged a fair sale was not had, on account of bidders and prospective bidders being deterred from bidding at the sale. A hearing was had upon the exceptions, which resulted in a judgment overruling the exceptions and confirming the report of sale, and ordering the commissioner to execute and report a deed to the purchaser, and permitting the purchaser to pay the sale bonds before maturity, if he desired. The committee excepted to this judgment and prayed an appeal to this court, which was granted. The appellant Florence Ragsdale Graves did not object or except to the rendition of this judgment, or to any order or judgment in the entire case. The proof upon the hearing of the exceptions was given orally, in open court, but the official stenographic reporter of the court was ordered to take notes of the evidence. He was also ordered to prepare a transcript of the evidence heard, and to file same as a part of the record of the case. It appears that the judgment appealed from was rendered on the 12th day of February, 1915. There is no order showing that the transcript of the evidence was ever

filed in court, or made a part of the record, or examined or approved by the judge of the court. What purports to be a transcript of the evidence, certified by the official stenographic reporter under date of March 12, 1915, and indorsed as examined and approved by the judge of the court over his signature, is on file with the record.

[1] The appellee has entered a motion in this court to strike the purported transcript of the evidence from the record, upon the ground that it was never filed in court, and there is no order of court showing the examination or approval of it by the court or making it a part of the record, and it was signed by the judge out of term time. A further motion was made to dismiss the appeal of Florence Ragsdale Graves, and both of these motions were ordered to be passed to the merits of the case.

As to the second of the motions, there are but two ways in which an appeal may come to this court from an inferior jurisdiction where the amount in controversy is as in this case. The court from the judgment of which the appeal is taken may grant the appeal as a matter of right to the one asking it, or the appeal may be granted by the clerk of this court. Florence Ragsdale Graves did not file exceptions to the report of sale, neither did she except to the judgment of the court overruling the exceptions, nor did she pray nor was she granted an appeal from the judgment. She has not secured an appeal from the clerk of this court. Hence there is no appeal pending in her behalf. The motion to dismiss her appeal will be treated as a motion to strike her name from the record as an appellant, and must be sustained, but this action does not interfere with any right she may have from which she is not precluded by the proceedings below.

[2, 3] The motion to strike from the record the bill of evidence must also be sustained. Where in a proceeding in equity oral testimony is given and heard and a party desires the benefit of it upon an appeal, it must be made a part of the record by a bill of exceptions, which must be prepared within the same time and in the same manner as a bill of exceptions is required to be prepared in actions in ordinary. *Shannon v. Stratton*, 144 Ky. 26, 137 S. W. 860; *Knecht v. Home Telephone Co.*, 121 Ky. 492, 89 S. W. 508, 28 Ky. Law Rep. 456; *Dupoyster v. Ft. Jefferson Imp. Co.*, 121 Ky. 518, 89 S. W. 509, 28 Ky. Law Rep. 504. A bill of exceptions must always be made a part of the record by an order of the court. The bill must be prepared and presented to the judge of the court for his approval and signature during the term of court at which the judgment becomes final, unless further time for its preparation is given by an order of the court. Civil Code, § 337, subsec. 2. It was never intended that the stenographer's bill of evidence should supply the place of and dispense with the necessity of a bill of exceptions filed by an

order of court. The bill of evidence in the case at bar, which seems to have been prepared by the official stenographer and approved by the judge, might be treated by agreement, no doubt, as a sufficient bill of exceptions in this case; but there is no order of court showing its approval or the filing it or making it any part of the record, or whether it was prepared or presented during the time required by law. A good reason for the requirement that a bill of exceptions or bill of evidence, before becoming a part of the record, must be approved and signed by the judge and filed by an order of court, is that parties to a suit are presumed to know and take cognizance of what is done by orders of the court in the conduct of a case, and if the bill is filed and made a part of the record by an order of court, the parties may have opportunity to examine it and secure the correction of any errors in it and the addition to it of anything which may have been omitted from it by oversight or otherwise. If the bill could be made a part of the record without being filed in open court and an order made showing that fact, the opposing parties would have no opportunity for its examination previous to its becoming a part of the record. That the stenographer's bill must be made a part of the record by order of the court was held in *McGeever v. Kennedy*, 42 S. W. 114, 19 Ky. Law Rep. 845; *Southern Railway Co. in Kentucky v. Thurman*, 25 Ky. Law Rep. 804; and other cases.

[4] There being no evidence in the record, the only thing to be considered is whether the pleadings and proceedings in the case are sufficient to support the action of the court in rendering the judgment appealed from. *McAllister v. Insurance Co.*, 78 Ky. 531; *Helm v. Coffey*, 80 Ky. 176; *Owensboro Ry. Co. v. Barker*, 22 S. W. 444, 15 Ky. Law Rep. 175; *Martin v. Richardson*, 94 Ky. 183, 21 S. W. 1039, 14 Ky. Law Rep. 847, 19 L. R. A. 692, 42 Am. St. Rep. 853; *C. O. & S. W. R. R. Co. Receivers v. Smith*, 101 Ky. 707, 42 S. W. 538, 19 Ky. Law Rep. 1826. The pleadings and other proceedings seem to fully support the judgment.

[5] Where exceptions to a judicial sale are heard upon evidence, and the evidence does not accompany the record, the questions raised will not be considered. *Creutz v. Knecht*, 6 S. W. 717, 9 Ky. Law Rep. 772.

[6] The contention that, in the absence of the evidence heard by the circuit court, the exceptions to the report of sale must be held good, and the judgment overruling the exceptions reversed, because there was no denial of the truth of the allegations made in the exceptions by a written pleading, we do not think is tenable. The rules of practice in courts of equity have never required a written traverse or confession and avoidance of the things set up in exceptions to the confirmation of a report of sale. The immemo-

rial practice has been to put upon the one excepting the burden of the proof of his allegations without further pleading, and, in the absence of proof supporting his contention, the exceptions must be overruled.

The judgment appealed from is therefore affirmed.

SANDUSKY v. SANDUSKY.*

(Court of Appeals of Kentucky. Oct. 28, 1915.)

1. DIVORCE — PROPERTY RIGHTS — JURISDICTION — STATUTES.

While Ky. St. § 2121, providing that on final judgment for divorce the court shall restore property which either party obtained from or through the other before or during the marriage, and Civ. Code Prac. § 425, providing that a judgment for divorce shall restore any property not disposed of at the commencement of the action which either party may have obtained from or through the other during marriage, did not authorize the court granting the wife a divorce to order that she pay the husband the value of permanent improvements placed on her property by him, yet the court was authorized to make such order so as to adjust the property rights of the parties and to settle all questions presented by the pleadings and to avoid the necessity of another suit.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 701-705, 707, 709, 712; Dec. Dig. § 249.]

2. DIVORCE — PROPERTY — HUSBAND'S PERMANENT IMPROVEMENTS — RECOVERY.

As a husband and wife may contract with each other and have all the remedies extended to other persons for the enforcement of contracts, a husband who, under an agreement with his wife that he should be repaid out of the rents of the property for the amount spent in making permanent improvements on her land, was entitled in her suit for divorce, to recover the amount so spent.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 701-705, 707, 709, 712; Dec. Dig. § 249.]

Appeal from Circuit Court, Daviess County.

Suit for divorce by Mary E. Sandusky against Wesley Sandusky, with lien claim on improved property by defendant. Judgment granting plaintiff a divorce and directing her to pay the value of improvements placed on her property by defendants, and she appeals. Affirmed.

Frank C. Mallin, of Owensboro, for appellant. W. T. Ellis and J. Houston Payne, both of Owensboro, for appellee.

CARROLL, J. Although the amount in controversy in this case is less than \$500, and the judgment will be affirmed, we have granted an appeal, and will write an opinion, as the decision of the questions presented may be of some interest in the administration of law.

The parties to this litigation are husband and wife, and in this suit by the wife, now the appellant, to obtain a divorce from her husband, now the appellee, the husband filed an answer in which, after controverting the grounds of divorce relied on, he set up that

at the instance and request of his wife he invested in permanent and valuable improvements on land owned by her the sum of \$1,000, under an agreement that she would repay to him the amount expended in the improvements; and he asked that he be adjudged a lien on the property on which these improvements were placed to secure the amount expended pursuant to the contract under which the improvements were made.

After the case had been prepared for trial, the court rendered a judgment granting the appellant a divorce from the bonds of matrimony, and further found that the value of the improvements placed on the property of appellant by appellee was \$350, and she was directed to pay to him this sum; and, it appearing that it was agreed between the parties that the rents of the improved property should be applied to satisfy the cost of the improvements, the commissioner of the court was ordered to take charge of that portion of the property described in the judgment and rent out the same and apply the proceeds to satisfy the judgment in favor of appellee.

Some minor grounds of reversal are relied on, but the only one that we deem of sufficient importance to write about is the contention that it was error to give appellee a judgment for the value of the money expended by him during the marriage in putting valuable and lasting improvements upon the property of his wife.

Section 2121 of the Kentucky Statutes provides in part:

"Upon final judgment of divorce from the bond of matrimony the parties shall be restored such property, not disposed of at the commencement of the action, as either obtained from or through the other before or during the marriage in consideration thereof."

And in section 425 of the Civil Code it is provided:

"Every judgment for a divorce from the bond of matrimony shall contain an order restoring any property not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other, during marriage, in consideration or by reason thereof; and any property so obtained, without valuable consideration, shall be deemed to have been obtained by reason of marriage. The proceedings to enforce this order may be by petition of either party, specifying the property which the other has failed to restore; and the court may hear and determine the same in a summary manner, after ten days' notice to the party so failing."

[1] One objection pointed out to so much of the judgment as awarded appellee \$350 is that in an action for divorce the court is only authorized by these provisions of the statutes and Code to restore property which either party may have obtained from or through the other during marriage in consideration or by reason thereof, and that, as the claim asserted by the appellee was not to have restored to him property obtained by his wife in consideration of or by reason of their marriage, but to enforce a claim arising

out of a contract between them, a separate action to obtain the relief to which he was entitled should have been brought by the appellee.

It is true that the right of the appellee to the relief granted by the lower court rested on and grew out of the contract made between these parties after their marriage, and did not arise from a state of facts coming within the meaning of the statutory provisions referred to. But, nevertheless we are of the opinion that the court had the power to grant the relief adjudged in this action. When a suit is brought by either party for a divorce from the bonds of matrimony, there seems to be no good reason why the property rights of the parties should not be adjusted in that suit, and thus avoid the necessity of bringing two suits for what might be accomplished in one. The section of the Code does not exclude the court from adjusting property rights arising under contract between the parties to a divorce suit; and when property rights are asserted in a divorce suit, whether they arise under the grounds specified in the Code or under grounds resting in contract, the court having jurisdiction of the subject-matter and the parties may settle all questions between them that are presented by the pleadings. It is the policy of the law to avoid a multiplicity of suits, and when the matters at issue between the parties litigant can be settled in one suit, this course should be pursued.

[2] Another objection urged to the judgment is that the court should not have given the husband a judgment against the wife for anything on account of the improvements placed by him on her property. Adopting the conclusion of the chancellor on the facts of this case, that the husband expended \$350, putting permanent, useful, and valuable improvements on the land of the wife under an agreement that he should be repaid out of the rents of the property for the amount expended in making the improvements, we find no reason for disturbing the judgment of the chancellor upon the ground relied on by counsel for appellant.

In *Coleman v. Coleman*, 142 Ky. 36, 133 S. W. 1008, and many other cases, this court has held that the husband and wife may enter into contracts with each other and have all of the remedies extended to persons other than husband and wife for the enforcement of the contracts so made. Therefore, if the husband, under a contract with his wife by which he is to be paid therefor, places on lands owned by her improvements, he may generally recover from her the agreed price, or, in the absence of an understanding as to the price, the cost of the improvements, if the agreement under which they were made contemplated the payment to him of their cost.

It is, however, contended by counsel that in *Nall v. Miller*, 95 Ky. 448, 25 S. W. 1106, 15 Ky. Law Rep. 862, *Carpenter v. Hazelrigg*, 103 Ky. 538, 45 S. W. 666, 20 Ky. Law

Rep. 231, *Stroud v. Ross*, 118 Ky. 690, 82 S. W. 254, 26 Ky. Law Rep. 521, *Ketterer v. Nelson*, 146 Ky. 7, 141 S. W. 409, 37 L. R. A. (N. S.) 754, and *Bean v. Bean*, 164 Ky. 810, 176 S. W. 181, this court has ruled that the husband should not be compensated for the value of improvements. We do not, however, understand any of these cases to announce the rule that, although the husband puts permanent and lasting improvements on the land of his wife under a contract with her that he is to be compensated for the improvements, he cannot recover under the contract.

In the *Nall Case* the controversy was between the husband and the heirs of the wife, and, as showing that the question here involved was not before the court in that case, it is said in the opinion that:

"It does not appear *Eliza J. Miller* ever agreed to pay or charge her land with payment for improvements or repairs put upon it, or for any money paid or services rendered by her husband. * * * There being then no agreement on her part to pay him for such services or advances of money, the law will not imply any. * * * Equity will, under particular circumstances, give effect to a contract between husband and wife, even at his suit, if fair, just, and founded upon a valuable consideration, but will not imply a promise by her to pay him for improvements or repairs on her land while possessed, used, and enjoyed in virtue of his marital rights, nor even for money advanced by him to remove an incumbrance from it."

To the same effect is *Ketterer v. Nelson*, 146 Ky. 7, 141 S. W. 409, 37 L. R. A. (N. S.) 754.

In the *Carpenter Case* it does not appear that the improvements with the value of which the husband sought to charge the estate of the wife were placed on her land under any agreement or understanding that the husband should be paid for them.

In the *Stroud Case* the husband, after the death of the wife, sought to recover from her estate money that he had expended in making improvements on land owned by her; and the court said:

"We are of the opinion that to the extent appellant, on the faith of the agreement entered into with his wife, advanced his own money for the purchase and improvement of real estate, the title to which was taken to her, after the execution of the obligation between them, he is equitably entitled to be reimbursed therefor, either by the sale of the property or a transfer of the title to him."

But it denied *Stroud* the right to be reimbursed for taxes paid or improvements made upon real estate which the wife owned in her own right and to the purchase of which he did not contribute his money. But it is clear from reading the opinion that the husband was denied the right of recovery for the value of improvements he placed upon her real estate because there was no agreement made with her that he should be reimbursed for these improvements.

In the *Bean Case* the husband's claim to be reimbursed for improvements put upon the land of his wife was rejected upon the

ground that under the circumstances of that case it would be inequitable to allow it.

There might, of course, be a case presenting facts and circumstances that would make it inequitable to allow the husband for improvements on the land of his wife, and in such a case the chancellor should disallow his claim, but the equitable reasons that might in some cases deny him a recovery do not appear in this case.

Wherefore the judgment is affirmed.

KENTUCKY HIGHLANDS R. CO. v. CREAL.

(Court of Appeals of Kentucky. Oct. 28, 1915.)

1. CARRIERS ↔247—"PASSENGER"—PERSONS BOARDING MOVING TRAIN.

One who attempts to board a moving train is not a "passenger," though he may have purchased a ticket entitling him to passage thereon. [Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 984-993; Dec. Dig. ↔247.

For other definitions, see *Words and Phrases*, First and Second Series, *Passenger*.]

2. CARRIERS ↔287 — PERSONS BOARDING MOVING TRAIN—CARE.

As to one attempting to board a moving train a carrier owes no duty except that which it owes to a trespasser, and upon discovery of his peril must exercise ordinary care to avoid injury to him; and hence, where there was no failure on the part of the engineer to do all that could have been done to prevent injury after discovery of plaintiff's peril, there was no actionable negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1154-1159, 1161-1166; Dec. Dig. ↔287.]

Appeal from Circuit Court, Woodford County.

Action by Henry Creal against the Kentucky Highlands Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

T. L. Edelen, of Frankfort, for appellant. Leslie Morris, of Frankfort, and H. A. Schoberth, of Versailles, for appellee.

HANNAH, J. Henry Creal sued the Kentucky Highlands Railroad Company, in the Woodford circuit court, to recover damages for injuries sustained by him in an attempt to board a moving train operated by the defendant. He obtained a verdict and judgment in the sum of \$500, and the defendant appeals.

Glenns Creek is a station on the line of railroad operated by appellant company between Frankfort and Versailles. It is about five or six miles from Frankfort. Between Frankfort and Glenns Creek appellant operates a mixed train consisting of both freight and passenger cars. This train leaves Frankfort and proceeds to Glenns Creek, where it takes the siding to await the passing of a through train which goes on to Versailles. When that train has passed, the Glenns Creek train goes out on the main line on

the Versailles side of the Glenns Creek depot, and then starts on its return trip to Frankfort.

On the morning of November 1, 1913, the through train was delayed, and the Glenns Creek train was compelled to remain on the siding about 20 minutes. While this train was on the siding, appellee went into the ticket office and purchased a ticket to Frankfort, and then, as he says, boarded the train. gave his ticket to the conductor, and took a seat therein with several other negroes, destined to Frankfort to attend a funeral. Appellee testified that after boarding the train he discovered that he had neglected to bring his purse with him; that he asked the conductor if he would have time to go to his home, a few hundred feet from the depot in the direction of Frankfort, and get his purse, and that the conductor informed him that they would wait for the passing of the through train; that he thereupon left the train and went to his home. When he returned to the depot, the through train had passed, and the Glenns Creek train had backed out from the siding on to the main line and was proceeding in the direction of Frankfort. It proceeded about 700 feet, and passed the Glenns Creek depot without stopping. Will Patterson, a companion of appellee's boarded it as it passed; another companion of appellee's, Frank Jordan, who had purchased a ticket, was at the depot as it passed, but refrained from any attempt to board it. Appellee, in his attempt to do so, was thrown between the coaches, and the wheels of the train passed over his foot, rendering necessary the amputation of the leg just above the ankle. Plaintiff testified that just as he grasped the handrails of the coach of the passing train a violent jerk thereof caused him to lose his grip and to be thrown under the wheels of the train.

[1] Upon his own evidence, appellee failed to make out a case. One who attempts to board a moving train is not a passenger, though he may have purchased a ticket entitling him to passage thereon. Ill. Cent. R. R. v. Cotter, 103 S. W. 279, 31 Ky. Law Rep. 679. Appellee was in no different position from that occupied by one who has purchased a ticket and attempts to board a train in motion, notwithstanding he had once been on the train.

[2] To one in his position the railroad company owed no duty except that which it owes to a trespasser; that is, upon discovery of his occupancy of a perilous position, to exercise ordinary care to avoid injury to him. But, it is contended by appellee, and admitted by the engineer, that the engineer saw plaintiff in the act of boarding the train.

Plaintiff and his mother testified that the jerk of the train occurred just as he was in the act of boarding it. Other witnesses for plaintiff testified to a jerk of the train, but

they did not see him making the attempt to get on.

The engineer testified that he saw plaintiff approaching the train as though it were his purpose to attempt to board it, but that, on account of its speed, he did not think plaintiff would make the attempt; that he watched plaintiff, saw him make the attempt, and saw him fall; that he then shut off the steam and applied the brakes, and at the same time some one back on the train "angle-cocked" him; that is, some one opened a valve which is a part of the system of air brakes, the effect of which was to apply the full force of the brakes immediately. This is done only in emergencies. It is very probable that the opening of this angle cock was the cause of the jerk which the witnesses experienced; at least none of them mentioned any second jerking.

Counsel for appellee argues that the engineer doubtless believed that plaintiff was safely aboard, and turned and opened the throttle valve, thereby suddenly increasing the speed and causing the jerk; but there was but one jerk, so far as the record shows, and, in addition, the engineer had no occasion to believe that plaintiff was safely aboard, for he saw plaintiff thrown under the train and then applied the brakes. But, if it be assumed that, as counsel for appellee contends, the true version of the matter is that the engineer believed plaintiff was safely aboard and suddenly increased the speed of the train, thereby throwing plaintiff under the train, there could be no recovery by him, because the railroad company owed him no duty unless his peril was discovered by its servants in time to have averted his injury by the exercise of ordinary care. He was in no peril while he was standing alongside the track, nor until he jumped and fell under the train, and there is no contention that there was any failure on the part of the engineer to do all that could have been done to prevent the injury after appellee fell.

There being no actionable negligence in either state of case, the plaintiff could not recover. The trial court should have directed a verdict for the defendant.

Judgment reversed.

WHITE v. LOUISVILLE GAS & ELECTRIC CO.

(Court of Appeals of Kentucky. Oct. 29, 1915.)

MASTER AND SERVANT — INJURY TO SERVANT — ASSUMPTION OF RISK.

A laborer directed by his foreman to remove a wooden horse from its position across a freshly cut ditch assumed the obvious risk of its caving in from his placing his weight too close to the edge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 648-651; Dec. Dig. § 222.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by Henry White against the Louisville Gas & Electric Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

Jacob Solinger and Ben F. Gargen, both of Louisville, for appellant.

TURNER, J. Appellant brought this action against appellee, alleging that while he was employed by it and engaged as a laborer in the laying of gas mains in the city of Louisville he was directed by the foreman, whose orders he was bound to obey, to remove a certain wooden horse which was over a trench which had been cut into the sidewalk for the purpose of laying the gas pipes; that the place where he was required to go and remove said wooden horse was in a dangerous and unsafe condition, because of the negligence and carelessness of the defendant and its officers and agents in failing to shore or brace said trench; that the earth and bricks close to same were loose and dangerous, which condition was known to the defendant and unknown to him; and that when he went to step on the sidewalk close to the ditch for the purpose of removing the said wooden horse, as directed, by reason of the dangerous condition of said trench and of the fact that same was not shored or braced, the same gave way and precipitated him into the trench and against the iron pipe at the bottom thereof, whereby he was injured.

To this petition a demurrer was filed and sustained, and, the plaintiff declining to plead further, his petition was dismissed, and he has appealed.

There is nothing in the petition to indicate that there was any hidden or unseen danger at the point where appellant alleges he fell into the ditch; on the contrary, it is apparent from the petition that the situation there was open and obvious, and whatever danger there was could have been seen and appreciated by any person of ordinary intelligence. The fact that a freshly dug ditch will cave in when weight is put upon the earth near its edge is one which a person of average intelligence must be presumed to know, and if appellant, with this situation plainly before his eyes, saw proper in disregard of his own safety to place the weight of his body upon the earth at the edge of the ditch, and thereby risk sliding into it, he alone is responsible for his injury. There is no claim that it was dark or that there was any obstruction to prevent him from fully understanding, seeing, and appreciating the situation as it was.

As said by this court in the case of Willson v. Chess & Wymond Co., 117 Ky. 567, 78 S. W. 453, 25 Ky. Law Rep. 1655:

"The lowest order of intelligence of a rational man would have comprehended that boiling water would scald the flesh if it came in contact with it, and that ice was slippery. The conditions were openly visible to the laborer. He had only to use his eyes and his most common experience and his earliest instincts to fully appreciate the danger of his position."

Instinctively one knows that to place his weight too close to the edge of a freshly dug ditch will cause it to cave in, and if he does so and is injured, he must be presumed to have voluntarily assumed the risk. Clearly the horse could have been removed from the ditch in a perfectly safe way, but appellant saw fit to do it in a different way.

The allegation in the petition that the plaintiff was directed by his foreman to remove the wooden horse from over the ditch can avail him nothing, for that direction is not equivalent to ordering him to place himself in a dangerous position by carelessly putting the weight of his body so close to the edge of the ditch as to cause it to cave in.

The demurrer was properly sustained, and the judgment is affirmed.

LOUISVILLE & N. R. CO. v. FENTRESS' ADM'R.

(Court of Appeals of Kentucky. Oct. 28, 1915.)

1. RAILROADS — 384 — PERSONAL INJURIES — CONTRIBUTORY NEGLIGENCE.

One who sees a train approaching a station and about twice as far away from the station as he is, and goes upon the track in an attempt to reach the station ahead of the train, is inexcusably negligent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1294; Dec. Dig. 384.]

2. RAILROADS — 389 — PERSONAL INJURIES — CONTRIBUTORY NEGLIGENCE — PROXIMATE CAUSE.

Where plaintiff's intestate, with full knowledge of the approach of a train, negligently ran along and upon the track ahead of it, there can be no recovery for his death by being struck by the train, although he thought the train was on another track; his negligence being the proximate cause of his death, whether or not any signals were given or the speed of the train was excessive.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1319-1323; Dec. Dig. 389.]

Appeal from Circuit Court, Muhlenberg County.

Action by the administrator of Bruce M. Fentress against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Benjamin D. Warfield, of Louisville, Taylor & Eaves, of Greenville, and Wilbur F. Browder, of Russellville, for appellant. Virgil Y. Moore, of Marion, Gordon & Gordon & Cox, of Madisonville, and Thos. J. Sparks, of Greenville, for appellee.

TURNER, J. On Sunday, November 9, 1913, Bruce M. Fentress and Duncan Morgau,

aged, respectively, 18 and 17, went to Cleaton, a mining town in Muhlenberg county on appellant's railway line, to call upon two young ladies, Misses Jackson. Finding that the young ladies were out of town, but would return on the afternoon train, they remained there and met them at that train. The young men themselves expected to leave the town on another train which left shortly after the train bringing the young ladies came. After having first made arrangements with a friend to purchase their tickets for them so that they could remain as long as possible with the young ladies and still catch their train, they proceeded with them down the railroad track about 250 or 300 yards in the direction of their home. At this place was a bridge or crossing where they had a view of the railroad track all the way back to the station and about 250 or 300 yards in the other direction from which the train they expected to board was coming. They stayed at the bridge or crossing and talked to the young ladies for about five minutes, when their train appeared around the curve about 250 or 300 yards away. They hastily told the young ladies good-bye, and started running down the track towards the station, the train coming behind them going in the same direction. It was about 5:40 p. m., and dark. Morgan was about 10 feet in front of Fentress. At a point about halfway between the bridge and the station there were four tracks, two of which ran under a coal tippie, another known as the main track, and a passing track. The main track was the most eastern, and the passing track was next to it, and between them was a space of a few feet. The headlight of the engine was shining brightly, and when they were near the coal tippie Fentress, thinking that Morgan was on the passing track, and that the train behind them was coming on that track, hollered to him that he was on the wrong track. Morgan at the time was not in fact on the passing track, but was in the space between the two tracks, but, when notified by Fentress that he was on the wrong track, he immediately observed that Fentress himself was on the track upon which the train was coming and which was then within 10 feet of him, and so notified him. Fentress then for the first time observed that he was on the track upon which the train was coming, and made a quick and well-nigh successful effort to jump off the track, but the engine struck his leg, threw him against a switch signal, and killed him.

This is an action by the personal representative of Fentress against the railroad company for damages. On the trial in the lower court the plaintiff recovered a judgment and verdict for \$2,500, and the railroad company appeals. The only ground of reversal is that the company was entitled to a peremptory instruction, and that is the only question necessary to be determined.

Morgan, Fentress' companion at the time,

was the only eyewitness to the accident, and tells of it in the following way:

"We ran right down there between those tracks and right a little of this side of the tippie here, about there, he got between those tracks; he got on the main track; that is where I judge he got on. Before I noticed it he was down here, along here somewhere, and he hollered to me to look out; that I was on the wrong track. I hollered— When I looked around, I guess the train was 10 feet away from him. I had time to holler, but he didn't have time to get off; he was almost off along there. The train hit him on his left leg. I found him laying right there. Q. He was along down here about this green cross somewhere alongside the tippie? A. Yes. Q. And said to you that you were on the wrong track? A. Yes, sir. Q. Immediately you turned and looked, and saw he was on the wrong track, and you told him so? A. Yes, sir. Q. And before he could get out of the way the train struck his left leg here at this point? A. Yes, sir. Q. And did you go to him immediately after the train passed? A. Yes, sir. Q. Where did you find him? A. Right there. Q. Did he hear your warning that he was on the wrong track? A. I believe he did. Q. How far were you from him at the time? A. I was about— I hollered about 20 feet— Q. Did he attempt to heed the warning you gave him? A. Yes, sir. Q. He didn't have time to get out of the way? A. No, sir. Q. What did you see him do when you cried to him that he was on the wrong track where the train was approaching? A. He looked around and saw he was wrong and tried to get off. Q. Was he in the act of jumping off when it struck him? A. Yes, sir. Q. As you saw him, did the train strike him at any place except on the left leg? A. No, sir."

Again on his main examination he testifies as to the point where Fentress got on the main track as follows:

"Q. You think young Fentress passed on to the main track about the green cross? A. That is where I said he got on—right there. Q. What distance, Mr. Morgan, is it from the point where he got on the track to the point where he was struck? A. 140 feet."

Again on cross-examination he says:

"Q. When you saw the train coming and heard it coming, what did you and Fentress do? A. Went down the track. Q. Who was ahead? A. I was. Q. What part of the track did you run down? A. Between the main track and the west side, on the west. Q. How far was the train away from you when you started to run down to Cleaton to get on the train? A. It was coming around the curve up there from Beaver. Q. About how far was that from where you were standing? Did you see that measured? A. No, sir. Q. It would be a mere guess to say how far it was? A. Yes, sir. Q. You don't know how far it was? A. No, sir. Q. Can you say approximately how far it was in your opinion? Was it as much as 200 yards? A. Yes, sir; it is that much. Q. 300 yards? A. I think between 200 and 300 yards. Q. Between 200 and 300 yards? And you were 200 yards from the station on that bridge? A. Yes, sir; what I guess. Q. That is your opinion? A. Yes, sir. Q. You saw the train between 200 and 300 yards coming towards you while you were standing on the bridge and then it was about 200 or 300 yards from the station where you were to get on the train? A. Yes, sir. Q. Well, you wanted to beat the train to the station, didn't you? A. Yes, sir. Q. When you left the little bridge where you left these young girls, did you both start together, or were you ahead when you started, or do you remember that? A. I don't remember. Q. Did you outrun him? A. Yes, sir; I was in front. Q. How far in front when he

told you you were on the wrong track? A. About 10 feet. Q. About 10 feet? And you saw that car, did you not, about along here? Where did he tell you you were on the wrong track? Were you on this track at all? A. No, sir. Q. You were between the tracks, were you not? A. Yes, sir. Q. You were on no track, were you? A. I was not. Q. Where was he when he hollered and said you were on the wrong track, having this point in view, and this up here? A. It was about there. Q. About there? A. Yes, sir. Q. Mark that with a piece of chalk. (Point was marked on the diagram with a green cipher.) Q. You were right here about 10 feet ahead of him? A. Yes, sir. Q. And he was there when he first said, 'Look out, Morgan; you are on the wrong track,' didn't he? A. Yes, sir. Q. What did you say to him? A. I said you are wrong. Q. Now, then, is it not true that he immediately, upon your saying that, tried to get off that main track? A. Yes, sir. Q. And was struck by the engine at once? Isn't that a fact? A. Yes, sir. Q. Do you know how far he was from the engine when he turned and said you were on the wrong track? A. I would say about 10 feet."

Morgan, as stated, was the only eyewitness to the accident, and this is all the testimony showing how it happened. The engineer, however, testified that he was in his cab maintaining an outlook, and that he did not see the decedent at all, and did not know of his injury until he had reached a station several miles north of Cleaton, where the news had come over the wire. He further explains that from his position in the cab if one had come on the track in front of his train within 35 feet of the engine, by reason of certain obstructions, he could not have seen him.

[1] It will be seen from this evidence that these two young men, with full knowledge that the train was approaching, deliberately started out on or alongside the railroad track to beat it to the station so that they might board it, knowing when they started that the train was only about twice as far from the station as they were, and presumably knowing that it was running much faster than twice as fast as they could go and would overtake them at some point before they reached the station. In this situation they deliberately ran alongside of and on the railroad tracks, and, while the evidence is somewhat confusing as to when Fentress got on the main track, it was pure recklessness and inexcusable negligence for him, under these conditions, to have gotten on it at any point.

It is perfectly clear, however, from the conversation between the two young men, that the real cause of the accident was that Fentress was on the main track and thought the train was coming up behind him on the passing track, and never discovered his mistake until the engine was within ten feet of him, when it was too late for him to save himself. So that the case resolves itself into the question whether he, being in full possession of the fact that the train was approaching from the rear, can recover from the railroad company because he was mistaken about which track it was coming on.

That he was mistaken is too plain for argument, for he notified Morgan that he was on the wrong track, thinking at the time that Morgan was on the passing track, and evidently thought that he himself was on the track that the train was not on, and never discovered his mistake until too late to save himself. In the first place, it was sheer recklessness for him, with knowledge that the train was approaching, to be on either track; and in the next place, being himself upon one track, and assuming that the train would run on the other, was his mistake, and not that of the company.

[2] It is not a pertinent inquiry in this case whether the signals were given or not. Fentress knew of the approach of the train, and no signals could have warned him of anything he did not know. Nor is it important whether he was a trespasser at the time or a licensee, or whether the train was running at an excessive rate of speed. The whole evidence shows that he, with full knowledge that the train was coming, negligently ran along and upon the track ahead of it, and that negligence, coupled with his mistaken opinion that the train was running on the other track, was the proximate cause of his death.

The case of Louisville & Nashville R. R. Co. v. Trower's Adm'r, 131 Ky. 589, 115 S. W. 719, 20 L. R. A. (N. S.) 380, was where a mail carrier who was under the duty of putting mail on the local passenger train was killed. A special train was running on the time of the local passenger, and Trower heard the train coming, presumably thinking it was the local, and knowing of the approach of the train, he undertook to cross the track in front of it and was killed. His administrator recovered a judgment in the circuit court, and this court, in reversing that judgment and directing a verdict for the defendant, said:

"He whose negligence is the proximate cause of the injury is the one at fault in law, and is the loser. Appellant's negligence in running its train too fast by the station was not the proximate cause of the intestate's death. His own negligence in going upon the track with knowledge of the defendant's negligence, or rashly or recklessly ignoring its negligence and 'taking chances,' was the proximate cause of his injury; for, but for it, appellant's negligence would have been harmless as to him. In all the cases cited, where the fact was undisputed that the injured party knew of the train's approach, and heedless of it, or miscalculating the results, went upon the tracks just in front of the train, a recovery was denied. From these authorities we gather the principle of law to be that it is such negligence for one to go upon the railroad track just in front of a rapidly approaching train, which he sees or knows to be then coming in, that for his injuries inflicted by it he cannot recover from the railroad company, not because it was free from negligence, but because his own negligence was the immediate and nearest cause of his injury. We think the undisputed facts of this case bring it within that principle, and the peremptory instruction should have been granted."

In that case the authorities were extensively reviewed, and the rule is deductible

from them that whenever one knows that a train is approaching, and either because of his recklessness or by reason of his mistaken judgment undertakes to cross in front of it and is killed or injured, there can be no recovery, because, however negligent the company may have been, his own conduct is the proximate cause of the accident. There are many cases in this state where this general proposition has been laid down. Fentress knew of the danger, and, so knowing, got on the track, assuming the train was coming from behind on another track. This error in judgment on his part furnishes no ground of recovery. *Thompson on Negligence*, 1 Sup. 27, § 186.

There should have been a directed verdict for the defendant.

The judgment is reversed, with directions to grant appellant a new trial, and for further proceedings consistent herewith.

DAVIS v. CHESAPEAKE & O. RY. CO.

(Court of Appeals of Kentucky. Oct. 29, 1915.)

1. MASTER AND SERVANT §213—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where plaintiff, who was employed to keep a railroad water tower in repair, was not directed as to the method of work, and knew that water dripped down the spout, he assumed the risk of injury in attempting to descend by that means, notwithstanding the railroad company furnished him no ladder.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 559-564; Dec. Dig. § 213.]

2. MASTER AND SERVANT §222—INJURIES TO SERVANT—ORDERS OF SUPERIOR.

Where it was plaintiff's business to keep in repair a railroad water tower, the fact that his superior notified him of a defect which he was proceeding to repair will not, on the theory that he was acting under the direct orders of his superior, render the railroad company liable for injuries occasioned by slipping on the wet spout, down which water had run.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 648-651; Dec. Dig. § 222.]

3. MASTER AND SERVANT §204—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where plaintiff, after repairing a slight defect in the valve of a railroad water tower, slipped from the wet spout in descending, the fact of the defect, which was of a temporary character, does not show that the railroad company was negligently using defective appliances, which would, under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]), preclude it from taking advantage of the defense of assumption of risk, as the only defects precluding defenses are those endangering employes.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 544-546; Dec. Dig. § 204.]

Appeal from Circuit Court, Greenup County.

Action by J. F. Davis against the Chesapeake & Ohio Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Allan D. Cole, of Maysville, for appellant. Proctor K. Mallin, of Ashland, and Worthington, Cochran & Browning, of Maysville, for appellee.

SETTLE, J. This action was brought by the appellant, J. F. Davis, to recover of the appellee, Chesapeake & Ohio Railway Company, damages for injuries sustained while he was engaged in repairing a leak in its water column at South Portsmouth, Ky., from which he fell during the progress of the work, or after its completion; the fall resulting in the breaking of a bone in his hand, the fracture of two of his ribs, and other bodily hurts of a less serious nature.

It is, in substance, alleged in the petition, as amended, that appellant's injuries were caused by the negligence of appellee in failing to furnish him a ladder for use in making the repairs on the water column, and in permitting a valve of the water column to become and remain so defective as that large quantities of water escaped and fell upon the place on the water column where appellant was compelled to ascend and descend in doing the work of repairs necessary thereon, which caused his feet to slip and his body to fall, and resulted in the injuries mentioned; that the work he did upon the water column was performed in pursuance of an order given him by an agent of appellee, his superior in authority; and that the defective and dangerous condition of the water column was not known to him when he began the work of repair required, but was known to appellee.

Appellee's answer traversed the averments of the petition, and alleged assumption of risk and contributory negligence on the part of appellant. On the trial the circuit court, at the conclusion of all the evidence, peremptorily instructed the jury to find for the appellee, which was done, and judgment rendered accordingly. The appellant was refused a new trial; hence this appeal.

The facts, as developed by the evidence heard on the trial, show that appellant was in the employ of appellee as a pumpman at South Portsmouth, and that his duties consisted in running a gasoline engine during the daytime, and keeping in repair the two water columns maintained by appellee at its station in South Portsmouth; these columns being supplied with water pumped into them by the gasoline engine operated by appellant. On the night of October 6, 1911, appellant was informed by appellee's night pumpman, whose name is Smith, that one of the water columns was leaking, and Smith advised him to repair same, as was his duty, whereupon appellant, shortly after midnight, started toward the depot for the purpose of repairing whatever defect there was in the column. While on his way to the depot he got from

his mail box a letter from A. B. Allen, his immediate superior, advising him of the defect in the water column and of the necessity of his repairing same. Upon reaching the water column appellant found upon investigation that the leak was caused by a defective valve seat, which he immediately undertook to repair and did repair. In performing this work he climbed up on top of the water column. While there a train came in and stopped at the column. After completing the repairs, appellant attempted to get down from the column by descending onto the tender of the engine standing below, thence to the ground. According to his statements the top of the water column was wet, owing to the leaking of water resulting from the defect he had repaired, which rendered the pipe slippery, and that while descending from the column to the tender his foot slipped on the wet pipe, causing him to fall and sustain the injuries complained of.

[1] It is apparent from the evidence that the service performed by appellant in repairing the water column was a part of the work for which he was expressly employed; that the work he did was not performed under the supervision or direction of any superior officer or employé of appellee, but according to his own judgment, after an inspection of the defect. Neither the notice from Smith, his fellow pumpman, of the necessity of making the repairs, nor the order from his superior, Allen, received while he was on his way to the water column, contained any direction as to the manner in which the work should be performed. They left to appellant the inspection and ascertainment of the defect, as well as the method of repairing it. Moreover, the evidence shows that appellant was experienced in the work of making such repairs, that he had for a year or more kept the two water columns of appellee at South Portsmouth in repair, and that he was thoroughly familiar with the construction of both and with the means necessary to be used in reaching the place where the repairs in this instance were made. This familiarity with the water columns and the means of making such repairs as the one in question make it reasonably apparent that appellant, at the time of receiving his injuries, was not called upon to meet any danger of which he was ignorant, or without means of ascertaining. He also knew, from an inspection of the defect and pipe before he attempted to descend from the water column, that water was leaking on the pipe by which he attempted to descend, and of its slippery condition, in view of which he is estopped to claim that the risk or danger he encountered from the slippery condition of the pipe in attempting to get down from the water column was unknown to him. He also knew that the risk attending his work was necessarily greater at night than it would have been in the daytime, and if the one lantern with which he was at the time provided gave

insufficient light, he ought to have provided himself with a second lantern before undertaking the repairs. It is true, as claimed by appellant, that he was not provided by appellee with a ladder upon which he could have climbed to the defect in the water column and descended therefrom; but he does not allege, nor does the evidence show, that there had ever been a ladder used in making repairs upon the water columns, or that he had, in making previous repairs thereon, used a ladder, or at any time advised appellee of the necessity of its use. So whatever risk attended appellant's climbing to the place of the defect or descending therefrom without the use of a ladder was known to him before and when he undertook the work of making the repairs on the water column.

It is our conclusion that the facts of this case place it in that class of cases to which the rule that the master owes the servant the duty of furnishing him a reasonably safe place to work, or reasonably safe tools with which to perform the work, does not apply, because the servant, by reason of the nature of his employment and the service required of him, is himself charged with the duty of inspection and seeing to it that the place of his work and the appliances with which he must perform it are reasonably safe for its performance. In *Daisey v. Wagner et al.*, 162 Ky. 554, 172 S. W. 942, L. R. A. 1915D, 157, will be found the latest statement of the rule in question as declared by this court. In that case the plaintiff sued to recover of the defendant damages for injuries he sustained by falling from a building upon which he and other employés of the defendant were engaged in placing a tile roof; the negligence complained of being the act of the defendant in requiring a steep roof to be put on without first providing either gutters or hangers, by means of which plaintiff would have been enabled to use ladders upon the roof while engaged in the work of placing and securing the tiles in position. In the opinion it is said:

"The work attempted to be done by appellant was in itself hazardous, and the danger of its performance obvious to a person of even less experience than was possessed by him. Being in charge of the work as foreman, because of his experience and skill, he will not be heard to say that he did not know of the danger. Therefore such risks as would ordinarily be incident to such work must be regarded as having been assumed by him. The duty of the master with respect to the furnishing of a safe place or safe premises for the performance of such work as fell to the lot of appellant can have no application. Therefore the master is not, in a case like this, charged with the duty of exercising ordinary care to discover the dangerous or unsafe place, and is not liable in damages for an injury to the servant because of the dangerous condition, for, the danger being obvious, the duty of protecting himself against it is shifted to the employé. So, assuming in this case that appellant's injuries were received as alleged in the petition, as the conditions which caused them were openly visible to him and the work was to be performed in accordance with

his judgment as appellees' foreman, there being no assurance by the appellees of the safety of the place (even if such assurance under the circumstances could have shifted the liability), nor promise by appellees to provide other appliances of greater safety, we can but hold that appellant assumed the dangers incident to the performance of the work, for which reason he cannot recover damages."

The above excerpt from the opinion is but a restatement in different language of the same rule announced by the court in *Russel v. W. E. Caldwell Co.*, 158 Ky. 229, 164 S. W. 787; *Ballard & Ballard v. Lee's Adm'r*, 131 Ky. 412, 115 S. W. 732; *Wilson v. Chess & Wymond Co.*, 117 Ky. 567, 78 S. W. 453, 25 Ky. Law Rep. 1655; *Louisa Coal Co. v. Hammond's Adm'r*, 160 Ky. 271, 169 S. W. 709; *Logan's Adm'r v. Sherrill-King Mill & Lumber Co.*, 160 Ky. 205, 169 S. W. 707; *Williams Coal Co. v. Cooper*, 138 Ky. 287, 127 S. W. 1000; *Mowrey v. Frazier*, 120 S. W. 289; *Wight v. Telephone & Telegraph Co.*, 137 Ky. 303, 125 S. W. 718; *Standard Oil Co. v. Watson*, 154 Ky. 550, 157 S. W. 929; *Dyer v. Pauley Jail Bldg. Co.*, 144 Ky. 592, 139 S. W. 789.

[2] The contention of appellant that he was working under the direct orders of a superior officer is wholly without merit. It is true he testified that he received an order from his immediate superior to make the repairs on the water column; but he admitted that he would have made the repairs without this order, because of the previous notice from Smith, his fellow pumper, of the necessity therefor, and, furthermore, that it was a part of his duties as day pumpman to make all necessary repairs in the water columns, whether required to be performed in the daytime or at night. In fact, when the order was received from his superior, he was on his way to make the repairs. So in no event was the order anything more than a general order to appellant to do what was one of the ordinary duties of his employment. The order did not, in fact or as a matter of law, impose any greater responsibility upon him than he would otherwise have incurred. The effect of such an order is considered and passed on in *L. & N. R. Co. v. Stanfill*, 107 S. W. 721, 32 Ky. Law Rep. 1043. Stanfill was a brakeman in the service of the railroad company on a work train. There was one other brakeman on it besides himself. While coupling an extra tank to the caboose, his hand was caught between the bumpers and all his fingers mashed off. He sued to recover damages for the injury, and obtained a verdict for \$5,500 in the circuit court. The judgment was reversed. The negligence charged was that the bumpers were defective, and plaintiff's injuries were caused by their dangerous condition. He claimed to have made the coupling by order of the conductor. The two brakemen, while asleep in the caboose at a station, were awakened by the conductor, who told them to "get up and get out of there; it is time to go to work; get

up and couple up; it is time to leave." The only coupling to be made was that between the tank and the caboose. This coupling was made by the plaintiff, who had served the railroad company on that train for about four months. The coupling had often been made by him, and he well knew the defective condition of the drawhead and how the coupling was made. In the opinion it is said:

"The rule in Kentucky is that ordinarily a servant, who knows the risk and understands the danger, cannot recover for his injury where he voluntarily takes the risk. *Dow Wire Works v. Morgan* [96 S. W. 530] 29 Ky. Law Rep. 854; *Wallace v. Bach* [97 S. W. 418] 30 Ky. Law Rep. 69; *Bollington v. L. & N. R. Co.* [125 Ky. 186, 100 S. W. 350] 30 Ky. Law Rep. 1280 [8 L. R. A. (N. S.) 1045]; *Avery v. Lung*, 106 S. W. 865, 32 Ky. Law Rep. 702. An exception is made to this rule where the servant acts in obedience to the specific order of his superior, and the risk is not so imminent that a person of ordinary prudence would refuse to take it; but the proof in this case does not bring it within the exception. There was no order from the conductor to Stanfill to make the coupling in question. There was simply a general order to both of the brakemen to 'get up and couple up; it is time to leave.' This left either one of them to do the work, and it left the one who did the work to choose his own mode of doing it. A general order from a foreman to proceed with the usual business of the day will not impose upon the master any greater responsibility than he ordinarily incurs. To hold otherwise would be to entirely ignore the rule that the servant cannot recover for the risks which he assumes; for, when servants are told to go to work every morning, they are expected to go about their usual business and do it in the usual way. In order to bring a case within the exception above referred to, there must be an order from the master to the servant to do the particular thing at that time. The conductor was in the caboose. It was the brakeman's duty to get the train ready to start, and after telling them 'to get up and get out and couple up,' he paid no further attention to them. If the conductor had been present at the time the coupling was made, and Stanfill had objected to making it, and the conductor had directed him to make it, a different question would be presented; but here the sum of the evidence is simply that the conductor told the brakeman to get up and get the train ready to leave, and Stanfill, in obeying this order, went out and undertook to make this coupling. He knew the condition of the drawheads as well as the conductor. The danger was perfectly patent. He understood the danger before he was hurt, as well as after he was hurt. He had never complained of the use of the link and pin, or objected to making the coupling with them. As a matter of fact such couplings were in general use a few years ago on all such trains, and they are still often used on work trains and in an emergency."

In this case, as in that, the servant chose his own way of doing the work, and made no complaint to any one. The condition of the water column was, as before stated, actually known to him, and the danger fully understood, as well before and when he received his injuries as afterwards. On the state of case here presented, the conclusion is inevitable that appellant assumed the risk and danger that resulted in his injuries; in other words, that the injuries resulted from the means adopted by him in performing the work of repairing the water column or for

quitting the place of work after its completion. Consequently they were caused and sustained by reason of his negligence, which absolves appellee from the liability attempted to be imposed upon it in this action. As said in *Louisa Coal Co. v. Hammond's Adm'r*, 160 Ky. 271, 169 S. W. 709:

"A servant is not ordinarily required to make a minute or detailed examination of the place where the master puts him to work, nor to take notice of any defects which would not be apparent to one who usually has neither time nor opportunity for more than a casual, hurried glance at the place of work or the instrumentalities, but is entitled to rely on the master's having adequately discharged his primary duty of using ordinary care to make the place of work and instrumentalities of work reasonably safe for his use. Where, however, the servant, as in the instant case, is the representative of the master, and in control of the place of work, or instrumentalities for doing it and the manner of its performance, if he himself undertakes its performance, he assumes, not only the risks or dangers that are obvious, but also such as ordinary care on his part in inspecting the place or instrumentalities of work before beginning it could have enabled him to discover."

Here appellant alone was in charge of the work. He alone knew whether it was safe or unsafe to attempt its performance in the manner pursued by him. He was charged with the duty of exercising ordinary care to ascertain whether the place and the instrumentalities were reasonably safe for the work he had to perform, and he admits that he saw and knew the wet and slippery condition of the pipe before he fell from the water column and was injured. These facts necessarily bar a recovery, for his injuries were incidental to and resulted from his assumption of the risk he knowingly incurred by his attempted use of the wet pipe in descending from the water column.

[3] The fact that the action was brought under the federal statute known as the "Employers' Liability Act" does not affect the question under consideration. Here there was no violation of the appellee of any provision of that statute. The evidence furnishes no proof that it negligently used in operating its railroad a defective appliance, which of itself caused the appellant's injury. The defect in the valve of the water column, being slight and of a temporary character, was repaired immediately after its discovery by appellant. Whether the defect was the result of accident or wear and tear does not appear, but the evidence fails to show that

it was attributable to the appellee's negligence. The appellant was not injured by the defective valve, but by his attempted use of a pipe in descending from the water column after repairing the valve. The pipe contained no defect, but was wet and slippery from the leaking of water from the valve, which made its use in the manner attempted by appellant obviously dangerous, which danger, as already shown, was known to him. In *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, it was held:

"The elimination of the defense of assumption of risk by Employers' Liability Act April 22, 1908, § 4, 35 Stat. 65, c. 149 (U. S. Comp. Stat. Supp. 1911, p. 1322), in any case where the violation by the carrier of any statute intended for the safety of the employes contributed to the injury or death of the employé, plainly evidences the legislative intent that in all other cases such assumption of risk shall have its former effect as a complete bar to the action." *Southern R. Co. v. Crockett*, 234 U. S. 725, 34 Sup. Ct. 897, 53 L. Ed. 1564.

The doctrine deducible from the cases supra, and others involving this question, decided by the Supreme Court, seems to be that the defense of assumption of risk is available to an interstate carrier under the "Employers' Liability Act" as at common law, except in the cases mentioned in section 4 of that act (Comp. St. 1913, § 8660); i. e.:

"Any case where the violation by such common carrier of any statute intended for the safety of employes contributed to the injury or death of such employé."

It is manifest that, even if there had been evidence conducing to prove that the wet and slippery condition of the pipe on the water column was attributable to the negligence of appellee, no doubt could exist of its right to rely upon the defense of the assumption of risk, for, according to the undisputed facts, the danger to which appellant subjected himself in attempting to make use of the wet pipe in descending from the water column was so obvious and imminent that an ordinarily prudent person could not, under the circumstances, have failed to know and appreciate it. It therefore follows that the giving of the peremptory instruction by the trial court was not error.

We have been unable to discover any error in the admission or rejection of evidence. For the reasons indicated, the judgment is affirmed.

PETE SHEERAN, BRO. & CO. v. TUCKER et al.

(Court of Appeals of Kentucky. Oct. 28, 1915.)

1. APPEAL AND ERROR — 173—REVIEW—DEFENSES.

In an action to recover damages for breach of a contract, where defendants failed to raise the question in the court below that the plaintiff union was an unlawful combination in restraint of trade and could not recover, it was too late to raise it on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095, 1098, 1101-1120; Dec. Dig. — 173.]

2. PLEADING — 207—TRIAL — 168—AFFIRMATIVE DEFENSES—SPECIAL DEMURRER.

An affirmative defense may not be asserted by special demurrer, or by a motion for a directed verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 511, 512; Dec. Dig. — 207; Trial, Cent. Dig. §§ 341, 376-380; Dec. Dig. — 168.]

3. SALES — 52—ACTION FOR PRICE—BURDEN OF PROOF.

In an action for damages for breach of a contract to purchase tobacco, where the issue was whether a sale was effected or whether there was merely an agreement to effect a subsequent sale by written contract, the burden was on the plaintiffs.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-144, 1045; Dec. Dig. — 52.]

Appeal from Circuit Court, Breckenridge County.

Action by E. H. Tucker and others against Pete Sheeran, Bro. & Co. Judgment for plaintiffs, and defendants appeal. Affirmed.

Claude Mercer, of Hardinsburg, for appellants. John P. Haswell, Jr., of Louisville, and Gus Brown, of Hardinsburg, for appellees.

HANNAH, J. This is the second appeal in this case. For the opinion on the former appeal, see *Tucker v. Pete Sheeran, Bro. & Co.*, 155 Ky. 670, 160 S. W. 176. Briefly stated, the action is one by Tucker and other members of a committee appointed by and acting for the Farmers' Union of Breckenridge County to effect a sale of the tobacco grown by the members of the union, instituted against Pete Sheeran, Bro. & Co. to recover \$500 as damages for failure to perform the terms of a contract which the plaintiffs claimed had been entered into by defendants and themselves, whereby they agreed to sell and defendants agreed to purchase the tobacco in question. The defense was that there was merely an agreement to effect a subsequent sale of the tobacco by a written contract to be thereafter entered into between the parties.

Upon the second trial the lower court instructed the jury in conformity to the opinion of this court reversing the first judgment, and the jury found a verdict for the plaintiffs. The defendants appeal.

The Farmers' Union of Breckenridge Coun-

ty is composed of 17 local unions; and the county union is in turn a constituent member of the Kentucky State Union, which is a branch of the Farmers' Educational and Co-operative Union of America.

Upon the second trial there was introduced in evidence a copy of the constitution and by-laws of the state organization, from which the following excerpts are taken:

"We declare the following purposes: * * * To secure and maintain profitable and uniform prices for grain, cotton, tobacco, live stock and other products of the farm. * * * As organized farmers, it is our aim and duty to attend to our own business, not to disturb or interfere with any other legitimate vocation, profession, or calling, but in attending to our own business, we shall strive to control the production, price, and distribution of every class of farm products."

[1, 2] Because of these declarations, it is now contended by appellants that the Farmers' Union is an unlawful combination in restraint of trade, and that it therefore cannot recover herein. But appellants failed to raise this question in the court below either by pleading or proof, and it is too late to raise it here. They insist that the question was raised by special demurrer and by motion for a directed verdict; but an affirmative defense may not be asserted in either of these ways.

[3] 2. Appellants also complain because the trial court did not assign to them the burden of proof. The real issue being, as said in the former opinion, whether a sale was effected, or merely an agreement to effect a subsequent sale by written contract, the burden was undoubtedly on the plaintiffs. This was not an action to recover on the check which was put up by the defendants as a forfeit, but to recover damages for breach of the contract.

The judgment is affirmed.

GEARY v. TAYLOR.

(Court of Appeals of Kentucky. Oct. 29, 1915.)

1. PRINCIPAL AND AGENT — 100 — EXTENT OF AUTHORITY—CONSTRUCTION OF CONTRACT.

A contract between the owners of a tract of several thousand acres of land and H. provided that H. was to have general supervision and control of all of such lands; that he was to see that no person entered, trespassed, or squatted upon it, or cut down, injured, or destroyed trees, etc.; that as to any persons then located upon and in possession of any portion of the land without record claim of title, but who were merely in the occupation thereof, H., if he thought it proper and prudent, was authorized to make a lease with such persons; that the rent collected should be accounted for to the owners; that timber cut and lying upon the land might be sold; that H. was to do all he could to aid the owners to get possession and control of any of the land claimed by persons located or squatted upon it without any valid claim or title; and that he should not cultivate or crop any portion of the land, or permit any person to trespass upon it, or take possession of any part thereof. Held, that this did not authorize H. to make leases to persons other than

those then living on the land, since, while it gave him general charge and supervision over the land, it particularly specified what his duties were, and authorized leases only to persons then on the land.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 262-273, 345, 364, 368-373; Dec. Dig. § 100.]

2. PRINCIPAL AND AGENT § 166—UNAUTHORIZED ACTS—RATIFICATION.

The owners of land gave H. general supervision thereof, with authority to lease to persons then living on the land, and to sell timber cut and lying on the ground; the contract providing that he was to account for moneys collected and that he was to receive \$10 a week for his services. H. made a lease to a party not then living on the land and received one month's rent. Under instructions from G., one of the owners, he took his expenses out of whatever he collected, and he was unable to state whether the rent so collected was retained by him or paid to the owners, but did state that he supposed it went in with the rest of the funds collected. It appeared that the owners other than G. never knew of the lease, or of the payment, until a suit by the lessee for failure to comply with the lease. *Held*, that the facts showed no ratification of H.'s lease by the owners other than G.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 627-633; Dec. Dig. § 166.]

3. PRINCIPAL AND AGENT § 145—LIABILITY ON CONTRACTS.

A principal may be charged upon a written simple executory contract entered into by an agent in his own name within his authority, though the name of the principal does not appear in the instrument and was not disclosed; this not contradicting the writing, but only explaining the transaction.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 499, 513-520; Dec. Dig. § 145.]

4. EVIDENCE § 450—CONTRACTS—PARTIES.

Where a contract purported to be made in the name of a company, it might be shown by parol who the members of the alleged company were, and whom it was intended to bind by the agreement, especially where they had frequently done business in the name of the company.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 1906-1910, 2109-2114; Dec. Dig. § 459.]

5. TENANCY IN COMMON § 49 — LEASES — RIGHTS OF LESSEE.

A lease by one or more of several tenants in common is not valid as to those not joining therein, but merely makes the lessee a tenant in common with the owners.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 123; Dec. Dig. § 49.]

6. TENANCY IN COMMON § 49—LEASE—FAILURE TO DELIVER POSSESSION—DAMAGES.

One of several tenants in common, in writing to an agent of the cotenant to "make lease for that cattle range the best you can," did not assume to be the sole owner of the land, nor vest the agent with authority to make the lease in his name alone, nor did he give H. any other authority than to make a lease in the name of the co-owners; and his liability for a breach of the lease made by the agent without authority from the other cotenants was not the same as if he had been the sole owner, and where he owned about an undivided one-third interest, the proper measure of damages was the difference between one-third of the agreed rent, including one-third of the reasonable cost of

fencing which the lessee agreed to build and one-third of the rental value.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 123; Dec. Dig. § 49.]

7. LANDLORD AND TENANT § 129—FAILURE TO DELIVER POSSESSION—DAMAGES.

Ordinarily, where a lessor refuses to comply with the terms of a lease, the measure of damages in an action by the lessee is the difference between the agreed rent and the rental value of the premises.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 450-457; Dec. Dig. § 129.]

8. LANDLORD AND TENANT § 129—FAILURE TO DELIVER POSSESSION—DAMAGES.

Where a lease provided that it was to terminate when the land was sold, the lessee could only recover, as damages for the lessor's failure to deliver possession, the difference between the agreed rent and the rental value up to the time a judicial sale was confirmed, though a deed was not made to the purchaser for 19 months thereafter, as the sale became effective when it was confirmed.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 450-457; Dec. Dig. § 129.]

9. LANDLORD AND TENANT § 129—FAILURE TO DELIVER POSSESSION—ACTIONS—EVIDENCE.

In a lessee's action for damages caused by the lessor's failure to deliver possession, the lessee was entitled to introduce evidence to show the value of the land for pasturage purposes, but not to show the probable profits which he would have realized from the use of the land.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 450-457; Dec. Dig. § 129.]

Appeal from Circuit Court, McCreary County.

Action by J. G. Taylor against John A. Geary and others. There was a judgment for plaintiff against the defendant named, and such defendant moves for an appeal. Appeal granted, and judgment reversed.

O. H. Waddle & Son, of Somerset, for appellant. Henry C. Gillis and J. B. Snyder, both of Williamsburg, for appellee.

CLAY, C. Plaintiff, J. G. Taylor, brought this action originally against the Flat Rock Coal Company, the Geary Land & Development Company, and A. P. Hodges to recover damages for failure on the part of the defendants to comply with a lease. Subsequently John A. Geary, Wd. Dowling, D. G. Falconer, and others were made parties defendant. The return of the service of process on the Flat Rock Coal Company was quashed. The court directed a verdict in favor of Dowling, Falconer, and others, and a trial before a jury resulted in a verdict and judgment in favor of plaintiff against John A. Geary for the sum of \$450. The amount in controversy being less than \$500, exclusive of interest and costs, the defendant Geary has moved for an appeal.

The facts are as follows: About the year 1881, the Flat Rock Coal Company, a cor-

poration, owned several thousand acres of land then located in Pulaski county, but now embraced in the new county of McCreary. Shortly thereafter certain creditors of the company brought suit, and the lands were sold and purchased by John A. Geary, Ed. Dowling, D. G. Falconer, John W. Lell, John B. Wilgus, and John T. Miller, and were held by them from that time on as tenants in common. On April 8, 1909, John A. Geary, Edward Dowling, D. G. Falconer, the Security Trust Company of Lexington, as administrator of John B. Wilgus and executor of John W. Lell, and John T. Miller, entered into a contract with A. P. Hodges, of Pulaski county, by which the following authority was conferred upon him:

"Second party is to have the general supervision and control of all of said lands, and see that no person enters upon any part of said lands, or trespasses or squats upon any part thereof, or cuts down, injures, or destroys or carries away any trees that may be on same, or strips the bark off any of the trees upon said land, or in any way injures any of the same. As to any person or persons now located upon and in possession of any portion of said land without any record claim of title, and who are merely in the occupation thereof, the said Hodges, if he thinks it is proper and prudent so to do, is authorized to make a lease with said persons for a term of one year, and from year to year, as may seem best for first parties. Said lease shall be made according to the form furnished to second party by first parties.

"The rent of said portions of land that may be leased or rented shall be collected by second party, and second party shall account for said rents and pay the same over on the 1st day of each and every month to first parties. Such timber as may have been cut and that is now lying upon said land may be sold where it lays on the land by second party for the best cash price he can get for it, the same to be removed by the purchaser at his own cost and expense. He shall account to and pay the purchase price over on the 1st day of each and every month to first parties. Second party shall do all he can to aid the first parties in every way possible to get the possession and control of any portion of said lands that are claimed by persons who have located or squatted upon the same or any part thereof, and who have no valid claim or title thereto or any claim or title of record. Second party shall take the full supervision and control of said lands, and give his services and attention to the keeping, preservation, and care thereof. He shall not cultivate or crop any portion of said land. Second party shall not commit or permit any waste to be committed on said land. He shall not cut or allow any trees to be cut, barked, or injured, or carried away. He shall not permit any person to trespass upon said land, or take possession of any part thereof, or cut down or injure any trees, or strip or bark any of them in any manner whatever. He shall make reports as to said lands from time to time to first parties on the last Saturday in each month. For all of his services herein he shall be paid by first parties ten dollars (\$10.00) per week, said payments to be made as herein provided, in proportion to the interest the first parties and each of them have in and to said land as follows."

On August 3, 1909, John A. Geary sent a letter to Hodges containing the following language:

"* * * And make lease for that cattle range the best you can; best not make it for too long a period, but use your own judgment."

On August 14, 1909, Hodges, in the name of the Flat Rock Coal Company, as party of the first part, by him as agent, leased to J. G. Taylor, party of the second part, a portion of the lands in question for purposes of pasturage. The lease provided that it should continue for a term of ten years, unless the premises should be transferred by the Flat Rock Coal Company. Taylor agreed to pay \$25 on the 1st of January of each year, and further agreed to inclose the heads of Straight creek with a good and sufficient fence and to keep same in repair during the term of the lease. The contract was signed by J. G. Taylor and A. P. Hodges, "Agent Flat Rock Coal Company." The first installment of rent was paid on January 1, 1910. Shortly thereafter, Geary notified Taylor not to do the fencing or take possession of the land. It further appears from the evidence that none of the joint owners, except Geary, knew anything of the alleged lease, and had never authorized Geary or Hodges to execute the lease. At that time there was a suit pending for the settlement of the estates of John B. Wilgus, John T. Miller, and John W. Lell, and these proceedings were all consolidated for the purpose of disposing of the lands in Pulaski county. The lands were sold on September 10, 1910. The sale was confirmed on October 10, 1910, and a deed made to the purchaser on May 18, 1912. Geary says that he never intended that Hodges should go ahead and make the lease without consulting the owners, but intended that he should prepare the lease and send it back for approval, as had always been done.

[1] It is clear, we think, that the above contract between the joint owners and Hodges is not sufficient to confer on Hodges the general power to make leases to persons not living on the land. While it is true that he is given general charge and supervision over the land, the contract goes ahead and specifies particularly what his duties are, and authorizes him to make leases only to persons then on the land. In view of the fact that his duties and powers are thus particularized, the terms of the contract cannot be considered broad enough to include the power to make leases to persons not on the land.

[2] It remains to consider what is the effect of the contract made by Hodges, as agent of and in the name of the Flat Rock Coal Company. As a matter of fact, the Flat Rock Coal Company no longer existed. It had been divested of all title to the lands. As before stated, the proof conclusively shows that none of the joint owners, with the exception of Geary, ever authorized the making of the lease either in their names or in the name of the Flat Rock Coal Company. The proof further shows that Geary himself was not authorized in behalf of the other co-owners to do anything with respect to the land, unless with their consent and approval. But the point is made that Geary's co-owners ratified the lease by accepting and retaining

the rent which plaintiff paid. It may be conceded that a cotenant not joining in a lease may ratify it by accepting and retaining his portion of the rent with knowledge of the circumstances under which it was paid. The proof in this case shows that plaintiff paid \$25 in rent to Hodges, the agent. Hodges says that he supposes it went in with the rest of the little funds that he collected. On being asked, "Did you keep it yourself or pay it to the owners of the land?" he answered:

"I could not say. Under the instructions I had from Mr. Geary, I was to take my own expenses out of whatever was paid on the property; but whether or not that \$25 went to Geary, or I used it, I could not say."

This is all the proof on the question of ratification. It does not show that Geary's co-owners, with knowledge of the fact that the lease had been made and the \$25 had been paid thereon, received and retained any portion of that sum, or derived any benefit therefrom in any settlement which they made with Hodges, the agent. On the contrary, the evidence shows that the co-owners, other than Geary, never knew of the lease in question, or of any payments made thereon, until the summons was served on them in this case. That being true, the evidence fails to show ratification by them. The lease not having been authorized or ratified by Geary's co-owners, it follows that it is invalid so far as they are concerned.

[3, 4] What is the effect of the contract so far as Geary is concerned? The contract purports to have been made by the Flat Rock Coal Company, as principal, by Hodges as its agent. It is the rule that a principal may be charged upon a written simple executory contract entered into by an agent in his own name within his authority, although the name of the principal does not appear in the instrument and was not disclosed. *Ford v. Williams*, 21 How. 287, 16 L. Ed. 36; *Eastern R. Co. v. Benedict*, 5 Gray (Mass.) 561, 66 Am. Dec. 384; 2 C. J. 683. This is true, notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, for it is held that such proof does not contradict the writing, but only explains the transaction. And where, as in this instance, the contract purports to be made in the name of a company, we see no reason why it may not be shown by parol who were the members of the alleged company and whom it was intended to bind by the agreement, in view of the fact that the co-owners of the land company frequently did business with respect to the land in question in the name of such company. We therefore conclude that the contract, though not binding on the other tenants in common, because not authorized by them, is binding on Geary, who did authorize it.

[5-9] It remains to determine the extent

of his liability. Where property is owned by several tenants in common, a lease by one or more of them is not valid as to those who do not join in the lease, but operates merely to make the lessee a tenant in common with the owners. *Du Rette v. Miller*, 60 Or. 91, 118 Pac. 202, Ann. Cas. 1913D, 1163, and note; *Zeigler v. Brenneman*, 287 Ill. 15, 86 N. E. 597; 7 R. C. L. p. 878, § 73. In authorizing Hodges to make the lease, Geary did not assume to be the sole owner of the land, nor did he vest Hodges with authority to make the lease in his name alone. His letter to Hodges cannot be construed to give Hodges any other authority than to make a lease in the name of the co-owners. The effect of the contract in question, therefore, is the same as if Hodges had purported to make the lease in the name of Geary and the other co-owners. Since the lease was effective only as to Geary's interest in the property, Geary's liability for a breach thereof is not the same as if he were the sole owner of the property, since all that plaintiff has been deprived of is the right to occupy and use the land for pasturage in conjunction with the other co-owners. In a case like this, it is very difficult to determine the precise measure of damages. Ordinarily, where the lessor refuses to comply with the terms of a lease, the measure of damages in an action by the lessee is the difference between the agreed rent and the rental value of the premises. *Devers v. May*, 124 Ky. 387, 99 S. W. 255, 30 Ky. Law Rep. 528. By its terms the lease was to terminate when the land was sold. As before stated, the land was sold on September 10, 1910. The sale was confirmed on October 10, 1910, though a deed was not made to the purchaser until May 18, 1912. Manifestly, the sale became effective, not when the deed was made, but when the sale was confirmed. It further appears that the agreed rent was for the whole of the premises, and not for Geary's portion thereof. Geary owned about an undivided one-third interest in the land. In our opinion, the proper measure of damages is the difference between one-third of the agreed rent, including one-third of the reasonable cost of fencing, and one-third of the rental value of the land up to October 10, 1910. In determining the rental value of the land, plaintiff will be permitted to introduce evidence tending to show its value for pasturage purposes, but will not be permitted to show the probable profits which he would have realized from the use of the land. *Kelly v. Davis*, 8 Ky. Law Rep. 58; 24 Cyc. 922.

Since the trial court assumed in its instruction that Geary was responsible for all damages following the breach of the rental contract, it follows that the instruction and judgment based thereon are erroneous.

Wherefore the appeal is granted, and the judgment reversed, for a new trial consistent with this opinion.

NEEL'S EX'R et al. v. NOLAND'S HEIRS.

(Court of Appeals of Kentucky. Oct. 28, 1915.)

1. TRUSTS ⇨63—RESULTING TRUST—PAYMENT OF CONSIDERATION FOR CONVEYANCE TO ANOTHER—STATUTE.

Ky. St. § 2353, relating to resulting trusts, abolishes the old doctrine of resulting trusts, except in the two expressed cases where title is taken in the name of the nominal purchaser without the consent of the real purchaser, and where the grantee, in violation of some trust, buys the land with the money or property of another.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 90; Dec. Dig. ⇨63.]

2. TRUSTS ⇨89—RESULTING TRUST—WEIGHT AND SUFFICIENCY OF EVIDENCE.

To establish a resulting trust by parol evidence as against the holder of the legal title to property, the proof of all the essential facts and circumstances must be clear, convincing, and satisfactory, and of such a character as to disclose the exact rights and relations of the parties and take the matter out of the realm of conjecture and presumption, especially after a long lapse of time.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134-137; Dec. Dig. ⇨89.]

3. TRUSTS ⇨89—RESULTING TRUST—SUFFICIENCY OF EVIDENCE.

Evidence, in an action by the executor and devisees of a decedent to establish a resulting trust in a farm, on the theory that certain bales of cotton originally belonged to the decedent's first husband; that his title thereto was divested and placed in the federal military authorities by its seizure, that such authorities then gave it to decedent; that she sold it and turned over the proceeds of sale to her husband for investment; and that he, in violation of the trust and without her consent, bought the farm and took the deed in her name for life only, with a reversion to his heirs—held not of that clear, full, and satisfactory character requisite to establish such a trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134-137; Dec. Dig. ⇨89.]

4. HUSBAND AND WIFE ⇨11—WIFE'S PROPERTY—HUSBAND'S REDUCTION TO POSSESSION.

Under the law in Kentucky in 1864 prior to the Married Women's Act of 1894 (Laws 1894, c. 76), the husband, by virtue of his marital rights, might reduce his wife's general estate to possession and thereby make it his own, so that money received by the wife from the sale of her cotton and her other money, used by the husband in the purchase of a farm taken in her name, with reversion to his heirs, was reduced to possession.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 39, 40, 47-57; Dec. Dig. ⇨11.]

5. WAR ⇨21—ENEMY PROPERTY—STATUTES.

No act of the military forces, or of any officer thereof, in the Civil War could, under the law, divest a citizen of his title to cotton, since private property on land not used in aid of the war is not subject to confiscation by the rules of international law, which rule was recognized by the Captured Property Act (Act Cong. March 3, 1863, c. 120 [12 Stat. 820]), declaring that the title to any property except that used in actual hostilities could not be divested in the insurgent states unless by judgment after due legal proceedings, so that the title to the proceeds of cotton coming into possession of the federal government by capture or

abandonment was not divested out of the original owner, who might obtain its restoration.

[Ed. Note.—For other cases, see War, Cent. Dig. §§ 105, 106, 108; Dec. Dig. ⇨21.]

6. LIFE ESTATES ⇨23—REINVESTMENT—PRESUMPTION.

Under a deed of a farm, reciting the husband's payment of the purchase price, made to the wife and her heirs for the separate use of herself and any children thereafter born of the marriage, and enabling her, with the husband's written consent, to sell any part of the land, and to reinvest any part of the proceeds, as she might deem expedient, which, if reinvested, was to be held for the same purposes, and on her survival of her husband, giving her such privilege without his consent, the proceeds to be reinvested for such purposes, and on her decease the property, or its proceeds if reinvested, to go to the husband or his heirs on failure of issue, and in fee simple to any issue then living, no presumption would be indulged, in the absence of evidence thereof, that money from the sale of a part during the husband's lifetime was received or spent by the wife, or reinvested under the clause permitting, but not requiring, reinvestment during the husband's lifetime.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 42-45; Dec. Dig. ⇨23.]

7. LIFE ESTATES ⇨23—CONDITION OF DEED—EXPENDITURE ON IMPROVEMENTS.

Under such deed, the wife's expenditure of the amount received from a sale of part of the land, after her husband's death, in making permanent improvements on the farm, to that extent satisfied the terms of the deed as to reinvestment.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 42-45; Dec. Dig. ⇨23.]

8. LIFE ESTATES ⇨17—IMPROVEMENTS—RECOVERY AGAINST REMAINDERMEN.

A life tenant is not bound to make any permanent improvements on the estate; and, if he makes them, it will be presumed that they are for his own benefit, and he cannot recover anything therefor from the remaindermen or reversioners.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 37, 38, 42; Dec. Dig. ⇨17.]

Appeal from Circuit Court, Shelby County.

Action by Pearce Noland's Heirs against Bettie Neel's Executor and others. Judgment for plaintiffs, and defendants appeal and plaintiffs take a cross-appeal. Affirmed on the original and the cross-appeals.

O'Rear & Williams, of Frankfort, for appellants. Hudson & McKay, of Vicksburg, Miss., and Willis, Todd & Bond, of Shelbyville, for appellees.

MILLER, C. J. In this action the appellants, who are the executors and devisees of Bettie Neel (formerly Mary Elizabeth Noland), are seeking to establish a resulting trust, in their favor, to a farm of 200 acres in Shelby county. The facts upon which the claim is based are wide in range, and nebulous in character. Substantially, they are as follows:

In May, 1858, Pearce Noland, a prosperous young planter, living near Vicksburg, in Warren county, Miss., married Mary E. McGaughey, of Shelby county, Ky. They immediately went to live upon his Mississippi

plantation, and continued to reside there until late in October, 1863. Upon the surrender of Vicksburg on July 4, 1863, to the federal forces under Gen. Grant, the surrounding country was overrun and largely devastated by the troops. By general order No. 50, issued by Gen. Grant at Vicksburg on August 1, 1863, it was provided that persons having cotton or other produce not required by the army would be allowed to bring the same to any military post within the state of Mississippi, and abandon it to the agent of the Treasury Department at said post, to be disposed of in accordance with such regulations as the Secretary of the Treasury might establish. Pearce Noland had 69 bales of cotton on his plantation, near the Big Black bridge, and within shipping distance of the railroad running out of Vicksburg, eastwardly. This railroad had been taken over by the federal government, and was operated as a United States military railroad. Pearce Noland was then in delicate health, although it is not made clearly to appear to what extent he was disabled from attending to business. It is claimed by the appellants that Pearce Noland's cotton was seized by the federal troops and carried to Vicksburg. The testimony, however, as to the seizure is quite vague and indefinite. The first bit of reliable evidence relating to the story of Pearce Noland's 69 bales of cotton is found in the following receipt found in the archives of the War Department:

"Received, Vicksburg, Mississippi, October 8th, 1863, of Mr. P. Noland, three hundred and forty-five dollars, being freight on 69 bales cotton transported to Vicksburg by United States military railroad.

"J. D. Bingham,

"Lieut. Col. and Chief Q. M. Dept. Tenn."

It will be observed that this receipt does not indicate that the 69 bales of cotton in question had been seized by the federal troops. On the contrary, the fact that Pearce Noland paid \$345 freight thereon to Vicksburg would raise the presumption that he was the shipper of his cotton. However that may be, the Noland's experienced quite a good deal of trouble in getting their 69 bales shipped out of Vicksburg.

It is contended by the appellants that Pearce Noland, being a southern sympathizer, could accomplish nothing toward liberating his cotton, and that Mrs. Noland, through her personal efforts with Gens. Grant and Logan, finally succeeded in getting 69 bales of cotton turned over to her, as appears from the following permit:

"Headquarters, Commander of the Post.

"Vicksburg, Miss., October 12, 1863.

"Mrs. P. Noland has permission to ship 69 bales of cotton marked (P. N.) to Memphis, Tennessee.

"By order of Maj. Gen. John A. Logan.

"Jno. S. Hoover, Lieut. and A. D. C."

Evidently Pearce Noland's 69 bales became intermingled with other cotton beyond identification, and that the 69 bales of cotton de-

livered to the Noland's was a part of 114 bales taken from the plantation of J. & M. Britton. The 69 bales were shipped to Yeatman, United States treasury agent at Memphis, by C. A. Montross, treasury agent at Vicksburg, per the steamer J. S. Pringle, on October 24, 1863, before Pearce Noland's mark ("P. N.") could be put on the bales.

Shortly after the 69 bales were received by Yeatman at Memphis, an order was presented to him by the agent of the Noland's, signed by Gen. Grant, for the 69 bales of the cotton that had been shipped from Vicksburg. At first Yeatman declined to surrender the cotton; but the agent subsequently returned, accompanied by Brigadier General James C. Veatch, the commander of the post at Memphis, who insisted on the delivery of the cotton pursuant to Gen. Grant's order; and, Gen. Veatch having indorsed his name upon the order, Yeatman surrendered the cotton. According to Yeatman, Mrs. Noland did not claim this cotton as her own, but said that 69 bales of her cotton had been taken, and that Gen. Grant had given her an order for the delivery of the same number of bales, out of some other lot. The remaining 45 bales of the 114 bales were shipped to Cincinnati, and sold for 78½ cents per pound. The Noland's departed with their 69 bales, and presumably sold it for about the same price, although there is nothing in the record to show precisely what they received for it. Pearce Noland and his wife thereupon returned to Shelby county, and spent the following winter of 1863-64 with Mrs. Noland's mother.

On January 23, 1864, Pearce Noland bought the farm of 303 acres (of which 200 acres are now in controversy), from Fielding Neel and J. A. Glass, for \$21,249.80. Of this sum he paid \$14,000 in cash, and gave his four notes for \$1,812.45 each, for the remainder of the purchase money. The deed recited that Pearce Noland had made the cash payment of \$14,000, and had executed his four notes for the deferred payments. The deed contained the following clauses:

"To have and to hold the above two described tracts of land, together with all and singular the appurtenances thereunto belonging unto the said Mary E. Noland, her heirs and assigns forever, for and to the sole and separate use and benefit of the said Mary E. Noland and such children as may hereafter be born unto her by her husband, Pearce Noland, and with the consent of her said husband given in writing the said Mary E. Noland shall have the right and privilege to sell, transfer, exchange or dispose of all or any part of the land hereinbefore mentioned, for such price and to such person or persons as she may desire, and to reinvest all or any portion of the proceeds or not, as she may deem most expedient, but if reinvested to be held by her as aforesaid; and, for the purpose aforesaid, and in case she should survive her said husband, she shall have such rights and privileges without his consent so given, the proceeds in this event shall be reinvested for the purposes hereinbefore mentioned.

"This indenture further witnesseth: That upon the decease of the said Mary E. Noland, the above property in whole or in part or the proceeds thereof if reinvested shall go to the

said Pearce Noland or his heirs, in the event there is no issue of the body of the said Mary E. Noland by her husband, Pearce Noland, living at the time of her death, but if there be such issue then living then the same shall go in fee simple to such."

Pearce Noland occupied the Kentucky farm, as a home, from 1864 until his death in 1876. Under the power thus given her, Mrs. Noland sold 103 acres of the farm to Reuben Scobee in February, 1876, for \$4,120, and Pearce Noland signed the deed in indication of his consent thereto. Pearce Noland died in 1876, leaving no issue, and his widow, Mary E., married Fielding Neel in the winter of 1878. She was ever afterwards known as "Bettie Neel." Fielding Neel died on September 21, 1881; and his widow, Bettie Neel, died on October 8, 1913, leaving a will by which she devised the Shelby county farm to her nieces and nephews, who are the appellants.

This action was instituted by the heirs at law of Pearce Noland against the devisees under Bettie Neel's will, to recover the farm in question. The devisees claim that, Bettie Neel having furnished the consideration, and the deed having been taken in the form it was taken, without her consent, a trust thereby resulted to her, whereby she held and owned the farm in question; and, the circuit court having decided against them they appeal.

The appellants introduced only three witnesses to sustain their claim.

John T. Ballard testified that he wrote the deed in 1864, in the presence of Pearce Noland, the grantee, and Neel and Glass, the grantors therein; that Pearce Noland directed him to add the clause which created a remainder in the heirs of Pearce Noland upon the failure of issue of his marriage with Mary E. Noland; that Pearce Noland told him he had paid the \$14,000 in cash; and that when the witness suggested to Pearce Noland that he had already given the farm to his wife to do with as she pleased, and to sell and to reinvest the proceeds as she pleased, Pearce Noland answered that he wanted the reversionary clause added to the deed, and it was done.

Ballard further testified that James McGaughey, a brother of Bettie Neel, was the first to notify her, in 1881, after the death of her second husband, Fielding Neel, of the reversionary clause in the deed. It is claimed she did not know of it at the time the deed was made, or at any time before 1881. But Ballard's testimony upon this point is but a repetition of what James McGaughey told him.

John R. Deering, the executor and principal devisee under the will of Bettie Neel, identified a diary which Pearce Noland had kept, in which he spoke of the farm in controversy as "my farm," and further testified that Mrs. Neel spent exceeding \$850 for improvements or betterments on the farm after Pearce No-

land's death. The remainder of his testimony is immaterial.

The third and last witness is Miss Emma McGaughey, a niece of Mrs. Neel, who frequently saw her aunt while she lived with the witness' grandmother after her return to Kentucky in the winter of 1863-64. The witness was then less than 16 years of age. Her testimony consists of a narrative of family lore, and is largely concerned with the war conditions of the South, which she acquired from hearsay. She says her parents and other relatives told her that Pearce Noland's cotton had been confiscated; that Mr. and Mrs. Noland and the witness' father had obtained an order for the cotton and transportation for it and the family to Memphis in 1863; and that both Mr. and Mrs. Noland and the witness' father went to Memphis, sold the cotton, and collected the proceeds. Miss McGaughey is the only witness by whom appellants attempted to prove that Pearce Noland agreed to invest the cotton money in the farm and take the title to his wife; and her testimony is found in the following questions and answers:

"Q. 40. What was the agreement, if any, between Mr. P. Noland and his wife, Bettie Noland, concerning that investment? State what they each said to the other so far as you heard it, or heard Mr. P. Noland recite it? A. I know of no agreement, but heard them discussing, at various times, as to the safest investment. My aunt seemed to prefer investing in a farm, and they looked at several and decided to buy, which he did. Q. 41. Relate the circumstances of the investment by Mr. P. Noland in the farm bought from Neel and Glass, in Shelby county, Ky., January 7, 1864, so far as you heard Mr. P. Noland state them to his wife, Bettie Noland, or as she may have stated them in Mr. P. Noland's presence and hearing. A. I was at my grandmother's, in the living room with my parents, grandmother, and my aunt Mrs. Noland. Mr. Noland returned from town and told his wife that he had bought the farm from Neel and Glass for her, and had Mr. John Ballard write the deed in her name, and record it."

She further testified that her aunt did not know, at the time of the purchase of the Shelby county farm, that the title had been taken to her for life only, with remainder to the heirs of Pearce Noland upon failure of issue. But it should not be overlooked that practically all of her testimony, with the exception of that part which related to the statement of Pearce Noland to his wife at the time he bought the farm, is hearsay given 50 years afterwards. Furthermore, the statement attributed to Pearce Noland that he had bought the farm for his wife, and had taken the deed in her name, was not inconsistent with the deed as it was written, since it did convey the land to her upon the reasonable conditions therein stated.

It appears that Pearce Noland subsequently became insolvent through endorsements for his brothers; and, at the time the Kentucky farm was bought, his Mississippi plantation was, by reason of war conditions, an incumbrance rather than an asset. And there is this further significant fact that, although

Mrs. Noland certainly knew the provisions of the deed which she, at first, claimed was a mistake, as early as 1881, 31 years before her death, she never took any action towards correcting the mistake, or asserting her alleged title.

The argument of counsel for appellants rests upon the following propositions: (1) That the 60 bales of cotton originally belonged to Pearce Noland; (2) that his title thereto was divested, and placed in the federal military authorities by the seizure of the cotton; (3) that Gen. Grant then gave the cotton to Mrs. Noland; (4) that she sold it and turned over the proceeds of sale to her husband for investment; and (5) that he, in violation of the trust, and without her consent, bought the Shelby county farm and took the deed in her name, for life only, instead of in fee.

[1] Section 2353 of the Kentucky Statutes under which appellants claim a resulting trust, reads as follows:

"When a deed shall be made to one person, and the consideration shall be paid by another, no use or trust shall result in favor of the latter, but this shall not extend to any case in which the grantee shall have taken a deed in his own name without the consent of the person paying the consideration, or where the grantee, in violation of some trust, shall have purchased the lands deeded with the effects of another person."

This statute abolishes the old equitable doctrine of resulting trusts except in two cases: (1) Where the title is taken in the name of the nominal purchaser without the consent of the real purchaser; and (2) where the grantee, in violation of some trust, buys the land with the money or property of another. *Foushee v. Foushee*, 163 Ky. 524, 173 S. W. 1115.

[2] In view of the well-established doctrine in this jurisdiction upon the subject of resulting trusts, we hardly deem it necessary to again review the authorities, at length. It will be sufficient to point out the general rule, and to refer merely to the leading cases upon the subject, which are uniform in their scope and application. In 39 Cyc. 166, the rule is stated, as follows:

"In order to establish a resulting trust by parol evidence, as against the holder of the legal title to property, the proof of all the essential facts and circumstances must, as a general rule, be clear, full, convincing, and satisfactory, and of such a character as to disclose the exact rights and relations of the parties, and take the matter out of the realm of conjecture or presumption, especially after a long lapse of time; and where the evidence is uncertain, conflicting, doubtful, or unsatisfactory, or is capable of reasonable explanation on a theory other than the existence of a resulting trust, no trust will be held to be established. The language used by the courts, however, in stating this rule has not been by any means uniform; but it has been variously stated that the proof must be clear and unequivocal, most convincing and irrefragable, clear and unquestionable, clear and undoubted, or so clear, strong, and unequivocal as to banish every reasonable doubt of the existence of such trust; or if the evidence is wholly by parol that it should be received with great caution. Thus to raise a trust between members of the same family, as between husband

and wife, or father and son, the evidence must be positive and free from all ambiguity; and loose and general expressions of intention, in common conversation, acknowledging a general obligation, etc., will not be sufficient."

See *Devlin on Real Estate* (3d Ed.) vol. 2, § 1183, to the same effect.

In the late case of *May v. May*, 161 Ky. 114, 170 S. W. 537, the question was considered at length. In that case one Allen Leslie, in 1847, conveyed a tract of land to his son-in-law Thomas P. May, the deed reciting the consideration to be the love and affection which the grantor had for his daughter, the wife of May, and \$1,100 in cash paid by Thomas P. May. The deed contained no restrictions upon the title, but certain grandchildren of Thomas P. May, being dissatisfied with the provision made for them by their grandfather's will, brought an action, claiming a resulting trust for the benefit of the children and heirs at law of their grandmother, who was the wife of Thomas P. May. The opinion called attention to the fact that it had not been shown that the grandmother had ever claimed the land was held in trust for her; and there, as here, the deed truly recited that the cash payment had been made by the husband. Allen Leslie lived 30 years after making the deed; in the case at bar Pearce Noland lived twelve years after the deed was made to the Shelby county farm, and Mrs. Noland lived forty-nine years thereafter. After conceding that a resulting trust might be established by parol proof, and that numerous cases so holding appear in the books, the court, in the *May Case*, quoted with approval the following passage from the opinion in *Nelson v. Nelson*, 96 S. W. 794, 29 Ky. Law Rep. 885:

"But these were cases in which it was clearly made to appear, either that the deed to the land conveyed was received by the grantee under an agreement with the grantor, or one paying the consideration, to hold the title in trust for a third person, or where the grantee in violation of a trust purchased the land with the means of another. There are yet other cases in which, upon parol evidence of a secret trust in behalf of an insolvent debtor, created by his act in conveying, or causing to be conveyed, to another property which, but for such conveyance, would be liable for his debts, the courts, at the suit of creditors, have declared the conveyance a fraud upon them, and subjected the property to the payment of his debts."

In the *May Case*, the court also quoted from *Devlin on Real Estate* (3d Ed.) § 1183, as follows:

"As it is sought, in attempting to establish a resulting trust, to raise an equity superior to the deed, and thus give it an effect not apparent upon its face, the proof that one other than the grantee is beneficially interested must be clear and convincing. We recognize the doctrine to the fullest extent, and such is the uniform holding in all the cases that, where a right or title is claimed against a writing, in this or any other class of cases, where it is permitted at all, it must be sustained by proof of the most convincing and irrefragable character. The courts have been deeply impressed with the danger of this kind of proof, as tending to perjury and insecurity of paper titles. Kent and other eminent

judges regret that the doctrine was ever introduced, as it opens a wide door to frauds and perjuries, which the statute was intended to close. * * * This rule is based upon the soundest legal principles, for the parol proof must, of necessity, be the testimony of witnesses as to what the parties have said or verbally agreed to—a class of testimony notoriously weak—and the fact to be overturned is a writing, the best evidence as to where the legal title is.”

This doctrine is fully established in this jurisdiction by a long line of decisions. *Snelling v. Utterback*, 1 Bibb, 609, 4 Am. Dec. 661; *Northcutt v. Hogan*, 4 Ky. Law Rep. 364; *Pool v. Thomas*, 8 S. W. 198, 10 Ky. Law Rep. 92; *Nelson v. Nelson*, 96 S. W. 794, 29 Ky. Law Rep. 885; *Couch v. Sizemore*, 106 S. W. 801, 32 Ky. Law Rep. 641; *Roche v. George's Ex'r*, 93 Ky. 609, 20 S. W. 1039, 14 Ky. Law Rep. 584; *Helm's Ex'r v. Rogers*, 81 Ky. 568; *Smick's Adm'r v. Beswick's Adm'r*, 113 Ky. 439, 68 S. W. 439, 24 Ky. Law Rep. 276; *Taylor v. Fox's Ex'r*, 162 Ky. 804, 173 S. W. 154; *Foushee v. Foushee*, 163 Ky. 524, 173 S. W. 1115.

[3] Under this explicit rule, it is clear that the evidence in this case fails signally to establish the resulting trust claimed by appellants. It neither clearly nor satisfactorily appears that the cotton was seized by the United States military authorities, or that the proceeds of the sale ever belonged to Mrs. Noland, or were ever in her possession, or that the deed was drawn contrary to her wishes. To establish a trust in behalf of Mrs. Noland under these facts, when taken in connection with the long period of 50 years during which this deed has stood unquestioned and unattacked, would be stretching the doctrine of resulting trust far beyond any instance reported in the books. To satisfy the rule, the proof offered to establish the trust claimed must be clear, full, convincing, and satisfactory. It has none of these essential qualities.

[4] 2. But, if we should be mistaken in this conclusion, and it should be assumed that the evidence did clearly, fully, and satisfactorily show that Pearce Noland's property had been seized by the military authorities as claimed, and that the cotton had been presented to Mrs. Noland by Gen. Grant, and that Mrs. Noland thereby became the owner of the property, it is nevertheless true that Pearce Noland reduced this property to possession while living in Kentucky, in 1864, and he thereby became the absolute owner of it, under the law as it then stood. This transaction occurred about 30 years before the passage of the Married Woman's Act of 1894, which freed the wife's property from many of the common-law rights of the husband. Under the law as it stood in 1864, the husband, by virtue of his marital rights, might reduce his wife's general estate to possession, and thereby make it his own. *Williams v. Coffman*, 101 S. W. 919, 31 Ky. Law Rep. 151; *Rose v. Rose*, 104 Ky. 48, 46 S. W. 524, 20 Ky. Law Rep. 417, 41 L. R. A. 353, 84 Am.

St. Rep. 430; *Mitchell v. Violet*, 104 Ky. 77, 47 S. W. 195, 20 Ky. Law Rep. 378; *Phillips v. Farley*, 112 Ky. 837, 66 S. W. 1006, 23 Ky. Law Rep. 2201; *Helm v. Board*, 114 Ky. 289, 70 S. W. 679, 24 Ky. Law Rep. 1037; *Bennett v. Bennett*, 134 Ky. 444, 120 S. W. 372; *Fowler v. Fowler*, 138 Ky. 326, 127 S. W. 1014.

There is no proof that the cotton money ever became the property of Mrs. Noland, but if it should be so treated, there can be no doubt that it was her general estate, or that Pearce Noland reduced it to possession, thereby making it his own property absolutely. And the claim that Mrs. Noland's patrimony of \$3,500 was used by her husband in the purchase of the farm, if true, stands upon precisely the same footing.

The contention that Pearce Noland did not reduce his wife's property to possession, and that he held it for her in trust, is not sustained by any competent evidence.

[5] 3. But if we should be mistaken in this last position, and it should be granted that the federal troops seized Pearce Noland's cotton, and that Gen. Grant presented it to Mrs. Noland, precisely as she claimed, and that Pearce Noland never reduced it to possession, we still are confronted by the proposition, which cannot be successfully controverted, that no act of the military forces of the United States, or any officer thereof, could, under the law, divest Pearce Noland of his title to the cotton in question. In 40 Cyc. 332, the rule is stated as follows:

“Private property on land not being used in aid of the war is not subject to confiscation by the rules of international law. Private property may be seized, however, when needed in the course of military operations; but upon the conclusion of peace it should be restored or compensation made.

“A belligerent nation may, by a valid municipal law, authorize the confiscation of private property of the enemy.

“In the United States, since the adoption of the federal Constitution, the sole power of authorizing confiscation of the enemy's property had been vested in Congress as an incident to its war powers.

“During the Civil War several important confiscation acts were passed by Congress. * * * Provision was also made by special legislation during the Civil War for the holding of captured and abandoned property.”

Accordingly, it was provided by the Abandoned and Captured Property Act of Congress, approved March 3, 1863 (12 Stat. at L. 820), that the title to any property, except that used in actual hostilities, could not be divested in the insurgent states, unless in pursuance of a judgment rendered after due legal proceedings. By that act, the federal government constituted itself the trustee for those who were entitled to the proceeds of abandoned and captured property, with the exception above stated. The federal government recognized to the fullest extent the humane maxims of the modern law of nations, which exempt private property of noncom-

batant enemies from capture as booty of war.

The scope and effect of the act of March 3, 1863, supra, was fully considered in the case of *United States v. Klein*, 13 Wall. 128, 20 L. Ed. 519, in an able opinion by Chief Justice Chase. It was there held that the title to the proceeds of property which came into the possession of the federal government by capture or abandonment, with the exception above referred to, was in no case devested out of the original owner, and that it was for the government itself to determine, and not its military officers, whether these proceeds should be restored to the owner. The act of 1863 directed the officers of the Treasury Department to take into their possession and make sale of all property abandoned by its owners, or captured by the national forces, and to pay the proceeds into the national treasury. It was then for the Court of Claims to determine, by a proper trial, whether the proceeds should be restored to the owner of the property. The title of the original owner was not disputed; but he could only recover his property or its proceeds by proving his loyalty to the government of the United States. Otherwise, it remained with the government. See, also, the Case of *Mrs. Alexander's Cotton*, 2 Wall. 404, 17 L. Ed. 915; *United States v. Padelford*, 9 Wall. 531, 19 L. Ed. 788; *Lamar v. Browne*, 92 U. S. 187, 23 L. Ed. 650; *Walker's Ex'rs v. United States*, 106 U. S. 413, 1 Sup. Ct. 300, 27 L. Ed. 166; *Austin v. United States*, 155 U. S. 424, 15 Sup. Ct. 167, 39 L. Ed. 206; *Rice v. United States*, 21 Ct. Cl. 419.

It follows, therefore, that the act of Gen. Grant in delivering the cotton to Mrs. Noland, even though it happened precisely as is claimed by appellants, did not affect Pearce Noland's title thereto. And, in justice to the memory of Gen. Grant it should be said that he did nothing that can be construed as a violation of the act of March 3, 1863. He did not attempt to confiscate the cotton in question, or to divest Pearce Noland's title thereto. On the contrary, he fully recognized that title by directing a surrender of the cotton to its owner. There is evidence in this record that Pearce Noland was a Union man, and not a Confederate; and if that were true, his cotton was not liable to seizure. And, as heretofore stated, there is no competent evidence that it was seized by the military authorities. It must follow, therefore, under any view of the case, that appellants have failed to sustain their claim to a resulting trust in the Shelby county

farm, and that the chancellor properly so held.

[8, 7] 4. The appellees prosecute a cross-appeal from so much of the judgment as refused them a recovery of the \$4,120 realized from the sale of the 103 acres to Scobee in 1875, and also from so much of the judgment as denied a recovery of the \$850 which was paid to Mrs. Neel in 1895 by the Louisville & Nashville Railroad Company for a right of way through the farm. Appellees admit, however, that they have been unable to make any direct proof of any reinvestment of the \$4,120 received from Scobee; and, as it was sold during the lifetime of Pearce Noland, no presumption will be indulged that the money was received or spent by her, or that it was reinvested under the clause of the deed permitting, but not requiring, reinvestments during Pearce Noland's life. But the \$850 received from the railroad company in 1895 was received after the death of Pearce Noland; and, under the later provision of the deed requiring a reinvestment of the proceeds of all sales made after his death, it is insisted that Mrs. Neel's estate is liable for the last-named sum.

It is stipulated of record, however, that Bettie Neel, about the year 1903, erected upon the farm in question a tobacco barn, at a cost of more than \$850 and that said barn is still on the farm. As above stated, Mrs. Neel was required by the deed to reinvest this money for the benefit of the remaindermen; and it is clear from the proof that she did invest or spend a great deal more than \$850 in permanent improvements upon the farm after Pearce Noland's death.

[8] A life tenant is not bound to make any permanent improvements on the estate; and, if he should make them, it will be presumed they were made for his own benefit, and he will not be permitted to recover anything therefor from the remainderman or the reversioner. 16 Cyc. 630; *Johnson v. Stewart*, 8 Ky. Law Rep. 857; *Nineteenth & Jefferson Street Presbyterian Church v. Fithian*, 29 S. W. 143, 16 Ky. Law Rep. 581; *Caldwell v. Jacob*, 22 S. W. 436, 27 S. W. 86, 16 Ky. Law Rep. 21. But that is not this case. There is no attempt here upon the part of the life tenant's executor to recover this \$850, or any sum. It is merely claimed, by way of defense, that she reinvested this money upon the farm, by improving it to that extent, and that the farm, thus improved, goes to the remaindermen. We think this was a sufficient compliance with the requirements of the deed.

Judgment affirmed upon both original and cross-appeal.

ROBINSON v. ROBINSON.

(Court of Appeals of Kentucky. Oct. 28, 1915.)

1. TRIAL \S 367—SUBMISSION OF CASE—ADMISSIONS IN PLEADING.

In a divorce suit by a husband against the wife, in which the petition was amended so as to seek an annulment of the marriage on the ground that the defendant at the time of the marriage had not procured a divorce from a former husband, submission of the case over defendant's objection was not premature, on the ground that the case did not stand for trial, where the wife's answer admitted that she had not been divorced from the previous husband.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 879, 886; Dec. Dig. \S 367.]

2. DIVORCE \S 152—PROCEEDINGS—PROOF.

The entry of a divorce judgment on the order book of the court is indispensable to establish the fact that a divorce has been granted.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 514; Dec. Dig. \S 152.]

Appeal from Circuit Court, Pike County.

Suit by E. M. Robinson against Eliza Robinson for divorce. From a judgment for plaintiff, defendant appeals. Affirmed.

J. S. Cline, of Pikeville, for appellant.

CARROLL, J. The appellee brought this suit in January, 1914, to obtain a divorce from the appellant on the ground of adultery. The appellant filed her answer and cross-petition in February, 1914, in which she averred that they were married on the 23d day of December, 1913, and lived together only about four weeks, separating some five days before the suit was brought. She denied the charge of adultery, and set up that the appellee had abused and mistreated her in such a manner as to indicate a settled aversion to her, and further averred that "although there was born of the marriage one child, of which the plaintiff is the father," he had refused to furnish anything for its support. She asked for an allowance pending the suit, and for alimony for herself and child. In March, 1914, the court made an order allowing the appellant alimony; and in May, 1914, an amended petition was filed, in which it was averred that the plaintiff had learned since the petition was filed that the defendant had never obtained a divorce from her first husband, although a suit had been brought by her for that purpose, and that in representing herself as a single woman she practiced a fraud on him, and therefore he prayed that the contract of marriage be set aside and held for naught.

For answer to this amended petition the appellee, after traversing it generally, affirmatively averred that she had instituted a suit for divorce against her former husband, which, after being prepared for hearing, was submitted, and the court had directed a judgment to be prepared granting her a divorce, and this judgment was given to the clerk, but for some reason was not recorded on the order book. The clerk of the Pike circuit

court, in which the divorce suit brought by appellant was pending, filed a certificate showing that the last order made in that divorce suit was "Submitted for judgment," and that there was no judgment of record in the case. Whereupon this case was submitted. The order granting alimony was set aside, and it was adjudged that the contract of marriage was void on account of the fact that the appellant had never obtained a divorce from her first husband.

[1, 2] On this appeal it is urged as a ground of reversal that the court erred in submitting the case over the objection of the appellant, as it did not stand for trial, and in dismissing the appellant's claim for alimony, as there was no competent evidence that she had not been divorced from her first husband. The court did not prematurely submit the case, and no evidence of the fact that the appellant had not been divorced was necessary, as her answer to the amended petition admitted that she had not been. The court may have indicated that it would grant her a divorce from her first husband, and directed her attorney to prepare the judgment; but the entry of the judgment on the order book of the court was indispensable to establish the fact that the divorce was granted, and it was admitted that the judgment had not been entered.

The judgment is affirmed.

BETHURUM v. BAKER et al.

(Court of Appeals of Kentucky. Nov. 3, 1915.)

1. JUDICIAL SALES \S 35—VACATION—AUTHORITY OF COURT.

The court's power to set aside a judicial sale is not an arbitrary one, and can be exercised only for cause showing irregularities preventing the property bringing its reasonable value; the court taking into consideration the rights of all parties, including the purchaser.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. \S 72, 73; Dec. Dig. \S 35.]

2. MORTGAGES \S 522—FORECLOSURE—SALES—VACATION.

Ky. St. \S 1684, declares that if property be sold at judicial sale for less than two-thirds of its appraised value, the owner may redeem it within one year thereafter by repaying the original purchase money, with interest. Mortgaged property when first exhibited for sale was, after a controversy between the mortgagee and the attorney for one of the parties, sold to the mortgagee for one-fourth of its appraised value. The mortgagee then announced to the commissioner that he would not claim the advantage of his bid, and on resale the property was sold to the mortgagee for two-thirds of its appraised value, thereby precluding redemption. Held, that as the first sale would have been vacated, the mortgagor cannot complain that the commissioner resold the property; it being to his benefit that the property bring its reasonable value.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 1522; Dec. Dig. \S 522.]

Appeal from Circuit Court, Rockcastle County.

Action by L. W. Bethurum against W. H. Baker and another, consolidated with an ac-

tion by the People's Bank. From a judgment setting aside a mortgage sale, the named plaintiff appeals. Reversed, with instructions.

Bethurum & Lewis, of Mt. Vernon, for appellant. C. C. Williams, of Mt. Vernon, for appellee.

MILLER, C. J. On June 2, 1911, the appellees, W. H. Baker and wife, mortgaged their Langford tract of 15 acres, situated on Round Stone creek, in Rockcastle county, to B. F. Hill, to secure the payment of a note of even date therewith, for \$424. Hill assigned the note to the appellant Bethurum. Subsequently, on the 14th of September, 1911, Baker and wife mortgaged the Langford tract and a house and lot on Main street, in Mt. Vernon, known as the "Hotel Property," to Williams, Mullins & Richards, to secure three notes aggregating \$2,250. By successive assignments, these last three notes became the property of the People's Bank of Mt. Vernon. On April 18th, 1913, Bethurum instituted this action to enforce his mortgage lien upon the Langford tract; and on August 8th of the same year, the People's Bank instituted an action against Baker and wife to enforce its lien upon the Langford tract and the Hotel Property. The two suits were consolidated and proceeded to a judgment on August 30, 1913, enforcing the liens and directing a sale of the mortgaged property to pay the respective debts of the plaintiffs. The Langford tract was appraised at \$1,000. The judgment provided that in case Bethurum directed a sale, the commissioner should sell only the Langford tract, or so much thereof as was necessary to pay Bethurum's debt, and any surplus remaining from the sale of that tract should be retained by the commissioner, subject to the order of the court. Bethurum directed a sale; and, when Griffin, the master commissioner, after due advertisement, was preparing to cry the property, C. C. Williams, who had been Mrs. Baker's attorney in a divorce case, and was presumably acting for her, or for himself as assignor of the notes then held by the People's Bank, stated to Griffin that he objected to his selling the Langford tract first, because the judgment provided that the Hotel Property should first be sold, and, if it failed to bring enough to satisfy the indebtedness for which the mortgage was executed, then the Langford tract should be sold. Bethurum disputed the correctness of Williams' statement, and after some further disputation between Bethurum and Williams, Griffin proceeded with the sale of the Langford tract. Bethurum started the bidding with an offer of \$250; and, there being no other bid, Griffin knocked down the property to Bethurum. Immediately thereafter, and before the crowd had dispersed, Bethurum announced that he would waive any right he had under his bid, and told

Griffin he might again offer the property for sale, and that he would cause them no trouble about his bid of \$250. Griffin again offered the property for sale, and Bethurum bid \$667 therefor, and it was again knocked down to him, Bethurum complied with the terms of sale by giving bond, and the commissioner so reported it to the court. The defendant W. H. Baker excepted to the report, because the commissioner sold the Langford tract for a sum less than two-thirds of its appraised value, thereby saving to the defendants a right of redemption, but that after the land had been sold for less than two-thirds of its appraised value, the commissioner, without right, and without an order of court, resold said tract for \$667, which was more than two-thirds of its appraised value, thereby attempting to deprive the defendant of his right to redeem said land. The court sustained the exception, and from a judgment setting aside the sale, Bethurum prosecutes this appeal.

[1, 2] Under section 1684 of the Kentucky Statutes, if property be sold at a judicial sale for less than two-thirds of its appraised value, the owner has the right to redeem it within one year thereafter, by repaying to the purchaser the original purchase money, with 10 per cent. interest thereon. This exception presents only one question for determination upon this appeal, viz.: Did the commissioner have the right to make the second sale?

The court's power to set aside a judicial sale and order another sale, is not an arbitrary power. It can only be exercised for cause showing such irregularities in the proceedings, or such misconduct on the part of persons interested, or officious intermediaries, as presumably interfered with the property bringing its reasonable value. But the court must regard the rights of all the parties, including the purchaser, and exercise a legal discretion as to rejecting or confirming sales. *Hughes v. Swope*, 88 Ky. 258, 1 S. W. 394, 8 Ky. Law Rep. 256; *Head v. Clark*, 88 Ky. 364, 11 S. W. 203, 10 Ky. Law Rep. 917.

In *Head v. Clark*, supra, in speaking of the commissioner and his duties, the court said:

"If it be conceded, however, that, in the case of an ordinary sale by auction, the power of the auctioneer is at an end the moment the hammer falls, and that the contract of purchase is then closed, no matter what mistakes he may have committed, or what misunderstanding may have existed upon his part as to the bidding, yet we are unwilling to say that this is true as to a decretal sale attended by circumstances similar to those now under consideration. In an ordinary sale by auction, the auctioneer is the agent of the seller only until the sale is made, when, for certain purposes, he becomes the agent of both parties.

"A commissioner, acting under a decree, has, however, duties to perform as to the complainant, the vendor, the purchaser, and the court; and in the performance of those duties he must exercise his best judgment. He is necessarily invested with a reasonable discretion, in many respects, as to the manner of its exercise, tak-

ing care, however, to obey the decree so far as it has given him specific directions. In acting under it, he should adopt all proper means to fulfill its directions; and in doing so he is, unless restricted by its terms, or the general law, to exercise a sound discretion. He may, for good reason, decline to sell at the time advertised. If there be but one person present, or by reason of sham bidding a sacrifice of the property is reasonably certain to occur, he may refuse to proceed. It was said by the Supreme Court of the United States in *Blossom v. Railroad Company*, 3 Wall. p. 209 [18 L. Ed. 43], that he might 'be justified in postponing the sale to a future day to prevent the sacrifice of the property. Every such officer has a right to exercise a reasonable discretion to adjourn such a sale, and all that can be required of him is that he should have proper qualifications, use due diligence in ascertaining the circumstances, and act in good faith, and with an honest intention to perform his duty.'

"Undoubtedly a sheriff in selling under execution may exercise his discretion in the respects to which we have alluded, and we see no reason why a commissioner in selling property under decree should not have the same right. The fact that his action is not final until approved by the court does not present a sufficient reason for a distinction."

In *Swafford v. Howard*, 50 S. W. 43, 20 Ky. Law Rep. 1794, the purchaser did not execute bond for the purchase money at the conclusion of the sale, whereupon the commissioner resold the property. In approving his action, the court said:

"Frederick did not execute bond for the purchase money, and the commissioner had the right to use his discretion as to whether or not he would resell it, and it does not appear that he abused the discretion which he had the right to exercise. *Head v. Clark*, 88 Ky. 362 [11 S. W. 203, 10 Ky. Law Rep. 917]; *Wilson v. Thorne & Co.* [13 S. W. 365] 11 Ky. Law Rep. 945; *Hughes v. Swope*, 88 Ky. 254 [1 S. W. 394, 8 Ky. Law Rep. 256]."

In 24 Cyc. 46, it is said:

"If the purchaser, at once upon the property being struck off to him, wrongfully refuses to comply with the terms of the sale, the officer may offer the property for sale again without an order for the resale."

If a commissioner has the right to make a new sale in case the purchaser fails to comply with his bid at the first sale, we see no reason why the commissioner may not resell the property, with the consent of the purchaser at the first sale. Of course he could not release the purchaser under the first sale if, by doing so, he would affect the rights of

any interested party. Appellees' exception, however, is based upon the idea that the commissioner was representing the defendant only when he made the sale, while, in fact, the sale was made at the direction of appellant, and for the purpose of preserving his rights under the judgment.

Moreover, it was to the interest of every one concerned that the property should bring the highest price possible, and the fact that the property brought more than two-thirds of its appraised value at the second sale, and thereby barred appellees' right of redemption, cannot affect the rights of any of the parties. There is proof to the effect that the wrangle between Bethurum and Williams before the sale deterred other persons from bidding, and thereby letting the property go at the nominal price of \$250. Appellant recognized that fact, and promptly notified the commissioner that his bid need not stand in the way of a higher bid. If the tract had been sold under the bid of \$250, there can be little doubt that, in view of the controversy between appellant and Williams, and the consequent low price, the sale would have been set aside, upon exception taken thereto, and a resale ordered. That has been accomplished to the benefit of all concerned by the second sale at more than double the bid at the first sale. If Bethurum's first bid of \$250 had prevailed, and the property had been sold to him for that sum, instead of for \$667, as was done under the second sale, the difference of \$417 would have been thrown upon the Hotel Property. Furthermore, if the first bid of \$250 had been accepted, the appellees' right of redemption in the Langford tract could have been sold to pay the unpaid balance of appellant's debt. It would seem, therefore, under any view of the case, that it was to the interest of both Baker and his creditors that his property should bring the higher rather than the lower price. The usual complaint is that the debtor's property sells for too small a sum. We are of opinion the chancellor was in error when he set aside the second sale.

Judgment reversed, with instructions to the circuit court to set aside the judgment appealed from, and to confirm the sale of the Langford tract to the appellant.

THOMAS v. NATIONAL CONCRETE CONST. CO.

(Court of Appeals of Kentucky. Nov. 3, 1915.)

1. MASTER AND SERVANT ⇨219—INJURIES TO SERVANT—DEFENSES.

A master will not be exonerated from liability for injuries sustained by a servant hurt when a bucket used to carry concrete broke, on the theory that it was a simple tool; the bucket not being used in the ordinary manner.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. ⇨219.]

2. MASTER AND SERVANT ⇨278—INJURIES TO SERVANT—RES IPSA LOQUITUR.

The doctrine of *res ipsa loquitur* applies only in a restricted sense to master and servant cases, and negligence on the part of the master will not be presumed from the mere fact that the bail of a bucket loaded with concrete broke; there being nothing in the surrounding circumstances to show that the bucket, which was new, was defective or that any defect was known to the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. ⇨278.]

3. MASTER AND SERVANT ⇨101, 102—INJURIES TO SERVANT—ASSURANCE OF SAFETY.

That a master gives a servant an assurance of safety, does not impose absolute liability, regardless of negligence, but only deprives the master of the advantage of the pleas of assumption of risk and contributory negligence, unless the defect was obvious.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. ⇨101, 102.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by John Thomas against the National Concrete Construction Company. From judgment for defendant, plaintiff appeals. Affirmed.

S. A. Anderson and J. J. Kavanaugh, both of Louisville, for appellant. Gibson & Crawford and J. Jos. Hettinger, all of Louisville, for appellee.

CLAY, C. In this action for damages by plaintiff, John Thomas, against the National Concrete Construction Company, the trial court, at the conclusion of plaintiff's evidence, directed a verdict in favor of defendant. Plaintiff appeals.

The facts are as follows: On April 4, 1911, the defendant was engaged in doing certain concrete work on a building at Fourth and Walnut streets, in Louisville. Prior to the accident plaintiff had been employed by defendant as a laborer, and was engaged in wheeling sand and gravel. On the day of the accident defendant's foreman placed him at work filling buckets with concrete, which were being hoisted to the third floor of the building. For this purpose two buckets were used, each attached to the end of a rope, and as one filled with concrete was being hoisted the empty bucket at the other end of the rope would be lowered to be refilled. As one of the buckets was being hoisted, the bail

or handle broke, and the bucket fell on plaintiff's head and injured him. The buckets which were being used were "brand-new" galvanized iron buckets, which had been purchased the day before. Plaintiff testifies that he had been engaged in concrete work for a number of years. On the occasion in question he believed that the work of filling the buckets was dangerous, but he feared that, if he did not do the work, he would lose his place. He further says that the foreman told him that he had examined the buckets and they were all right. He was unable to tell what caused the bail to break. James Thompson, who at the time of the accident was engaged in pulling up the buckets which plaintiff filled, says that the foreman just before the accident fixed one of the buckets, and he heard the foreman say that the buckets were all right. On being asked what caused the bail to break, he replied that the bucket must have been too heavily loaded. John H. Johnson, another employé who was present, says that he heard the foreman tell plaintiff that the bucket was all right.

In his petition plaintiff charges that the bucket and bail thereon had become old and worn and out of repair and in a dangerous and defective condition, and that this condition was known to the defendant, or could have been known by the exercise of ordinary care. He further alleges that defendant assured plaintiff that the buckets and bails were in safe condition, and that plaintiff relied on such assurance, and that the danger attending his employment was not obvious.

[1] We are not disposed to the view that a recovery cannot be had because the bucket which injured the plaintiff was a simple tool. It might be so regarded had it been used in the ordinary and usual way; that is, if the plaintiff had been engaged in carrying the bucket at the time. As a matter of fact, however, the bucket was being used as a part of the hoisting apparatus, which was being operated by another employé. In view of these circumstances, we conclude that the simple tool doctrine has no application.

[2] It remains to consider, however, whether there is any evidence of negligence on the part of the defendant. Though plaintiff alleges that the bucket was worn and defective, there is not only an absolute failure of proof on this point, but the evidence shows that the buckets were "brand-new" buckets. Nor is there any evidence that the buckets were not of sufficient strength for the purpose for which they were being used, the proof showing that they were the kind ordinarily used for hoisting purposes. Indeed, the only evidence as to the cause of the accident is the statement of one of the witnesses to the effect that the bucket was probably too heavily loaded, and the loading was being done by plaintiff. Is the mere fact that the bail broke sufficient evidence of negligence? While the doctrine of *res ipsa loquitur* ap-

plies in a case of master and servant, its application is in a more restricted sense than in a case of carrier and passenger, because of the difference in the degree of care imposed and in the character of defenses that may be made. Therefore it is generally held in a case of master and servant that the inference of negligence is deducible, not from the mere happening of the accident, but from the attending circumstances. Consequently, the mere breaking of a piece of apparatus is not of itself sufficient to make out a prima facie case. The attendant circumstances must show that the apparatus was defective, and that this fact was known to the master, or could have been known to him, by the exercise of ordinary care. *Idle v. Louisville Railway Company*, 161 Ky. 347, 170 S. W. 986. Nor is the question affected by the assurance of safety.

[3] An assurance of safety does not impose upon the master absolute liability, regardless of the question of negligence. It bears only on the question of assumed risk, or of contributory negligence, and, where the master is negligent, renders such pleas ineffective to prevent a recovery, unless the danger is so obvious that an ordinarily prudent person would refuse to do the work.

There being no evidence of negligence, the peremptory instruction was proper.

Judgment affirmed.

REID v. NICHOLS.

(Court of Appeals of Kentucky. Oct. 27, 1915.)

1. APPEAL AND ERROR ⇨969—TRIAL ⇨2—ACTIONS—TRIAL TOGETHER—DISCRETION OF COURT.

The action of the trial court in ordering a suit for damages for libel against a newspaper company to be tried with a suit for libel against a reporter of the paper based on the same issues was not error, where it does not appear that plaintiff was prejudiced in any way, since the consolidation of cases involving the same issues lies in the discretion of the trial court, and its exercise will not be disturbed on appeal, except for clear abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3845-3848; Dec. Dig. ⇨969; Trial, Cent. Dig. §§ 3-5; Dec. Dig. ⇨2.]

2. LIBEL AND SLANDER ⇨104—RETRACTION—STATUTE—CONSTRUCTION.

Ky. St. 1915, § 2438b, prescribing the effect of retraction in cases of libel, does not confer on the plaintiff the right to show failure to retract for the purpose of aggravating punitive damages, but extends the privilege of showing retraction only to defendant for the purpose of defeating such damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 284-291; Dec. Dig. ⇨104.]

3. LIBEL AND SLANDER ⇨120—MALICE—PRESUMPTION.

Where defendant caused to be published of plaintiff that he was rumored to have committed a murder, there was in effect a charge of murder, which is libelous per se, and raises a presumption of malice, authorizing punitive

damages until rebutted by proof of a contrary motive or of the truth of the matter published.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 350, 351; Dec. Dig. ⇨120.]

4. LIBEL AND SLANDER ⇨62—MALICE—PRESUMPTION—BELIEF—DEFENSE.

While belief in good faith in the charge made is a defense to the presumption of malice raised by the charge, the mere belief of defendant, upon reasonable grounds, that plaintiff is the person accused of the crime, is insufficient, since it in no way tends to disprove malice in making the charge.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 162, 163, 317; Dec. Dig. ⇨62.]

Appeal from Circuit Court, McCracken County.

Action by John Randolph Reid against Bell Nichols for libel. There was judgment for plaintiff for one cent and costs, and plaintiff appeals. Reversed.

D. G. Park, of Paducah, for appellant. Berry & Grassham, of Paducah, for appellee.

CLAY, C. In this action for damages for libel, plaintiff John Randolph Reid, recovered of the defendant, Bell Nichols, a verdict and judgment for one cent and costs. Reid appeals.

Briefly stated, the facts are these: One Marshall T. Finley was found dead, and Bell Nichols, a reporter for the Paducah Evening Sun, wrote an article which was published in that paper on August 5, 1913, which, in substance, charged plaintiff, John Randolph Reid, with the murder of Finley. Thereupon Reid sued the Sun Publishing Company, the owner of the paper, for damages. The trial resulted in a verdict and judgment in his favor for one cent and costs. On appeal to this court the judgment was reversed, and the cause remanded for a new trial, in an opinion which may be found under the title of *Reid v. Sun Publishing Company*, in 158 Ky. at page 727, 166 S. W. 242, and which sets out at length the libelous article complained of. After the reversal plaintiff brought this action. Over the objection of plaintiff, the cases were tried together and heard by one jury. The trial resulted in a verdict and judgment for \$400 against the Sun Publishing Company and in the verdict and judgment against Nichols above indicated.

[1] The first question presented is: Did the trial court err in ordering the two cases to be tried together? Plaintiff insists that, as the actions were separate, he had the right to have a separate trial as to each defendant. The rule seems to be well settled that where several actions are brought by one plaintiff against different defendants, or by different plaintiffs against one defendant, and the issues are the same in each action, the court may, in order to avoid unnecessary delay and expense, order them to be tried together. Whether the cases should be tried together

is a matter in the discretion of the court, and such discretion will not be interfered with on appeal, unless it is clearly made to appear that the discretion was abused. *St. Louis, etc., R. Co. v. Hardin*, 88 Ark. 255, 108 S. W. 614; *Walker v. Conn*, 112 Ga. 314, 37 S. E. 408; *Anderson v. Sutton*, 2 Duv. 480; *Sullivan v. Boston Electric Light Co.*, 181 Mass. 294, 68 N. E. 904; *Worley v. Glentworth*, 10 N. J. Law, 241; *Jackson v. Leggett*, 5 Wend. (N. Y.) 83; *Taylor v. Standard Brick Co.*, 66 Ohio St. 360, 64 N. E. 428; *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397; *New York Mut. L. Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706; *Benge's Adm'r v. Fouts*, 163 Ky. 796, 174 S. W. 510. Here the defendant Nichols was employed by the defendant Sun Publishing Company. He wrote the libelous article and had it printed in the paper published by the Sun Publishing Company. The issue and the evidence being the same, and it not appearing that a joint trial would place plaintiff in a position not occupied by his adversaries, or would probably give them an undue advantage in the trial, we cannot say the trial court abused its discretion in ordering the two cases tried together.

[2] Another ground urged for reversal is the alleged error of the court in striking from plaintiff's reply an allegation to the effect that defendant failed to publish a retraction within the time limit fixed by the statute, and in refusing to give an instruction based upon such allegation. The statute (section 2438b, Kentucky Statutes 1915) prescribing the effect of a retraction in case of libel, is as follows:

"1. *Effect of Retraction.* That in any civil action for libel, charging the publication of an erroneous statement, alleged to be libelous, it shall be relevant and competent evidence for either party to prove the fact that the plaintiff requested retraction or omitted to request retraction.

"The defendant may also allege and give proof that the matter alleged to have been published, and to be libelous, was published without malice, and that the defendant in the next regular issue of the newspaper or publication, after receiving demand in writing or within seven days if no such demand is made to correct and to retract said statement, or in the next regular issue of the newspaper or publication did publish a sufficient correction, retraction, explanation or rectification, as conspicuously and publicly as that in which said alleged libelous statement was published in the same type and in the same place in at least two successive issues of the same periodical publication accompanied by editorials in which the alleged slander is specifically repudiated.

"Upon proof of such facts, the plaintiff shall not be entitled to punitive damages; and the defendant shall be liable only to pay actual damages. And upon the publication of such correction, retraction, explanation or rectification, the defendant may plead same in mitigation of damages.

"2. *Repealing Clause.* All acts or parts of acts in conflict herewith are hereby repealed."

It will be observed that the statute, after providing that either party may prove the fact that the plaintiff requested retraction

or omitted to request retraction, further provides that the defendant may also allege and give proof that the matter alleged to have been published, and to be libelous, was published without malice, and that he published a correction, retraction, explanation, or rectification in the manner provided by the statute. In other words, the statute confers upon the defendant the right to show the retraction for the purpose of defeating punitive damages. It does not confer upon the plaintiff the right to show a failure to retract for the purpose of showing malice or aggravating such damages, where, as in this instance, no retraction was demanded by plaintiff. The court, therefore, did not err in striking from plaintiff's reply the allegation referred to, or in refusing to give an instruction based on such allegation.

Omitting the libelous article, which is too long to be published, the court instructed the jury as follows:

"Instruction No. 1. It is admitted by the pleadings and is the undisputed evidence in this case that the defendant Bell Nichols, on the 5th day of August, 1913, wrote and procured to be printed and published in the Paducah Evening Sun the following article, to wit: [Here follows the libelous article.] And the court now instructs you that the law presumes that defendant wrote and procured said article to be published maliciously, or with malice and the court further instructs you to find for the plaintiff such sum in damages as you may believe, from the evidence, will reasonably compensate him for injury to his character, if any, caused by the writing and publishing of said article by defendant, or humiliation and mortification to his feelings, if any of either, so caused, for mental anguish, if any, so caused, but not exceeding the amount claimed in the petition, to wit, ten thousand dollars (\$10,000); and you will at least find for plaintiff nominal damages. And the court further instructs you that you may, or may not, in the exercise of your sound discretion, in addition to the compensatory damages above mentioned, assess such exemplary or punitive damages as you may think right and proper under the facts proven in this case, unless you shall believe, from the evidence, the facts stated and mentioned to you in instruction No. 3 herein.

"Instruction No. 2. The court further instructs you that if you shall believe from the evidence that at, or previous to, the time said article was written and caused to be published of and concerning plaintiff by the defendant Nichols, in the Paducah Evening Sun, it was circulated and rumored generally in McCracken county, and in the city of Paducah, and in the vicinity of Marshall T. Finley's home, that said Finley had been murdered, and that some of his near relatives had murdered him, and that plaintiff was the relative who was accused of murdering him, then you may consider these facts in mitigation of damages, if any, you find for the plaintiff.

"Instruction No. 8. The court further instructs you that if you shall believe from the evidence that the defendant Nichols, at the time said article was written by him and caused to be published in the Paducah Evening Sun, had received such information as would lead a reasonably prudent person to believe, and the defendant did believe, that the plaintiff was the near relative who was accused of murdering Marshall T. Finley, and wrote and caused to be published said article as a matter of news, in good faith, and without any 'actual malice' towards plaintiff, and did not in a wanton and

reckless disregard of plaintiff's right publish said article of and concerning the plaintiff, then you cannot find for the plaintiff punitive damages as mentioned to you in instruction No. 1, but you may find for him compensatory damages as herein instructed."

While, under the facts in the particular cases, this court has apparently approved instructions imposing upon the plaintiff the burden of proving malice in cases of words libelous per se (*Morgan v. Lexington Herald Co.*, 138 Ky. 637, 128 S. W. 1064), the settled rule in this state is that, where the publication is libelous per se, the law presumes malice and authorizes a recovery of punitive damages (*Tanner v. Stevenson*, 138 Ky. 578, 128 S. W. 878, 30 L. R. A. [N. S.] 200; *Pennsylvania Iron Works Co. v. Henry Vogt Machine Co.*, 139 Ky. 497, 96 S. W. 551, 29 Ky. Law Rep. 861, 8 L. R. A. [N. S.] 1023; *Nicholson v. Merritt*, 109 Ky. 369, 59 S. W. 25, 22 Ky. Law Rep. 914; *Nicholson v. Merritt*, 67 S. W. 5, 23 Ky. Law Rep. 2282; *Reid v. Sun Publishing Company*, supra); and this presumption of malice remains throughout the entire case until it is rebutted by proof of a contrary motive or of the truth of the matter published (*Riley v. Lee*, 88 Ky. 614, 11 S. W. 713, 11 Ky. Law Rep. 586, 21 Am. St. Rep. 358; *Courier-Journal Company v. Sallee*, 104 Ky. 341, 47 S. W. 226, 20 Ky. Law Rep. 634).

[3, 4] Instruction No. 1 is in accord with these opinions, and tells the jury that the law implies malice and authorizes a finding of both compensatory and punitive damages. It goes further, however, and denies the right to find punitive damages if the jury believe the facts set out in instruction No. 3. In other words, the court holds, as a matter of law, that no punitive damages should be allowed if the defendant had received such information as would lead a reasonably prudent person to believe, and the defendant did believe,

that the plaintiff "was the near relative who was accused of murdering Marshall T. Finley," and wrote and caused to be published said article as a matter of news, in good faith, and without any actual malice towards the plaintiff, and did not in a wanton and reckless disregard of plaintiff's right publish said article of and concerning the plaintiff. While there are numerous cases holding that, on the question of malice, any competent evidence legitimately tending to show that the publication was made in good faith and under belief in its truth is admissible (*State v. Clyne*, 53 Kan. 8, 35 Pac. 789; *People v. Stark*, 59 Hun, 51, 12 N. Y. Supp. 688, affirmed in 136 N. Y. 538, 32 N. E. 1046), we are not aware of any case going to the extreme laid down in the instruction complained of. It does not require belief, upon reasonable grounds, in the truth of the charge contained in the libelous article, but mere belief, upon reasonable grounds, that the plaintiff is the person accused of the crime. To publish of one that it is rumored that he has committed a murder is, in effect, to charge him with murder; and we are unable to see how belief in the fact that the person, concerning whom the charge is made, is the person accused, can in any way affect the question of malice. We therefore conclude that instruction No. 3 is erroneous. On another trial the court will omit this instruction, and will also omit from instruction No. 1 the concluding words, "unless you shall believe from the evidence the facts stated and mentioned to you in instruction No. 3 herein," and substitute therefor the words, "unless you shall believe from the evidence that the publication of the article was made without malice, in which event you will not find any punitive damages against the defendant."

Judgment reversed, and cause remanded for a new trial consistent with this opinion. All concur.

HUGHES et al. v. BUTLER et ux. (No. 463.)
(Court of Civil Appeals of Texas. El Paso.
Oct. 14, 1915.)

APPEAL AND ERROR ⇐1002—**REVIEW—VERDICT ON CONFLICTING EVIDENCE.**

A verdict clearly and fully supported by the evidence, though conflicting, will not be reversed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ⇐1002.]

Appeal from District Court, Harris County; A. R. Hamblen, Special Judge.

Action by L. Butler and wife against M. L. Hughes and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Stanley Thompson, of Houston, for appellants. W. F. Carothers and R. A. Davis, both of Houston, for appellees.

HIGGINS, J. Butler and wife sued to recover the title and possession of certain premises in city of Houston, which were conveyed by them to M. L. Hughes and J. J. Lyles on March 28, 1910, and to cancel the deed of conveyance. The interest of Lyles subsequently passed to Hughes. It was alleged that the property was the homestead of Butler and his wife at the time it was conveyed, and, while the deed upon its face was absolute, it was, in fact, intended as a mortgage, and was given to secure the repayment of a loan of \$75 made by the grantees to the grantors. It was further alleged that the loan had been repaid. In response to the only issue submitted to the jury, it was found that the conveyance in question was intended by the parties thereto as security for a loan; whereupon judgment was rendered in favor of appellees as prayed for.

The only question presented by this appeal is the sufficiency of the evidence to support the jury's findings. We have carefully examined the facts, and the conclusion is reached that the evidence abundantly supports the finding. It will serve no purpose to state the same in detail. The issue of veracity between the defendants and plaintiffs was sharply joined, and by the jury resolved in the latter's favor—a conclusion which this court deems clearly and fully supported by the evidence.

Affirmed.

HUGHES et al. v. COLBERT et ux.
(No. 470.)

(Court of Civil Appeals of Texas. El Paso.
Oct. 14, 1915.)

APPEAL AND ERROR ⇐1002—**REVIEW—VERDICT ON CONFLICTING EVIDENCE.**

A verdict clearly and fully supported by the evidence, though conflicting, will not be reversed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ⇐1002.]

Appeal from District Court, Harris County; A. R. Hamblen, Judge.

Suit by Anderson Colbert and wife against M. L. Hughes and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Stanley Thompson, of Houston, for appellants. W. F. Carothers and R. A. Davis, both of Houston, for appellees.

HIGGINS, J. Colbert and wife sued to recover the title and possession of certain premises in the city of Houston, conveyed by them to M. L. Hughes and J. J. Lyles by deed dated February 28, 1910, and to cancel the deed of conveyance. The interest of Lyles subsequently passed to Hughes. It was alleged that the property was the homestead of Colbert and his wife at the time it was conveyed, and, while the deed upon its face was absolute, it was, in fact, intended as a mortgage, and was given to secure the repayment of a loan of \$100 made by the grantees to the grantors. It was further alleged that the loan had been repaid. In response to a special issue submitted to the jury it was found that the conveyance in question was intended by the parties thereto as security for a loan; whereupon judgment was rendered in accordance with the prayer of the petition.

The only question presented by this appeal is the sufficiency of the evidence to support the finding of the jury upon the issue indicated. We have carefully examined the facts, and the conclusion is reached that the evidence abundantly supports the finding. It will serve no purpose to state the same in detail. The issue of veracity between the defendants and plaintiffs was sharply joined and by the jury resolved in the latter's favor—a conclusion which this court deems clearly and fully supported by the evidence.

Affirmed.

HOUSTON TRANSP. CO. v. PEDEN IRON & STEEL CO. (No. 467.)

(Court of Civil Appeals of Texas. El Paso.
Oct. 14, 1915.)

APPEAL AND ERROR ⇐80 — **DECISIONS REVIEWABLE—FINAL JUDGMENT—DISPOSAL OF ISSUES.**

In an action on a note, with a prayer by the indorser that on judgment for plaintiff he have judgment over against his codefendant, a judgment for plaintiff not disposing of the prayer for judgment over was not a final appealable judgment, so that an appeal therefrom would be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 429, 432, 433, 450, 456, 457, 494-500; Dec. Dig. ⇐80.]

Error from District Court, Harris County; Wm. Masterson, Judge.

Suit by the Peden Iron & Steel Company against the Houston Transportation Company and John G. Tod, with prayer by defendant Tod that on judgment for plaintiff he have judgment over against his codefend-

ant. Judgment for plaintiff, and the Houston Transportation Company brings error. Dismissed.

John G. Tod, of Houston, for plaintiff in error. Baker, Botts, Parker & Garwood, of Houston, for defendant in error.

HARPER, C. J. Plaintiff, Peden Iron & Steel Company, brought this suit against the Houston Transportation Company and John G. Tod, defendants, upon certain notes for principal, interest, and attorney's fees. The Houston Transportation Company answered by general denial, and, specially, that the charge of 10 per cent. attorney's fees is unjust, etc. Defendant John G. Tod answered by general denial, and pleaded specially that, if he is liable at all on the notes sued on, it is as indorser thereof, and that therefore he prays that, if any judgment be rendered in favor of plaintiff and against the defendants, he have judgment over against his co-defendant, the Houston Transportation Company.

The judgment rendered is as follows:

"Be it remembered that on this, the 13th day of October, 1913, came on to be heard the above numbered and entitled cause, and came the plaintiff, Peden Iron & Steel Company, and announced ready for trial, and also came the defendant Houston Transportation Company, by its attorneys, and announced ready for trial, and also came the defendant John G. Tod, in person, and announced ready for trial, and the defendants in open court withdrew their demand for a jury, and all matters of fact and law were submitted to the court, and the court, having heard the pleadings and evidence, is of the opinion that the defendants are jointly and severally indebted to the plaintiff in the sum of fourteen hundred and six and $\frac{72}{100}$ (\$1,406.72) dollars, which amount plaintiff is entitled to recover from said defendants, jointly and severally, with interest from date at the rate of eight per cent. (8%) per annum.

"It is therefore ordered, adjudged, and decreed by the court that plaintiff, Peden Iron & Steel Company, do have and recover of and from the defendants, Houston Transportation Company and John G. Tod, jointly and severally, the sum of fourteen hundred and six and $\frac{72}{100}$ (\$1,406.72) dollars, with interest from date at the rate of 8 per cent. per annum and all costs of suit, for which let execution issue."

It will be noted that the decree does not dispose of Tod's plea for judgment over against the Houston Transportation Company in case judgment is rendered against him, without which it is not a final judgment. *Cook v. Fore*, 37 S. W. 970; *Florence v. Choice et al.*, 124 S. W. 436.

The appeal is therefore dismissed.

BARNES & MITCHELL et al. v. CAMPBELL et al. (No. 7467.)

(Court of Civil Appeals of Texas. Dallas. July 3, 1915. Rehearing Denied Oct. 16, 1915.)

1. VENDOR AND PURCHASER — 33 — SALE — RESCIND.

A purchaser of a tract of land who knew at the time that a viaduct connecting the lots

with the business portion of the city was not built cannot, the grantors not having built the viaduct, rescind on the ground of misrepresentations contained in the deed platting the property, which recited that a viaduct was to be constructed and granted the city a right of way for the building of a viaduct and waived any damages which might accrue, for it appeared that the city, and not the grantors, were to build a viaduct.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 38, 40-43, 66; Dec. Dig. —33.]

2. VENDOR AND PURCHASER — 33 — RESCISION—GROUNDS.

Where a vendor subsequently agreed with a city for the construction of a viaduct on the property sold, a statement at the time of the sale that there then existed a contract for the construction of the viaduct is no ground for rescission.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 38, 40-43, 66; Dec. Dig. —33.]

3. VENDOR AND PURCHASER — 110—SALES—RESCISSIION.

Where the agent of a landowner represented to purchasers of property in a subdivision that a viaduct leading to the business portion of the city would be subsequently constructed, a breach of that agreement does not warrant rescission unless it was made with intent to deceive and defraud.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 196, 197; Dec. Dig. —110.]

4. VENDOR AND PURCHASER — 33—RESCISSIION—ACTIONS—EVIDENCE.

In a suit, where it was sought to rescind a purchase of land on the ground of misrepresentations as to future actions, *held*, that such misrepresentations were not fraudulently made so as to warrant rescission.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 38, 40-43, 66; Dec. Dig. —33.]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Action by L. W. Campbell, Jr., and others against George W. Barnes and wife and John O. Mitchell, copartners doing business as Barnes & Mitchell, and others. From an order granting plaintiffs a temporary injunction, defendants appeal. Injunction dissolved.

Cockrell, Gray & McBride, of Dallas, for appellants. Muse & Muse and L. W. Campbell, all of Dallas, for appellees.

RAINEY, C. J. This is an appeal from an order of the Forty-Fourth district court of Dallas county granting a temporary injunction to appellees against appellants in an action wherein L. W. Campbell, Jr., and Campbell-Harris Lumber Company sued George W. Barnes and wife, Madge Barnes, and John O. Mitchell, a partnership under the name of Barnes & Mitchell, and Ben T. Seay and Tom E. Cranfill, doing business as partners under the name of Seay-Cranfill Company, the Dallas Trust & Savings Bank, and J. D. Robinson, the object of the suit being to rescind a contract for the sale of land situated in the city of Dallas, said contract hav-

ing been made by L. W. Campbell, Jr., with Barnes & Mitchell.

We gather from the sworn petition, answers and evidence introduced that Barnes & Mitchell in 1911 owned a 40-acre tract of land. They had it laid off into blocks, lots, and streets and alleys, and had a map there of placed upon the records of Dallas county. Said plat so mapped and recorded was designated "Barnes & Mitchell's Grand Avenue Addition." This map did not designate a "viaduct" at Merlin street, as did a subsequent map recorded a few weeks thereafter, of which a copy is hereto attached.

contained in said addition set forth and described."

Said plot or tract of land is separated from the business part of Dallas on the north by the Santa Fé Railroad, and Merlin street had only been opened up to said railroad and the extension of said street, and the building of a viaduct was greatly desired for the accommodation of those purchasing lots in said addition. Barnes & Mitchell resided in the state of Oklahoma, and Ben T. Seay, their attorney in fact, looked after their interests in Dallas and superintended the sale of lots and to such matters as pertained to said ad-

BARNES AND MITCHELL'S GRAND AVENUE ADDITION.



At the time the last map was filed, to wit, December 2, 1911, there had been filed for record a deed of dedication from Barnes & Mitchell to the city of Dallas, which deed was dated November 24, 1911, and had been accepted by said city. Said deed, after setting out a strip of land for the extension of Merlin street, recites:

"Whereas, there is to be built a viaduct on and across the G., C. & S. F. R. R. tracks and right of way at the point herein described as the N. end of the strip of land herein conveyed and dedicated, the said grantors herein, for and in consideration of the premises herein, hereby covenant and agree and do hereby grant to the city of Dallas the right and privilege to construct an adequate and suitable approach to the said proposed viaduct at its south approach, located and situated on the N. end of South Merlin street, as herein set out, and a sufficient portion of said land is hereby conveyed to the city of Dallas for such purpose, and we, the owners and holders of said land, hereby expressly give the city of Dallas the right and privilege to construct said approach and waive any claim for damages that may result to our said property

dition. During the year 1912, at different times, L. W. Campbell, Jr., purchased through Ben T. Seay all the lots in said addition remaining on hand; the consideration being cash and notes for deferred payments. Said notes were indorsed by Campbell-Harris Lumber Company, which notes were placed with the Dallas Trust & Savings Bank to secure an indebtedness due it by Barnes & Mitchell.

On December 27, 1912, the board of commissioners of the city of Dallas passed an ordinance granting to the Gulf, Colorado & Santa Fé Railroad Company the privilege of constructing and operating certain switch tracks along its line of road just north of the boundary line of said addition in consideration of said railway company constructing an overhead viaduct across its tracks on Merlin street for the purpose of extending said street. Said ordinance was duly accepted and agreed to by said railway

company, but said viaduct has never been constructed up to this time, nor any effort made to do so.

Appellee sold and conveyed a number of lots to individuals, some of whom have built upon them. Appellee's petition, in effect, charges that he was deceived and induced to enter into the contract for the purchase of said lots for the following reasons: (1) That the map of said plat first recorded did not have written thereon the word "viaduct," as indicated on the second plat recorded; (2) that the deed of dedication made by Barnes & Mitchell to the city of Dallas recited that a viaduct was to be built across the Santa Fé track on Merlin street; and (3) that said grantors stated that a contract had been made to build said viaduct, and that it was assured by them that said viaduct would be constructed across the railroad tracks on Merlin street.

[1, 2] Appellee evidently knew at the time of purchase of the lots that the viaduct was not then constructed. He should not have been deceived by the recitations in the deed of dedication made by Barnes & Mitchell to the city of Dallas that they were to construct the viaduct. While it was therein recited that a viaduct was to be constructed, said recital was made merely in connection with the covenant conveying the right of way over the property and releasing it from all damages that might accrue to adjoining property that might arise from the construction of the viaduct, and it is clear therefrom that the city was to see to the construction. There is no express agreement alleged in the petition that Barnes & Mitchell were to construct the viaduct, and if they stated that an agreement then existed to construct the same, and said agreement did not then exist, an agreement was made some time thereafter to so construct between the city of Dallas and the railway company, which rendered said statement harmless, and affords appellee no ground for relief.

[3] This leaves for consideration the question of assurance that the viaduct would be built, which assurance was made by Ben T. Seay, who was the authorized agent of Barnes & Mitchell, to make sales of said lots, and did, in fact, make the sales. This assurance was not a representation that the viaduct was then in existence, but that it was to be erected in the future. Appellee may have relied on such assurance, and believed the viaduct would be built at some future time. But was such reliance and the failure to build such as authorized a recovery in an action for rescission of a contract for the sale of land? We think not.

In *Railway Company v. Titterington*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39, where action was for the rescission of a sale of land, the deed conveyed the right of way over the land, and fraud was charged in that the agent represented that the company would establish and maintain a passen-

ger and freight depot upon the land, which representation had been breached. The court held:

"That ordinarily a promise to perform some act in the future, although made by one party as a representation to induce the other to enter into the contract, will not amount to fraud in legal acceptance, though subsequently the promise is without any excuse, entirely broken and nonfulfilled. This is a plain and well-established proposition about which there can be no controversy; otherwise every breach of a contract would amount to fraud"—citing *Bigham v. Bigham*, 57 Tex. 238.

The court, however, held that, while the above was the true rule, there was a well-founded exception, though there is a conflict in the authorities upon the question. The exception is that where the parties make the representation with the intent to deceive and defraud with no intention to perform the promise.

[4] We think there is in this case a total failure to show any purpose to deceive or defraud.

Appellee read in evidence the affidavit of Ben T. Seay, president, and T. E. Cranfill, vice president, who compose the firm of Seay-Cranfill Company, and represented the said Barnes & Mitchell in platting and laying off the streets and alleys and in all other matters pertaining to the establishment of said addition, and represented them in making sales of said lots, which affidavit states, in effect: While the plat was being made and before it was placed on record, negotiations had begun between the city of Dallas and the said railway company looking to the building of said viaduct. The city required the deed of dedication from Barnes & Mitchell conveying the right of way, waiving all damages and widening Merlin street from 50 to 60 feet. This necessitated the making of a new map, which was recorded, as before stated, on December 27, 1911. The deed and map were the result of the joint acts of the city and the said Barnes & Mitchell, and were, in fact, contemporaneous transactions. That the filing of said map for record showing the viaduct was not done until the said city had prepared said deed, and was done wholly and solely in reliance upon the good intentions of said city and said railway company that they would proceed with the building and completion of the viaduct without unusual delay. That in placing said lots upon the market and in selling same to various parties they advertised and stated orally to said purchasers that said viaduct was assured and would be built within a reasonable time, which statements and advertisements were based not only upon the contract made in said deed, but on the oral assurance of the members of the board of commissioners and representations of said railway company that said viaduct would be built and said acts were done by said agents in perfect good faith, and affiants believed a majority of the purchasers bought upon the faith they had in the affiants, the municipal

board of said city, and the representations of the representatives of the railway company. The existence of such a viaduct would greatly enhance the value of said lots. This affidavit is uncontradicted, and we must accept it as embracing the true facts in regard to the question of fraud and deceit.

As we understand the transaction, there is nothing in the record to show deceit or fraud on the part of Barnes & Mitchell or their agents, but, on the other hand, it shows they acted in perfect good faith in trying to procure the building of the viaduct.

Believing the injunction was improperly granted, it will be dissolved.

BROOKS v. STATE. (No. 3668.)

(Court of Criminal Appeals of Texas. Oct. 13, 1915.)

CRIMINAL LAW — 636 — TRIAL — NECESSITY OF DEFENDANT'S PRESENCE.

Under Code Cr. Proc. 1911, art. 646, providing that in all prosecutions for felonies defendant must be personally present on the trial, and that he must likewise be present in all cases of indictment or information for misdemeanors, where the punishment or any part thereof is imprisonment in jail, where on a trial for a misdemeanor the jury, by the terms of the statute, assessed defendant's punishment at six months in jail in addition to a fine, defendant's absence from the courtroom while his counsel was arguing a motion for an instructed verdict, in the absence of the jury, required a reversal; defendant having been locked in jail, and not voluntarily absent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1465-1482, 2120; Dec. Dig. § 636.]

Prendergast, P. J., dissenting.

Appeal from Maverick County Court; Ben V. King, Judge.

Z. M. Brooks was convicted of an offense, and he appeals. Reversed and remanded.

David E. Hume, of Eagle Pass, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted for soliciting and procuring Clara Brooks, a female, to be at a particular place, describing the place, for the purpose of meeting and having unlawful sexual intercourse with Percy Hamilton, a male person.

There was a square issue between the state and the defendant as to this matter on the facts. There is an issue presented by the record that defendant was absent during a part of the trial of his case. The facts in reference to this matter show that during the argument of defendant's attorney for instructed verdict—that is, between the hours of 2 p. m. and 3 p. m.—the defendant was locked up in jail. As the deputy sheriff testified, he was "locked up good and tight in the county jail." The jury went back into the courtroom at about 8 o'clock, about the same time the officer brought in the defendant. About 1:55 p. m. defendant's attorney

submitted to the court a written motion for an instructed verdict, and began argument on said motion, which argument lasted about an hour, during which time neither the defendant nor the jury was present in the courtroom. As the defendant went in defendant's attorney was just concluding his argument for an instructed verdict. Defendant's attorney began said argument about 2 o'clock. This is the agreed statement of facts approved by the county judge in regard to that matter. It is also stated in the general statement of facts, which was filed on April 13th, also made before the adjournment of court, that at 12:30 p. m. the court adjourned until 2 p. m., at which hour the defendant's attorney began his argument for an instructed verdict, and concluded said argument at 3 p. m. At the conclusion of the argument the jurors and the defendant were brought into the courtroom. So the fact seems to be uncontroverted that defendant was locked up in jail, as the deputy sheriff said, "good and tight," at the time his case was being argued to the court on the question of an instructed verdict in his favor. There was no question in this case like that in Killman v. State, 53 Tex. Cr. R. 570, 112 S. W. 92. In that case the defendant voluntarily absented himself under the circumstances detailed in that opinion, and it was held, under the circumstances of that case, it was not reversible error, but in this case defendant's absence was forced by being locked up by the deputy sheriff in the county jail.

The Revised Criminal Statutes 1911, art. 646, provide:

"In all prosecutions for felonies, the defendant must be personally present on the trial, and he must likewise be present in all cases of indictment or information for misdemeanors where the punishment or any part thereof is imprisonment in jail."

Part of the punishment in this case is imprisonment. By the terms of the statute the verdict of the jury allotted defendant six months in the county jail in addition to a fine of \$50. The Killman Case, supra, is not in point. The other authorities collated under the statute, we think, are in point, and require a reversal of the judgment.

For this reason, the judgment will be reversed, and the cause remanded.

PRENDERGAST, P. J. (dissenting). The agreed statement of facts shows that all that was done during appellant's absence was that "at about 1:55 p. m. defendant's attorney submitted to the court a written motion for an instructed verdict, and began argument on said motion, which argument lasted about an hour, during which time neither the defendant nor the jury were in the courtroom"—simply that, and nothing more. No complaint of this was made at the time, and no objection thereto was made until after the

trial in the motion for a new trial. This is a misdemeanor case. I think this was no such proceeding or part of the trial as the statute contemplates cannot be had in the defendant's absence. No possible injury is shown or even claimed to him. It was too late to complain after the trial.

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HAWKINS v. STATE. (No. 3684.)
(Court of Criminal Appeals of Texas. Oct. 13, 1915.)

1. CRIMINAL LAW § 1098—APPEAL—STATEMENT OF FACTS—FORM.

A statement of facts, made up of questions and answers, cannot be considered; there being no statement by the judge in approving the statement that this was necessary, and it not appearing to have been necessary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2863, 2865; Dec. Dig. § 1098.]

2. CRIMINAL LAW § 778 — INSTRUCTIONS — BURDEN OF PROOF.

An instruction that in all criminal cases the burden of proof is on the state is usually sufficient, unless there is some peculiarity about the case requiring the court to charge further that the burden never shifts to defendant, especially where there is no proper statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. § 778.]

3. CRIMINAL LAW § 330—BURDEN OF PROOF.

There are instances in which the burden of proof is, or may be, placed on defendant; but this usually applies to special matters, like nonage and insanity, and does not include any case until after the state has made out a case overcoming the presumption of innocence and reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 721; Dec. Dig. § 330.]

4. CRIMINAL LAW § 1119 — RECORD — MATTERS PRESENTED FOR REVIEW.

Where defendant, a negro, received the minimum punishment for the offense of which he was convicted, and there was no statement of facts which could be considered, the prosecuting attorney's allusion in harsh and bitter terms to the negro race was not ground for reversal, as the facts may have been overwhelming.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2927-2930; Dec. Dig. § 1119.]

5. CRIMINAL LAW § 720 — ARGUMENT OF COUNSEL.

Prosecuting attorneys in their argument should confine themselves to legitimate deductions from the facts as they apply to the law of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.]

Appeal from District Court, San Patricio County; F. G. Chambliss, Judge.

John Hawkins was convicted of robbery, and he appeals. Affirmed.

O. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of robbery with firearms; his punishment being assessed at five years' confinement in the penitentiary.

[1] The statement of facts is made up of questions and answers. The motion of the Assistant Attorney General to strike out and not consider the evidence will be sustained. Under all the authorities, and under our law, a statement of facts in this condition cannot be considered. There is no statement by the judge in approving the statement of facts that this was necessary, and in fact it seems not to have been necessary to so arrange the evidence.

[2, 3] Appellant requested the court to charge the jury that the burden is on the state, and never shifts to the defendant. This charge was refused. In the charge of the court this language is found: "In all criminal cases the burden of proof is on the state." Usually this is sufficient, and will be treated so, unless there is some peculiarity about the case that will require the court to give the other phase of it, to wit, that the burden never shifts to the defendant. There are instances in which the burden is or may be placed on the defendant; but that does not include any case until after the state has made out a case overcoming the presumption of innocence and reasonable doubt. That rule usually applies to special matters, like nonage and insanity. We think that the court gave a sufficient charge on this proposition as presented by this record, and especially in the absence of a statement of facts.

[4, 5] The district attorney made some rather vigorous remarks with reference to the negro race, defendant being a negro, and alluded to that race in harsh and bitter terms. Objection was urged to this by appellant's counsel. The bill recites that the court did not stop the district attorney, nor did he charge the jury to disregard the remarks. However that may be, as the record is presented, the defendant received the minimum punishment. The facts may have been overwhelming. The error is not thought to be of such a nature, under the circumstances, as to require a reversal. Had the defendant received a punishment above the minimum, we might have quite a different proposition, and would, in the mind of the writer, have a very serious question in the case. We wish again to admonish the prosecuting officers against such speeches. Such remarks ought not to be permitted, nor ought they to be indulged, and we again request the trial courts to use judicial authority in regard to these matters. They are unnecessary, and often lead to reversal of cases, when without it such reversal might not occur. Prosecuting officers should confine themselves to legitimate deductions from the facts as they apply to the law of the case. This is enough, and a conviction secured by means independent of the admitted facts frequently brings about reversals. It is, however, under the circumstances, thought not advisable to reverse this judgment for these improper remarks.

The judgment is ordered to be affirmed.

GOUGH v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky. Nov. 5, 1915.)

1. APPEAL AND ERROR ⇐2—RIGHT TO APPEAL—WHAT LAW GOVERNS.

The law in force at the time an appeal is granted controls the right, as it is a privilege which can be given, taken away or restricted by legislative authority.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3-7, 1882, 2421; Dec. Dig. ⇐2.]

2. APPEAL AND ERROR ⇐45—RIGHT TO APPEAL—DISMISSAL.

Ky. St. § 950, subsec. 1, declares that no appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or personal property if the value be less than \$500, exclusive of costs, save that the Court of Appeals may grant an appeal, when satisfied that the ends of justice require the judgment to be reversed, when the amount exceeds \$200, or when the construction of a statute or the Constitution is in issue. Subsection 3 provides that, if the court is satisfied that an appeal should not be granted, the motion therefor, where the amount in controversy is less than \$500, should be overruled without a written opinion. The amount in controversy as shown by the record was less than \$500, and the bill of exceptions showed that neither the construction nor validity of a statute or of the Constitution was involved, and that there was no error prejudicial to the substantial rights of appellant. *Held*, that the appeal must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 152-155, 157, 158, 172-176, 178-184, 186-197; Dec. Dig. ⇐45.]

Appeal from Circuit Court, Graves County.

Action between Minnie O. Gough and the Illinois Central Railroad Company. From a judgment for the latter, the former appeals. Appeal dismissed.

W. J. Webb, of Mayfield, for appellant. Gus Thomas and Robbins & Robbins, all of Mayfield, and Trabue, Doolan & Cox, of Louisville, for appellee.

HURT, J. [1] The appeal in this case was granted on the 3d day of December, 1914. The law in force at the time an appeal is granted controls the right of appeal. *Hale v. Grogan*, 106 Ky. 311, 50 S. W. 257, 20 Ky. Law Rep. 1857. The right of appeal is a privilege and can be given, taken away, or restricted by the legislative authority.

[2] Section 950, subsection 1, Ky. Statutes, provides among other things:

"But no appeal shall be taken to the Court of Appeals as a matter of right from a judgment for the recovery of money or personal property, or any interest therein, or to enforce any lien thereon, if the value in controversy be less than five hundred dollars, exclusive of interest and costs."

The section, *supra*, further provides that the Court of Appeals may grant an appeal when it is satisfied from an examination of the record that the ends of justice require that the judgment appealed from should be reversed, if the value of the amount or thing in controversy, exclusive of interest and cost, is as much as \$200, or when the

construction or the validity of a statute or the construction of a section of the Constitution is necessarily and directly put in issue, and a correct decision of the case cannot be had without passing on the validity of the statute or construing the section of the Constitution, or statute involved.

Subsection 3 of section 950, *supra*, regulates the manner in which this court may grant an appeal when the amount in controversy is as much as \$200 and less than \$500. It further provides, in reference to when the amount in controversy is as much as \$200 and less than \$500:

"If the court decides, after an examination of the record, that the appeal should not be granted, the motion shall be overruled without a written opinion."

This has reference to the motion for an appeal in this court, as provided by said subsection 3, *supra*, and rule 20 of the court.

Under a former statute, which fixed the minimum sum at \$200, from a judgment either for granting or refusing a recovery, an appeal could be taken, it was held by this court that, either in the case of an appeal being granted by the court, which rendered the judgment from which the appeal was taken, or where granted by the clerk of this court, that if the record demonstrated conclusively, that the amount in controversy was, in fact, less than \$200, the appeal would be dismissed upon or without motion. *Thomas v. Thomas*, 162 Ky. 630, 172 S. W. 1064; *Louisville Property Co. v. Whitley County State Co.*, 163 Ky. 336, 173 S. W. 783; *Smith v. O. & O. Ry. Co.*, 118 Ky. 825, 82 S. W. 410; *K. & P. Lumber Co. v. Sledge*, 143 Ky. 137, 135 S. W. 1030; *Renaker et al. v. Adams et al.*, 146 Ky. 513, 142 S. W. 1013; *Morgan v. Johnson*, 158 Ky. 417, 165 S. W. 649; *Chenault v. Bank of Arlington*, 159 Ky. 104, 166 S. W. 789. These decisions rested upon the fact that, if the amount in controversy was not as much as \$200, this court had no jurisdiction. These decisions further held that the value in controversy must be the actual amount of the controversy, in fact, regardless of the claims of the parties.

Under the present statute governing the right of appeals, this court, in an action for the recovery of money, does not have jurisdiction of an appeal unless the value of the amount in controversy is not less than \$500, or unless the value of the amount in controversy is as much as \$200, and the court is satisfied, from an examination of the record, that the ends of justice require the judgment appealed from to be reversed, or the construction or validity of a statute or the construction of a section of the Constitution is necessarily and directly put in issue, and a correct decision of the case cannot be had without passing upon the validity of the statute or construing the section of the Constitution or statute involved.

The evidence contained in the bill of ex-

ceptions in this case, which is a suit for the recovery of money, only demonstrates conclusively that the amount in controversy and claimed by appellant is much less than \$500, and while there is some evidence tending to show that the amount in controversy, exclusive of interest and costs, is in excess of \$200, an examination of the record does not show any error prejudicial to the substantial rights of the appellant, and does not satisfy the court that the ends of justice require a reversal of the judgment. Neither the construction or validity of any statute or any section of the Constitution is involved.

The appeal is therefore dismissed, without any written opinion upon the merits of the controversy.

CHAPMAN v. FREEMAN.*

(Court of Appeals of Kentucky. Nov. 4, 1915.)

SCHOOLS AND SCHOOL DISTRICTS \S 53—TRUSTEES—ELECTION—TITLE TO OFFICE—ACTION FOR OFFICE.

Under Ky. St. \S 4485, providing that the board of trustees of graded schools shall appoint the officers to hold elections, who shall make returns of poll books, and certify the result of the elections to such board, who shall examine and compare the same, and issue certificates to the persons found to be elected, one has not title to the office of trustees, so as to have right to maintain action to enjoin another from asserting title to, or exercising the duties of, such office, he not having a certificate from the board, issuance of which he could, if necessary, compel by mandamus, but the officers appointed to hold the election certifying the result, showing his election, to the superintendent of schools, and he administering the oath of office to those returned as elected.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. $\S\S$ 113, 127-135; Dec. Dig. \S 53.]

Appeal from Circuit Court, McCreary, County.

Action by J. B. Freeman against John Chapman. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

John W. Sampson, of Whitley City, J. W. Rawlings, of Danville, and I. N. Steely, of Williamsburg, for appellant. James Denton, of Somerset, and Stephens & Gilreath, of Whitley City, for appellee.

CARROLL, J. The appellee, Freeman, claiming to have been elected as one of the trustees of the Greenwood graded school, in McCreary county, and afterwards made chairman of the board, brought this suit against the appellant, Chapman, to enjoin him from attempting to exercise the duties of the office of chairman of the board of trustees and holding himself out as a member of the board and chairman thereof. The circuit court granted Freeman the relief prayed for, and Chapman appeals.

It appears that at an election held in May, 1915, for the purpose of electing three trustees, at which election Chapman, who was a member of the old board, was a candidate

for re-election, Freeman was elected as one of three new members; Chapman being defeated for re-election. After this Chapman, who had been chairman of the old board, undertook to continue to exercise or attempt to exercise the duties of the office of chairman, claiming that Freeman, who was also undertaking to exercise the duties of the office by virtue of his election in May, 1915, was not, in fact, elected, or entitled to act as a member of the board, for reasons that will be presently pointed out. Whereupon, as stated, Freeman brought this suit.

Section 4485 of the Kentucky Statutes provides:

"After the first election provided for in this law shall have been held, the tax voted, trustees elected, and the graded common school organized, the board of trustees shall appoint the officers to hold all other elections, which officers shall take an oath to be under the same responsibilities and subject to the same penalties as the officers holding state or county elections, only they shall make returns of poll-books, and certify the result of the elections to the board of trustees, who shall examine and compare the same and issue certificates to the persons found to be elected."

It will be observed that under this section the board of trustees should appoint the election officers and that the officers should return the poll books and certify the result of the election to the board, who, after examining and comparing the same, should issue certificates to the persons found to be elected. There were five candidates for trustee at the election, namely, Freeman, Chapman, Young, Treadway, and Clark. Freeman, Clark, and Young each received more votes than did Treadway or Chapman, and so the officers of election certified to the county superintendent of schools that Freeman, Young, and Clark had been elected trustees, and the county superintendent of schools administered the oath of office to these persons, and thereupon they entered upon the discharge of their duties as trustees of the graded school, although the result of the election was not certified by the officers of election to the board of trustees, nor did the board of trustees issue a certificate of election to either Freeman, Clark, or Young.

On this appeal it is insisted that the petition of Freeman should have been dismissed in the lower court because, assuming that Chapman was interfering with him in discharging the duties of the office of trustee, Freeman could not maintain an action to prevent this interference, as the election returns had not been returned to the board of trustees, or examined and compared by them, nor had they issued to Freeman the certificate of his election. Taking this as a basis, the argument is made that Freeman, at the time he brought this suit, was not a trustee of the graded school, and, of course, if this position is well taken, he could not maintain this action.

A strict and literal observance of the statute should not be required, where the elec-

tion has been honestly conducted and the result fairly arrived at. All that is necessary is that there should be a substantial compliance with the requirements of the statute. But elections like this are to be held under the supervision and direction of the board of trustees of the graded school, and it is the duty of the officers of election appointed by them to return the poll books, with their certificate, showing the result, to the board of trustees, and the duty of the board of trustees to examine and compare the same, and, if correct, to issue certificates to the persons found to be elected. And the issue of a certificate by the board to the person found by it to have been elected is, we think, indispensable to confer upon the person elected the right to maintain an action to prevent interference by another who is also claiming the office. It is the certificate that gives the person elected title to the office, and although a person may have received the majority of the votes at an election regularly held, until he has this insignia of office, he is not in a position to bring a suit like this.

There is no claim in this case that the board of trustees refused to issue a certificate to Freeman; but, if such a case should arise, a trustee who was elected could compel the board by mandamus proceedings to issue him a certificate. In behalf of Freeman the argument is made that, although he did not have a certificate from the board of trustees showing his election, he was, nevertheless, a de facto officer, and therefore had a right, not only to discharge the duties of the office, but to maintain an action against Chapman for disturbing him in the performance of his duties.

We do not find it necessary in this case to determine the extent of the right of a de facto trustee to discharge the ordinary duties of the office in a case where his power is questioned. The point presented as necessary to a decision does not require us to go any further than to hold that a certificate showing his election is necessary to confer upon a trustee claiming to be elected the right to enjoin another person from asserting title to the office. In *Hughes v. Roberts*, 142 Ky. 142, 184 S. W. 168, Ann. Cas. 1912D, 148, the court cited with approval from a North Carolina case the following:

"An essential element of a valid election is that it shall be held by lawful authority, substantially as prescribed by law. It is not sufficient that it be simply conducted honestly; it must as well have legal sanction. The statutory provisions and regulations in respect to public elections in this state must be observed and prevail, certainly in their substance. Otherwise, the election will be void, and so treated. Therefore the contention that, if the election in question was simply conducted fairly and honestly, it was valid, is unfounded."

In *Watkins v. Snyder*, 148 Ky. 733, 147 S. W. 899, *Watkins* brought a suit against Sny-

der to obtain the possession of an office. The circuit court sustained a demurrer to his petition and he appealed. In the opinion the court said:

"The demurrer to the petition was properly sustained, for the reason that the plaintiff must recover, if at all, on the strength of his own title, and he shows no right in himself to the office. He has neither a certificate of election from the proper authorities nor a commission from the Governor. Although he received a majority of the votes cast at the election, and although the election was valid in every other respect, still he is not entitled to be inducted into office until the result of the election has been determined in the manner prescribed by law. If any officer has failed to do his duty in the premises, his remedy is by mandamus against that officer."

To the same effect are *Wilson v. Tye*, 126 Ky. 34, 102 S. W. 856, 31 Ky. Law Rep. 491; *Dorain v. Walters*, 132 Ky. 54, 116 S. W. 313; *Wooton v. Wheeler*, 149 Ky. 62, 147 S. W. 914.

Wherefore the judgment is reversed, with directions to dismiss the petition.

HESTER v. HESTER.

(Court of Appeals of Kentucky. Nov. 4, 1915.)

1. WITNESSES \S 60—HUSBAND AND WIFE—WHEN COMPETENT—DIVORCE.

In a wife's action for divorce upon the ground that the husband had attempted to injure her, so as to indicate probable danger to her life or great bodily injury if she remained with him, it was error to allow the wife to testify as to her residence, since under the specific provisions of Civ. Code Prac. § 606, as amended by Act March 15, 1912 (Acts 1912, c. 104), the husband and wife are competent witnesses against each other in an action for divorce only upon the issue of probable danger or great bodily injury to the wife as specified therein.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 167-173; Dec. Dig. \S 60.]

2. COURTS \S 223—COURT OF APPEALS—JURISDICTION.

The Court of Appeals has no jurisdiction to reverse a judgment granting a divorce.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 600, 601, 603-606; Dec. Dig. \S 223.]

3. DIVORCE \S 286—RESTORATION OF PROPERTY—APPEAL—FINDINGS—CONCLUSIVENESS—EVIDENCE—EFFECT.

Where, in an action for divorce by the wife, there is a prayer for money belonging to her wrongfully withheld by the husband, and the evidence on that issue is such as to leave the mind in doubt as to the truth, the finding of the chancellor will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 769, 770; Dec. Dig. \S 286; *Appeal and Error*, Cent. Dig. § 598.]

Appeal from Circuit Court, Simpson County.

Action by Sarah Hester for divorce from Dan Hester, and the restoration of property and money. From a judgment granting a divorce, but refusing to restore property or money, plaintiff appeals. Affirmed.

John J. Milliken, of Franklin, for appellant. G. W. Merritt, of Russellville, for appellee.

HANNAH, J. Sarah Hester sued Dan Hester in the Simpson circuit court for a divorce from the bonds of matrimony. She obtained it, but appeals from the judgment.

[1, 2] The cause of divorce alleged in the petition was an attempt to injure the plaintiff, such as indicated probable danger to her life or great bodily injury from her remaining with the defendant. Section 606 of the Civil Code, as amended by the act of March 15, 1912 (Acts 1912, c. 104), provides that in actions for divorce, where such a charge is made, either or both the parties may testify. But this means only that they may testify concerning facts bearing upon the grounds relied on as specified in the act. By that amendment, the wife was not made a competent witness to prove the facts in respect of her residence as was done in this case; and, there being no proof other than her own in that respect, the chancellor should not have granted the divorce. Section 422 of the Civil Code. However, we have no jurisdiction to reverse the judgment granting a divorce.

[3] 2. It was charged in the petition that the defendant had in his possession about \$2,000 of the plaintiff's money, and plaintiff complains because the judgment did not order the restoration of this sum to her. This was a second marriage for both of the parties. The plaintiff was in comfortable circumstances at the time of the marriage, and is yet so. The defendant had no property of any consequence at that time, and has but little now. He was, however, a trader of no mean ability; and it seems from the record that by dealing in live stock, which he purchased with funds advanced to him from time to time by his wife, he earned some profits. She admits that he repaid to her several sums which she so advanced to him, but claims that he failed to repay others; and on this question the competent evidence is conflicting and very unsatisfactory. The trouble between them while they lived together seems to have been, not so much the failure to repay these sums as their inability to agree as to who was entitled to the profits arising out of these transactions, and as to which should carry the money. The husband contended that it was inconvenient and embarrassing to be compelled to return home to get money every time he purchased property, and the wife insisted that she had been the treasurer of the first marital firm with which she was connected, and that a second term in that office was not inhibited by the Constitution or the law of the land. And about this they could not agree.

There was no prayer in the petition for the restoration of property, but, as there was quite a great deal of testimony in the record upon this subject, we assume that the chancellor (although the judgment makes no mention of this issue and merely grants the

divorce with costs, including a fee to plaintiff's attorneys) considered the matter, and that he declined to render any judgment against the defendant in this respect because of the unsatisfactory and indefinite state of the proof.

Upon a consideration of the evidence in respect of this claim concerning money loaned to the defendant and its repayment, the mind is left in doubt as to the truth of the matter; and, where this is the case, the finding of the chancellor will not be disturbed on appeal. *Robinson-Pettit Co. v. Sapp*, 160 Ky. 445, 169 S. W. 869; *Gragg v. Barton's Adm'r*, 161 Ky. 210, 170 S. W. 621.

Judgment affirmed.

BOONE et al. v. ROBINSON et al.

(Court of Appeals of Kentucky. Nov. 4, 1915.)

BOUNDARIES — 46 — AGREEMENT — EFFECT.

There having been no shortage in a lot, when partitioned between R. and B., R. waived no rights and conceded no part of his share, where he, while erecting a partition fence, on claim of B. that there was a shortage, agreed to remove the fence if it should later be established that he had inclosed more than the part to which he was entitled, though it developed that B. had permitted another to encroach on his part of the lot.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 212-226, 249-251; Dec. Dig. 46.]

Appeal from Circuit Court, Clark County.

Action by Mary E. Boone and others against William S. Robinson and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

J. Smith Hays, Elmer D. Hays, and J. Smith Hays, Jr., all of Winchester, for appellants. J. M. Stevenson, of Winchester, for appellees.

NUNN, J. This is a second appeal. The appellees were the plaintiffs below, and at the first trial demurrer was sustained to their petition. This court held that the petition stated a cause of action, and the judgment was reversed. 151 Ky. 715, 152 S. W. 753, Ann. Cas. 1915A, 352. Issues were then joined, and upon the proof the court rendered a judgment for defendants, and the plaintiffs again appeal.

The heirs at law of J. W. Ried's deceased wife, who are the appellants here, and J. W. Ried owned jointly a lot in Winchester, fronting 38 feet and 5 inches on Main street, and extending 210 feet to an alley in the rear. August 1, 1908, Ried and the heirs at law agreed to partition the lot and exchanged deeds therefore, whereby Ried took the south portion of the lot, fronting 20 feet on Main street, and the heirs took the north portion, fronting 18 feet and 5 inches on Main street. The parties supposed that the lot was a rectangle, and that they were getting an equal

frontage on the alley as well as on Main street. The southern portion which the heirs took adjoined a lot which belonged to the Stubblefield estate, and they were among the heirs of that estate. August 28th they joined with the heirs of Stubblefield in conveying to Piersall that part of the Stubblefield lot adjoining the lot which they received in the partition of the Ried property. On January 18, 1909, Ried undertook to build a fence between the lots partitioned in order to inclose for himself a rectangle fronting 20 feet on Main street and the alley. But the appellants objected, because they discovered that the frontage of their lot on the alley would be less than it was on Main street, and insisted that Ried should bear a proportionate part of the shortage.

The proof in the case shows that there was then 29 inches less front on the alley than on Main street. When appellants complained, the parties entered into a written agreement in which it was recited that the line had not been definitely established, and that Ried might proceed to erect the partition fence as begun, that is, so as to inclose a rectangle fronting 20 feet on the street and alley, and Ried agreed to remove the fence if it should later be established that he had inclosed more of the lot than he was entitled to. Ried died in about 11 months, and while he lived no steps were taken to establish the line. The Ried lot descended to the appellees by inheritance. In December, 1910, appellants brought this action to establish a division line and have it so drawn as to apportion between them the shortage on the alley in the proportion which 18 feet and 5 inches bears to 20 feet. It is alleged that the parties were laboring under a mutual mistake when they undertook to convey to each other the lots having a like frontage on the street and alley. The court found from the proof that at the time the deeds of partition were made the combined frontage of the two lots was 38 feet and 5 inches on both the street and alley, but that the deed to Piersall, made by the Stubblefield heirs, in which the appellants joined, 28 days afterwards, conveyed a part of or encroached upon the lot of appellants to the extent of 29 inches, the exact shortage as ascertained by survey.

We think this finding of the court is supported by the evidence, and we also concur in the opinion that, if the appellants permitted Piersall to encroach upon the rear of their lot to the extent of 29 inches, in order that he might get the full width which he purchased from the Stubblefield heirs, then the appellees, who were in no wise connected with the Stubblefield transaction, should not be required to make up any part of that loss. The tentative agreement made January 18, 1909, between the parties, with reference to the division line, was not a waiver

by Ried of his rights, nor a concession of any part of his lot. The effect of this agreement was that, if it should be established that at the time they divided the lot there was less frontage on the alley than on Main street, then Ried would tear down his fence, and place it upon the real line, after bearing his part of the shortage. But, as found by the court, there was no shortage; that is, there was an equal frontage on the alley and street at the time Ried and the appellants divided the lot.

The judgment is therefore affirmed.

DYER v. DYER et al.

(Court of Appeals of Kentucky. Nov. 4, 1915.)

EMINENT DOMAIN — 157 — CONDEMNATION AFTER ALLOTMENT OF DOWER—VALUE OF INTEREST IN FUND.

Ky. St. 1915, table 4, p. 2466, showing the value of a widow's dower where the fund involved is subject thereto, that is, prior to allotment of dower, is not applicable for determining the cash value of her dower right in a sum awarded for condemnation of part of the land allotted to her as dower, but she has a life estate in such fund, and table 8, page 2466, shows the present cash value of a life right in the income of a fund.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 427; Dec. Dig. ¶ 157.]

Appeal from Circuit Court, Union County. Proceeding between Mary E. Dyer and Ben W. Dyer and others for division of a sum awarded in condemnation. From the judgment said Mary E. Dyer appeals. Reversed, with directions.

P. H. Winston, of Sturgis, and Allen & Allen, of Morganfield, for appellant. Morton & Morton, of Morganfield, for appellee.

HANNAH, J. John M. Dyer died intestate, domiciled in Union county, the owner of several hundred acres of land therein, and survived by a widow and a number of children. A portion of these lands was allotted to the widow as her dower. This dower allotment comprised 256 acres. On April 7, 1913, the West Kentucky Coal Company instituted a proceeding in the Union county court against Mrs. Dyer and her children and the children of John M. Dyer by a former marriage, to condemn 1.51 acres of this 256-acre dower tract, for railroad purposes. Such proceedings were had in the Union county court and in the Union circuit court as resulted in a recovery of damages in the sum of \$4,084.18 net to the widow and heirs. See *West Kentucky Coal Co. v. Dyer*, 161 Ky. 407, 170 S. W. 967. The parties to this appeal then agreed that the widow should take absolutely and in fee simple the cash value of her dower right in the sum awarded to them as damages, it being stipulated that she was 65 years of age and in reasonably good health and strength and having the ordinary expectation of life for one of her age. Upon

this agreement the lower court adjudged to her 15.3 per cent. of the recovery, and from that judgment she appeals.

The lower court in fixing the amount due the widow out of said fund seemingly used table 4 found on page 2466 of Kentucky Statutes, 1915 Edition, and approved in *O'Donnell v. O'Donnell*, 3 Bush, 216, and *Alexander v. Bradley*, 3 Bush, 667. This table shows the value of a widow's dower where the sum or fund involved is subject thereto, that is, prior to any allotment of dower. Such is not the present case. In this case, dower had been previously allotted appellant, and the fund in hand represents the diminution in value of the dower allotment, that is to say, the whole of the 256 acres of land allotted to her as dower, and in which she has a life estate, has diminished in value to the extent of \$4,034.13. As she was entitled to the use of the 256 acres of land during life, in the condition in which it was at the time of the allotment, she is entitled to the use during life of the fund which represents its diminution in value; or, as the parties have in this case agreed, to the present cash value of the use of that fund during life. The rule is that the owner of a life estate in land condemned for a railroad right of way is entitled to a life estate in the money received as damages in the condemnation proceedings. *K. C. & M. Ry. Co. v. Weaver*, 86 Mo. 473; *Miller v. Asheville*, 112 N. C. 769, 16 S. E. 765; *In re Camp*, 128 N. Y. 377, 27 N. E. 799; *Diehl v. Cotts*, 48 W. Va. 255, 37 S. E. 546; *Lewis on Eminent Domain*, § 717.

In ascertaining the present cash value of Mrs. Dyer's life estate in the \$4,034.13, the lower court should have used table 3, shown on page 2465, Kentucky Statutes, 1915 Edition, which table shows the present cash value of a life right in the income of a fund. Mrs. Dyer's age being 65, and her physical condition being normal, she would be entitled to 45.1 per cent. of the fund.

The judgment is therefore reversed, with directions to enter a judgment conforming to this opinion.

ROSS v. ROSS et al.

(Court of Appeals of Kentucky. Nov. 4, 1915.)

1. COURTS \S 189—POLICE COURT JUDGMENT—ABSENCE OF WRITTEN PETITION.

While, under Civ. Code Prac. § 705, the proper practice in an action in a police court on a note of over \$50 is to file a written petition, failure to do so does not render the judgment void, so as to authorize enjoining its collection, but only erroneous; such court having jurisdiction of the subject-matter and the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 413, 429, 453; Dec. Dig. \S 189.]

2. COURTS \S 189 — POLICE COURT JUDGMENT—PREMATURE RENDITION.

Rendering default judgment in a police court on a note of over \$50, nine days after

service of the summons, when it should not be before the tenth day, does not make it void, so as to authorize the enjoining of its collection, but is merely a clerical misprision, to be corrected by a motion seasonably made.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 413, 429, 453; Dec. Dig. \S 189.]

3. JUDGMENT \S 416—INJUNCTION—JUDGMENT ON NOTE—WRITTEN ASSIGNMENT OF NOTE.

That a note was not assigned in writing by the payee does not render void the default judgment obtained thereon by another, so as to authorize enjoining its collection.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 784, 786-788; Dec. Dig. \S 416.]

Appeal from Circuit Court, Muhlenberg County.

Action by W. J. Ross against Alaska Ross and others. Petition dismissed, and plaintiff appeals. Affirmed.

Doyle Willis, of Greenville, for appellant. Taylor, Eaves & Sparks, of Greenville, for appellees.

CARROLL, J. The appellant, as plaintiff, brought this suit to enjoin the collection of an execution issued against him in favor of the appellee Alaska Ross. The circuit court dismissed the petition, and he appeals.

There is no dispute as to the facts. It appears that the appellant executed a note for \$55 to one Rane Jones. This note came into the possession of one Alexander, the record not showing how, as it was not indorsed by or assigned to Alexander in writing by Jones. Alexander, by indorsement on the back of the note, transferred it to Alaska Ross, who brought suit on it in the South Carrollton police court. No petition was filed, the note only being filed with the police judge, who issued summons against the appellant, which summons was executed on December 28, 1887. On January 6, 1888, judgment was rendered by default, and on this judgment from time to time executions were issued and returned "No property found," until finally one was issued, the collection of which is here sought to be enjoined.

[1] The appellant insists that the judgment in the police court was void, and therefore the collection of the execution should have been enjoined. If the judgment was void, the circuit court had jurisdiction in this action to enjoin the collection of this execution. If, however, the judgment was merely erroneous, and not void, the circuit court did not have jurisdiction to enjoin its collection.

Section 705 of the Civil Code provides that:

"If the matter in controversy do not exceed fifty dollars, the pleadings in the action may be oral and without verification. But before the summons is issued the plaintiff shall file in the court the account, or the written contract, or a short written statement of the facts, on which the action is founded."

In *Bracy v. Bracy*, 12 Bush, 153, it was said that under this section, when the amount in controversy is more than \$50, the pleadings must be in writing; and clearly it is the proper practice when the amount in controversy exceeds \$50, as in this case, to file a petition in the manner and form required by section 90 of the Civil Code; but manifestly, where the writing, or claim, or account that is the basis of the action is filed with the magistrate and summons issued thereon, the judgment is not to be treated as void merely because the plaintiff failed to set out in a petition his cause of action. The police court had jurisdiction of the subject-matter of the action and the parties, and the failure to file a petition on the note was not substantial error, although if the defendant in the suit had moved the court to require a petition to be filed, the court should have done so.

[2] Proceedings in these inferior courts are not to be judged by the same rules of strictness that would apply to suits in the circuit court, and unless it appears that the rights of the parties have been prejudiced by the failure to observe correct rules of practice, errors in this respect will be treated as immaterial. It seems that the judgment on this note was entered nine days after the service of summons, when it should not have been entered until ten days afterwards. But this premature judgment was not a void judgment. The rendition of a judgment before a case stands for trial is not ground for enjoining the collection of the judgment, and in this case it was merely a clerical misprision to be corrected by a motion made in seasonable time in the court rendering the judgment. *Webber v. Webber*, 1 Metc. 18; *Smith v. Mullins*, 3 Metc. 182; *Com. v. Caudill*, 121 Ky. 537, 89 S. W. 535, 28 Ky. Law Rep. 520.

[3] Nor does the fact that the note was not assigned in writing by Jones to Alexander furnish any reason for granting the relief sought in this action. The defendant, if he desired so to do, should have raised this question in the police court.

Wherefore the judgment is affirmed.

TODD v. FINLEY.

(Court of Appeals of Kentucky. Nov. 4, 1915.)

1. VENDOR AND PURCHASER §175—ACTIONS FOR PRICE—DEFENSES.

Where there was no eviction and the grantee is in the undisturbed possession of the property under an executed contract, he will not be relieved from payment of the price by a mere showing of a defect in title coupled with the insolvency of the grantor, unless there is palpable danger of immediate eviction and ultimate loss without legal remedy and the grantee uses due diligence to bring before the court the adverse claimants.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 360-363; Dec. Dig. §175.]

2. FRAUDS, STATUTE OF §158—CONTRACTS RELATING TO LAND—PLEADING.

It will be presumed that a contract to convey land within the statute of frauds was oral unless the pleader alleges it was in writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 373-376; Dec. Dig. §158.]

3. FRAUDS, STATUTE OF §129—PART PERFORMANCE.

Where a contract for the reconveyance of land was oral; a subsequent tender of a deed by the grantee was not enough to take the case out of the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292, 303, 306-308, 310-312, 314, 318-320, 322, 323, 325, 326; Dec. Dig. §129.]

Appeal from Circuit Court, Hopkins County.

Action by Thomas E. Finley against Ella Todd. From a judgment for plaintiff, defendant appeals. Affirmed.

Gordon & Hopewell, of Madisonville, for appellant. C. J. Waddill, of Madisonville, for appellee.

CLAY, C. On December 16, 1903, Thomas E. Finley and wife, in consideration of \$400 cash, sold and conveyed to Ella Todd, by deed of general warranty, a lot in Madisonville. On October 19, 1905, Finley erected for grantee a house on the lot in question and took from her a note and mortgage on the premises to secure the contract price of \$600. The grantee made certain payments on the note, which left due thereon \$420, with interest from January 5, 1909. On September 6, 1912, Finley brought this suit against Ella Todd to enforce the mortgage lien. Defendant presented two defenses; one based on a breach of warranty of title and insolvency of plaintiff, and the other based on an agreement by her to reconvey the property to plaintiff upon payment by him of the purchase price and the amount she had paid on the mortgage. These defenses were held insufficient, and the answer and counterclaim stricken from the record, and judgment rendered enforcing plaintiff's lien. Defendant appeals.

[1] It is the well-settled rule in this state that where there has been no eviction, but the grantee is in the undisturbed possession of the property under an executed contract, relief against the payment of the purchase money will not be decreed upon a mere showing of a defect in the title, coupled with the insolvency of the grantor. In such a case, relief will not be granted unless there is palpable and threatening danger of immediate eviction or ultimate loss without legal remedy, and the grantee uses due diligence to bring before the court the adverse claimants from whom the danger is apprehended. *Vance v. House*, 5 B. Mon. 540; *Simpson v. Hawkins*, 1 Dana, 309; *Taylor v. Lyon*, 2 Dana, 276; *Payne v. Cabell*, 7 T. B. Mon.

202; *Denny v. Wickliffe*, 1 Metc. 226. While plaintiff alleges that defendant was without a title and specifies wherein his title is defective, and by amended answer alleges his insolvency, she did not attempt to bring the adverse claimants before the court, nor did she allege facts tending to show a palpable and threatening danger, of immediate or ultimate loss, without legal remedy. That being true, her answer is insufficient.

[2, 3] As a second defense to the action, defendant pleaded a compromise agreement by which she, in consideration of the payment to her of the purchase price and the amount she had paid on the mortgage, agreed to reconvey the property to plaintiff. In pleading a contract within the statute of frauds, the pleader must allege that it is in writing; otherwise it is presumed to be oral. *Byassee v. Reese*, 4 Metc. 372, 83 Am. Dec. 481; *Hocker v. Gentry*, 3 Metc. 463; *Smith v. Fah*, 15 B. Mon. 443; *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394. Clearly a contract to convey or reconvey real estate is within the statute, and unless in writing cannot be enforced. As neither plaintiff nor defendant was bound by the oral contract, the subsequent tender of a deed by the defendant was not sufficient to take the case out of the statute. *Newburger v. Adams*, 92 Ky. 26, 17 S. W. 162, 13 Ky. Law Rep. 339; *Asher v. Brock*, 95 Ky. 270, 24 S. W. 1070, 15 Ky. Law Rep. 631; *Myers v. Brown*, 110 S. W. 402.

Judgment affirmed.

AMERICAN MFG. CO. v. CRITTENDEN RECORD-PRESS et al.

(Court of Appeals of Kentucky. Nov. 5, 1915.)

1. CONTRACTS —108—LEGALITY OF OBJECT— FRAUD—EFFECT.

An advertising contest, involving popularity voting, which is based on deceitful methods of maintaining interest, by arbitrarily rating contestants, and by false statements as to nominations, number of votes received, etc., is fraudulent, and a contract based thereon is against public policy, so that no cause of action can arise from it, or its breach, but the parties will be left in statu quo.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 498-503, 506, 507-511; Dec. Dig. §108.]

2. BILLS AND NOTES —114—FRAUD—PER- SONS IN PARI DELICTO.

Where defendant, in an action on notes given in consideration of a fraudulent popularity contest contract, did not know of its fraudulent nature when the notes were given, and might therefore escape liability, not being in pari delicto with the plaintiff, but failed to object to the fraud until three months after the contest was begun, he became a party to the fraud, and cannot counterclaim for the amount of notes assigned to innocent purchasers, which he was compelled to pay.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 224; Dec. Dig. §114.]

Appeal from Circuit Court, Crittenden County.

Action by the American Manufacturing

Company against the Crittenden Record-Press and others. From a judgment for defendants on their counterclaim, plaintiff appeals. Reversed and remanded, with directions.

A. O. & V. Y. Moore and John A. Moore, all of Marion, for appellant. J. W. Blue, Jr., of Marion, for appellees.

CLAY, O. The American Manufacturing Company is a corporation engaged in the business of selling plans for conducting automobile popularity contests. On July 1, 1911, it entered into a contract with S. M. Jenkins, whereby it sold him the right to put on a contest. As a part of the contract, it agreed to furnish him an automobile, a book of instructions and other literature, and to increase the circulation of his newspaper and the revenue therefrom. It also gave him a bond providing that, if his gross sales were not increased \$4,800 the next year, it would supply the deficiency to the extent of 15 per cent. of that sum. In consideration of this undertaking on the part of the American Manufacturing Company, Jenkins executed and delivered to the company ten promissory notes, for \$150 each, and one for \$100. With the exception of the three notes sued on in this action, all the notes were sold and transferred to bona fide purchasers for value without notice, who brought suit thereon and recovered judgments against Jenkins. This action was brought by the American Manufacturing Company to recover on the three notes which had not been sold. Jenkins filed an answer and counterclaim, pleading, among other defenses, that the contest scheme was fraudulent and contrary to public policy, and that the company, with knowledge of the fraudulent character thereof, had transferred the notes to bona fide purchasers for value and he had been compelled to pay the same. He asked that the petition be dismissed, and that he recover over on his counterclaim. On final hearing, the plaintiff's petition was dismissed, and defendant given judgment in accordance with the prayer of his answer and counterclaim. The American Manufacturing Company appeals.

In addition to the above facts, it appears that shortly after the execution of the contract the company mailed to Jenkins the book of instructions and other literature. Some weeks later they sent him an automobile, which was injured while being taken from the car. Jenkins instituted the contest and proceeded to conduct it. He occasionally sent to the manufacturing company certain reports indicating the progress of the contest. The contest continued through August, September, October, and November. On December 29, 1911, he wrote the company that he had been advised by counsel that the scheme was fraudulent. He then discontinued the contest and put on a contest

of his own. The book of instructions provides that the person conducting the contest shall make a list of 200 names to be sent to the American Manufacturing Company. Thereupon the company prepares a voting register, which is sent to the person conducting the contest. When the voting register is returned, the person conducting the contest is directed to send to the persons on the list the following letter:

"Dear Miss: We are notifying you that you were nominated as a contestant in our piano [or automobile] contest, and No. — was assigned to you. Your friends have cast — votes to your credit, which shows that they are rooting and working for you. If you will ask five or ten more of your friends to subscribe to our paper, or patronize our jobbing and advertising department, you will be able to increase your standing by 2,500 votes for each subscription sold. Get busy. No publicity. Everybody's name will be held secret. Boost your number and watch your standing every week in our paper.

"Yours truly."

The next week he was directed to send the following letter:

"Date ———."

"Dear Miss: We wish to notify you that you have been nominated as a contestant in the piano [or automobile] contest, and No. — was assigned to you. Your friends have cast — votes to your credit, which brings you in the lead. If you will have five or ten more of your friends to patronize our store and make their purchases here, they will receive votes, which they can bring to you or have them credited to your number, and you will have an excellent opportunity of winning the piano [or automobile]. As we are contemplating giving away weekly prizes and monthly prizes, you will have an opportunity of winning some of these. We are also issuing trading books good for twelve months' trade at our store, which will entitle the contestant to 50,000 votes for each \$5 deposited in advance. These books will be put on sale at the sixth week of our contest and not before. Call and get particulars. Watch your standing by number on our bulletin board in the window and in the newspaper each week. Boost your number. No publicity. Get busy. Everybody's name is secret. We wish you success.

"Yours truly."

For the purpose of keeping the contestants interested, and as near equal as possible, the book contains the following directions:

"The way we do it is that, after we have recorded and transferred the votes on that recording date, we run over the standing of contestants by thousands, and, as there are eight on a page, it is a very simple process to find out who stands the highest. When you have the highest number, then credit in the space for that week each contestant who is more than 5,000 votes below the leader with any number that comes into your head which will bring her within the 5,000 limit. This 5,000 limit is for the first six weeks of the contest, after which allow a 10,000 votes limit, and after the third or fourth month of the contest, 100,000 and 200,000 votes limit. It is always advisable to put six or ten who are absolutely inactive, and who have brought in no votes at all, in the lead, say anywhere from 1 to 100, as you will see from the way we keep the register. Always place the letter 'C' in front of those complimentary votes, so that at the end of the fifth month of your contest you can sum up all the

credits given to each contestant and give every other contestant a like number of votes, so that each person will have an equal amount of those complimentary votes, thus making it equal and fair to every person connected with the contest.

"Now, when you make up the complimentary votes at the end of the fifth month, always make a special sale, offering on a certain day say 100,000 votes for a dollar, and, after all the votes have been recorded in the register, take the contestant's column and pick out the amount of complimentary votes as aforesaid. The reason of giving these tremendous bonus of votes on this special sales day is to offset the big jump that may be caused by equalizing the complimentary votes, and gives a good reason for the rapid jump, as every \$10 purchase at that time would increase the standing by 1,000,000 votes.

"If they don't reply to that, or record votes before that seventh day, then take any lady or man, who comes into your store, and tell them that somebody has been casting votes to the number which you have just eliminated, and as one of your signs reads that the contestants number from 1 to 200, and if they are not a contestant, to cast votes for one of the above numbers, that is the reason why somebody has been casting votes for that particular number, and that number being in the lead, and your not having any contestant for it is the reason why you wish to give them that number, which will put her way up in the lead, and you will find, Mr. Merchant, that there is not a single person who will refuse to enter the contest at this stage of the game, while, if you offered her only 2,000 votes to start with, she would think that the others were so far ahead that she would have no chance at all, and as all of these votes that she will get are actually complimentary it really makes no difference, because it will be equalized at the end of the fifth month.

"Mr. Merchant, don't use any ballot box. Don't publish the contestants' names, as this is one of the methods that we have in getting the contestants active. Only publish the numbers assigned to them, so that no person can come in and say, 'I don't want to run; take my name out of the paper.' By our method she must run, whether she likes it or not, and even if she comes in and says, 'I don't want to run as a contestant,' you simply tell her that the contest manager, Mr. Howard, says that we must accept the votes cast to that number, and, if she should win the piano, why, she can give it away, if she doesn't want it. Carry all contestants in register, active or inactive.

"As a matter of fact this contest is absolutely made to sell goods, and not to waste time in the operation of the contest by bookkeeping, giving out votes, or counting votes. You don't have to count their votes at all. We allow the contestants themselves to count their votes, and write their number and amount of votes on top slip only. That saves you a lot of labor and trouble. Votes really don't mean anything to you, and, as a matter of fact, each contestant believes that you are going to take her package of votes and count them, and she will try her very best to get the proper amount down.

"Where one or two contestants have accumulated during the week say two or three million votes in advance of everybody else, in order to keep the contestants as close as possible, and to prevent one contestant from causing everybody else to lose interest, we advise you that, when they bring in their votes the following week, give them, instead of credit for the entire amount of votes, a receipt, one for each week, say for a certain equal proportion, good and available during the contest, and the receipts can only be voted on the week for which they are dated. A receipt of this character, 'Good for 30,000 votes May 7, 1911,' 'Good for 30,000 votes May 14, 1911,' and so on until every one of the votes are used up. You can explain to the party as follows: 'That it takes too long

to count the votes, and if you have to record all the votes that day it would be impossible to check up the enormous amount of votes that he has got. Therefore you will give him his receipts, and that you will credit him with at least 30,000 this week, and if you can use more you will call in more receipts the following week until you can get them all checked up.' In every case we have found this will work. The contestant is satisfied, because he has receipts, which will be credited during the contest, and you won't have to give enormous complimentary votes in order to bring each contestant within a reasonable distance of each other, and you and the other contestants are all satisfied, as it doesn't appear in the standing."

[1]. From the foregoing it will be observed that the persons who are notified of their nomination are led to believe that they have been nominated and voted for by some of their friends, when, as a matter of fact, they are placed in nomination and given complimentary votes by the person conducting the contest. It further appears from the plan that persons who take no interest and are inactive are placed in the lead by giving them complimentary votes. Not only that, but the plan provides for the elimination of inactive contestants and the transfer of their votes to others, who are led to believe that the votes have been actually cast by their friends. People who are actually in the lead are led to believe that they have fallen behind, when, as a matter of fact, the contestants who have passed them have acquired their new positions, not by bona fide votes, but by complimentary votes entirely. Another part of the scheme is not to record the votes of the leading contestants, but to give them mere receipts, and thus keep in the race the other contestants, who if they knew the facts, would probably cease their efforts or withdraw from the contest.

We regard further discussion of the plan as unnecessary. It speaks for itself. It is founded on deceit and misrepresentations. It is no defense to all this to say that in the end the complimentary votes are equalized and the contestants are put on the same footing. That may be true, but all during the contest they have served their purpose by deceiving the contestants and the public in general. We do not doubt that voting contests may be fairly planned and fairly conducted; but a plan like this, that is based on falsehood and deceit, and operates as a fraud, not only on the contestants themselves, but on the public in general, who, relying on the misrepresentations, are led to come to the assistance of their friends and spend money unnecessarily in their behalf, should not receive the sanction of the courts, and any contract based on such a fraudulent scheme is in violation of good morals, inconsistent with honest purposes, against public policy, and will not be countenanced by the law, or by the tribunals which administer the law. From such a foundation no cause of

action can arise. Courts will not authorize a recovery by either participant, nor will they restore to either anything that he may have paid to the other. The parties will be left exactly where they have placed themselves. *Smead v. Williamson*, 16 B. Mon. 492; *Chapman v. Haley*, 117 Ky. 1004, 80 S. W. 190, 25 Ky. Law Rep. 2182, 4 Ann. Cas. 712; *Howe's Ex'r v. Griffin's Adm'r*, 126 Ky. 373, 103 S. W. 714, 31 Ky. Law Rep. 784, 128 Am. St. Rep. 296.

[2] But defendant insists that he and plaintiff are not in *pari delicto*, and that the above rule has no application to him. It is argued that he falls within the exception laid down in the case of *Anderson's Adm'r v. Merideth*, 82 Ky. 564, where the court said:

"When there is imposition, duress, oppression, threats, undue influence, taking advantage of necessity or weakness, the party thus placed at disadvantage, although participating in the fraud, may be relieved in a court of equity as against his co-wrongdoer."

The point is made that defendant did not receive the book of instructions until some time after the notes were executed; that he testified that he carried out the instructions only in so far as he thought they were fair; and that, upon being advised by counsel that the scheme was fraudulent, he immediately notified the company. It is clear that he knew of the plan of conducting the contest at least three months before he repudiated it. During that time he never complained of the plan, but complained only of the fact that the results were not satisfactory. It is certain that defendant was not a victim of duress, oppression, threat, or undue influence. He may, in the first instance, have been the victim of imposition, and if he had acted promptly and repudiated the transaction there might be some reason for holding that he was not in *pari delicto* with plaintiff. He could not carry on the contest for at least three months, and thus participate in the illegal scheme, and then claim that he was not a party to it. We therefore conclude that neither of the parties is entitled to any relief.

Judgment reversed, and cause remanded, with directions to enter judgment in conformity with this opinion.

RICHARDSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 17, 1915.)

1. CRIMINAL LAW §534, 678—ELECTION BETWEEN ACTS—WHAT CONSTITUTES.

Where on a trial for breaking into a railroad depot which had been twice broken into the first witness for the commonwealth directly testified as to accused's possession of flour stolen from the depot the second time it was

broken into, the commonwealth thereby elected to try accused for such breaking.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1202-1205, 1222-1224, 1580-1583; Dec. Dig. Ⓒ534, 678.]

2. CRIMINAL LAW Ⓒ369—EVIDENCE—OTHER OFFENSES.

Ordinarily, evidence of a different offense from that for which accused is being tried is incompetent, but there are exceptions to this rule applicable to cases in which it is necessary to establish identity, guilty knowledge, intent, or motive for the crime, or when other offenses are so interwoven with the one being tried that they cannot well be separated from it, in the introduction of relevant and competent testimony, or when the independent offense was perpetrated to conceal the crime for which accused is on trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. Ⓒ369.]

3. BURGLARY Ⓒ41—EVIDENCE—INTENT OR MOTIVE.

On a trial for breaking into a railroad depot with intent to steal, the mere breaking and the taking of goods from the depot proves beyond doubt the motive actuating the commission of the crime.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. Ⓒ41.]

4. CRIMINAL LAW Ⓒ517—CONFESSION—EVIDENCE—INTENT OR MOTIVE.

Where accused, in one conversation with a witness for the commonwealth, confessed that he broke into a railroad depot in July and again in August, the commonwealth on his trial for the offense committed in August was entitled to prove the entire confession and conversation, and, in corroboration thereof, to introduce evidence as to the finding of goods stolen on each occasion in or near accused's house, for the purpose of establishing his identity as one of those who broke into the depot.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1146-1156; Dec. Dig. Ⓒ517.]

5. CRIMINAL LAW Ⓒ678—RECEPTION OF EVIDENCE—LIMITING EVIDENCE.

Where, for the purpose of establishing accused's identity as one of the persons who broke into a railroad depot, the court admitted evidence of his confession that he broke into such depot at a time other than that for which he was on trial, and evidence of the finding in and near his house of goods stolen on such occasion, it should have admonished the jury that they should not consider such evidence as conducing to prove his guilt of the breaking for which he was being tried, but, in connection with all other evidence, only for the purpose of determining whether or not he had a motive for the commission of the crime charged, or of identifying him as a participant therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872-1876; Dec. Dig. Ⓒ678.]

6. BURGLARY Ⓒ41—EVIDENCE—WEIGHT AND SUFFICIENCY.

On a trial for breaking into a railroad depot with intent to steal, evidence held sufficient to support a conviction.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. Ⓒ41.]

7. CRIMINAL LAW Ⓒ507—TESTIMONY OF "ACCOMPLICE"—CORROBORATION.

A person who at accused's request aided accused in removing flour stolen from a railroad

depot from a place where it had been concealed to accused's home, knowing that it had been stolen, but who was in no way connected with the offense of breaking into the depot, or charged therewith, and who did not even know that it had been broken into, until told by accused at the time of the removal of the flour, was not an "accomplice" to the offense of breaking into the depot, so as to require that his testimony be corroborated, as an "accomplice" is one of several equally concerned in the commission of a felony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096; Dec. Dig. Ⓒ507.]

For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

Appel from Circuit Court, Estill County.

Jonah Richardson was convicted of breaking into a railroad depot with intent to steal, and he appeals. Reversed.

Clarence Miller and R. W. Smith, both of Irvine, for appellant. Jas. Garnett, Atty. Gen., and Robert Caldwell, Asst. Atty. Gen., for the Commonwealth.

SETTLE, J. The appellant, Jonah Richardson, was separately tried in the court below under a joint indictment charging him, Harlow Richardson, Bertie Richardson, and Arch Harris with the crime of breaking into the depot of a common carrier, with intent to steal therefrom. The trial resulted in his conviction; the verdict of the jury fixing his punishment at confinement in the penitentiary not less than two years nor more than two years and a day. From the judgment entered upon that verdict, he prosecutes this appeal. The errors assigned in the motion and grounds for a new trial, and for the reversal of the judgment, are: (1) The admission by the trial court of alleged incompetent evidence; (2) its failure to give a peremptory instruction directing a verdict of acquittal; (3) failure to properly instruct the jury.

It appears from the bill of evidence that in August, 1914, some person or persons, at night, forcibly and feloniously broke into the depot of the Louisville & Nashville Railroad Company at West Irvine, and did steal, take, and carry away therefrom several sacks of flour and other merchandise of value. The commonwealth's principal witness was one Luther Lunsford, who testified, in substance, that some days after the breaking into the depot he, at the request of appellant, went with him from the latter's home, five or six miles from West Irvine, to the residence of his (appellant's) brother-in-law and codefendant, Arch Harris, near the West Irvine depot, from which appellant and Harris, after nightfall, took the witness to a ravine in a nearby forest, and there showed him several sacks of flour which appellant said he and his brothers, Harlow and Bertie

Richardson, and brother-in-law, Arch Harris, had taken from the West Irvine depot and concealed in the ravine, and that they had obtained the flour by breaking into the depot at night; that appellant then opened the ends of the sacks by cutting them with his knife, and, after emptying the flour therefrom into other sacks which he had taken with him from his home, he threw the old sacks on the ground, and those into which the flour had been emptied were carried by him and the witness to appellant's home, where it was placed in a barrel used as a receptacle for flour. The discarded flour sacks left in the ravine bore the name of C. C. Carroll, a local merchant, who testified he had ordered flour from a wholesale dealer before the breaking into the depot and taking of flour therefrom, and that by reason of the commission of that offense a considerable quantity of the flour he had ordered was never received by him. Lunsford also testified that while he and appellant were in the ravine and engaged in transferring the flour from the sacks to those which appellant had carried with him the latter told him he had on another occasion and prior to the taking of the flour from the depot taken therefrom a dozen pairs of overalls and other merchandise, and that three pairs of the overalls were appropriated by appellant, three by each of his brothers, and three by Harris, and that two of the men whom he did not name had also taken 100 pounds of meat. Lunsford further testified that a pair of the overalls was afterwards given him by Herman Richardson.

Another witness for the commonwealth testified that late in the afternoon preceding the night of the August depot breaking he saw appellant, Arch Harris, and a woman whom he took to be Harris' wife coming down the Kentucky river in a boat, which landed in a secluded place near his (witness') house, and that after leaving the boat the party, instead of taking the road customarily traveled, which leads from a point near where they landed to West Irvine and Harris' residence, took an untraveled and secluded route to get there, which made the distance to Harris' residence greater than by the customary road.

Yet another witness for the commonwealth, living near Harris, saw appellant, Harris, and two other men he recognized as appellant's brothers sitting on Harris' porch just after sundown of the night of the August breaking into the depot.

Charles Brinegar, a constable, testified in behalf of the commonwealth that Luther Lunsford related to him the conversation he had with appellant in the ravine, and thereupon he (Brinegar) procured the issue of a search warrant and went, with Lunsford, Hiram Canter, and perhaps others, to the place in the ravine where the conversation between appellant and Lunsford occurred, and there found the flour sacks which Luns-

ford testified had been discarded by appellant after transferring their contents to the sacks carried by him from his home; that the sacks bore the name of the local merchant mentioned, had been cut open at the end with a knife, and had the appearance of having contained flour. After securing possession of the sacks, Brinegar and his posse went to the residence of appellant, where they found a barrel containing 50 or 60 pounds of flour and a pair of overalls. About 100 yards from appellant's house Brinegar found a box of tobacco in a chestnut stump. The tobacco contained the brand "Index." Very near the stump in which the tobacco was found Brinegar discovered a man's tracks, which he followed a few feet to a large chestnut log, between which and a large slab resting against it he found a can of lard, a box of dry goods, and a box of bacon, and, in the box with the meat, a pair of overalls.

Appellant's brother, Bertie Richardson, was arrested by Brinegar after leaving appellant's house, and when arrested, was wearing a pair of overalls. The overalls worn by Bertie Richardson, those found in the box of meat, and the pair found in appellant's house were all of the same make and color, and contained on the top button a dollar trade-mark. According to the evidence, such overalls are called in West Irvine the "dollar mark" overalls. The flour sacks found by Brinegar in the ravine near the house of Arch Harris and the overalls and other articles of property found in and near the residence of appellant were taken in charge by the constable, introduced in evidence, and identified as the same articles, or similar in character to those, taken from the depot.

It appears from the evidence that the depot at West Irvine was twice broken into, on each of which occasions property of value was taken from the building. The first breaking occurred July 23 or 24, 1914, and the second in the following month, August. According to the evidence the dry goods, meat, and overalls found at and near appellant's residence were taken from the depot at the time of the July breaking; the flour and tobacco at the August breaking. Appellant objected to Lunsford's testimony respecting his alleged confession that he had broken into the depot and taken property therefrom in July, as well as in August, and moved that the commonwealth be required to elect whether it would prosecute him for the July or August breaking; but both the objection and motion to elect were overruled, and the evidence in question admitted, to which ruling appellant excepted. He also objected to the evidence introduced by the commonwealth as to the finding at and near the home of appellant of the articles of property alleged to have been taken from the depot at the time of the July breaking, and all other evidence tending to connect him with the July breaking, but did not renew the mo-

tion to elect. However, all the evidence referred to was admitted over his objection, to which he excepted, and it is now insisted for him that this evidence was incompetent and highly prejudicial to his substantial rights.

[1, 2] In view of the rule of practice announced in *McCreary v. Commonwealth*, 163 Ky. 206, 173 S. W. 351, we deem it right to hold that, as Lunsford, the first witness for the commonwealth, directly testified as to appellant's possession of the flour stolen from the depot at the time it was broken into in August, the commonwealth must be regarded as having elected to try him for the August breaking, and, if correct in this conclusion, it must be determined whether the evidence as to the July breaking should have been admitted, and, if so, for what purpose could it be considered by the jury. Ordinarily such evidence is incompetent, but, as said in *Romes v. Commonwealth*, 164 Ky. 334, 175 S. W. 680:

"There are, however, a few exceptions to this general rule applicable to cases in which it is necessary to establish identity, or guilty knowledge, or intent, or motive for the commission of the crime under trial, or when other offenses are so interwoven with the one being tried that they cannot well be separated from it in the introduction of relevant and competent testimony, or when the independent offense was perpetrated to conceal the crime for which the accused is on trial. *Morse v. Com.*, 129 Ky. 294 [111 S. W. 714, 33 Ky. Law Rep. 831, 894]."

In *O'Brien v. Commonwealth*, 115 Ky. 608, 74 S. W. 666, 24 Ky. Law Rep. 2511, we held that in a prosecution of burglars for murder by a pistol shot, where the confession of one had disclosed pistols concealed by them after the crime, evidence of other burglaries by them occurring before and on the night of the murder, and in which the pistols so found were stolen, was admissible to identify the guilty parties. In the opinion it is said:

"Bishop's New Criminal Procedure, vol. 1, § 1126, in discussing the admissibility of such evidence as that under consideration, says: 'The intent, knowledge, or motive under which the defendant did the act charged against him, not generally admitting of other than circumstantial evidence, may often be aided in the proofs by showing another crime, actual or attempted. Then it is permissible.' Again, in section 1125, same volume, we find the following statement: 'Whole Transaction.—As explained under the doctrine of *res gestæ*, wherever a part of a transaction appears in evidence, the rest is thereby made admissible. So that the entire transaction wherein it is claimed the wrong in issue was done may be shown, though it includes also other crimes, and even though each transaction was a continuing one, or transpiring in parts on different days.' The same doctrine is recognized in *Greenleaf on Evidence*, vol. 1, § 53, wherein it is said: 'In some cases, however, evidence has been received of facts which happened before or after the principal transaction, and which had no direct or apparent connection with it and, therefore their admission might seem, at first view, to constitute an exception to this rule. But those will be found to have been cases in which the knowledge or intent of the party was a material fact, on which the evidence, apparently collateral and foreign to the main subject, had a direct bearing, and was therefore admitted.' * * * Again, in volume 3, § 15, we find this further

statement from the same learned author: 'In the proof of intention, it is not always necessary that the evidence should apply directly to the particular act with the commission of which the party is charged, for the unlawful intent in the particular case may well be inferred from a similar intent proved to have existed in other transactions done before or after that time.' * * * We find that this court has in more than one case given its sanction to the rule announced in the foregoing authorities. In *Tye v. Commonwealth*, 3 Ky. Law Rep. 59, it is said: 'It was proper to allow the commonwealth to prove the number of attempts by the defendant to commit the same offense, for the purpose of establishing the alleged identity of the accused.' * * * In *Thomas v. Com.*, 1 Ky. Law Rep. 122, appellant was on trial for effecting an entrance into a dwelling with the intention of stealing. Previously a store had been broken into and goods stolen, and the manner in which the entrance was effected gave strong evidence that the appellant was concerned in the prior breaking into the store. Evidence of the first breaking was admitted to show the appellant's intention to steal in entering the house. Held, 'that, in admitting such evidence of the first breaking, the court did not assume that the appellant was guilty of that crime; but the evidence was such as to warrant the court in allowing the facts to go to the jury, not as evidence that the appellant broke into the store, for that was abundantly proved without, but as evidence of his intention, and such evidence was properly admitted for that purpose.' * * *"

[3, 4] Here the necessity for proving the motive cannot be said to have existed, because the mere breaking into the depot and the taking of the goods therefrom proved beyond doubt the motive actuating the commission of the crime; but the necessity for establishing the identity of appellant as the person or one of the persons who broke into the depot in August did exist, and the confession he made to Lunsford of his participation in the first crime, namely, the breaking into the depot in July, as well as that of the August breaking, for which he was under trial, made it permissible for the commonwealth to prove in corroboration of Lunsford's testimony as to the confession, and of the confession itself, the facts appertaining to the first offense as well as the last. This corroboration was furnished by the finding at his house of the flour, and, at the place where he had discarded them, of the sacks in which he confessed to have taken it from the depot at the time of the August breaking, and also by the finding in and near his house of the overalls, meat, tobacco, and other property which, in his confession to Lunsford, he admitted taking from the depot at the time of his breaking therein in July. Appellant, having admitted in the one conversation and by a single confession his guilty participation in the two crimes, cannot complain of the connection given them by the evidence, or confine the commonwealth's evidence to so much of the conversation as constituted a confession of his guilt of the crime committed in August. The commonwealth had a right to prove the entire confession and conversation on the subject.

[5] But, while we agree with the trial court as to the competency of this evidence,

we concede the soundness of appellant's contention that the court, upon or after overruling appellant's objection thereto, should have advised the jury as to the purpose of its admission, and admonished them that they could not consider it as conducing to prove his guilt of the August breaking into the depot, for which he was being tried, but that it might be considered by them, in connection with all other evidence in the case, only for the purpose of determining whether or not he had a motive for the commission of the crime committed in August, or of identifying him as a participant therein. *Bess v. Commonwealth*, 118 Ky. 858, 82 S. W. 576.

[6] It is apparent that appellant's complaint of the failure of the court to give the peremptory instruction directing his acquittal cannot be sustained. There was abundant evidence of his guilt.

[7] It is further apparent that appellant's third and final contention must likewise be rejected. This contention rests upon the theory that the witness Lunsford was an accomplice of the appellant in the commission of the crime charged, and that his testimony was uncorroborated, and therefore the peremptory instruction should have been given by the court. Although unauthorized by the evidence, the court instructed the jury that a conviction could not be had upon the testimony of Lunsford, unless corroborated by other evidence tending to connect appellant with the offense; and the corroboration would not be sufficient if it merely showed that the offense was committed and the circumstances thereof. An "accomplice" is one of several equally concerned in the commission of a felony. There is in this case no evidence whatever connecting Lunsford with the commission of the crime for which appellant was indicted. Indeed, it appears from his testimony, which in that particular is uncontradicted, that he had not heard of the depot's having been broken into, either in July or August, until told of it by appellant at the time they went for the flour that the latter had taken from the depot. At most, the evidence only shows that Lunsford aided him in removing the flour from the place of concealment to his home, with knowl-

edge of the fact that it had been stolen from the depot by appellant. If appellant had been indicted for the larceny of the flour, instead of breaking into the depot with intent to steal and take property therefrom, it might be claimed that Lunsford was connected with the commission of the offense as an accomplice and accessory after the fact, for it appears that the crime had been committed and the immediate asportation of the flour effected more than a month before appellant was assisted by him in removing it from the place of concealment to the home of the former. However, it is useless to speculate as to this matter, for the indictment is not for larceny nor for the receiving of stolen property with guilty knowledge of its having been stolen, but for the statutory offense arising out of the felonious breaking into the depot with intent to steal and take therefrom property of value. It is manifest, therefore, that Lunsford was not an accomplice in the commission of the crime charged. In *Sizemore v. Commonwealth*, 6 S. W. 123, 10 Ky. Law Rep. 1, we held:

"It is not the mere fact that a person is charged with a crime in connection with another person that makes him an accomplice. In order to make him an accomplice, it is necessary that his criminal participation in the crime charged should be shown by the evidence."

Here Lunsford was not even charged with the crime for which appellant was indicted, and there was no evidence conducing to show his criminal participation in its commission. In *White v. Commonwealth*, 5 Ky. Law Rep. 318, it was held that, in order to constitute a witness an accomplice, he must sustain such a relation to the criminal act as that he could be jointly indicted with the defendant for its commission.

The instructions of the court seem to have fairly advised the jury of all the law applicable to the case; but, because of the error of the court in failing to admonish the jury of the purpose for which the evidence as to the first breaking into the depot might be considered by them, the judgment is reversed, and cause remanded for a new trial consistent with the opinion.

CITY OF MAYSVILLE et al. v. DAVIS et al.
CITY OF MAYSVILLE v. JANUARY
& WOOD CO.

(Court of Appeals of Kentucky. Nov. 5, 1915.)

1. MUNICIPAL CORPORATIONS ⇐282—PUBLIC IMPROVEMENTS—MODE OF IMPROVEMENT.

Under Ky. St. § 3572, providing that in cities of the fourth class a portion of the length of a street may be improved by original contract without undertaking to improve the entire length, and section 3567, directing the council and courts in case of improvements to make all necessary corrections, rules, and orders to do justice between all parties concerned, the council may, in its discretion, improve only a portion of the width of the street, which discretion may be corrected, if abused.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 750-752; Dec. Dig. ⇐282.]

2. MUNICIPAL CORPORATIONS ⇐354—PUBLIC IMPROVEMENTS—CONTRACTS—CONSTRUCTION.

Where the plans and specifications for improvement of a public street, which were adopted as part of the contract, provided that the engineer and council might make alterations or modifications which should be agreed upon in writing and should not avoid or annul the contract, and that the term "council" and "engineer" should mean the council and its committee, and the engineer or his duly authorized agent, the contract might be modified either by the council by a valid ordinance, or by the engineer and paving committee, if the modification was thereafter approved by the council.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 886, 887; Dec. Dig. ⇐354.]

3. MUNICIPAL CORPORATIONS ⇐302—PUBLIC IMPROVEMENTS—CONTRACTS.

Under Ky. St. § 3487, providing for publication of ordinances, and section 3567, relating to cities of the fourth class, and declaring that a lien shall exist for the cost of the original improvement of public ways, square, etc., from the passage of the ordinance ordering the improvement, an ordinance for the original construction of a street is not valid without publication.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 803-807; Dec. Dig. ⇐302.]

4. MUNICIPAL CORPORATIONS ⇐413 — IMPROVEMENT OF STREETS—DUTY OF RAILROAD COMPANY.

Where its charter required a street railroad company to conform its tracks to the grade of the street and keep the portion occupied in good repair, the cost of improving the portion of the street occupied by the tracks should be assessed against the railroad company, and not abutting owners.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1014-1016, 1019, 1020; Dec. Dig. ⇐413.]

5. MUNICIPAL CORPORATIONS ⇐413—PUBLIC IMPROVEMENTS—LIABILITY FOR.

Ky. St. § 3567, which is part of the charter of cities of the fourth class, declares that payment of the lien for public improvements may be enforced upon the property bound by suit in equity, and no error shall exempt from payment or defeat the lien after the work has been done as required by ordinance, but the council or the courts shall make all corrections, rules, and orders, to do justice to all parties concerned, and if the improvement be made as required by ordinance, the city shall not be liable without the right to enforce the lien against

the property benefited. Section 3573 declares that, when work is completed in accordance with the contract, it shall be received by the city council upon the receipt of a certificate from the city engineer and committee on streets, stating that the work has been done according to contract, and the engineer shall apportion the cost against the abutting property, while section 3576 declares that liens on property for street improvements shall not be defeated by judicial sale, or by any mistake in the description of the property, or the names of the owners. An ordinance of a city of the fourth class provided for the improvement of the entire width of a street, and contracts were let on that basis. A street railway company whose tracks occupied a portion of the street obtained an injunction preventing interference with its property, and the contract was modified so as to leave the street car tracks unpaved; concrete headers being put in 14 inches from the tracks. The rest of the work was done according to contract and accepted by the city. Held that, though the ordinance providing for the change was invalid for want of publication, yet, as the modification was made by the city engineer, who was authorized to alter the contract, and the work was done according to contract, the abutting property may be charged; the work having been accepted.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1014-1016, 1019, 1020; Dec. Dig. ⇐413.]

6. MUNICIPAL CORPORATIONS ⇐365—PUBLIC IMPROVEMENTS—ACCEPTANCE OF WORK.

In the absence of fraud or collusion between the council and contractors, the acceptance of an improvement by the council, after having been completed in accordance with the ordinance and contract, is conclusive on property owners.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 898; Dec. Dig. ⇐365.]

7. MUNICIPAL CORPORATIONS ⇐446—PUBLIC IMPROVEMENTS—RIGHT OF ABUTTING PROPERTY OWNERS.

Where a city was unable to secure a temporary removal of car tracks from a street, abutting owners cannot complain that the city authorized the contractor to put in concrete headers between the tracks and portions of the street which were improved and left the other portion unimproved; the cost of the headers being considerably less than the cost of improving the whole street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1066, 1067; Dec. Dig. ⇐446.]

Appeal from Circuit Court, Mason County.

Action by the City of Maysville and others against Thomas A. Davis and others, consolidated with an action by the same plaintiff against the January & Wood Company. From judgment for defendants, plaintiffs appeal. Reversed and remanded, with directions.

John M. Calhoun, of Maysville, for appellants. Worthington, Cochran & Browning, of Maysville, and J. P. Hobson & Son, of Frankfort, for appellees.

HURT, J. These consolidated suits involve very much the same questions for determination. The city of Maysville is a city of the fourth class, and in the year 1910 the common council determined upon the improve-

ment of Second street, by original construction, from the west property line of Wall street to the west property line extended of E. B. Browning's property, and Market street from the south margin of Second street to the north margin of Third street, by paving Second street within the limits above stated with vitrified brick and with cement curbs and gutters, on the ten-year bond and paving plan, at the cost of the owners of the abutting property. According to the ordinance, which was duly adopted on the 23d day of May, 1910, the paving of the street with vitrified brick was to extend from curb to curb. At the same time plans and specifications were adopted for the construction of the work, which were made a part of the ordinance. The ordinance was duly published, and a committee appointed to conduct competitive bidding for the contract to do the work, and thereafter Kelly Bros. became the accepted bidders, and executed the required bond and entered into a contract with the city and proceeded to do the work according to the plans and specifications. The tracks of the Maysville Street Railroad & Transfer Company are situated about the center of Second street, and run longitudinally along said street for about two blocks, when it approaches the north side of the street and extends for about one-half of a block alongside of the sidewalk, which was embraced within the proposed improvements. In the right of way contract between the Maysville Street Railroad & Transfer Company and the city of Maysville, which exists in the character of an ordinance of the city council, it was agreed between the street railroad and transfer company and the city that the tracks of the railroad are to conform to the grades of the street, "as they are now fixed, or as they may be hereafter fixed by ordinance of the city, and the said company shall keep any portion of said street that it may use, occupy, or damage in the same good repair in which the remaining part of said street may be kept by the city, free of any cost to the city; and any portion of said street which may be torn up or injured by the construction of said road shall be replaced in the same good condition in which they found it." After Kelly Bros. had commenced upon the construction of the street under contract made under the ordinance of May 23d, they and the city engineer joined in reports to the city council that, in order to construct the street as required by the contract, it would be necessary to temporarily remove the tracks of the railroad company. The city requested the railroad company to remove its tracks, which it refused to do, and the representatives of the city then undertook to remove the tracks themselves. This resulted in the railroad company procuring an injunction against the city authorities enjoining them from the removal of the tracks, and the city, within the time allowed, made a motion

before a judge of this court to dissolve the injunction, which motion was overruled. Thereafter, on the 25th day of July, the council, by unanimous vote, adopted another ordinance, which provided that concrete headers 4 inches in thickness and 22 inches in length should be set 14 inches from the tracks of the railroad, and on each side of it throughout the length of the portion of the street which Kelly Bros., under their contract, had undertaken to improve. This ordinance was never published. It provided for the making of a contract for the construction of the concrete "headers" between representatives of the city and the contractors, but did not provide that the contract to put in the "headers" should be let to competitive bidding. Neither did the ordinance provide for a failure to improve the street with vitrified brick between the "headers" and along the track and on each side of the track of the railroad. That seems to have been arrived at by a parol agreement between Kelly Bros., who obtained the contract to put in the "headers," and the city council. Anyhow, Kelly Bros. proceeded to construct the street, leaving a space of 3½ feet from the center of the railroad track and on each side of the center and extending out to the concrete "headers" unimproved in any way. When the appellees realized that the portion of the street occupied by the railroad track and 14 inches on each side of it was not to be constructed as provided in the ordinance of May 23d, they filed with the city council a protest against constructing the street in that way, and accompanied it with an offer to pay their pro rata portions of the cost of constructing the street along and on the railroad track as the other portions of the street. The council taking no heed to their protest, the appellees then served notice upon the city and upon the contractors that they would not consider themselves nor their property bound for the cost of construction of the street after it was carried out with a failure to construct the street upon and along the railroad tracks as the remainder of it was constructed. No heed was given to this. The contractors proceeded to construct the street with vitrified brick out to the railroad track and upon each side of it, but 14 inches from the rails they put in the concrete "headers," which, as contended by the appellees, left 7 feet in the center of the street, through two blocks of the improved portion of it, entirely unimproved as required by the ordinance of May 23d, and for one-half a block unimproved for the width of 7 feet from the north curb on the side of the street where the railroad track was situated. The work was accepted by the city council, and a report by the city engineer and paving committee apportioning the cost of construction of the street and the concrete "headers" between the abutting property owners on each side of the street was adopted by the council. The city then

proceeded to issue bonds for the unpaid portions of the assessment and to offer them for sale by advertisement, when the appellees instituted a suit against the city, in which they sought to restrain the city from the sale of the bonds. No immediate injunction was obtained, and the bonds, after the filing of the suit, were sold to the contractors, Kelly Bros., through the agency of a certain bank in Maysville.

After the first installment of the bonds became due the city instituted a suit against the January & Wood Company one of the abutting property owners, to recover from it the amount of the assessment of the cost of the street and "headers" apportioned to it, and to enforce a lien upon its property to satisfy the payment of the assessment apportioned to it. Defense was made to both suits, and a statement of facts agreed upon, which was filed after the two cases had been consolidated, and it resulted in a judgment of the circuit court in the first-named suit which recited that, as the bonds had been already sold, the city was restrained from attempting to collect the assessment apportioned for the cost of the work, or to enforce any lien which might exist upon the abutting property to secure the payment of the assessments. The petition in the second stated case was dismissed. The city excepted to the judgment in each case and prayed an appeal to this court, which was granted.

It should be stated that nothing was included in the assessments for the cost of constructing the street according to the ordinance in the vacant space left along and on each side of the railroad track, but the contract price for putting in the concrete headers, and which amounted to about \$1,525, was included in the assessments, and was a part of the amount for which the city issued and sold its bonds.

Paragraph 7 of the original plans or specifications for the work was to the effect that, if the engineer and council should deem it best, they might make alterations or modifications of the plans or specifications for the work and the price to be paid for the work as altered or modified, to be agreed upon in writing and signed by the contractor and some one authorized by the council on behalf of the city. The ordinance adopted on the 25th day of July on its face purported to be an amendment to the original specifications, which were a part of the ordinance of May 23d, and provided that any provisions of the original specifications as were in conflict with the provisions of the amendment should be repealed.

When the street had been constructed as above stated, some one, presumably the Street Railroad & Transfer Company—the agreed state of facts does not show whom—filled up the space between the concrete "headers" with dirt and broken stone, and since that time the travel upon the street has cut that space into ruts, and mud would scatter

from it upon the remainder of the street, causing it to be unsatisfactory for travel and the use of the street.

The appellees in their suit contend:

First. That the city had no power to improve a street by original construction, except to the entire width of the street.

Second. That under the ordinance of the 23d day of May, 1910, the street was to be improved with vitrified brick from curb to curb, and that same had not been done.

Third. That the ordinance amendatory of the specifications, of date July 25th, was void because of its want of publication, as required by the statutes.

Fourth. The amendatory ordinance of July 25th did not provide that the 7-foot strip through the street which is occupied by the railroad tracks should not be improved as required by the original contract and specifications, but it only provided that the concrete "headers" should be put in on each side 14 inches from the railroad tracks, and for these various reasons the contract under the ordinance had never been complied with, and that they were for that reason not bound for the assessments.

The appellant contends that the amendatory ordinance of July 25th did not require publication, under the statute to make it valid, and that the change in the plans for construction of the street was such as was entirely reasonable and beneficial to the abutting property owners, and were such as the city had a right to make under the contract with the contractors, and that the abutting property owners are bound for the assessments, and which are a lien upon the property.

[1] First. We will consider the contentions of the appellees in the order stated above. Has the council of a city of the fourth class authority to provide for the original construction of a street, at the cost of the abutting property owners, except it improve the street to its entire width? The statutes relating to cities of the fourth class are silent upon the subject. Section 3572, Ky. Statutes, expressly provides that a portion of the length of a street may be improved by original construction, without an undertaking to improve the entire length of the street. The case of *Town of Bowling Green v. Hobson*, 3 B. Mon. 478, relied upon by appellees as sustaining their contention, cannot have any application to the power of the city council, under the present charter of cities of the fourth class, for the improvement of the streets. That opinion was based upon a provision of the charter of the named city which authorized its trustees to cause a street to be improved, upon the petition of a majority of the property holders upon the street, and this court correctly held that it required a majority of the persons owning property upon the entire street, as to length, and not a majority of the owners upon a certain section of the street. It is apparent

that a rule requiring the entire width of a street to be improved, or else to withhold the authority to improve any portion of it, under the varying conditions as to width of streets and the nature of their surface, and the necessity and desirability of their improvement to their entire width, in all cases, would be a harsh and unreasonable construction of the statutes, and would greatly militate against proceedings to make useful and necessary improvements, and would oftentimes impose unnecessary burdens upon the abutting property owners. For these reasons, and in the light of the provision which is embraced in section 3567, Ky. St., which directs the council and the courts to "make all corrections, rules, and orders to do justice to all parties concerned," it seems that the better rule is to leave the question as to whether all or a portion of the width of the street shall be improved to the sound discretion of the board of council of the city, which discretion may be corrected if abused.

[2] Second. Under the ordinance of May 23, 1910, the street was to be made of vitrified brick from curb to curb, and same has not been done for the space of seven feet, which is occupied by the tracks of the street railroad. The portion of the street not occupied by the tracks of the railroad was improved as provided for by the ordinance and contract. There is no attempt made to show that the improvement of the street, to the extent to which it was done, was not in accordance with the contract, and not in accordance with the ordinance, except as to the concrete "headers," or that it was not a substantial and valuable work and beneficial to the abutting properties. The plans and specifications for the improvement, which were duly adopted as a part of the ordinance of May 23, 1910, provided in section 7 that:

"The engineer and council may, if they deem best, make alterations or modifications of the specification or plans for this work; the price to be paid for this work under such altered or modified specifications to be agreed upon in writing and signed by the contractor and some one authorized by the council on behalf of the city of Maysville."

"And it is expressly agreed that such alterations shall not annul or violate this contract," etc.

"Such additional work, alterations, or modifications shall be upon and subject to all the provisions of the original contract."

The contract entered into for the performance of the work provided:

"That the power reserved to or conferred upon any body or person in the said specifications, plans, and profiles may be exercised by said body or person, and expressly covenant that the agreement as to amount to be added or deducted from the contract price for any omission, addition, or alteration shall be final," etc.

The ordinance of May 23, 1910, of which the plans and specifications were a part, was regularly adopted and published, as required by law. The plans and specifications provided that alterations and modifications of same could be made by the engineer and council, and the original contract provided

that such engineer and council could make alterations and modifications. Section 2 of the plans and specifications provided that the words, "council and engineer" shall mean the council or its committee and the engineer or his duly authorized agent. It thus appears that, in accordance with the ordinance of May 23, 1910, and in the contract entered into under it, the council had the right to make alterations in and modifications of the plans and specifications of the work, or that same could be done by the engineer and paving committee. If done by the council, it must have been necessarily done at a meeting of it, by ordinance, but if done by the engineer and paving committee, it was valid without a resolution or ordinance of the council, if thereafter approved by the council.

[3] Third. The council undertook by the amendatory ordinance of July 25, 1910, to alter and modify the plans and specifications by providing for the placing of the concrete "headers" upon each side of the railroad track, and a contract was entered into by the mayor with the contractors, under authority from the council, to pay for the "headers." The action of the council, as far as the resolution of July 25th may be considered an ordinance, was void and ineffective, as it was never published. Sections 3487 and 3567, which are a part of the charter of cities of the fourth class, provide for the manner of the adoption of ordinances and when they shall become enforceable. The terms of these statutes construed together make it plain, that no ordinance for the original construction of a street can be valid without publication, as provided in section 3487, supra; *C. & O. Ry. Co. v. Mullins*, 94 Ky. 355, 22 S. W. 558, 15 Ky. Law Rep. 139; *Fox v. Middlesborough*, 96 Ky. 262, 28 S. W. 776, 16 Ky. Law Rep. 455; *City of Newport v. N. N. Bank*, 148 Ky. 213, 146 S. W. 377; *Muir v. Bardstown*, 120 Ky. 739, 87 S. W. 1096, 27 Ky. Law Rep. 1150.

[4] Fourth. It is true that the amendatory ordinance of July 25th does not provide for leaving the seven-foot strip occupied by the railroad track unimproved. The work was, however, being done under the supervision of the engineer and paving committee, who certified to the council that the work had been completed according to the contract and in accordance with the ordinance as adopted and published by the council. The report of the engineer and paving committee showed that the part of the street which was occupied by the street car tracks was left unimproved, and nothing for the costs of improving same was apportioned to any of the abutting property owners. This report and apportionment of costs was adopted and approved by the council. We must presume that the contractors failed to improve the portion of the streets occupied by the railroad tracks because the city was unable to procure the temporary removal of the tracks

in order to enable the contractors to perform their contract, and the seven-foot strip was left unimproved by the direction of the engineer and paving committee, and with the full concurrence of the council. When the engineer and paving committee exercised the authority vested in them by the ordinance and contract to change the plans and specifications, by directing that the portion of the street occupied by the car tracks be left unpaved with vitrified brick, it cannot be said that the leaving of such space unpaved was not in accordance with the contract and ordinance. It does not appear that the contractors sought to be relieved from the paving of the strip.

The modification of the plans and specifications, which left unpaved the portion of the street which was occupied by the railroad tracks was not a capricious and unreasonable exercise of discretion by the council, because it was unable to have the tracks temporarily removed for the purpose of doing the work, and failed in its effort theretofore to compel the railroad to bear any portion of the costs of improving the streets, as an owner of abutting property, as appears from the opinion of this court in *City of Maysville v. Maysville Street Ry. & Transfer Co.*, 128 Ky. 673, 108 S. W. 900, 32 Ky. Law Rep. 1366. From the portion of the contract under which the railroad and transfer company occupies the streets of the city, which is embraced in the agreed statement of facts, it appears that the railroad and transfer company is obligated to keep the portion of the street which it uses in the same good repair in which the remaining part of the street may be kept by the city. The council should require the railroad company to comply with its obligation, rather than to lay the burden of paying the portion of the streets occupied by the railroad tracks upon the abutting property owners.

[5, 6] Conceding the invalidity of the amendatory ordinance of July 25, 1910, and that the original ordinance and contract provided for the paving of the street from curb to curb, with the right of the council and engineer or the street paving committee and engineer to alter and modify the plans and specifications, and the making of a subsequent contract to cover the alterations and modifications, has the city now a right to recover from the abutting property owners the assessment made upon them to pay for the improvement? It has been held in a long line of adjudications that the power to require an abutting property owner to pay the costs of street improvements is derived from the statutes which govern the subject, and until recently it was held in this jurisdiction, that, to enable a city council to enforce the collection of an assessment for street improvements, it must have, as a condition precedent, proceeded in absolute conformity to the statutes giving it power for such purpose to cause the improvement to be

made and to levy the assessment; that the work to be done must have been ascertained and prescribed in the ordinance; and that the councils of the cities had no power to accept a part performance of a contract and to subject the abutting property owners to the payment for the work performed. *Henderson v. Lambert*, 14 Bush, 24; *City of Lexington v. Wally*, 109 S. W. 299, 33 Ky. Law Rep. 116; *Hydes & Goose v. Joyes*, 4 Bush, 466, 96 Am. Dec. 311; *Murphy v. Louisville*, 9 Bush, 189; *Murray v. Tucker*, 10 Bush, 241. It remains true that the liability of the abutting property owner for street improvements depends and is derived from the statute laws of the state, and there is no liability, except where created by statutes, but the liability of the property owner is determined by the statute in force at the time the improvement of the street is made. Since the rendition of the above opinions, in the charter of cities of the fourth class, with reference to the lien upon the abutting property for the cost of construction and reconstruction of streets, in section 3567 it has been provided as follows:

"And payment may be enforced upon the property bound therefor by suit in equity, and no error in the proceeding of the board of council shall exempt from payment or defeat said lien after the work has been done as required by ordinance; but the board of council or the courts in which said suits may be pending shall make all corrections, rules and orders, to do justice to all parties concerned; and if such improvements be made as required by ordinance, in no event shall the city be liable therefor without the right to enforce it against the property receiving the benefit thereof."

Section 3573 provides as follows:

"When the work is undertaken under the provision of section 3572, and is completed in accordance with the contract, the work shall be received by said city council upon receipt of a certificate from the city engineer and committee on streets, stating that the work has been done according to contract, and said city engineer shall apportion the cost of said improvement against the lots or grounds abutting or bordering the improvement," etc.

Since the enactment of the present provisions of the charters of cities of the fourth class, when an ordinance is enacted or a contract entered into for the construction of a street in a city of that class, it is done in contemplation of the provisions and requirements of the statutes supra, and other provisions of the charter. Since that time a different rule has been held as regards ordinances and contracts for street improvements. The legislative authority has, by statutes, changed the rule adhered to in cases before the adoption of these statutes.

Section 3576, Ky. St., provides that liens upon the property for street improvements shall not be defeated or postponed by any judicial sale, or by any mistake in the description of the property, or in the name or names of the owners thereof. The present statutes seem to have intended to empower the cities of the fourth class to cause streets to be constructed at the cost of the abutting

property, and to require such property to bear the costs of such construction, where they are benefited thereby, and to prevent the defeat of the enforcement of the liens for such costs, where such property is equitably entitled to bear a portion of the burdens, on account of any mistake or error of the council in its proceedings. In the case at bar, if the ordinance had provided at the first for the paving of the street, except the portion occupied by the tracks of the railroad, and the setting of the concrete "headers," as was done by contract after the original contract had been made and changed, at the cost of the abutting property, no valid objection could have been made by the owners of the property. The property received the benefits of the improvement to the extent it was made, and, it seems, is equitably entitled to bear the cost of it. The defense that the work was not done according to the contract will not defeat the lien, for two reasons, one of which appears to have been in accordance with the contract, and the other is that the city accepted the work as having been done in accordance with the contract, and it is made the duty of the court trying the case to make such orders and to correct such errors as will result in justice to all parties concerned.

In the absence of fraud or collusion between the council and the contractors, the acceptance of the work by the council as having been done in accordance with the ordinance and contract is conclusive upon the property owner. *Joyes, etc., v. Shadburn*, 13 S. W. 361, 11 Ky. Law Rep. 892; *Creekmore v. Central Construction Co.*, 157 Ky. 336, 163 S. W. 194; *Nevin v. Roach*, 86 Ky. 494, 5 S. W. 546, 9 Ky. Law Rep. 819; *Lovelace v. Little*, 147 Ky. 137, 143 S. W. 1031. There is no charge of fraud or collusion upon the part of any one in the case at bar.

Gleason v. Barnett, 106 Ky. 125, 50 S. W. 67, 20 Ky. Law Rep. 1894; *Orth v. Park*, 117 Ky. 779, 79 S. W. 206, 25 Ky. Law Rep. 1910, 80 S. W. 1108, 81 S. W. 251, 26 Ky. Law Rep. 184, 342, and *Lindenberger Land Co. v. Park*, 85 S. W. 213, 27 Ky. Law Rep. 437, were cases construing a section of the charters of cities of the first class, and *Lindsey v. Brawner*, 97 S. W. 1, 29 Ky. Law Rep. 1240, construed a provision in the charter of

cities of the third class, both of which are similar to the provision cited in section 3567 of cities of the fourth class, and the conclusion arrived at in those opinions supports the conclusion arrived at here.

In the *Lindenberger Land Co. v. Park*, supra, this court said:

"The former rule existing under previous statutes on this subject has been modified so as to allow a just and reasonable execution of the work. Technical objections formerly interposed to defeat wholly the claim of the contractor who had done the work are now made to yield by the more just provision of the statute that the court may adjust the rights of the parties after the completion and acceptance of the work if there is some variance, yet is a substantial compliance with the ordinance and contract."

There is no reason why the same rule should not apply to contracts for street improvements in cities of the fourth class.

As the authorities of the appellant city were proceeding within the terms of the ordinance and contract, it is immaterial whether the property owners protested against the manner of doing the work or not.

[7] The appellees have no valid claim for relief on account of the putting in of the concrete "headers," as, in the discretion of the authorities, they were necessary and a proper thing to be done, and did not add to the burdens of the abutting property, since it was relieved from the payment of the costs of improving the portion of the street which was occupied by the railroad tracks, and which cost was largely more than the cost of the "headers," which were necessarily put in when the city authorities were not able to secure a temporary removal of the tracks so as to enable the street to be constructed, and determined not to pave that portion of the street which was occupied by the railroad tracks. *Lindsey v. Brawner*, supra; *Orth v. Park*, 117 Ky. 779, 79 S. W. 206, 25 Ky. Law Rep. 1910, 80 S. W. 1108, 81 S. W. 251, 26 Ky. Law Rep. 184, 342; *Barber Asphalt Co. v. Gaar*, 115 Ky. 334, 73 S. W. 1106, 24 Ky. Law Rep. 2233; *Schuster v. Barber Asphalt Co.*, 74 S. W. 226, 24 Ky. Law Rep. 2346.

It is therefore ordered that the judgments appealed from be reversed, and this cause is remanded for proceedings consistent with this opinion.

COMMONWEALTH v. WHITE.

(Court of Appeals of Kentucky. Nov. 4, 1915.)

1. INTOXICATING LIQUORS \Leftrightarrow 1123, New, vol. 20 Key-No. Series—CONTROL OF SHIPMENT—INTERSTATE COMMERCE.

The Webb-Kenyon Act (Act Cong. March 1, 1913, c. 90, 37 Stat. 699 [U. S. Comp. St. 1913, § 8739]), which divests shipments of intoxicating liquor of their interstate character in certain cases, applies only where the shipments are "intended, by any person interested therein, to be received, possessed, sold or in any manner used * * * in violation of any law of such state" into which the liquors are shipped.

2. COMMERCE \Leftrightarrow 8—INTOXICATING LIQUORS—POWER TO CONTROL SHIPMENTS.

Shipments of intoxicating liquor are all under the interstate commerce clause of the federal Constitution (article 1, § 8, cl. 3), saving those expressly excepted by the Webb-Kenyon Act, which prohibits only shipments intended to be used in violation of law, so that no state regulation of interstate shipments is valid unless the shipment to which it applies falls specifically within the Webb-Kenyon Act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. \Leftrightarrow 8.]

3. INTOXICATING LIQUORS \Leftrightarrow 139—REGULATION OF SALE.

Ky. St. 1915, § 2569 et seq., prohibiting the sale or possession of intoxicating liquors in local option districts, does not prohibit all shipments of liquor, so that one may lawfully have liquor purchased where its sale is lawful.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 149; Dec. Dig. \Leftrightarrow 139.]

4. INTOXICATING LIQUORS \Leftrightarrow 224—CONTROL OF SHIPMENT—PRESUMPTIONS.

The protection of the commerce clause of the Constitution of the United States still attaches to lawful shipments of liquor, and the courts will not presume, in the absence of proof, that a record of interstate liquor shipments kept by the defendant as required by Ky. St. 1915, § 2569b, subsec. 3, contains a record of an unlawful shipment.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 275-281; Dec. Dig. \Leftrightarrow 224.]

5. COMMERCE \Leftrightarrow 8—CONFLICTING REGULATIONS—CARRIERS—DUTY TO SHIPPERS.

Where interstate shipments of intoxicating liquor are for lawful use, the carrier cannot divulge information of them to private persons, since the Mann-Elkins Act (Act Cong. June 18, 1910, c. 309, § 12, 36 Stat. 553 [U. S. Comp. St. 1913, § 8583, subd. 6]), prohibits giving such information, and Ky. St. 1915, § 2569b, subsec. 3, making refusal or failure to divulge such information unlawful, cannot apply to lawful interstate shipments, since the state law must give way to the law of the United States.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. \Leftrightarrow 8.]

Appeal from Circuit Court, Warren County.

J. M. White was acquitted of the offense of unlawfully refusing, neglecting, and failing to keep open to public inspection during business hours the book of the Adams Express Company in which was kept a record of all shipments of intoxicating liquors received by them within territory in which the sale of intoxicating liquors for beverage purposes was prohibited by law, and the Commonwealth appeals. Affirmed.

G. Duncan Milliken and John B. Grider, both of Bowling Green, and James Garnett, Atty. Gen., for the Commonwealth. Maxwell & Ramsey and Joseph Graydon, all of Cincinnati, Ohio, and Sims, Rodes & Sims, of Bowling Green, for appellee.

MILLER, C. J. The appellee, J. M. White, was tried and acquitted of the offense of unlawfully refusing, neglecting, and failing to keep open to public inspection during business hours of the Adams Express Company, in Bowling Green, Ky., the book of that company in which was kept a record of all shipments of intoxicating liquors shipped into Warren county, within which territory the sale of intoxicating liquors for beverage purposes was prohibited by law.

Under the stipulation of facts, it appeared that the company maintained a local office in the city of Bowling Green, and that in said city the sale of intoxicating liquors for beverage purposes was prohibited by law; that the appellee, White, was the local agent at Bowling Green of the Adams Express Company, and the manager of its local office; that in said local office White, as agent and manager, kept two separate books, in which was entered immediately upon receipt thereof truthful statements of the quantity and kind of liquors received, with the name and address of the consignor and the name and address of the consignee, the purpose for which said liquor was intended to be used as stated on the outside of the package containing such liquor, the date when received, and the date when delivered, and by whom and to whom delivered, and with a blank space in said book in which the consignee, by himself or agent, was required to sign his true name, before said liquor was delivered to him or his agent; and that said book was open to public inspection, during the business hours of said company.

It was further stipulated that only shipments of liquor from points within the state of Kentucky to the city of Bowling Green were entered in one of the books and in the manner above referred to, and that no interstate shipments of liquor—that is to say, no shipments of liquor by the company from places without the state of Kentucky into the state of Kentucky, and consigned to persons or consignees at Bowling Green—were entered in the book of intrastate shipments, but that the company kept another and different book which showed all such interstate shipments of liquor from places without the state of Kentucky to Bowling Green, showing, in substance, the quantity and kind of said liquor, the name and address of the consignor, the name and address of the consignee; the fact whether or not the package containing said liquor was marked for the personal use solely of the consignee, the date when received and delivered, and by whom

and to whom delivered, as well as a receipt from the person to whom the same was delivered; that the last-named book of interstate shipments was not open to public inspection at any time, except in response to legal process issued under the authority of any state or federal court, or to any officer or agent of the federal government, or of any state or territory, in the exercise of his powers, or to any official or other duly authorized person seeking such information for the prosecution of persons charged with, or suspected of, crime, and that many competing dealers, by wholesale and retail, in intoxicating liquors, shipped their goods from places without the state of Kentucky to persons at or in the city of Bowling Green.

It was further stipulated that on the day in question E. H. Porter, a private citizen of Bowling Green, holding no official position, entered the local office of the Adams Express Company and requested of White, its agent, to be shown the record of interstate shipments of intoxicating liquors, above described, showing the shipments of liquors from places without the state of Kentucky consigned to persons at or in the city of Bowling Green, Ky.; that Porter's request was refused by White, as agent, and the record of interstate shipments was not shown to Porter; and that White, as agent at the time, expressly relied upon, and still relies upon, the provision of the act of Congress entitled "An act to regulate commerce," approved February 4, 1887 (24 Stat. 379, c. 104), together with the amendment thereto, known as the Mann-Elkins Act, passed June 18, 1910, and entitled "An act to create commerce court, and amending the act entitled 'An act to regulate commerce,' approved February 4, 1887, as theretofore amended, and for other purposes." He relied particularly upon that provision of the Mann-Elkins Act which provides that it shall be unlawful for any common carrier, subject to the provisions thereof, or any agent of such carrier, knowingly to disclose to any person other than the shipper or consignee any information concerning the nature, kind, quality, destination, consignee, or routing of any property tendered or delivered to such carrier for interstate transportation, which inspection might be used to the detriment or prejudice of such shipper or consignee, or which might improperly disclose his business transactions to a competitor, under penalty of a fine of not more than \$1,000.

The warrant was issued under the authority of section 3 of chapter 7 of the act of the Kentucky Legislature, approved March 9, 1914, which reads as follows:

"All railroad, express or other transportation companies within this state, within the state, or doing business within this state, are hereby required to keep at each local office in territory within which the sale of intoxicating liquors for beverage purposes is prohibited by any law, a separate book, in which shall be entered immediately upon receipt thereof, truthful statements

of the amount and kind of liquor received, the name and address of the consignor, the name and address of the consignee, the purpose for which said liquor is intended to be used, as stated upon the outside of the package containing such liquor; the date when received, the date when delivered, and by whom and to whom delivered; after which record shall be a blank space in which the consignee, by himself or his agent, shall be required to sign his true name before such liquors are delivered to such consignee or his agent, which book shall be open to public inspection at any time during the business hours of said company. Such book shall constitute prima facie evidence as to the facts therein stated, and be admissible as evidence in any court in this state. Any railroad, express or other transportation company, or any employé or agent thereof who fails, neglects, or refuses to comply with the provisions of this section, or who makes, or causes to be made, any false entry in said book, shall be deemed guilty of a misdemeanor, and for each offense shall be punished by a fine of not less than fifty dollars, nor more than two hundred dollars, or imprisoned in the county jail not less than thirty days nor more than six months, or both such fine and imprisonment, in the discretion of the jury." Acts 1914, p. 27; Carroll's Statutes 1915, § 2569b, subsec. 3.

The Mann-Elkins Law, passed June 18, 1910, as an amendment to the Interstate Commerce Act of 1887, provides in part as follows:

"It shall be unlawful for any common carrier subject to the provisions of this act, or any officer, agent or employé of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may disclose his business transactions to a competitor;" etc.

That act further provides that any information of the character above described may be obtained by any officer or agent of the government of the United States, or of any state, in response to any legal process, and imposes a penalty of not more than \$1,000 for a violation thereof.

Unquestionably, the Mann-Elkins Act was designed for the protection of interstate commerce, and was an extension of the original Interstate Commerce Act of 1887. Under the operation of the original act of 1887, it was found that great abuses existed, and to prevent those abuses and to protect shippers from the injury resulting from the improper acts of the common carrier in disclosing information as to the transactions of shippers to their competitors, the amendment above referred to was enacted.

[1] The federal act, however, could apply only to interstate shipments; and, by its terms, it does not pretend to control intrastate shipments. On the other hand, the Kentucky Statute of 1914, supra, under which this prosecution arose, applies to intrastate shipments, and could not affect in-

terstate shipments, unless the federal law, approved March 1, 1913, known as the Webb-Kenyon Act, had the effect of withdrawing interstate shipments of liquor from the protection afforded to interstate shipments by the federal Constitution, and made them subject to the state laws.

The Webb-Kenyon Law reads as follows:

"An act divesting intoxicating liquors of their interstate character in certain cases.

"Be it enacted, etc., that the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

It will be observed that by this express provision of the Webb-Kenyon Law only such interstate shipments are thereby prohibited as are "intended by any person interested therein, to be received, possessed, sold, or in any manner used, * * * in violation of any law of such state." The Webb-Kenyon Law puts beyond the protection afforded interstate commerce any intoxicating liquor shipped into the state to be sold or in any manner used in violation of a law of this state. *Palmer v. Express Co.*, 129 Tenn. 116, 165 S. W. 236; *State v. Doe*, 92 Kan. 212, 139 Pac. 1169; *State v. Express Co.*, 164 Iowa, 112, 145 N. W. 451; *United States v. Oregon-Washington R. & N. Co.* (D. C.) 210 Fed. 378; *Van Winkle v. State* (Del.) 91 Atl. 385; *Ex parte Peede* (Tex. Cr. App.) 170 S. W. 749; *Southern Express Co. v. State* (Ala.) 66 South. 115; *State of West Virginia v. Adams Express Co.*, 219 Fed. 802, 135 C. C. A. 464.

[2] Before the passage of the Webb-Kenyon Law all interstate shipments were under the protection of the commerce clause of the federal Constitution, and they must so remain, except to the extent they have been taken out of that protection by the Webb-Kenyon Law; and, since that law specifies the character of the shipment designed to be taken from under the protecting clause, to wit, liquors intended to be received, possessed, sold, or in any manner used in violation of any law of a state, it was manifestly not the intention of Congress to remove this protection from any other character of shipment.

The question, therefore, for decision in the case under consideration is whether in-

toxicating liquors shipped from points outside of the state of Kentucky and received at Bowling Green, Ky., and concerning which the record in question was kept, were, by the operation of the Webb-Kenyon Law, divested of the protection afforded to interstate shipments by the federal Constitution. Obviously, such shipments are not divested of that protection, unless they are intended to be received, possessed, sold, or in some manner used in violation of a state law.

[3] But all shipments of intoxicating liquors into Kentucky are not prohibited by law. It is not unlawful for one to buy, where it is lawful to sell it, intoxicating liquor for his own use and bring it into Kentucky, or to have liquor so purchased in his possession, for such use. *Adams Express Co. v. Commonwealth*, 154 Ky. 471, 157 S. W. 908, 48 L. R. A. (N. S.) 342. In the case last above cited we said:

"The result of our views on the whole case is that whether a carrier of an interstate shipment of liquor subjects itself to punishment or not depends on the use to which the person to whom it delivers liquor intends to put it. If this use violates a law of the state, then the carrier may be punished; if it does not, the carrier has not committed any offense. A further result is that the guilt or innocence of the carrier becomes in each case a question of fact to be determined as are other disputed issues of fact under our law."

See, also, *Adams Express Co. v. Commonwealth*, 160 Ky. 66, 169 S. W. 603, and *Adams Express Co. v. Kentucky*, 238 U. S. 190, 35 Sup. Ct. 824, 59 L. Ed. 1287, decided June 14, 1915.

[4] The protection of the commerce clause still attaches to all lawful interstate shipments of liquor; and, to bring the transaction involved in this controversy within the operation of the Webb-Kenyon Law, and divest it of the protection of the commerce clause of the Constitution, the court would have to presume, without proof, that the book which Porter requested to see contained a record of shipments of liquor intended to be received, possessed, sold, or in some manner used in violation of the law of Kentucky. But, under well-established principles of law, the contrary presumption must prevail in the absence of proof, and there is no proof here as to the character of the shipment. The carrier must take notice of the use for which the liquor is intended, and if this use will violate the law of the state at the place of delivery, it may refuse to accept the shipment, or, having received it, may refuse to deliver it. But, as above stated, in the absence of proof upon the subject, it must be presumed that the carrier did not violate the state law, and consequently that the record in question is a record of shipments of liquors for lawful purposes.

[5] It follows, therefore, under the record before us, that the shipments in question must be treated as if they were lawful, and, consequently, fully invested with the protection afforded to interstate commerce by the

commerce clause of the Constitution, and that the agent of the express company could not lawfully disclose to a private citizen any information concerning said shipments, except with the consent of the consignor and the consignee.

Judgment affirmed.

MASSACHUSETTS BONDING & INSURANCE CO. v. DUNCAN.

(Court of Appeals of Kentucky. Nov. 4, 1915.)

1. INSURANCE — 646 — APPLICATION — ANSWERS — PRESUMPTION.

Where an applicant for insurance makes categorical answers to the questions in the application, it will be presumed that such answers supply the company with all the information required by it for determining the acceptance or rejection of the risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. — 646.]

2. INSURANCE — 291 — APPLICATION — LOCAL OR CONSTITUTIONAL DISEASE — VULNERABILITY — DISTINCTION.

Where, in an application for insurance, there was no direct question as to family history, or whether applicant was afflicted with hemorrhagic diathesis, answers by applicant, whereby he represented that he did not then and had not had during the past year any local or constitutional disease, were not a material misrepresentation of fact, in the absence of any knowledge on his part that his tendency to bleed excessively was due to such diathesis, since his affliction, though congenital, was a vulnerability, and not a disease.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 681-690, 694-696; Dec. Dig. — 291.]

3. INSURANCE — 668 — APPLICATION — MENTAL AND PHYSICAL CONDITION — ANSWER — QUESTION FOR JURY.

Where, in answer to the question in an application for accident insurance, applicant said that he was in sound condition mentally and physically, he did not mean that he was as sound as the strongest, or even the average, man, since the question related only to his own condition, as measured by what it had been theretofore, and the question whether such answer was truthful on the part of applicant was for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. — 668.]

4. INSURANCE — 665 — SUIT BY BENEFICIARY — SUFFICIENCY OF EVIDENCE.

Evidence, in an action by a beneficiary under an accident policy to recover for death of assured, held to sustain a finding that assured's answers to questions in the application were truthful.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. — 665.]

5. INSURANCE — 549 — AUTOPSY — INDEFINITE REQUEST — REFUSAL — EFFECT.

An accident policy provided that, in case of death, the company should have the right to make or participate in an autopsy upon the body of assured. Upon assured's death, the father telegraphed the company, informing them thereof, whereupon the company answered: " * * * Adjuster will be in Greenville immediately. Withhold burial, as autopsy may be necessary." The weather was warm, the

funeral notices had been distributed, and during the interval of 2½ hours between the receipt of the telegram and the hour for the funeral no adjuster appeared, and the interment was had. Held, that the policy was not rendered void by the failure to withhold burial, since there was no demand for an autopsy as provided by the policy, but simply a request to hold the body for an indefinite time.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1356; Dec. Dig. — 549.]

6. INSURANCE — 549 — RIGHT OF INSURER TO AUTOPSY.

Where the evidence, in a suit on an accident policy for death of assured, failed to show a reasonable probability that an autopsy held seven months after the accident would disclose whether assured died from accidental causes or disease, it was not error to overrule defendant's motion for exhumation and autopsy, since the motion was addressed to the discretion of the court, throwing upon the defendant the burden of showing with reasonable certainty that an autopsy would determine the cause of death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1356; Dec. Dig. — 549.]

7. INSURANCE — 549 — GROUNDS FOR AUTOPSY — EVIDENCE — SUFFICIENCY.

Evidence, in an action on an accident policy for death of assured, held not to show sufficient reason for ordering exhumation and autopsy seven months after death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1356; Dec. Dig. — 549.]

8. INSURANCE — 549 — AUTOPSY — REQUEST — INDIRECT REFUSAL — PROOFS IN LIEU — EFFECT.

Where, in response to a request by the company's claim examiner, the beneficiary under an accident policy did not directly refuse to allow exhumation of assured's body for autopsy, but suggested certain proofs in lieu thereof, the policy was not rendered void for refusal to comply with a provision securing to the company the right in case of death to make an autopsy upon the body of assured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1356; Dec. Dig. — 549.]

9. INSURANCE — 389 — ISSUANCE OF POLICY TO AGENT — WAIVER.

Where an insurance company accepted an application from its own agent and issued a policy thereon, it waived any disadvantage which might arise from the want of a local representative to protect its rights under the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1028-1031; Dec. Dig. — 389.]

10. EVIDENCE — 128 — STATEMENTS TO PHYSICIAN.

A statement made by assured to a physician, called to attend him on the day of the injury from which he afterwards died, as to how he was injured, was competent evidence in an action by the beneficiary on an accident policy to recover for death of assured.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 383-387; Dec. Dig. — 128.]

11. INSURANCE — 515 — ACCIDENT POLICY — DEATH DUE TO STRAIN — AMOUNT RECOVERABLE.

Where assured died within a few days as the result of an accident, a provision in an accident policy that, if assured was disabled by a strain, the company would pay assured \$50 per month during disability, did not limit the recovery of beneficiary to \$50; she being entitled to the indemnity provided for in case of death, though the death resulted from a strain.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1800-1802; Dec. Dig. — 515.]

Appeal from Circuit Court, Muhlenberg County.

Action by Kate R. Duncan against the Massachusetts Bonding & Insurance Company. From a judgment for the plaintiff, the defendant appeals. Affirmed.

E. B. Anderson, of Owensboro, and Fred Forcht, of Louisville, for appellant. W. P. Sandidge, of Owensboro, and T. J. Sparks, of Greenville, for appellee.

NUNN, J. On July 1, 1913, David W. Duncan made a written application for, and there was issued to him on that date, a policy of accident and disability insurance, which provided indemnity for loss of life or bodily injury from accidental means, and for disability and loss of time by disease. For accidental death the company agreed to pay \$2,500 to Kate R. Duncan, mother of the assured, the appellee herein. On Thursday, August 28, 1913, David W. Duncan died as the result of an alleged accident which happened on Saturday, August 23d. In an action on the policy, Mrs. Duncan recovered judgment for \$2,500; and appellant brings the case here for review, complaining of many prejudicial errors which it says the trial court committed.

David W. Duncan was unmarried, 20 years of age, and resided with his parents in Greenville. He was in partnership with his father under the firm name of D. J. Duncan & Son. They were engaged in the insurance business, and were local agents for the appellant. It seems that as such agents they had the power, not only to receive applications, but to issue policies of insurance, and for this purpose they were supplied with the necessary blank forms. It appears that the assured wrote on the same day with his own hand both the application and the insurance policy. These facts were fully and promptly reported to and approved by the company. The policy was issued in consideration of the payment of a monthly premium of \$1.50, and was to continue in force for as many consecutive months as the assured might pay same. So far as payment of premiums is concerned, it is admitted that the policy was in force at the time referred to; but appellant claims that the policy is void by reason of false and fraudulent answers made in the application.

By the application, which was written into and made a part of the policy, the assured represented to the company: (1) That he was in sound condition mentally and physically; (2) that he did not then have, and had not had during the past year, any local or constitutional disease. The company refused to pay the policy, and this suit was filed by the beneficiary, Mrs. Duncan, in January, 1914. Among other things, she alleged that, while the policy was in force, her son died from a bodily injury, effected directly and independently of all other causes by direct, external, violent, and purely accidental

means. In the following language she explains how the assured received his injury:

"The said David W. Duncan was upon said August 23, 1913, engaged in carrying two large water melons, one under each arm, and while engaged in carrying said melons over a rough stretch of ground, one of said melons slipped forward and caused an injury to his stomach and bowels to such an extent that an uncontrollable hemorrhage resulted therefrom, and from the effects of which the said David W. Duncan died."

At the following April term of court the parties went into trial. During the course thereof appellee offered an amendment, which the court permitted to be filed over appellant's objection. The amendment is as follows:

"The plaintiff, by leave of court, for amendment to her petition herein, and in order to conform to the proof, states that the accidental injury described in the original petition was caused, not by the slipping forward of the melon as alleged therein, but by the strain caused by the carrying of said melons, and the carrying of the melons over the rough or uneven ground over which he traveled while carrying same."

Appellant then traversed the allegations of the amended petition, and affirmatively alleged that the policy provided that, if the assured should be disabled by a strain, the recovery therefor should be \$50, and no more. These allegations were controverted of record, but on the ground of surprise the trial was suspended, and the case continued to the September term, when it was tried, with the result already stated.

The following are the facts with reference to the death of the assured: On Saturday noon, August 23, 1913, five days before his death, he bought two water melons, weighing 40 pounds each, from a wagon which stood in the street in front of a neighbor's house. Carrying one under each arm and against his abdomen, he started to his father's home, a distance of some 60 feet. He had to pass over a rough place and a perpendicular step-off, some 12 inches high. The assured told his physician that while so carrying these melons he slipped or fell. There was no one who saw him all of the time he was going home. The man who sold the melons, and Mrs. Martin also, saw him leave the wagon and go diagonally toward his father's front door. He placed the melons on the floor in the front hall and went immediately into his mother's room. She says he was nearly exhausted and breathing with difficulty. In a few moments he recovered somewhat and left the room, going in the direction of a closet in the garden. In two or three minutes his mother thought she heard his calls, and went hurriedly to the garden, and saw him holding himself up against a gate. His mother and sister assisted him to walk through the yard to the back porch. He was so exhausted that they laid him down. Almost immediately he lost consciousness. The neighbors and a doctor were called. When the doctor reached him,

he had been placed in bed. The doctor described his condition as one of collapse, with rapid pulse, difficult breathing, and abnormal temperature. He improved somewhat during the afternoon, and was able to sit up awhile. He spent a restless night, but on Sunday was able to eat a light breakfast and dinner. In the afternoon, when he undertook, by his mother's assistance, to leave his bed, he fell to the floor in a faint. In about three hours he began to throw up blood, and also passed a great deal of it from his bowels. The first blood thrown up was decayed, as if it had been retained in his stomach a while; but after that the blood he threw up and that which passed from his bowels was fresh. This continued until his death on the following Thursday. Dr. Koontz, who was first called, did not obtain full details of what had happened, and did not then realize the gravity of the case. When he grew worse the next day, Dr. Slayden was called also. Each of these doctors had for a long time practiced in and were acquainted with the medical history of the family. Being now convinced that there was an internal hemorrhage, they endeavored to find out the place and cause. In answer to their inquiries, the assured said to Dr. Slayden that while he was carrying the water melons he slipped or fell, Dr. Slayden did not remember which, and received a strain where the melons pressed against his abdomen, and he at once became ill.

Briefly stated, the reasons given by the company for resisting payment are that Duncan's death was not due to any personal injury effected by accidental means; that he was the victim of a spontaneous hemorrhage; that at the time the application was made, and for many years theretofore, in fact, all of his life, the assured was in bad health, and in an unsound physical condition, and suffering from a dangerous constitutional disease, technically known as hemophilia, that is, he was what is commonly known as a "bleeder"; that this disease culminated in a spontaneous hemorrhage, and was the sole cause of his death. The peculiar characteristic or symptom of a "bleeder" is that in the event of an injury, causing a wound in the flesh, internal or external, there immediately results a persistent flow of blood, causing weakness and exhaustion, difficult to arrest, and which, if not stopped, will result in death. We understand from the evidence that in such cases, as distinguished from normal persons, the walls of the blood vessels may be thinner; but usually it is a blood condition, whereby it does not coagulate and automatically stop the flow.

[1, 2] The assured made categorical answers to every question set forth in the application. We must assume that such answers, if true, supplied to the company all the information needed or required by it in order to determine whether it would accept the risk and issue the policy or continue it in force. No inquiries were made about his

family history, and he was not asked if he was a hemophiliac, or a "bleeder," or if a slight wound subjected him to copious or persistent bleeding; nor was he asked if his physical condition was normal as compared to other people. The question propounded was whether he was in sound physical condition. He answered that he was, and further represented that he was in good health, and to the question, if within a year past he had a constitutional disease, he said, "No."

We are satisfied from the evidence that in carrying the water melons over the rough place he slipped or stumbled, and the strain or pressure thus made against the stomach ruptured a blood vessel. We think it was also made clear that the young man was a "bleeder." The proof shows this to be an inherited characteristic. From the medical testimony it seems that the symptoms are more pronounced in the male line, although, as a rule, it is inherited directly from the mother. His maternal grandfather was a "bleeder," and his mother was to some extent. Between 2 and 3 years before the application, three teeth were extracted, and his gum bled at one place for several days, and he was indisposed for a week. When he was 10 or 12 years of age he had a nasal hemorrhage which lasted for several days. Two or three other instances were shown by the evidence where from slight wounds there was a profuse flow of blood, and in this, as well as the instances already referred to, medical services were availed of, if not required, to staunch the flow. Some of the text-writers say that in such cases there have been instances of spontaneous bleeding; but, with one exception, all of the doctors testified that there must be a cause for such bleeding, although the cause may not be ascertained. In every case there must be a ruptured blood vessel; therefore there must be something to rupture it, and when spontaneous hemorrhage is assigned as a cause of death it signifies that the cause of the rupture is not known.

The physicians all testified, having in mind his tendency to bleed, that in their opinion an internal hemorrhage would be produced in the assured if he carried the two melons in the manner described. It is also clear from the evidence that the company would not have issued or carried the policy, had it known that the assured was a "bleeder." The assured, of course, must have known that in the instances referred to he had bled persistently; but it is not shown that he knew the significance of it. In other words, he did not know he had an inherited condition of vein walls or of blood that would probably continue through life, and always subject him to dangerous bleeding whenever any blood vessel, however slight, was ruptured. On this branch of the case we believe the question comes down to whether the condition described was equivalent to a disease. If so, there was a material

misrepresentation of fact, for he answered that he had no disease. As to what hemophilia is, the appellant quotes the Century Dictionary, vol. 4, page 2791:

"A congenital morbid condition characterized by a tendency to bleed immoderately from any insignificant wound, or even spontaneously; also called hematoiphilia, hemorrhaphilia, and hemorrhagic diathesis."

Dr. Osler and others in their text-books give substantially the same definition, and they refer to it as hemorrhagic diathesis. Dr. Koontz, a witness, was asked:

"Whether or not hemorrhagic diathesis is a constitutional disease?" Answer: "I do not consider any diathesis a disease." Question: "Is hemorrhagic diathesis a constitutional disease or not?" Answer: "It could not be in my opinion."

In making out the proof of loss, Dr. Koontz had stated:

"The disease was naturally of a hemorrhagic diathesis, which, in my judgment, was a potent factor in his fatal illness."

Counsel for appellant asked him to state, "What do you mean by hemorrhagic diathesis?" to which he answered:

"Diathesis means a susceptibility, a vulnerability, to disease. Hemorrhagic merely qualifies pertaining to hemorrhage; being a potent factor means that it was one of the most important things in my judgment in the case."

Dr. Slayden said that:

"Duncan was of a hemorrhagic diathesis; but that is a vulnerability, not a disease."

One may be vulnerable to tuberculosis by an inherited predisposition, and still may never have it. One's skin may be thin, and in that way he may have an inherited vulnerability to sunburns, and yet keep free of them. In the same way, one may be vulnerable to hemorrhages, that is, by inheritance be more susceptible to them than others, yet he may never have a hemorrhage.

The testimony of Dr. Furgerson and Dr. Tichenor is to the same effect. The evidence of these doctors, as well as other witnesses, who were intimately acquainted and associated with the assured, shows that he was in good health, up and about at all times, attending to all his duties. Except the instances of bleeding already referred to, his complaints were no different nor more frequent than those of the ordinary person.

[3,4] When the applicant answered that he was sound physically, it did not necessarily mean that he was as sound, or that his anatomy was as perfect, as the strongest, or even the average, man. The question related only to his own condition measured by what it had been, and by the answer one naturally infers that he was sound as compared to his condition theretofore. In this particular it was for the jury to determine from the evidence whether the assured made truthful answers. The jury believed that his answers were truthful, and we are of opinion that the evidence sustains their verdict.

[5] The next question relates to the re-

quest by the company to withhold burial, and to the right of the company to make an autopsy upon the body of the assured. The policy contained this provision:

"The company shall have the right and opportunity to examine the person of the assured in case of accident or disability, at such times and in such manner as the company shall require, and in case of death shall have the right to make or participate in an autopsy upon the body of the assured, where not forbidden by statute."

On the 27th of August the father of the assured addressed and mailed a letter to the company at Boston, setting out in detail the manner in which the assured had received his injuries, and stating that in the opinion of the attending physicians there was no hope for his recovery. On the next day he died, and the father sent to the company at Boston this telegram:

"My son David W. died at 2:30 this afternoon, result of injury received August 23rd. See letter of August 27th.

"[Signed] D. J. Duncan."

This telegram went as a night letter; that is, was not to be delivered until next morning. It was delivered to the company at 10 o'clock on the morning of August 29th. It seems that the letter had not been received at that time. The company sent the following telegraphic reply, which the father received at 1:30 o'clock that afternoon:

"Legal department in absence of details requires further investigation. Adjuster will be in Greenville immediately. Withhold burial as autopsy may be necessary."

The weather was warm, he died the day before at 2 o'clock, funeral notices had been distributed among friends, and all arrangements had been made for the burial that day at 4 o'clock. During the next 2½ hours, the interval between the telegram and the hour fixed for the funeral, the adjuster did not appear, and no word came from him. Instead of postponing indefinitely, and dismissing the company of friends, they proceeded with the funeral as announced. By this telegram the company did not demand an autopsy, or say that one would be demanded, or even be necessary. It amounted to a request to withhold the burial for an indefinite time—until the adjuster got there. The telegram did say that the adjuster would be there immediately; but he did not come immediately, and the family receiving no word from him, and having no information as to his whereabouts, they could not know how long it would be necessary to hold the remains in order to comply with the request. That day, after the burial, the adjuster in Owensboro did call some friend in Greenville, not connected with the family, and in that way received the information that the interment had already taken place. Subsequently numerous letters passed between the company and the father, who was acting for the beneficiary.

The following, taken from a letter of September 25th, illustrates the manner of re-

quest or demand made by the company for an autopsy:

"Will you be good enough to advise at once whether or not you will permit said autopsy?"

On November 6th the company wrote:

"We desire permission immediately to disinter the body of said David W. Duncan for the purpose of performing an autopsy thereon."

It is the contention of Mrs. Duncan that she neither refused nor granted permission to disinter the remains or to make an autopsy. Technically her position was one of neutrality, although there is no attempt to conceal a natural feeling of abhorrence to the idea of reopening the grave. The only evidence to show a denial of the request comes from Mr. Carey, employed by the appellant as a claim examiner, and he says that on the 14th of October, 1913, he met Mr. D. J. Duncan, the father, at the Seelbach Hotel in Louisville, in an effort to adjust the claim. Carey says he then requested permission to make an autopsy, and that Mr. Duncan "refused to permit an autopsy, stating that he wished said defendant company to examine certain proofs of claims about to be filed with defendant company, and that he thought * * * the company would pay the claim * * * upon a basis of the information contained in said proofs."

[6, 7] At the April term of court the company entered a motion, supported by affidavits, and for the first time made formal demand to have the remains exhumed and an autopsy held. The appellee filed a response, in which she maintained her position of neutrality; that is, said she had never denied nor consented to an autopsy. The court overruled the motion, and, in our opinion, properly so. The motion was addressed to the sound discretion of the court, and it was incumbent upon appellant to show with reasonable certainty that an autopsy then made would disclose bodily conditions from which it could be determined whether the assured died of disease or accident. Had it been a case of suspected metallic poisoning, no doubt an autopsy, made even seven months after burial, would have thrown light on the question; but where the conceded cause of death was a ruptured blood vessel, a condition involving tissues and membranes only, it is doubtful if an autopsy at any time would have shown whether the rupture was spontaneous or accidental, and especially is this so if made at a time when decomposition was so far advanced. The depositions of several doctors who testified on the trial accompanied the motion for an autopsy; but, except in the case of Dr. Koontz, there was absolutely no showing from any of them to indicate that an autopsy would be of any aid in determining the question, and the testimony of Dr. Koontz was not sufficient to justify the court in sustaining the motion. Dr. Koontz, in answering the question whether a hemophiliac might have internal hemorrhage spontaneously, said:

"It might be possible, but, without some cause, a very improbable thing in my opinion."

He was then asked:

"State to the jury whether or not an autopsy performed on the body of David W. Duncan would have shown what was the cause of the internal hemorrhage." Answer: "It may have and may not have. I judge it would have at least given some information; I doubt that." Question: "It would have been a help, would it not, Doctor?" Answer: "It would have been; but, as to its being specific, I rather doubt it."

It does not appear that the testimony of this doctor refers to the time when the motion was made. In all probability he referred to the time of death. We are satisfied that the evidence does not show sufficient reason for ordering a disinterment and autopsy in April, seven months after the burial, and the question of error can only be measured by the ruling at that time.

[8] We are of the opinion that the policy was not voided by a failure to withhold burial, or by the failure then to give consent to an autopsy, or by refusing permission on the 14th of October, the time referred to by Mr. Carey, which was 45 days after the burial. Certainly no positive demand was made for an autopsy before the time referred to by Mr. Carey, and Mr. Duncan's response to him hardly amounts to a refusal. He suggested certain proofs in lieu. In *Granger Life Insurance Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 446, the court said:

"We are not prepared to say that in a proper case the court, in the interest of justice, should not compel the exhuming and examination of a dead body which is under the control of the plaintiff, if there is strong reason to believe that without such examination a fraud is likely to be accomplished, and the defendant has exhausted every other method known to the law of exposing it."

But in this case neither the evidence nor the affidavits show that an examination would disclose anything material. The company never demanded an autopsy, and did not exhaust its efforts to have an examination. During the boy's illness the father notified the company by letter of the accident and the probable consequence. While the company had not received this letter when it received the telegram giving notice of death, yet in ordinary course of the mails the letter should have been in the hands of the company at that time, and the father naturally so believed. Measured by the custom in that section, the burial was not hasty, and we are satisfied that none of appellant's rights were violated when the remains were buried as theretofore planned, and, under all the circumstances, the appellee did not thereby forfeit her rights, particularly when it is not shown that an examination of the body would have thrown any additional light on the case. *Wehle v. U. S. Mut. Acc. Ass'n*, 153 N. Y. 116, 47 N. E. 35, 60 Am. St. Rep. 598.

[9] The company argues that, since the assured was its agent, there was no one at Greenville upon whom it could rely to pro-

test its interests; therefore it could not act immediately. This circumstance made it necessary to send an adjuster from some other point. But the telegram did not make it known who the adjuster would be, or from what point he would come, or how much time would be required. The disadvantage to which it might be placed in this particular case must be considered as waived by the company when it accepted an application from and issued a policy to its own agent.

[10] We are of opinion that the evidence of Dr. Slayden with reference to the statement the young man made to him as to how he was injured was competent. *Omberg v. U. S. Mut., etc., Co.*, 101 Ky. 303, 40 S. W. 909, 19 Ky. Law Rep. 462, 72 Am. St. Rep. 413.

[11] Appellant insists that, if the deceased suffered from a strain, he can only recover \$50. Section 13 of the policy provides that if the assured be disabled within six months "by rheumatism, tuberculosis, * * * strains, * * * then the company will pay the assured \$50 per month for the number of months that the assured is confined or disabled thereby." As already stated, the policy provided indemnity for death or disability due to accident, and for disability due to certain diseases. The \$50 per month for a strain covered such time as he may be disabled thereby, but was not intended to be in satisfaction of a claim for death, if it resulted therefrom.

We perceive no error in the instructions, and on the whole case we are of opinion that the judgment should be affirmed; and it is so ordered.

LONG v. MICKLER.

(Supreme Court of Tennessee. Oct. 16, 1915.)

1. WILLS §123—REQUISITES—EXECUTION—WITNESSES.

Where the testator wrote out his will, signed it, and on his request procured the signature of one witness without disclosing that it was a will, and that of another witness after disclosing it to be his will, it is valid, under Shannon's Code, § 3895, providing that no will shall be good unless written in the testator's lifetime and signed by him and subscribed in his presence by two witnesses, although neither witness saw him sign or subscribed as witness in the presence of the other witness.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 321-331; Dec. Dig. §123.]

2. WILLS §119—EXECUTION—WITNESSES.

Unless publication of the contents of a will to the subscribing witnesses is required by statute, they need not be informed of the character of the document when they subscribe.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 305-313; Dec. Dig. §119.]

Appeal from Circuit Court, Hamilton County; Nathan L. Bachman, Judge.

Will contest between Emma Long and Margaret Mickler. From a judgment on a directed verdict in favor of the will, affirmed

by the Court of Civil Appeals, Mrs. Long appeals. Affirmed.

W. B. Miller, of Chattanooga, for appellant. Sizer, Chambliss & Chambliss, of Chattanooga, for appellee.

GREEN, J. This case presents a contest of the validity of the will of R. N. Phillips, deceased. The question submitted is whether it was necessary for the testator to have made known to the subscribing witnesses the nature of the document.

The proof showed that R. N. Phillips lived in Chattanooga at the Mountain City Club. He had been ill and confined to his room for several days, and upon his recovery executed the will in controversy here. He wrote the will himself on the stationery of the club, and signed it. After signing it he took the paper to L. W. Llewellyn, exhibited it, and asked Mr. Llewellyn to witness his signature. The paper was so held or folded by Phillips that no part of its contents could be seen or its character ascertained by Llewellyn. Llewellyn demurred to signing the instrument on the ground that he did not like to sign anything without knowing what it was. Phillips replied, "Well, you know that is my signature," and thereupon Llewellyn signed the instrument at the request and in the presence of Phillips as a witness. Phillips then took the paper to W. W. Spotts and requested Spotts to sign it, telling him that it was his (Phillips') will. Spotts thereupon signed the paper as a witness, in Phillips' presence. About a week later Phillips told Llewellyn, the first witness, that the paper the latter had subscribed was his (Phillips') will.

Upon the foregoing testimony being offered, the trial judge directed a verdict in favor of the will, there being no question made upon its validity except the failure of the testator to make publication of its contents to the subscribing witnesses. The Court of Civil Appeals affirmed the judgment below, and we think the action of the two courts was proper.

[1] It was not necessary that either of the witnesses should have seen the testator sign the paper, nor that either should have subscribed it in the presence of the other witness. *Simmons v. Leonard*, 91 Tenn. 183, 18 S. W. 280, 30 Am. St. Rep. 875, and cases cited.

The statute of Tennessee is as follows:

"No last will or testament shall be good or sufficient to convey or give an estate in lands, unless written in the testator's lifetime, and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, neither of whom is interested in the devise of said lands." Shannon's Code, § 3895.

This statute is founded on the section of the statute of frauds relating to wills (29 Car. II, c. 8), which provides that a devise

of lands shall be attested and subscribed in the presence of the testator by three or four credible witnesses.

The English courts have always held, construing the statute, that the witnesses need not know the instrument they were attesting was a will. They said the question was whether there was an acknowledgment in fact by the testator to the subscribing witnesses, though there was none in words, that the instrument was his will; for if, by what the testator did he must in common understanding and reasonable construction be taken to have acknowledged the instrument to be his will, the attestation thereof would be considered as complete. *White v. British Museum*, 6 Bing. 310; *Ellis v. Smith*, 1 Ves. Jr. 11; *Wright v. Wright*, 7 Bing. 457.

In his work on wills, Mr. Underhill points out that in some of the states of the American Union the English statute referred to has been re-enacted with the additional requirement that the testator must declare the instrument to be his will in the presence of the attesting witnesses. But he states that in those jurisdictions where the English statute of frauds has been re-enacted without the additional requirement for publication the witnesses need not know the instrument which they attest is a will.

"For," he says, "the law requires a subscription by witnesses only in order that the paper which is offered for probate as a will may be then identified as the same instrument which was executed by the testator in the presence of the witnesses." Underhill on Wills, § 180, and section 202.

The Supreme Court of Massachusetts has said:

"This will was in writing, signed by the testator, and attested and subscribed in his presence by three competent witnesses. It was written by the testator. He knew, therefore, if of sound mind, what he signed, and what he asked the witnesses to attest. The calling upon witnesses to attest his execution of an instrument, whose character and contents he well knew, was in effect a declaration that the instrument he had signed, and his signature to which he desired them to attest, was his act, though the character and contents of the instrument were not disclosed to them. It was as if the testator had said: 'This instrument is my act; it expresses my wishes and purposes; and, though I do not tell you what it is, I desire you to attest that it is my act, and that I have executed and recognized it as such in your presence.' We think all the requirements of the statute are met and satisfied. No formal publication of the instrument, no declaration of its contents, or of its nature, is in terms required. The Legislature has prescribed certain solemnities, to be observed in the execution of a will, that it may be seen that it is the free, conscious, intelligent act of the maker; but they have not prescribed that he should publish to the world or to the witnesses, what is in the will, or even that it is a will." *Osborn v. Cook*, 11 Cush. (Mass.) 532, 59 Am. Dec. 155.

[2] The law seems to be well settled that unless publication of the contents of the will to the subscribing witnesses is required by statute, it is unnecessary, and such witnesses need not be informed of the character of the document at the time they subscribe their names as witnesses. See *In re Clafin's Will*, 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261; *Scott v. Hawk*, 107 Iowa, 723, 77 N. W. 467, 70 Am. St. Rep. 228; *Watson v. Pipes*, 32 Miss. 451. See, also, 40 Cyc. 1116, 1117, and cases cited.

The judgment of the Court of Civil Appeals will be affirmed.

STATE v. WILCOX. (No. 18304.)

(Supreme Court of Missouri. June 29, 1915.)

1. INDICTMENT AND INFORMATION \Leftrightarrow 202 — SUFFICIENCY—AIDER BY VERDICT.

An information for embezzlement not assailed before the trial on any of the grounds mentioned in Rev. St. 1909, § 5115, providing that no information shall be deemed invalid, nor shall the proceedings be affected by reason of certain specified grounds, held good after verdict.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 640-650; Dec. Dig. \Leftrightarrow 202.]

2. EMBEZZLEMENT \Leftrightarrow 39—EVIDENCE—OTHER OFFENSES—INTENT.

In a prosecution for embezzlement by a bank cashier evidence of shortages in the bank's assets other than those resulting from the transaction counted on was admissible upon the question of fraudulent intent, where there was evidence that defendant was responsible for the entire shortage which he had continuously contrived to conceal.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 62; Dec. Dig. \Leftrightarrow 39.]

3. CRIMINAL LAW \Leftrightarrow 396—EVIDENCE—ADMISSIBILITY.

In a prosecution for embezzlement by a bank cashier, where evidence had been admitted showing a general shortage in the assets of the bank as bearing upon fraudulent intent, testimony by accused tending to explain the shortage was improperly excluded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 862; Dec. Dig. \Leftrightarrow 396.]

4. EMBEZZLEMENT \Leftrightarrow 23—INSTRUCTIONS—DISPOSITION OF PROPERTY EMBEZZLED.

In a prosecution for embezzlement by a bank cashier, an instruction that the fact that the proceeds of the check whereby the embezzlement was consummated went to another did not constitute a defense, was not erroneous.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 31-35½; Dec. Dig. \Leftrightarrow 23.]

5. EMBEZZLEMENT \Leftrightarrow 11—"CONVERSION"—ELEMENTS—DEFINITION—"IMPLY."

Conversion is any dealing with the property of another which excludes the owner's dominion; the word "imply" meaning it is "virtually involved or included; involved in substance; inferential, tacitly conceded—the correlative of express or expressed."

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 9, 10; Dec. Dig. \Leftrightarrow 11.]

For other definitions, see Words and Phrases, First and Second Series, Conversion.]

6. CRIMINAL LAW \Leftrightarrow 730—TRIAL—CONDUCT OF COUNSEL—CURE OF ERROR.

That counsel expressly advised the jury not to read the instructions, but to return a verdict forthwith, was cured by the direction of the court that the jury pay no attention thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1698; Dec. Dig. \Leftrightarrow 730.]

Bond, J., dissenting.

In Banc. Appeal from Circuit Court, Stoddard County; E. M. Dearing, Judge.

A. D. Wilcox was convicted of embezzlement, and he appeals. Reversed and remanded.

See, also, 179 S. W. 482, 483.

Mozley & Woody, Fort & Green, and J. W. Farris, all of Bloomfield, for appellant. John T. Barker, Atty. Gen., and W. T. Rutherford, Asst. Atty. Gen., for the State.

BLAIR, J. In the Stoddard county circuit court defendant was convicted of embezzlement and sentenced to three years in the penitentiary, and has appealed. Two other cases against appellant were submitted in Division No. 2 at the same time this case was submitted. In those cases opinions have been handed down in each of which reference is made to this case for the statement of the facts upon which the decisions therein depend. Finding the statement made in the opinion in division to be correct, it will be used (substantially) in this opinion. No change is made which affects the references in the two other cases mentioned.

The amended information described the property defendant was charged with embezzling as "certain money, property, rights in action, valuable securities and effects, a particular description of which is to the prosecuting attorney unknown," to the amount and value of \$1,000.

The evidence tended to show that the City Bank of Bloomfield was incorporated in 1900, its stock being practically all owned by George Houck, who died in 1907, leaving his stock to his two sons, George and Rudolph S. Defendant was cashier of the institution during its entire existence. He was a nephew of George Houck, Sr., and was 44 years old at the time of the trial. On May 14, 1912, defendant owed the Bank of Bloomfield, located across the street from the City Bank, a note for \$2,500, on which, on the day mentioned, he paid \$1,000, delivering his check drawn on the City Bank for that purpose. This check was paid by the City Bank in the "exchange of checks" for that day's business. It was never charged to appellant's account, but (he testified) was carried as a cash item until November 18, 1912, when the City Bank was closed by the bank commissioner. There was also evidence that there were 40 or 50 other checks of the same kind drawn and signed by appellant for sums aggregating \$18,000 or \$20,000, and paid by the City Bank, none of which had been charged to appellant's account; that defendant brought all these checks from his house and gave them to the bank commissioner subsequent to the closing of the bank; that there was a shortage totaling \$78,000; and that defendant admitted he was responsible for it all. There was other evidence that about November 18, 1912, appellant stated that the whole trouble was due to the Bloomfield Mercantile Company, of which he was president and principal owner, and that he claimed that the \$2,500 note above mentioned was, in fact, the debt of the mercantile company.

In his testimony appellant specifically de-

nied that he had admitted responsibility for the shortage of \$78,000, and denied other admissions, of which there was evidence to the effect that he had collected notes due the bank and appropriated the money. He testified that the shortage in the funds of the City Bank originated in the lifetime of George Houck, Sr., the founder of the institution; that a cash item is one which "is carried in a drawer and represents cash which the bank has paid out and which is not charged up until it is reconverted into cash," and that the general practice and custom of the City Bank always was to carry more or less cash items; that the \$1,000 check was carried as a cash item according to the customary course of the City Bank, and that the then president of the bank, George Houck, Jr., and "all of them" knew it and "knew all that was going on there"; that there was no concealment of the check; that during this time his wife had over \$5,000 on deposit with the bank which he was at all times at liberty to use, if necessary, to pay the check; and that he had no intention of embezzling the bank's money. He also testified that George Houck, Sr., in his lifetime knew of what is termed in the evidence "the general shortage," and that the other officers knew of it down to the time the bank closed, and that it was concealed with the knowledge and at the direction of George Houck, Jr. There was testimony for the state to the contrary, though there was evidence of admissions by George Houck, Jr., president of the bank after 1907, which, if made by him, clearly indicated he was aware of the bank's condition and aware that it was due to bad loans and bad management and thought appellant's relation to the family and the gratitude due from him for kindnesses of George Houck, Sr., obligated him to use every effort to keep it concealed.

Appellant contradicted all testimony tending to ascribe to him responsibility for the "general shortage" referred to, evidence of the existence of which was offered to characterize the intent of appellant in respect to his dealings with the \$1,000 check to the Bloomfield Bank. During the examination of appellant by his counsel the following occurred:

"Q. Mr. Wilcox, there has been some testimony in this case about a general shortage of the City Bank at Bloomfield, and the amount of it. I will ask you to tell the jury how far back the shortage in the City Bank at Bloomfield began. A. During George Houck, Sr.'s, lifetime. Q. I will ask you to state what the practice and custom had been there with you and Mr. George Houck, Sr., during his lifetime, and the other officials of the bank, with respect to checking money out of the bank and not replacing it.

"Mr. Ward: I object to that as incompetent and immaterial.

"The Court: The objection will be sustained.

"Mr. Mosley: I except to the ruling of the court. I think, your honor, inasmuch as I have objected to all the testimony about a general shortage, that this is competent. The court will remember that I have objected, and he has ruled

against me. Now, then, manifestly we would have a right to explain that, and how it came about, and all about it. That is what I now propose to do by this witness.

"The Court: The court is not going to allow that.

"Mr. Mosley: If the court holds that I can't do that, all I can do is make my offer.

"The Court: I don't want to sit here and consume time showing the conduct of other men. There is only one question in this case, and that is the question of whether or not this man embezzled this \$1,000.

"Mr. Mosley: That is precisely what I contended when the state was offering their testimony.

"The Court: You can't separate some of these things.

"Mr. Mosley: I will save my exceptions to the ruling of the court."

There was evidence for the state that it was not customary for banks to carry as cash items checks drawn on themselves, except such checks as were received after the close of business for the day, and these were carried until the following morning.

[1] 1. The information was not assailed before the trial. It is good after verdict. Section 5115, R. S. 1909.

[2] 2. Appellant contends that it was error to admit evidence of any shortage in the bank's assets, except that resulting from the particular transaction which is the foundation of this case. The general rule excluding evidence of other offenses is invoked. There are exceptions to that rule. A vital issue of fact in prosecutions for embezzlement is the intent of the defendant. Other offenses intermixed with that on trial or committed in efforts at concealment or any such as are of a character tending to prove a fraudulent intent in the act under investigation may be shown upon the question of intent. *People v. Hatch*, 168 Cal. 868, 125 Pac. 907; *People v. Rowland*, 12 Cal. App. 6, 106 Pac. 428; *State v. Foley*, 247 Mo. loc. cit. 635, 153 S. W. 1010; *Underhill on Criminal Evidence*, § 233; *Rapalje on Larceny and Kindred Offenses*, § 392. To warrant the admission of evidence of other offenses, however, they must fall within the exceptions to the general rule. An examination of the testimony objected to in this connection discloses there was no error in its admission; it being considered in the light of the evidence tending to show that appellant was responsible for the entire shortage, and that he had continuously contrived to conceal the whole from the bank officers, and that the shortage occasioned by the act for which he was being tried was a part of the whole.

[3] 3. It is next insisted that the court erred in refusing appellant's offer to explain the general shortage. It must be remembered that evidence of the total shortage was admitted and its admission is now defended upon the ground that it tended to show appellant's fraudulent intent in the transaction on trial. Appellant undoubtedly had the right to meet such evidence with any evidence he could adduce which would tend

to support his denial of fraudulent intent by explaining the general shortage or any part of it in a manner consistent with his innocence. If he was not responsible for the general shortage, or if it originated in such a way that it would not tend to prove fraudulent intent in this case, evidence to show either of these things was clearly admissible. We do not understand this to be controverted. On the contrary, it is said no offer of any such evidence was made, and that the absence of an offer precludes a ruling on the question. *McCormick v. City of St. Louis*, 160 Mo. loc. cit. 338, 339, 65 S. W. 1038. The record in this case shows, however, a distinct offer "to explain the general shortage and how it came about and all about it," and a ruling excluding any explanation on the ground that the trial court refused to "consume time showing the conduct of other men." Appellant denied in detail all the evidence tending to show his responsibility for this general shortage. The offer "to explain" must be read in the light of this fact; further, the trial court understood that the offer was to "show the conduct of other men" by way of explanation. In view of these disclosures, it is not reasonable to say that the record does not show an offer to prove that this general shortage was not the result of appellant's criminal acts. It was admitted upon the vital issue of intent, and any explanation of it showing that it did not originate or continue in a way tending to prove a fraudulent intent upon appellant's part was admissible. An offer to make such an explanation is sufficiently disclosed by the record, and the ruling was error.

[4] 4. Objections are made to rulings in giving and refusing instructions. There was no error in instructing that the mere fact, if it was a fact, that the proceeds of the check went to the Bloomfield Mercantile Company did not constitute a defense. The law is not concerned with the use to which the fruits of crime are put. The instruction to the effect that the defendant is presumed to intend the natural and probable consequences of his act was not erroneous. *State v. Noland*, 111 Mo. loc. cit. 497, 19 S. W. 715.

[5] The definition of "conversion" as "any using or dealing with the property of another which impliedly or by its terms excludes the owner's dominion" is criticized. This definition is in apparent accord with what is said in *State v. Rigall*, 109 Mo. loc. cit. 663, 70 S. W. 150. The question there was different, however. The word "imply" is defined thus, "To signify or import by fair inference or deduction," and it is said that, "when a thing is implied, it is fairly to be inferred from the words used or the acts performed." *Century Dict.* To "imply" is "to involve in substance or essence, or by fair inference, or by construction of law, when not expressly stated in words or by signs." When a thing is implied it is "virtually involved or included;

involved in substance; inferential; tacitly conceded—the correlative of express or expressed." *Webster's Intern. Dict.* It is enough to say to the jury in a criminal case that conversion is any dealing with the property of another which excludes the owner's dominion. It would seem that in such case the word "impliedly" opens the way for the construction that the jury are required to take as true an inference which it ought ordinarily to be left to them to draw or refuse to draw, as they conclude is just. *State v. Rigall*, supra, is in no wise in conflict with this conclusion. The instruction that the jury should not be influenced by their sympathies, nor by considerations of public policy, nor by over anxiety to enforce the law, etc., was unnecessary, but not prejudicial. *State v. Talbott*, 73 Mo. 347. The objection to the frequently used opening and closing instructions are not well taken. Instruction No. 2, in which the elements of the offense are set forth, might well be so rephrased as to confine it clearly and distinctly to the particular transaction for which defendant was on trial, and to exclude the possibility of the jury convicting defendant for any offense other than that relied upon by the state in connection with the \$1,000 check offered in evidence. There was evidence tending to show numerous other offenses offered upon the issue of intent. No doubt ought to be left in the jury's mind that defendant was not to be convicted for any of these. The references in the instructions to descriptions in the information should be eliminated. The description therein was general and broad enough to include any offense of which there was evidence. Besides, under the general rule, references in instructions to the information ought to be avoided. The instruction as to appellant's good character, of which there was evidence, was in the usual form, and the objections thereto are untenable.

It is not necessary to discuss in detail the contentions based upon the refusal of appellant's offered instructions. What has been said indicates sufficiently, upon all disputed points, the character of the instructions which should, on this record, have been given, both for the state and appellant.

5. Certain exceptions were saved during the argument of the state's counsel. The trial court ruled correctly upon these.

[6] Counsel improperly advised the jury not to read the instructions, but to return a verdict forthwith. This he should not have done, but the court directed the jury to "pay no attention to that," and in the circumstances this was sufficient.

For the reasons given, the judgment is reversed, and the cause remanded.

GRAVES and WALKER, JJ., concur. WOODSON, C. J., concurs in separate opinion, in which FARIS, J., concurs. BOND, J., dissents, because he is of opinion that no er-

ror was committed in excluding the testimony quoted in the opinion. BROWN, J., dubitante.

WOODSON, C. J. (concurring). In my opinion, instruction numbered 10 given on behalf of the state is clearly erroneous, and should not have been given.

It told the jury, among other things, in effect, that they should not permit the social position of the accused to affect their minds in the consideration and disposition of the case.

What right has the trial court to assume that the defendant's social position would bias or prejudice their minds? But, conceding that his social position, good or bad, would have had a bearing upon the minds of the jury, that was nothing more than it should have done. When a person is placed upon trial for his life or liberty, he should be tried just as he stood before God and man at the time of the commission of the alleged offense for which he is being tried. A man or woman, whether of good or bad character, or whether occupying a high or low social position in society, has the legal right to appear before the court and jury of the country in that rôle, unsullied, praised, or questioned by the court, either by instruction or word of mouth, except when those questions are properly put in issue, and properly assailed by legitimate evidence. If it was not for this safeguard thrown around the accused by the law of the land, then the man or woman of the highest honor, integrity, or morality in the community would stand in no better position before the jury than would the most immoral and degraded man or woman in the community.

What is it that commands our confidence, admiration, and respect for man and woman except their cardinal virtues and the social position they occupy in consequence thereof? Do not those matters influence our daily relations and social and business conduct with our fellow beings, and properly so? Certainly they do. Then why should the court, when those matters have not been put in issue, and have not been assailed by the evidence, strip the accused by an instruction of the court, and thereby leave him or her, as the case might be, to stand before the jury in the same rôle that the known immoral and dishonest man or woman would stand before them?

I can conceive of no greater error than a trial court could commit in the trial of a person for his life or liberty, or which would be calculated to inflict greater injustice upon him or her.

For the reasons stated, I dissent from my learned Associate as to that point, and believe that the judgment of the trial court should be reversed, and the cause remanded for that error.

In this Judge FARIS concurs.

STATE v. WILCOX. (No. 18365.)

(Supreme Court of Missouri, Division No. 2.
Jan. 4, 1915.)

EMBEZZLEMENT —6— PROPERTY SUBJECT—DRAFTS.

Under Rev. St. 1909, § 4550, making money, goods, rights in action, or valuable security or effects subject to embezzlement, and section 4551, making a distinction between evidences of debts made negotiable by delivery only and those that are not so negotiable, a draft is not subject to embezzlement prior to delivery.

[Ed. Note.—For other cases, see Embezzlement, Dec. Dig. —6.]

Appeal from Circuit Court, Stoddard County; E. M. Dearing, Judge.

A. D. Wilcox was convicted of embezzlement, and he appeals. Reversed.

See, also, 179 S. W. 483.

This is another one of the series of prosecutions against the defendant growing out of the closing of the City Bank of Bloomfield. We adopt the statement of facts in case No. 18364, 179 S. W. 479, just decided as the statement herein, except as otherwise shown.

The amended information charged the defendant with embezzling on October 3, 1912, the property of the bank described as follows:

"One thousand dollars, the money, property, right in action, valuable securities and effects, a particular description of which is unknown to the prosecuting attorney," etc.

It was conceded by the defendant in his testimony that the Bloomfield Mercantile Company was indebted to J. V. Farwell & Co., of Chicago, for \$1,000, and that he sent to that company his check on the City Bank for that amount to pay the debt. That check came back to the Bank of Bloomfield for collection. It was presented by that bank along with other checks on the City Bank to the latter bank for payment. The balance due the Bank of Bloomfield on that day's clearing was \$1,195.78, in payment of which the City Bank gave to the other bank its draft drawn by it on the First National Bank of Cape Girardeau for the amount of the balance above stated; the draft being payable to the order of the Bank of Bloomfield. Whether the City Bank at that clearing held any checks against the other bank is not shown by the evidence; the witnesses stating that they did not remember. The draft was paid in regular course. The check was never charged to defendant on the books of his bank, and was in the bunch of checks brought by defendant from his house and given to Mr. Swanger, the bank commissioner. The draft was not offered in evidence.

J. W. Farris, Fort & Green, and Mozley & Woody, all of Bloomfield, for appellant. John T. Barker, Atty. Gen., and W. T. Ruth-erford, Asst. Atty. Gen., for the State.

ROY, C. (after stating the facts as above).
 I. The thing used in paying the Farwell check was the draft for \$1,195.78. That draft paid other checks in addition. Whether the City Bank held any checks at that time against the other bank we are not informed. We are therefore driven to consider this case on the theory that \$1,000 of the \$1,195.78 draft paid the Farwell check. That \$1,000, part of the draft, was the thing appropriated by defendant to his own use, at least so far as the jurisdiction of the circuit court of Stoddard county is concerned. If the draft was not such an instrument in contemplation of law as to be the subject of embezzlement by defendant, then no part of that draft was the subject of such embezzlement. At common law bonds, bills, and notes, being mere choses in action, were held not to be the subject of larceny.

15 Cyc. 489, speaking of embezzlement, says:

"The offense is of purely statutory origin, and accordingly the particular statutes of the various jurisdictions must be looked to in order to determine the constituent elements of the offense therein."

The courts of England hold that checks while in the possession of the drawer, before negotiation, are a "valuable security" within the English statute and the subject of larceny. *Reg. v. Heath*, 2 *Moody's Crown Cases*, 33.

In *Bork v. People*, 91 N. Y. 5, it was held that city bonds of the city of Buffalo, prior to their negotiation, and while in the hands of the defendant, as treasurer of that city, were properly described as bonds, and were "property," the subject of embezzlement.

In *State v. Raby*, 31 Wash. 111, 71 Pac. 771, it was held that undelivered county warrants in the hands of the county auditor were "property" in the meaning of the statute of that state.

In *State v. White*, 66 Wis. 343, 28 N. W. 802, it was held that unissued negotiable bonds of a city in the custody of the city comptroller are "property" under the statute and the subject of embezzlement by such officer.

In *Com. v. Parker*, 165 Mass. 526, 43 N. E. 499, it was held that the act of a railway conductor in converting to his own use tickets issued by his company and received by him in the usual course of his duties constituted embezzlement.

Sections 4550 and 4551, R. S. 1909, substantially in their present form originated in the revision of 1835 (sections 40 and 41, p. 179). Some portions of section 4550 are found in section 29, p. 288, of the revision of 1825. But it may be said that, as they now stand, they were both enacted in the revision of 1835. Following the precedents set in the English case and in the cases from the other states of the Union, it might be held that section 4550, standing alone, by the words "money, goods, rights in action,

or valuable security or effects," included an instrument such as the draft in controversy here. However, the two sections are to be construed together as parts of one and the same act. If section 4550 is given the broad construction so as to include commercial paper in the hands of the maker or drawer before negotiation, then section 4551 is useless. By that section a distinction was made between evidences of debt "negotiable by delivery only" and those which were not so negotiable. The expression of one class should in that connection be construed to exclude the other. We conclude that those sections cannot be construed to make evidences of debt not "negotiable by delivery only" the subject of embezzlement prior to their being delivered or issued as valid instruments. In reaching such a conclusion we are only following the reasoning of *Gantt, J.*, in *State v. Stebbins*, 132 Mo. 332, 33 S. W. 1147. In *State v. Mispagel*, 207 Mo. 557, 106 S. W. 513, it was held that such a draft did not constitute any part of the assets of the bank by which it was drawn.

We do not undertake to decide whether by reason of the facts in evidence the defendant can be convicted in the circuit court of some other county.

The judgment is reversed.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur; FARIS and BROWN, JJ., in result.

STATE v. WILCOX. (No. 18366.)

(Supreme Court of Missouri, Division No. 2.
 Jan. 4, 1915.)

Appeal from Circuit Court, Stoddard County;
 E. M. Dearing, Judge.

A. D. Wilcox was convicted of embezzlement, and he appeals. Reversed.

See, also, 179 S. W. 479, 482.

The facts in this case except as otherwise noted are the same as in the preceding cases against the same defendant. 179 S. W. 479, 482.

In this case the defendant paid his personal debt to the Holecamp Lumber Company, of Webster Groves, Mo., by his check drawn in favor of that company for \$457.15 on the City Bank, dated September 9, 1912. That check was sent in regular course to the Bank of Bloomfield, which received payment thereof from the City Bank, by a draft drawn in its favor by the City Bank on the First National Bank of Cape Girardeau. That draft was paid in the usual course.

J. W. Farris, Fort & Green, and Mozley & Woody, all of Bloomfield, for appellant. John T. Barker, Atty. Gen., and W. T. Rutherford, Asst. Atty. Gen., for the State.

ROY, C. So far as the jurisdiction of the Stoddard circuit court is concerned, it must be held that the draft was the thing which was appropriated by defendant to his own use. Under the ruling in the next preceding case, the draft

was not a subject of embezzlement under our statute.

The judgment is reversed.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur; FARIS, J., in result.

ARKANSAS VALLEY TRUST CO. v. CORBIN et al. (No. 11390.)

(Kansas City Court of Appeals. Missouri.
May 8, 1915.)

1. APPEAL AND ERROR \S 627, 773—NONCOMPLIANCE WITH RULES GOVERNING APPEAL—AFFIRMANCE OF JUDGMENT—DISMISSAL OF APPEAL.

Under Rev. St. 1909, \S 2047-2049, authorizing affirmance of the judgment for failure to file a transcript, and empowering the court to pass rules prescribing penalties enforcing the service and filing of abstracts, failure of appellant to comply with Courts of Civil Appeals rule 15 (169 S. W. xxi), requiring the service and filing of abstracts of the record and briefs, does not justify affirmance of the judgment, but the court may only dismiss the appeal authorized by rule 18 (169 S. W. xxii).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2744-2749, 3104, 3108-3110, 3126; Dec. Dig. \S 627, 773.]

2. APPEAL AND ERROR \S 1230 — APPEAL BOND—FAILURE TO PROSECUTE APPEAL.

Failure by an appellant to prosecute his appeal by willfully or negligently failing to take the necessary steps, or by affirmatively asking for dismissal of the appeal, is a breach of his bond, conditioned to prosecute his appeal with diligence to a decision in the appellate court, and on the court dismissing the appeal, an action lies on the bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4750; Dec. Dig. \S 1230.]

3. APPEAL AND ERROR \S 1180—FAILURE TO GIVE BOND—ENFORCEMENT OF RESTITUTION.

Where one appeals without giving a stay bond, and execution issues and payment of judgment is compelled, appellant, obtaining reversal of the judgment, may recover back the money he has been compelled to pay.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4626-4631, 4658, 4659; Dec. Dig. \S 1180.]

Appeal from Circuit Court, Jackson County; Kimbrough Stone, Judge.

Action by the Arkansas Valley Trust Company against W. D. Corbin and another. From a judgment for plaintiff, defendants appeal. Motion for affirmance of judgment denied.

Sebree, Conrad & Wendorff, of Kansas City, for appellants. John G. Paxton, of Kansas City, for respondent.

ELLISON, P. J. This is an appeal, prosecuted by defendant Corbin, from a judgment for \$2,656.25 and costs, rendered against him and his codefendant in the circuit court of Jackson county December 4, 1913. The appeal was allowed December 19, 1913, and the appeal bond, fixed at \$3,000 was filed and approved. The appeal was returnable to the March, 1914, term of this court (section 2047,

R. S. 1909), and on February 3, 1914, the appellant duly filed in the office of our clerk a short-form transcript, which conformed to the requirements of section 2048, R. S. 1909. The case reached this court too late to go on the docket of the March term (section 2079, R. S. 1909), and was placed on the docket for the October term and set for hearing December 10, 1914. Appellant failed entirely to comply with the provisions of rule 15, requiring the service and filing of abstracts of record and briefs, and respondent filed a motion for an affirmance of the judgment. The question raised by the motion is whether a failure to comply with rule 15 may be a sufficient ground for an affirmance of the judgment.

[1] The statute (section 2047, R. S. 1909) provides for filing transcripts of appeal in the appellate court, and also provides that the penalty for failure to do so shall be an affirmance of the judgment, if the respondent will present a transcript and ask for such affirmance.

The short form of appeal, together with the manner of presenting the record of the trial court, is a special and comparatively new method of appellate procedure. Under the old method, it was necessary to bring up the whole record, and such thing as an abridged record was not known to the statute. Influenced by the desire to facilitate appeals, to reduce the labor, and to cut the expense, the Legislature enacted the statute now incorporated in section 2048, R. S. 1909, wherein a short form of record, consisting of a memoranda of the judgment appealed from, certified by the clerk, may be filed in the appellate court. Then, in order that such appellate court might be advised of the case and the grounds of appeal, it was provided, in the same section, that a printed abstract of the record in the trial court should be prepared by the appellant—

"within the time and manner as is now or may hereafter be prescribed by the rules of such appellate court."

It is then provided, in section 2049 of the statute, that the appellate court "shall from time to time make and promulgate suitable rules and regulations for carrying into effect the provisions" of this statute. By authority of the first of said section 2048, we have prescribed in rule 15 (169 S. W. xxi) the time when the abstract must be served on the opposite party and when it shall be filed in court. And by authority of the last of these sections, we have, in rule 18 (169 S. W. xxii), fixed upon and named the penalty for a failure to serve and file such abstracts in these words:

"The court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent, or defendant in error, continue the cause, at the costs of the party in default."

It seems to me that now, without warning, to bring into existence and to enforce a dif-

ferent and far more drastic penalty would be in its nature *ex post facto*.

As first above stated, the statute (section 2047) authorizes an affirmance of the judgment for failure to file the transcript, and sections 2048, 2049 authorize the court to pass rules prescribing penalties enforcing the service and filing of abstracts, and the court has prescribed that the penalty shall be a dismissal of the appeal. It seems to me that that is all the penalty we can inflict.

[2] The suggestion has been made that in order that the respondent, plaintiff, may have a right of action on the appeal bond, there must be an affirmance of the judgment, for, respondent says, the dismissal of the appeal will not give that right; and he cites a decision of the Springfield Court of Appeals in support of that view (*Hill v. Keller*, 157 Mo. App. 710, 139 S. W. 523). That interpretation of the statute does not affect the question now before us.

The statute (section 2042, R. S. 1909) in relation to appeal bonds prescribes that the bond shall be in double the amount of the judgment, and shall be conditioned—

"that the appellant will prosecute his appeal with due diligence to a decision in the appellate court and shall perform such judgment as shall be given by such court, or such as the appellate court may direct the circuit court to give, and if the judgment of such court or any part thereof, be affirmed, that he will comply with and perform the same, so far as it may be affirmed, and will pay all damages and costs which may be awarded against the appellant by any appellate court."

Judge Nixon, who wrote the opinion in the case referred to, takes the view that a dismissal of an appeal is "a decision," and that therefore the condition of the bond has been fulfilled and no liability is incurred. If it be conceded that a judgment of dismissal is a decision of the case, within the meaning of the bond, yet it seems to me that the learned judge fails to give effect to the words immediately preceding the word "decision." The whole phrase should be considered, viz., "that the appellant will prosecute his appeal with due diligence to a decision." Now if an appellant fails altogether to prosecute his appeal, by either willfully or negligently defaulting in the steps necessary to take care of it, to the end that it may be heard, or by affirmatively asking that it be dismissed, he certainly is violating the condition to prosecute with diligence. He is taking exactly the opposite to the course he obligated himself to take. He who dallies or lags with an appeal, or who neglects or willfully abandons it, is not prosecuting it. To prosecute an appeal means to keep step, as well as reasonably may be, the circumstances considered, with the legal requirements to bring it to a final disposition. It seems to me absurd to allow that one who neglects or abandons his appeal may say

that he diligently prosecuted it. That construction would make the statute furnish safe means for the loser to trifle with the process of the court and to practice gross imposition on the prevailing party. For he may appeal and stay execution, then delay until thrown out of court, or maybe, go out on his own motion, and then be heard to say to a helpless respondent that he had complied with his bond.

It is held by the weight of authority that when the appeal is complete and the appellate court has jurisdiction, the dismissal of the appeal, an action which leaves standing in full force the judgment appealed from, in every respect operates as, and practically is, an affirmance of the judgment, and would give an action on the bond under the foregoing condition for affirmance. *Stearns, Suretyship*, 364; *Baylies on Sureties and Guarantors*, 174; *Chase v. Beraud*, 29 Cal. 138; *Coon v. McCormick*, 69 Iowa, 539, 29 N. W. 455; *Dolan v. Bartruff*, 145 N. W. 273 (Supreme Court of Iowa, 1914); *Blaer v. Reading*, 103 Ill. 375; *McConnel v. Swalles*, 2 Scam. (Ill.) 572; *Sutherland v. Phelps*, 22 Ill. 91; *Harrison v. Bank*, 3 J. J. Marsh. (Ky.) 375; *Gregory v. O'Brien*, 13 N. J. Law, 11, 13; *Teel v. Tice*, 14 N. J. Law, 444. But whether authorizing an action on that part of the condition is of no consequence in this case, since the literal terms of the bond as to a prosecution with diligence, have been violated.

[3] As influencing the view that a dismissal of an appeal for failure to prosecute in the manner required by law will not give an action on the appeal bond, it is said that the statute permits one to sue out a writ of error at any time within a year of the rendition of the judgment, and that the writ may be had after the dismissal of an appeal. And it is said that to allow the respondent to recover on his appeal bond would produce, in many instances, the anomaly of one having paid a judgment which is afterwards reversed on writ of error. But that would be no more than frequently happens; thus, if one appeals or sues out a writ of error and does not give bond, there is no supersedeas, and execution may immediately issue and compel him to pay a judgment which may afterwards be reversed when the case is heard in the appellate court. But in each of these instances the successful party in the appellate court may recover back the money he has been compelled to pay. So though an appellant who dismisses his appeal (or his sureties) is compelled to pay the judgment, and though such judgment is afterwards reversed on a writ of error, he is in no worse situation than he who appeals, or who sues out a writ of error, without bond.

The motion to affirm should be denied.

NALL v. KELLEY et al. (No. 155.)

(Supreme Court of Arkansas. Oct. 11, 1915.)

1. HIGHWAYS —90— ROAD IMPROVEMENT DISTRICTS—CREATION.

A special statute, creating a road improvement district and authorizing the board of commissioners to improve a road running across the county wherein it was located and passing through an incorporated town therein, is not void because it includes property in such town without obtaining the consent of the majority in value of the property owners, since the constitutional provision relating to improvement districts entirely inside cities and towns has no application to districts covering territory not wholly within the limits of a municipality.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. —90.]

2. HIGHWAYS —90—ROAD DISTRICTS—INVASION OF MUNICIPAL AUTHORITY.

A special statute, creating a road improvement district and authorizing the board of commissioners to improve a road running across a county and pass through an incorporated town therein, was not invalid as invading the jurisdiction of the town by authorizing the improvement of a highway constituting one of the streets therein, since the purpose of the statute was merely to provide for improving the street and not to take away from the municipality the control thereof.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. —90.]

3. HIGHWAYS —90— HIGHWAY DISTRICTS— DESCRIPTION OF RIGHT.

A special statute, creating a road improvement district and describing the road by name, the route along which it was to run, and providing that improvements were to be made on the road "as now laid out, or substantially on such line, and any of the improvements and any change in the line of said road to be approved by the county board," is not invalid as not sufficiently describing the route.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. —90.]

4. HIGHWAYS —95—HIGHWAY DISTRICTS— DELEGATION OF LEGISLATIVE AUTHORITY.

The Legislature has power to confer upon a board of improvement of a road improvement district plenary power in the matter of selecting the materials as well as forming the plans for the improvement.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 309-312; Dec. Dig. —95.]

5. CONSTITUTIONAL LAW —63— HIGHWAY DISTRICTS— DELEGATION OF LEGISLATIVE AUTHORITY.

A special statute, creating a road improvement district and providing that after the board of improvements shall have formed plans for the improvement and ascertained the costs thereof, "but if they deem it expedient to make said improvements they shall appoint three electors of the county who shall constitute a board for the assessment of the benefits to be received," is not invalid as constituting a delegation of legislative authority to the board of improvement; the Legislature having power to make a law to delegate the power to determine some facts upon which the law makes or intends to make its own action depend.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108-114; Dec. Dig. —63.]

6. CONSTITUTIONAL LAW —60— CONSTRUCTION—DELEGATION OF AUTHORITY.

The test as to whether a statute is invalid as delegating legislative authority is whether

the statute delegates power to make the law, thereby necessarily involving the discretion as to what it shall be, or whether it confers authority or discretion as to its execution to be exercised under and in pursuance of the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 90, 98; Dec. Dig. —60.]

7. HIGHWAYS —90—HIGHWAY DISTRICTS— ORGANIZATION—QUALIFICATION OF COMMISSIONERS.

A proceeding under a special statute creating a road improvement district and providing for the appointment of commissioners thereunder was not invalid because one of the commissioners named was not the owner of property within the district, where he owned property in an incorporated town which was included within the confines thereof.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. —90.]

8. HIGHWAYS —90—HIGHWAY DISTRICTS— ORGANIZATION— OATH OF COMMISSIONERS— "OFFICER."

A special statute creating a highway improvement district is not void because it fails to provide that the commissioners must take an oath of office, the members of the board of commissioners not being "officers" within Const. art. 19, § 20, requiring all officers to take and subscribe an oath before entering upon the duties of their office.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. —90.]

For other definitions, see Words and Phrases, First and Second Series, Officer.]

Appeal from Grant Chancery Court; Jethor P. Henderson, Chancellor.

Suit by H. M. Nall against J. W. Kelley and others to enjoin the construction of a highway. From a decree dismissing the complaint, plaintiff appeals. Affirmed.

Thos. E. Toler, of Sheridan, for appellant. Coleman & Gantt, of Pine Bluff, and R. R. Posey, of Sheridan, for appellees.

McCULLOCH, C. J. The Legislature at the 1915 session (Laws 1915, p. 136) enacted a special statute creating a road improvement district in Grant county, embracing a considerable portion of the lands of that county, and authorizing the board of commissioners to improve a certain public road known as the Pine Bluff, Sheridan, and Hot Springs Road. That road runs clear across the county and passes through the incorporated town of Sheridan. The statute creates a complete scheme for the organization of the district, the formation of plans for the improvement, the assessment of benefits, and for the construction of the improvement and enforcement of payment of the improvement tax. It appears from the allegations of the complaint in this action that the board of improvement has effected an organization in accordance with the terms of the statute and are attempting to carry out the provisions of the statute. This is an action instituted by a property owner in the district to enjoin the board from proceeding with the construction of the improvement, the levying of assessments, and the issuance of bonds. The cause

was heard upon an agreed statement of facts and the depositions of witnesses, and the chancellor, on a hearing of the cause, dismissed the complaint for want of equity.

The complaint in the case seems to have been framed so as to constitute an assault upon the validity of the whole statute, section by section, and all of the proceedings of the board; but we must treat as abandoned all of the assaults except the ones that are made in the briefs of counsel filed in this court.

[1] In the first place, it is contended that the act is void because it includes property in an incorporated town without obtaining the consent of the majority in value of the property owners. This contention may be disposed of merely by citing several of our decisions where we held that the provision of the Constitution with reference to improvement districts entirely inside of cities and towns has no application to districts covering territory not wholly within the limits of a municipality. *Butler v. Board of Directors of Fourche Drainage District*, 99 Ark. 100, 137 S. W. 251; *Alexander v. Board of Directors of Crawford County Levee District*, 97 Ark. 322, 134 S. W. 618; *Cox v. Road Improvement District*, 176 S. W. 876.

[2] It is also contended, in this connection, that the statute invades the jurisdiction of the municipality by authorizing the improvement of a highway which constitutes one of the streets therein. In the case of *Cox v. Road Improvement District*, supra, we expressly pretermitted any discussion of that question for the reason that none of the improvements involved in that case were to be made within the corporate limits of the town of Keo, though the property in the town was to be assessed. It is very plain, however, that the inclusion of a street is not an invasion of the authority and jurisdiction of a municipality for the reason that the purpose of this statute is merely to provide for improving the street and not to take away from the municipality the control thereof. This question is ruled by the case of *Pulaski Gas Light Co. v. Rammel*, 97 Ark. 318, 133 S. W. 1117, where we decided that an urban improvement district formed under the general statutes of the state acquired no control over streets except for the purpose of making the improvement. The principle is the same whether the improvement district has been created in a city or town under the general statutes or whether by a special statute creating a road improvement district embracing property both in and outside of a city or town. It is clearly within the power of the Legislature to authorize the property owners to improve a street or highway, either inside or outside of a municipality, without invading the jurisdiction of either the municipality or the county court. We have held that the Legislature may create improvement districts authorizing the improvement of public highways, and that such proceeding

does not invade the jurisdiction of the county court. *Road Improvement District v. Glover*, 89 Ark. 513, 117 S. W. 544. Our conclusion therefore is that there is no basis for the contention that the act is void on either of the grounds just stated.

[3, 4] Section 2 of the act describes the road by name as "the Pine Bluff, Sheridan, and Hot Springs Road," and also specifically describes the route along which the road runs. Then follows the provision that the improvements "are to be made on the road as now laid out by the county court in Grant county, or substantially on this line, the nature of the improvements and any change in the line of said road to be approved by the county court of Grant county, Ark." That section also provides that the improvement "is to be constructed of macadam or of such other material as the commissioners may deem best." There is no basis for the contention that the description of the route is too uncertain, for the act does not authorize any substantial deviation from the particular line prescribed. Whether a substantial deviation under those provisions would invalidate the proceedings, we are not called on to decide, for it is plain that only slight deviations are authorized, and those are to be approved by the county court. Nor is it necessary for us to determine how far the board of commissioners may deviate from the specification as to the material to be used and how far they could go in adopting other material not of the same general character as that which is used in constructing a macadam road. There appears to be no valid reason why the Legislature cannot confer upon a board of improvement plenary power in the matter of selecting the materials as well as forming the plans for the improvement. What we said in the recent case of *Cox v. Road Improvement District*, supra, about the necessity for certainty in the specification of the character of the improvement, does not apply, for the reason that there is no requirement in this statute for a petition of landowners, and therefore a legislative specification of the character of improvement is not necessary. Nor does the decision in *Swepton v. Avery*, 177 S. W. 424, have any bearing here, for the reason that the statute in that case provided for an arbitrary assessment of benefits in proportion to the value of the land, whereas in the present case the governing statute authorizes an assessment of benefits based upon the character of the improvement after it has been determined upon.

[6] Section 8 of this statute provides that, after the board shall have formed plans for the improvement and ascertained the cost thereof, "if they deem it expedient to make said improvement, they shall appoint three electors of the county, who shall constitute a board for the assessments of the benefits to be received," etc. This provision is not found in any statute which has come before this

court for review, and presents a new question. It is contended that the provision constitutes a delegation of legislative authority to the board of improvement. After careful consideration of the question, we are, however, of the opinion that the provision does not constitute a delegation of legislative authority, but that it comes within the rule announced by this court that, while the Legislature cannot delegate power to make laws, "it can make a law to delegate the power to determine some facts or state of things upon which the law makes or intends to make its own action depend." *Boyd v. Bryant*, 35 Ark. 69, 37 Am. Rep. 6. This statute, it will be observed, is completely put in force by the Legislature, and nothing is left to the board so far as completing the enactment. It only delegates to the board the authority of determining the extent to which the proceedings may go towards the construction of the improvement. The improvement district itself is created by the statute, and the board of improvement is named for the purpose of carrying out the provisions of the statute. The board is clothed with complete authority, not only to perform the preliminary acts, but to construct the improvement and assess benefits and collect taxes, etc. There is a mandatory direction to the board to organize itself by the election of officers, and to employ engineers and form plans for the improvement. At this point the board is authorized, before incurring further expense, to determine whether or not it will be expedient to make the improvements; and this is not a delegation of legislative authority, but power to ascertain the facts whether or not the plan for the improvement is feasible and shall be consummated. Of course, there is a further limitation upon the power of the board to proceed, in that the benefits must be ascertained to be equal to the cost of the improvement. But it was the purpose of the lawmakers to provide for an ascertainment by the board in advance of the assessment of benefits whether or not the plan to construct the improvement is feasible, or, to use the exact language of the statute, to determine whether or not it is "expedient to make said improvement."

[6] Counsel for defendants have cited many cases on their brief which sustain the view that this is not a delegation of legislative authority. The true test, approved by many courts in accord with the rule announced by this court in *Boyd v. Bryant*, supra, is stated by the Supreme Court of Ohio in *Railroad Company v. Commissioners*, 1 Ohio St. 77, as follows:

"The true distinction * * * is between the delegation of power to make the law, which necessarily involves the discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

The drainage laws of this state constitute the county court as the tribunal for determining the expediency of such an improvement in a given locality, and we can see no reason, from the standpoint of constitutionality, why the Legislature cannot create, even in a special statute, a tribunal, consisting of the members of the board of improvement, to determine the feasibility of the improvement to be undertaken before unnecessary expense is incurred. It is not essential that the lawmakers themselves shall first determine the feasibility of the improvement. The passage of the statute presupposes a legislative determination as to the necessity for the improvement, or at least as to its desirability; but there is no reason why the lawmakers should not delegate to a special tribunal the further authority of determining its expediency before incurring considerable expense towards its construction. The statute therefore is not open to the objection that it constitutes a delegation of legislative authority.

[7] There is also a contention that the proceeding is void because one of the commissioners named is not the owner of property except inside the town of Sheridan. There is no force in that objection, even if the act required the commissioners to be landowners; for, as we have already said, it was within the power of the Legislature to include the town within the limits of the district, and if a commissioner owned land inside of the district he was qualified. The statute, it is true, provides that commissioners who are to succeed those named in the statute at the expiration of their terms shall be property owners within the district; but the statute names certain individuals who are to constitute the first board of improvement, and there is no specification as to their qualifications. Therefore the question cannot arise whether or not they are property owners.

[8] Nor is there anything in the contention that the act is void because it fails to provide for the commissioners to take an oath of office. The statute is silent on that subject, though it contains an express provision that the commissioners "shall organize by electing one of its members as president and by electing a secretary and treasurer." The members of the board are not officers within the meaning of the provision of the Constitution (article 19, § 20) requiring all officers, both civil and military, to take and subscribe to a certain oath before entering upon the discharge of the duties of their office; but, if it were to be held that that provision did apply, there is nothing in this statute in conflict with it, even though it contains no requirement for taking the oath. If the commissioners were public officers, it would be their duty to take the oath in conformity with the Constitution, without

any express provision of the statute to that effect.

Finally it is urged, with considerable earnestness, that the evidence shows that the assessment of benefits is invalid on account of the lack of uniformity, and for other reasons. The case was, as before stated, tried upon an agreed statement of facts and the depositions of witnesses. The depositions of two of the assessors were taken, and it appears that they exercised their judgment fairly and that the state of the proof is such that we cannot say that the assessments are unreasonable or that they lack uniformity. It is contended further that, according to the statement made by one of the assessors, they made their assessment without any reference to the cost of the improvement and without having the plans before them. It appears, however, from a preponderance of the testimony in the case, that the plans for the improvement had been formed before the assessment was made, and that those plans were laid before and considered by the board in making the assessment. In other words, the preponderance of the testimony is against the contention of appellants on the issue made concerning the validity of the assessment.

This disposes of all the attacks made here on the validity of the statute, and of the proceedings, and it follows from what we have said that the decree of the chancellor dismissing the complaint for want of equity should be affirmed. It is so ordered.

MCGILL et al. v. ADAMS. (No. 153.)

(Supreme Court of Arkansas. Oct. 11, 1915.)

1. TAXATION \Leftrightarrow 805—TAX SALES—CANCELLATION OF DEED.

Where the purchaser of wild and unimproved lands sold to the state for unpaid taxes, paid taxes thereon for 14 years after his purchase, the former owner's action to cancel the deed is barred by the statute of limitations requiring actions in such cases to be brought within 7 years.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. \Leftrightarrow 805.]

2. TAXATION \Leftrightarrow 805—TAX SALES—CANCELLATION OF DEED—LACHES.

Where plaintiffs in an action to quiet their title in property sold to the state for unpaid taxes, and by the state to defendant, are under the disability of coverture, and therefore not barred by the statute of limitations, nevertheless failure to enforce their rights or to pay taxes for 45 years, 14 of which were after defendant's acquisition of title from the state, during which time the land increased markedly in value, bars their action on the ground of laches.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. \Leftrightarrow 805.]

Appeal from Clark Chancery Court; Jas. D. Shaver, Chancellor.

Action by Josephine McGill and another against W. P. Adams. From judgment for defendant, plaintiffs appeal. Affirmed.

A. N. Meek, of Camden, and E. L. Carter, of Little Rock, for appellants. Hardage & Wilson, of Arkadelphia, for appellee.

MCCULLOCH, C. J. Plaintiffs inherited the lands in controversy, which are still wild and unimproved, and which were forfeited to the state for taxes in the year 1869. Defendant's grantor purchased the lands from the state and received a deed therefor dated January 25, 1900, and defendant and his grantor have paid taxes continuously on the lands up to the present time. This is an action instituted by the plaintiffs in the chancery court to cancel the tax sale and quiet their title, on the ground that said sale was void, for the reason that the statutory requirements concerning tax sales were not complied with. It is conceded that the tax sale was void, but the action is defended on the ground that one of the plaintiffs is barred by the statute of limitations, and that the other two, who are now and have been married women since defendant's grantor purchased the land from the state, are barred by laches. The chancellor sustained this defense, and plaintiffs have appealed.

[1, 2] The evidence shows that the defendant and his grantor have paid taxes continuously since the latter purchased the land from the state in the year 1900, and that since that time the lands have become greatly enhanced in value. There is an agreed statement in the record to the effect that at the time the defendant's grantor purchased the lands they were worth from \$1.25 to \$1.50 per acre, and that at the commencement of the suit the lands were worth from \$10 to \$15 per acre. The one plaintiff who is not laboring under any disability is clearly barred by the statute of limitation, the lands being wild and unimproved, and defendant and his grantor having paid taxes thereon under color of title for more than 7 years prior to the commencement of the action. The other two plaintiffs are under the disability of coverture, and are not barred by the statute of limitation, but they are barred by their own laches. The facts of the case bring it within the rule announced by this court in a long line of cases, beginning with Clay v. Bilby, 72 Ark. 101, 78 S. W. 749, 1 Ann. Cas. 917, and coming down to the comparatively recent case of Burbridge v. Wilson, 99 Ark. 455, 138 S. W. 880. The same rule is announced in still later cases, where it was found that the facts did not bring them within the application of the rule. Herget v. McLeod, 102 Ark. 59, 143 S. W. 103; Bradley Lumber Co. v. Langford, 109 Ark. 594, 160 S. W. 866.

We have uniformly held that the failure to pay taxes on unimproved lands for a long period of time, together with great enhancement in values, constitute an abandonment, and that an action seeking equitable relief against one who has paid taxes under those

circumstances for more than 7 years is barred by laches. In many other cases we have decided that there is no bar against one who has not paid taxes for as much as 7 years, unless there are other intervening equities sufficient in themselves to create an estoppel. *Earle Improvement Co. v. Chatfield*, 81 Ark. 296, 99 S. W. 84; *Chancellor v. Banks*, 92 Ark. 497, 123 S. W. 650; *Fordyce v. Vickers*, 99 Ark. 500, 138 S. W. 1010; *Tatum v. Arkansas Lumber Co.*, 103 Ark. 251, 146 S. W. 135; *Herget v. McLeod*, supra; *Bradley Lumber Co. v. Langford*, supra.

In the present case there was a failure on the part of the plaintiffs and their ancestor to pay taxes for about 45 years, the last 14 of which were after the defendant and his grantor purchased from the state and began to pay taxes thereon. The lands enhanced in value very materially during the time that the defendant was bearing the burden of taxation. So this case falls within the first-mentioned line of cases, and does not come within the exception recognized in the other cases just cited. This is not an action merely to enforce a legal right, but plaintiffs come into court asking purely equitable relief. Therefore they are barred by their own laches.

Decree affirmed.

MAY & ELLIS CO. v. FARMERS' UNION MERCANTILE CO. (No. 165.)

(Supreme Court of Arkansas. Oct. 18, 1915.)

1. ACCOUNT STATED — PRESUMPTIONS.

Where no objection to an itemized account is made within a reasonable time, it is to be regarded as admitted by the person charged as prima facie correct.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 30-39; Dec. Dig. ¶6.]

2. ACCOUNT STATED — ACTIONS — JURY QUESTION.

In an action on an account, where a notice of alleged shortages was not given for over a month after discovery, although the goods were not unpacked for some time after receipt, held, that the question whether the account, which had been duly presented, was an account stated, should have been submitted to the jury.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 9, 40, 94, 95, 97-99; Dec. Dig. ¶20.]

Appeal from Circuit Court, Lafayette County; Geo. R. Haynie, Judge.

Action by the May & Ellis Company against the Farmers' Union Mercantile Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

D. L. King, of Lewisville, for appellant.

MCCULLOCH, C. J. This is an action instituted in the circuit court of Lafayette county by appellant, a Louisiana corporation, against appellee, a domestic corporation engaged in mercantile business at Stamps, Ark., to recover a balance of \$130.34 alleged

to be due on an open account for goods and merchandise sold and shipped from appellant's place of business in the city of New Orleans. Appellee, in its answer, admitted that it purchased a bill of goods from appellant and received a shipment and the invoice, but that on opening the boxes of goods there was found to be shortages of items aggregating the sum of \$130.34, according to the invoice price, and that appellee paid the balance of the bill, but refused to pay for the items found to be short. There was a trial of the case before a jury, but the court gave a peremptory instruction in appellee's favor.

[1, 2] An itemized, verified account was exhibited with the complaint, and shows a balance of the amount claimed by appellant. The manager of appellee corporation testified, in substance, that he purchased the bill of goods from appellant, and that the same was shipped out from New Orleans on December 30, 1913, and received by appellee at its place of business in Stamps on January 6th; the invoice being mailed out at the same time and received by appellee in due course of mail. He testified that on account of certain changes in the business of appellee the goods were not opened until about a month after their receipt, and that then the shortages were discovered, and later reported to appellant, when the remainder of the bill was paid; in other words, his testimony shows that the goods were received on January 6, 1914, but not opened until about a month from that date, and that on March 10, 1914, the alleged shortages were first reported to appellant. The letter from appellee to appellant was introduced in evidence giving notice of the alleged shortages. The letter is dated March 10, 1914, and states that the boxes of goods were received in good order, but when opened up, about a month after receipt, items aggregating in price the sum of \$130.34 were found to be missing.

In this state of the proof the court should not have given a peremptory instruction, but should have submitted the issues to the jury upon appropriate instructions. The testimony in the case would have warranted a finding in appellant's favor that the failure of appellee to make objection to the account within a reasonable time converted the transaction into an account stated. The facts of the case bring it very clearly within the decision of this court in *Hamilton-Brown Shoe Co. v. Choctaw Mercantile Co.*, 80 Ark. 438, 97 S. W. 284. The facts in that case were very similar to the facts of the present case, there being a claim of shortage in a shipment of goods, and we reversed the judgment of the trial court on account of the refusal to give an instruction to the effect that it was the duty of the defendant, "if it claimed a shortage, to report the same with-

in a reasonable time," and that, if there was a failure to do so, the jury might consider that fact, together with all other facts in the case, as to whether or not the defendant received all the goods with which it was charged. In disposing of the case here, we said:

"It is well settled that, when an itemized account is rendered, objection must be made within a reasonable time, or it becomes an account stated and subject to attack for fraud or mistake only. * * * The retention of the account without objection is evidence of more or less weight according to the length of time, the business, character, education of the parties, and all the circumstances of the case."

In *Ruling Case Law*, vol. 1, p. 213, the law on this subject is stated as follows:

"But an account which has been rendered and to which no objection has been made within a reasonable time is to be regarded as admitted by the person charged as *prima facie* correct. This wholesome presumption rests on the principle which is the foundation of evidence of this kind; namely, that the silence of the receiver of the account warrants the inference of an admission of its correctness. The circumstances of each case govern the strength of the inference."

The circumstances in this case, as related by the manager of appellee corporation, were sufficient to warrant a submission to the jury of the question whether or not appellee had by silence for an unreasonable length of time admitted the receipt of the goods.

For the error in giving a peremptory instruction, the judgment is reversed, and the cause remanded for a new trial.

McDANIEL, Treasurer, v. BYRKETT. (No. 161.)

(Supreme Court of Arkansas. Oct. 11, 1915.)

1. TAXATION \S 860 — INHERITANCE TAX — SPECIAL TAX—CONSTRUCTION.

The Inheritance Tax Act (Laws 1909, p. 904) is not a tax on property, but is on the privilege of succession, and its character as a special tax requires that the law be construed strictly against the government.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 1675; Dec. Dig. \S 860.]

2. TAXATION \S 866 — CHARACTER — WHAT LAW GOVERNS.

The widow of one deceased does not take dower as the heir of her husband, or by virtue of the intestate laws, but her estate is inimicable to the estates of heirs, and hence is not taxable under Inheritance Tax Law.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. \S 866.]

3. TAXATION \S 889 — INHERITANCE TAX — DOWER.

Although the Inheritance Tax Act provides for the payment thereunder of certain taxes by the widow of the deceased, that provision applies only to such property as she acquires in such manner as to make it taxable, and not to her dower.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 1710; Dec. Dig. \S 889.]

Appeal from Circuit Court, Lawrence County; Dene H. Coleman, Judge.

Action by R. G. McDaniel, treasurer,

against Fairbelle Byrnett. From order dismissing petition, plaintiff appeals. Affirmed.

Wm. L. Moose, Atty. Gen., Jno. P. Streep, Asst. Atty. Gen., and H. L. Ponder, of Walnut Ridge, for appellant. W. P. Smith, G. M. Gibson, and Lester L. Gibson, all of Walnut Ridge, for appellee.

SMITH, J. This was a proceeding begun in the probate court of Lawrence county to collect the inheritance tax alleged to be due upon the dower interest of a widow in the estate of her deceased husband. A demurrer was sustained to a petition praying that this dower be appraised and taxed both in the probate court and in the circuit court, and this appeal has been duly prosecuted from the order of the court below dismissing the petition.

[1] The question presented for our decision is whether dower is taxable under the Inheritance Tax Act approved May 31, 1909, the same being Act No. 303 of the Acts of 1909.

Authority for the collection of this tax is said to be found in section 1 of the above-mentioned act, which reads as follows:

"All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, or whether tangible or intangible, which shall pass by will or by the intestate laws of this state, or by deed, grant, sale or gift made or intended to take effect in possession after the death of the grantor to any person or corporation in trust or otherwise, shall be liable to tax for the use of the state at the rate hereinafter specified."

It is thoroughly well settled by the decisions of this court, and all other courts which have construed similar statutes, that this legislation is not a tax on the property of the estate of the deceased person, but is a tax laid upon the privilege or right of succession to that property. *State v. Handlin*, 100 Ark. 179, 139 S. W. 1112, and cases cited. And the courts are likewise agreed that, as this is a special tax, the laws imposing it are to be construed strictly against the government and favorably to the taxpayer. *Crenshaw v. Moore*, 124 Tenn. 528, 137 S. W. 924, 34 L. R. A. (N. S.) 1161, Ann. Cas. 1913A, 165; *English v. Crenshaw*, 120 Tenn. 531, 110 S. W. 210, 17 L. R. A. (N. S.) 753, 127 Am. St. Rep. 1025.

[2, 3] The Supreme Court of Illinois, in the case of *Billings v. People*, 189 Ill. 472, 59 N. E. 798, 59 L. R. A. 807, hold that the wife's dower interest is taxable under the Inheritance Tax Law of that state, and this decision has been followed in subsequent decisions in that state. But the opinion in the *Billings* Case, *supra*, set out the statute of that state upon the subject of dower, from which it appears that the estate of curtesy has been abolished in that state and that dower has been given alike to the husband and the wife and each being given a certain fixed interest in the lands of the other upon

the death of either spouse. This estate is called dower, but it is not the dower of the common law, as the term "dower" at common law related exclusively to the interest the widow had in the real estate of inheritance, for it was out of that she was entitled to be endowed of the specific thing. *Hill v. Mitchell*, 5 Ark. 808; *Encyclopedic Digest Ark. Reports*, vol. 3, p. 620. In its opinion in the *Billings* case, *supra*, the Supreme Court of Illinois said:

"It is contended, however, that whatever the power of the Legislature may be to control dower or to impose burdens upon it, the act imposing a tax upon inheritances, when strictly construed, as it should be, does not include dower, because, it is said dower does not 'pass by the intestate laws of this state,' and the act does not, by any necessary terms, include dower. There are no laws of this state which are specifically designated as 'intestate laws,' and we are called upon to determine what laws or system of laws were referred to under that appellation by the act in question. The same term is employed in similar statutes in other states, and we have no doubt the laws referred to are those laws of the state which govern the devolution of estates of persons dying intestate, and include all applicable rules of the common law in force in this state. The statutes from which we have above quoted are intestate laws, and they govern, regulate, and control the interest which the widow, *Augusta S. Billings*, took in her husband's property at his death. As a general rule, the property of persons dying passes in two ways; that is, by will, or by descent in the modes provided by law. And when it does not pass by will it generally passes by law; that is, by the law governing the disposition of property of persons dying intestate."

It must be conceded that this language is against the views which we herein express, but it will be observed that the dower statute therein referred to is treated as an intestate law, and this is not the view taken generally by the courts in construing dower statutes which are declaratory of the common law or amendatory of it.

The Supreme Court of California, in the case of *In re Estate of Moffitt*, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207, held that the wife upon the death of the husband takes his half of the community property as heir within the meaning of a statute taxing all property which shall pass by the intestate laws from one who shall die seised or possessed of the same. This case is sharply criticized in the note to the case of *English v. Crenshaw*, 127 Am. St. Rep. 1063, and also by *Ross* in his work on *Inheritance Taxation* at page 84.

In the later case of *Kohny v. Dunbar*, 21 Idaho, 259, 121 Pac. 544, 39 L. R. A. (N. S.) 1107, Ann. Cas. 1913D, 492, the Supreme Court of Idaho expressly refused to follow the decision of the California court; the Supreme Court of Louisiana, in the earlier case of *In re Marsal Succession*, 118 La. 212, 42 South. 778, having already taken a contrary view.

Except in the states of Illinois and California, the courts which have construed the inheritance tax laws of the respective states

have held that the dower interest of the widow does not pass under the intestate laws. The language of the various statutes is almost identical with the statute of this state in so far as they relate to the question under consideration.

In the later case of *In re Estate of Kennedy*, 108 Pac. 280 (157 Cal. 517, 29 L. R. A. [N. S.] 428), the Supreme Court of California held (to quote the syllabus of that case) that:

"The statutory homestead and allowance set apart by the court to the family of a decedent pending administration of his estate are not within the provisions of a statute providing for a succession tax on property which shall pass by will or by the intestate laws of the state, and it is immaterial that had the property not been so set apart it would have passed to the widow under the will."

A leading and well-considered case on this subject is that of *Crenshaw v. Moore*, *supra*, in which the Supreme Court of Tennessee construed a statute of that state identical with our own in the employment of the phrase "intestate laws of this state." It was there said:

"Nor do we think that the widow's dower is subject to this tax. By the common law, if a husband acquire an estate which is subject to descend to his heirs, the wife, at the same time the husband acquires his title, has vested in her the right of dower; and, although the husband aliened the estate, the wife's dower would attach. By the acts of 1784 and 1823, carried into Shannon's Code at section 4139, the widow is dowerable in one-third part of all the lands of which her husband died seised and possessed, or of which he was equitable owner. In all other respects, the widow's right of dower in this state is the same as it was at common law. It has the same qualities as the common-law right of dower, but its quantity was cut down by the statutes referred to. This right originates with the marriage. It is an incumbrance upon the title of the heir at law, and is superior to the claims of the husband's creditors. Its origin is so ancient that neither Coke nor Blackstone can trace it, and it is as 'widespread as the Christian religion, and enters into the contract of marriage among all Christians.' * * * So, it is seen that, whether it be considered that the widow holds her dower in the nature of a purchaser from her husband by virtue of the marriage contract, or whether it be merely a provision of the law made for her benefit, it cannot be considered that her right is in succession to that of her husband upon his death, or that the husband bestows it upon her in contemplation of death. While it is true that her right to dower is not consummated until the death of the husband, and that it is carved out of only such realty as he owned at his death, it does not follow from this premise that the widow succeeds to his title by the intestate laws. She derives it by virtue of the marriage, and in her right as wife to be consummated in severalty to her upon the death of her husband. *Boyer v. Boyer*, 1 Cold. 14."

Other cases on this subject are those of *In re Riemann*, 42 Misc. Rep. 648, 87 N. Y. Supp. 731; *In re Weiler*, 122 N. Y. Supp. 608; *In re Page*, 39 Misc. Rep. 220, 79 N. Y. Supp. 382.

In the case of *In re Page's Estate*, *supra*, the court said:

"The term 'intestate laws' is intended to cover the statute of descents, which relates to the descent of real estate, and the statute of distribu-

tions, which provides for the distribution of the surplus of the personal property of a decedent after the payment of his debts and legacies if he left a will, and after the setting apart to the widow and minor children of the exemptions specified in section 2713 [Code Civ. Proc.]."

And in the case of *In re Riemann's Estate*, supra, it was said:

"A dower right is an interest in real estate not subject to a tax or to the testator's disposition, and is therefore not a transfer of or a succession to property of her husband. It is property which exists inchoately during her husband's lifetime, and passes to the widow regardless of the laws governing the disposition of the property of a decedent by will or under the laws applicable to intestacy."

Blakemore and Bancroft, in their work on *Inheritance Taxes*, state the law, at page 95 of their treatise, as follows:

"Probably in most states dower or curtesy rights do not fall within the class of interests under the intestate laws subject to tax, although, when dower is released and the property so released passed to taxable beneficiaries, the tax must be imposed on that property."

To the same effect, see *Dos Passos on Inheritance Tax Laws*, § 38, and *Ross on Inheritance Taxation*, § 56. In the last-mentioned text, at the section cited, it is said:

"It is true that dower had its origin and continuance by force of the law and depends upon the husband's death for its consummation. But it is quite another thing to suppose that the estate is dependent upon the law of succession or owes its existence to any such transfer as the inheritance tax statutes contemplate. Dower comes to a wife by virtue of the marriage, and the death of the husband serves only to consummate, not to transmit, it. The law that confers dower on the widow is not the law that appoints the inheritable property of a decedent to designated heirs."

In this state the subject of dower has always constituted one chapter in the digest of the statutes of this state, while the subject of descents and distributions has been covered by a separate chapter. It is true that the statute of descents and distributions does contain a section showing what interests the wife would take under the conditions there named, but that interest is not dower, nor is it intended in lieu of dower.

In the case of *Barton v. Wilson*, 172 S. W. 1032, we had occasion to construe section 2709 of Kirby's Digest. This section defines the widow's dower in the estate of a husband who is survived by no children. It was there contended that the widow took as heir of her husband, but after reviewing and citing various authorities we quoted with approval from the case of *Golder v. Golder*, 95 Me. 259, 49 Atl. 1050, the following language:

"The Supreme Court of Maine, in construing a similar statute, * * * says: 'The statute does not change the status of the widow with reference to her deceased husband's estate. It enlarges her interest by giving her an estate in fee instead of an estate for life. She still takes, not as heir, but as widow.'"

The act under consideration provides for the payment of certain taxes by the wife, but that provision, of course, applies only to

property which she acquires in a manner to make it taxable.

We conclude therefore that the widow of a deceased person does not take dower as the heir of her husband or by virtue of the intestate laws, but that this estate is inimicable to the claim of the heir and is carved out of the estate of the deceased in spite of and in derogation to the rights of the heir under the intestate laws; and the judgment of the court below will therefore be affirmed.

BARKER v. LACK. (No. 169.)

(Supreme Court of Arkansas. Oct. 18, 1915.)

1. APPEAL AND ERROR ⇐1009—FINDINGS OF FACT—CONCLUSIVENESS.

Where, in an action for specific performance of a contract, there is competent evidence to support the contentions of the parties, but no clear preponderance for either, the findings of the chancellor as to the facts will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. ⇐1009.]

2. EVIDENCE ⇐434—PAROL EVIDENCE—VARYING WRITING.

Where the defendant sued on a contract, alleges fraud and misrepresentations in its procurement, parol evidence is admissible to show the deceit, although it varies the written contract.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2005-2020; Dec. Dig. ⇐434.]

Appeal from Clay Chancery Court; Chas. D. Frierson, Chancellor.

Action by J. C. Barker against R. A. Lack. From a judgment for defendant, plaintiff appeals. Affirmed.

R. H. Dudley, of Piggott, for appellant. Ira C. Langley, of Piggott, and R. E. L. Johnson, of Paragould, for appellee.

HART, J. J. C. Barker instituted this action in the chancery court against R. A. Lack to obtain specific performance of a contract for the sale of a stock of goods. The complaint alleged, in substance, that the plaintiff had entered into a written contract with the defendant for the sale of a stock of goods, and that the defendant, as part payment therefor, had agreed to sell to the plaintiff 98 shares of stock in a mercantile corporation; that the defendant had been placed in possession of the stock of goods sold to him, and had later abandoned possession of it, and that he had failed to perform the contract on his part. The prayer of the complaint was for specific performance of the contract and for the appointment of a receiver to take charge of the stock of goods abandoned by the defendant and for an injunction restraining the defendant from disposing of the stock in the mercantile corporation. The defendant admitted the execution of the contract, and as a defense to the action set up false representations in the procurement of the contract. The chancellor

found the issues in favor of the defendant, and the plaintiff has appealed.

Both the defendant and his son testified in the case. They testified that the plaintiff represented to the defendant, as an inducement to get him to purchase the stock of goods, that the goods would not invoice more than \$5,000, and that the indebtedness would not be more than \$1,500 or \$2,000; that the defendant, believing these representations to be true, entered into the contract for the purchase of the stock of goods, and agreed to pay therefor the wholesale invoice price and the cost of the fixtures, less \$75; that in payment of the purchase price the buyer assumed the indebtedness of the seller, and also agreed to sell to him 98 shares of stock in a mercantile company of the par value of \$25 each; that the contract further provided that whatever differences there might be in the settlement should be settled by the party found to be indebted, giving his promissory note to the other payable 12 months after date; that the stock in the mercantile company was worth \$2,000; that the stock of goods inventoried something over \$7,000, and that the indebtedness amounted to a little more than \$3,900; that the plaintiff refused to deliver the invoices to the defendant, but admitted that the invoices, as far as made, amounted to more than \$7,000 and the indebtedness to a little more than \$3,900; that at the request of the plaintiff they took possession of the stock of goods and began to sell the same as soon as the contract of sale had been executed; that the defendant remained in possession of the stock of goods for 8 or 10 days selling the same in the usual course of business; that when he learned that the representations made by the plaintiff were false, he offered to return the stock of goods to the plaintiff and the amount of money he had received for cash sales, and agreed to account to the plaintiff for the credit sales; that demand was made of the plaintiff during the progress of making the inventory for the original invoices; and that the plaintiff refused to deliver them to him. Other testimony was introduced by the defendant which tended, in some measure, to corroborate his testimony and that of his son.

The plaintiff testified in his own behalf, and flatly contradicted the defendant. He testified that he only gave his opinion to the defendant as to the amount the goods would inventory and as to the amount of the indebtedness, and that the defendant so understood it, that he made the representations in good faith, and that the contract embodied the whole agreement between the parties, and that it was not understood by the defendant that the plaintiff had made the representations to the defendant as to the amount that the goods would inventory, or as to the amount of indebtedness as matters of inducement to the defendant to purchase the stock of goods. The testimony of

the plaintiff was corroborated, to some extent, by that of other witnesses.

[1] The chancellor found the issues as to the false representations in behalf of the defendant, and we cannot say that his finding is against the preponderance of the evidence. It is the settled rule of this court that findings of fact made by a chancellor will not be disturbed on appeal unless they are against the clear preponderance of the evidence.

[2] It is contended, however, by counsel for the plaintiff that the written contract expresses the agreement between the parties, and that parol evidence is inadmissible to vary, qualify, or contradict, to add to or subtract from, the absolute terms of a valid written contract containing no ambiguity. Though this is the settled rule in this state, there are certain limitations to the rule, and one is that, an action of deceit, based on fraud in the procurement of a contract, not being an action to enforce the contract, parol evidence of the fraud is admissible, notwithstanding the fact that the contract is in writing. 20 Cyc. 112.

In the case of Hanger et al. v. Evins & Shinn, 38 Ark. 334, the court held that an intentionally false and misleading representation, which induced the contract, to the other's injury, is a tort outside of the contract, and is provable by parol. To the same effect, see Delaney v. Jackson, 95 Ark. 131, 128 S. W. 859.

It follows that the decree must be affirmed.

WESTERN UNION TELEGRAPH CO. v. CULPEPPER. (No. 167.)

(Supreme Court of Arkansas. Oct. 18, 1915.)

TELEGRAPHS AND TELEPHONES ~~68~~—DAMAGES — FAILURE TO DELIVER MESSAGES — MENTAL ANGUISH.

Where plaintiff sued to recover for failure of defendant to deliver a telegram sent from a point in Louisiana to plaintiff in Arkansas, alleging no expense, messenger fee paid, or other monetary damage, he cannot recover; mental anguish alone not being a ground of recovery of damages for negligence in the transmission of interstate messages.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 69, 70; Dec. Dig. ~~68~~.]

Appeal from Circuit Court, Union County; Chas. W. Smith, Judge.

Action by C. N. Culpepper against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed, and cause dismissed.

George H. Fearons, of New York City, and Gaughan & Sifford, of Camden, for appellant.

HART, J. C. N. Culpepper sued the Western Union Telegraph Company to recover damages for mental anguish alleged to have been suffered by him. The plaintiff resided

in the suburbs of El Dorado in Union county, Ark., and the message which is the foundation of this action was addressed to him at El Dorado, in the state of Arkansas, and was sent from Campti, in the state of Louisiana.

There is no item of expense for the telegram or for a messenger fee sued for or alleged to have been paid by the plaintiff; and we have held that an action for mental anguish will not lie under our statute for negligence in the transmission or delivery of an interstate message. See *Western Union Telegraph Co. v. Johnson*, 171 S. W. 859.

It follows that the judgment of the court below must be reversed, and the cause of action dismissed.

WARD et al. v. WARD. (No. 175.)

(Supreme Court of Arkansas. Oct. 18, 1915.)

CURTESY — 12—SALE — REMEDIES OF PURCHASER—DEFECTS IN TITLE.

Where remaindermen, who took after the expiration of plaintiff's estate by the curtesy, recognized his title and purchased his interest without investigating whether the taxes had been paid, and there were no misrepresentations by plaintiff, who was an aged man, payment of the purchase price cannot be avoided on the ground that, the property having been sold for taxes, the estate by the curtesy was forfeited under Kirby's Dig. § 7132.

[Ed. Note.—For other cases, see *Curtesy*, Cent. Dig. §§ 43-64; Dec. Dig. § 12.]

Appeal from Clay Chancery Court; Edward D. Robertson, Chancellor.

Suit by T. J. Ward against J. J. Ward and others. From a decree for plaintiff, defendants appeal. Affirmed.

Appellee brought this suit upon two purchase-money notes, to foreclose a vendor's lien retained in a deed conveying certain lands to appellants. The complaint alleges that appellants inherited the lands from their mother, Josephine Ward, wife of appellee, upon her death, and that he, the father of appellants, paid off judgment liens and purchase-money notes, by which the lands were incumbered, amounting to the sum for which the notes sued on were executed, and that he also sold to them his curtesy interest in the lands for said sum. Appellants answered, and admitted the execution of the notes, and that they had refused to pay same, but denied that there were any judgment liens or purchase-money notes outstanding against the lands that had been paid by their father, appellee; that he was entitled to a lien against the property on account of any such payment, or for the payment of the notes executed by them, and alleged that the consideration for the notes had failed. They alleged by cross-complaint that appellee had fraudulently and falsely represented to them that judgment and purchase-money liens existed against the land for the sum of \$450, and induced them to execute the notes sued on to relieve the lands from such liens, de-

nied that there was any liens of any kind existing against the property, and charged that the notes were obtained by such fraudulent and false representations. They alleged, further, that the appellee was in possession of the lands, enjoying the rents, and had remained so since the execution of the notes, and collected rents amounting to more than \$500, and converted timber from the lands of the value of \$250, and had failed to pay the taxes of \$150 due thereon, and asked judgment for the difference between the amount of the notes sued on and the amounts alleged in their cross-complaint. The testimony tends to show that Josephine Ward died in 1900, the owner of the lands, and that appellee became the administrator of the estate; that there were debts amounting to about \$450 and assets of the value of \$250 to \$260; that appellee executed a deed to his children, the appellants, conveying his curtesy interest in the lands in consideration of the notes sued on, which also covered the amount the estate was due him for judgments paid off and liens discharged. There was some testimony about improvements upon the place made by him, for which appellants had agreed to pay \$200, and also for the clearing of some lands which had not been paid. His final settlement as administrator showed a balance due him of \$444, and that the taxes had been charged against the estate in each settlement. He said he had charged himself in the settlements for the rents collected from the lands, and when he sold them to appellants, it was agreed that they would pay the delinquent taxes and make no claim for the timber cut. The fences and house built by appellee were worth about \$375. Appellants admitted the execution of the notes, that appellee had a life estate in the lands, and insisted that they were entitled to the rents for the year of 1911, the deed having been made to them in June, and that appellee had forfeited the life estate by failure to pay the taxes and a sale therefor not redeemed from by him within a year thereafter, and that his right was forfeited on this account before and at the time of the conveyance, of which appellants had no knowledge, and that the notes were therefore without consideration. They also denied that there was any judgment alleged against the land that had been discharged by appellee before the execution of the notes sued on. From the decree foreclosing the lien, appellants appeal.

R. H. Dudley, of Piggott, for appellants.

KIRBY, J. (after stating the facts as above). The chancellor's findings, in appellee's favor, that there was no failure of consideration of the notes sued on is supported by the testimony, which tends to show that the estate was indebted to appellee, as administrator, in a sum equal to the amount for

which these notes were given, and that his curtesy estate was also conveyed in consideration therefor.

No question was raised in the court below as to the forfeiture of the curtesy or life estate, on account of the failure to pay taxes thereon, within the meaning of section 7132 of Kirby's Digest, nor did appellants insist there that they acquired the curtesy estate by such forfeiture. In other words, they recognized at the time of the execution of the notes appellee's life estate in the lands, and purchased it without any representation on his part as to whether the taxes had been paid or not, and they were in as good position to ascertain whether such was the case as was appellee, and should have done so for their own protection. It is true that appellee was their father, but he was a man 80 years of age, whose judgment and statements relative to business transactions would not perhaps have been given great weight by appellants, who were of different ages, from majority up to 40 years, and there was no showing of any false or fraudulent representations made by him. The testimony of appellants at best shows only that they did not know, at the time of the conveyance and execution of the notes, that the lands had been allowed to be sold for taxes and had not been redeemed, and they stated that they would not have executed the notes if such fact had been known to them.

It is not necessary, under this state of case, to decide whether or not appellee's curtesy estate had forfeited to appellants as remaindermen by reason of the tax sale and failure to redeem, under the provisions of said section of the statute and the doctrine of *Magness v. Harris*, 80 Ark. 583, 98 S. W. 362.

The decree is affirmed.

SMITH v. McLAUGHLIN. (No. 177.)

(Supreme Court of Arkansas. Oct. 18, 1915.)

EVIDENCE §441—PAROL EVIDENCE RULE—WRITTEN INSTRUMENT.

Where defendant executed a note secured by a mortgage, which note was an unconditional and absolute promise, it could not, in the absence of fraud or mistake, be contradicted by parol agreement that the creditor should seek satisfaction solely out of the mortgaged property.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. §441.]

Appeal from Carroll Chancery Court; T. H. Humphreys, Chancellor.

Action by G. H. McLaughlin against J. K. Smith. From the decree, plaintiff appeals. Reversed and remanded.

Appellant brought suit to recover judgment for the amount of a note executed to his order by appellee and to foreclose a mortgage given to secure this note. The note and

mortgage were filed as exhibits to the complaint.

Appellee answered, admitting the execution of the note, but alleged that there was an understanding at the time of its execution between himself and appellant that he was not to be bound personally by such note, but that appellant was to look solely to the mortgage for the collection of the debt, and that pursuant to such understanding the note and mortgage were executed. Appellee, in detailing the facts upon which this understanding was had, alleged that he traded for a house in Eureka Springs subject to a mortgage for \$1,250 held by appellant, and that shortly after this indebtedness became due appellee paid appellant \$250, and executed his own note for \$1,000, and gave the mortgage sought to be foreclosed, but with the understanding that the property alone should be looked to for the payment of this note.

Appellant filed a demurrer to this answer, whereupon the cause was submitted on the pleadings; no proof being offered on the part of appellee. The proof on the part of appellant consisted of the original note and mortgage which had been made exhibits to the complaint. The court proceeded to try the issues, and, after ascertaining the amount due on the note, entered a decree of foreclosure upon the mortgage for the satisfaction of the debt and costs. Appellant moved for a judgment in personam against appellee, which motion was denied by the court, and this appeal has been duly prosecuted from that decree.

Festus O. Butt, of Eureka Springs, for appellant. C. A. Fuller, of Eureka Springs, for appellee.

SMITH, J. (after stating the facts as above). We think the demurrer to the answer should have been sustained. The execution of the note and mortgage is admitted, but the answer contains no allegation that there was any misunderstanding of what these instruments purported to be, nor that appellee was unacquainted with their contents, nor that any fraud was practiced upon him in procuring his signature. The substance of the defense is that at the time of the execution of these instruments there was an understanding which contravened the purport and tenor of the recitals of the note and mortgage. The note is an unconditional and absolute promise to pay a definite sum of money at a given time, and, in the absence of any allegation of fraud practiced in procuring the execution of the note, or mistake made as to its provisions at the time of its execution, parol proof cannot be received to vary or contradict its terms. *Joyner v. Turner*, 19 Ark. 690; *Martin v. Cole*, 104 U. S. 30, 28 L. Ed. 647; *Upton v. Tribblecock*, 91 U. S. 45, 23 L. Ed. 203; *Casteel v. Walker*, 40 Ark. 117, 48 Am. Rep. 5; *Cox v. Smith*, 99

Ark. 218, 138 S. W. 978; Delaney v. Jackson, 95 Ark. 131, 128 S. W. 859; Bradley Gln Co. v. Means, 94 Ark. 130, 126 S. W. 81; Soudan Planting Co. v. Stevenson, 83 Ark. 163, 102 S. W. 1114.

The decree will therefore be reversed, and the cause will be remanded, with directions to sustain the demurrer to the answer.

MILWAUKEE MECHANICS' INS. CO. v. FUQUAY.

SOUTHERN STATES FIRE INS. CO. v. SAME.

(No. 171.)

(Supreme Court of Arkansas. Oct. 18, 1915.)

1. INSURANCE — 93 — POLICY — VALIDITY — PRINCIPAL AND AGENT.

Absent a showing of fraud, a fire policy, by clause thereof, made payable to the mortgagee as its interest might appear, is not void because the insurance company's agent, unknown to it, was also president of the bank holding the mortgage, small compared with the value of the property.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 123; Dec. Dig. — 93.]

2. INSURANCE — 556 — PROOF OF LOSS — WAIVER — POWER OF ADJUSTER.

An insurance company's adjuster, having authority to ascertain the nature, extent, and cause of the loss, and to agree with insured as to the amount that should be paid as indemnity, can waive the proof of loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1374-1377; Dec. Dig. — 556.]

3. INSURANCE — 558 — PROOF OF LOSS — WAIVER.

Filing of proof of loss as provided by the policy is waived where insured, pursuant to direction of the adjuster, has estimates of the cost of rebuilding prepared at his own expense, and sends them, with his own affidavit as to cost of the house and the date of the fire, to the adjuster.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1382-1390, 1405; Dec. Dig. — 558.]

4. INSURANCE — 668 — MAILING AND RECEIPT OF LETTERS — QUESTION FOR JURY.

In view of the presumption that a letter properly mailed was duly received, the question whether an insurance adjuster received estimates of the cost of rebuilding, which insured testifies he mailed to the adjuster at his proper address before expiration of time for filing proofs of loss, is for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. — 668.]

5. INSURANCE — 278 — POLICY — FORFEITURE — DWELLING HOUSE — PRIVATE BOARDERS.

A policy on a house insured as a dwelling house, and in fact insured's dwelling, is not voided because he sometimes kept private boarders there, the keeping of a boarding house not being expressly prohibited, and there being no reference to a boarding house in the trades or businesses denominated hazardous or extrahazardous.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 593; Dec. Dig. — 278.]

6. INSURANCE — 668 — POLICY — FORFEITURE — WAIVER — OIL ON PREMISES.

The adjuster having, when he, after the fire, as testified by insured, directed insured to

send estimates of cost of rebuilding, a list of the articles kept in the house, the question of waiver of forfeiture, because of insured keeping oil in greater quantities than permitted, is for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. — 668.]

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Two actions, both by J. W. Fuquay, one against the Milwaukee Mechanics' Insurance Company, the other against the Southern States Fire Insurance Company. Judgment for plaintiff, and defendants appeal. Affirmed.

J. W. Fuquay filed separate suits in the circuit court against the Milwaukee Mechanics' Insurance Company and the Southern States Fire Insurance Company, to recover on policies of insurance. The causes of action were consolidated for trial.

J. W. Fuquay owned a dwelling house in Arkansas City, Ark., and on the 29th day of July, 1913, the Milwaukee Mechanics' Insurance Company issued him a policy on his house for the sum of \$3,000; and on the 23d day of September, 1913, the Southern States Fire Insurance Company issued him a policy for \$2,000. Henry Thane, who was at that time and for many years had been president of the Desha Bank & Trust Company, as well as a stockholder in the bank, was the agent of both insurance companies, and issued the policies to the plaintiff. The Desha Bank & Trust Company held a mortgage on the insured property in the sum of \$840, and there was a clause in each policy, providing for payment to the bank as its interest might appear. There is no proof that either of the insurance companies knew that the bank had a mortgage on the property.

On the 29th day of December, 1913, the insured property was destroyed by fire. Fuquay also carried insurance on his personal property. After the fire two insurance adjusters, Mr. Smallwood and Mr. Hirsch, visited Arkansas City for the purpose of adjusting the loss on the personal property. They also signed a nonwaiver agreement with reference to the real property. Fuquay and the two adjusters went to the scene of the fire and examined the burned premises. Smallwood, who was the adjuster for the insurance companies in this suit, directed Fuquay to have estimates made of the cost of rebuilding his house and to send same to him. Pursuant to this direction Fuquay had two firms of contractors make estimates of the cost of rebuilding his house, and paid them therefor the sum of \$25 each. He attached the estimates made by them to an affidavit made by himself before a notary public, in which he stated that the contractors had made the estimates of the loss sustained by him on his

residence which was destroyed by fire on the 29th of December, 1913, and that the contractors had offered to rebuild the house for the amounts set out, and that it cost him more than \$6,000 to build the said dwelling house.

Fuquay testified that he mailed these estimates, together with his affidavit, to Mr. T. R. Smallwood, at his address at the Marion Hotel in Little Rock, Ark., and that he stamped the letter and placed it in the post office himself. Mr. Smallwood denied that he directed Fuquay to make out these estimates, and denied that he entered into any agreement whatever with him looking to the adjustment of the loss on his dwelling house. He also denied that he received the estimates which Fuquay testified he had mailed to him. He admitted, however, that the Marion Hotel was the place where he lived and where his mail was sent. Other facts will be referred to in the opinion. The jury returned a verdict for the plaintiff, and the defendants have appealed.

W. L. & D. D. Terry and Mehaffy, Reid & Mehaffy, all of Little Rock, for appellants. E. E. Hopson, of Arkansas City, and J. W. House, Jr., of Little Rock, for appellee.

HART, J. (after stating the facts as above). [1] Henry Thane was agent for both companies, with authority to make contracts for insuring property and to write policies of insurance. He wrote and issued the policies of insurance on which these actions are based. At the time he was president of the Desha Bank & Trust Company, which held a mortgage for \$840 on the insured property. The mortgage clause made the loss, if any, payable to the mortgagee as his interest might appear. It was not shown that the insurance company had notice that Thane was president of the mortgage bank at the time he wrote the policies.

Under these circumstances it is contended by counsel for the defendants that, as it was neither alleged nor proved that they had notice that their agent Henry Thane was acting for the bank and its benefit in issuing the policies, they are not bound by his acts. They invoke the rule that no man can faithfully serve two masters whose interests are in conflict. In support of the rule they cite a line of cases which hold that an insurance agent, by writing a policy for the company, cannot bind it where he himself is the applicant for insurance, unless the policy be approved by the company, and also cases to the effect that an agent cannot bind his principal by issuing, without notice to his principal, a policy upon the property of a corporation in which he is an officer. See case note to *Arispe Mercantile Co. v. Capital Insurance Co. of Des Moines*, 9 L. R. A. (N. S.) 1084.

The facts do not bring the present case within that rule. Here the insurance agent

had no interest whatever in the insured property. The property was insured for \$5,000, and it is not claimed that that was an excessive amount. The property was only mortgaged to the bank for \$840. The fact that the insurance agent who issued the policy was the president of the bank which held a mortgage for \$840 did not prevent the agent from acting with fidelity to the insurance company, and there is no reason whatever to think that the company would have refused the risk had it known that the bank held a mortgage on the insured property.

On the other hand, the amount of the mortgage, as compared with the value of the insured property, was so small that the insurance company might, with justice, have complained had its agent permitted the business to go elsewhere. So far as the record discloses, Thane acted fairly with the insurance company and with the insurer, and did precisely what one, under those circumstances, would have done with the approval of his principal. No fraud in connection with the matter has been alleged or proved, and there are numerous decisions to the effect that the law will never presume fraud where none is shown. Such was the effect of the holding of the Supreme Court of Kansas in *Citizens' Bank of Chautauqua et al. v. Shawnee Fire Insurance Co.*, 91 Kan. 18, 137 Pac. 78, 49 L. R. A. (N. S.) 972. In that case this precise question was before the court, and the court held:

"An agent of an insurance company, with power to issue policies, insured a property, on which the bank of which he was cashier held a mortgage, for about one-half the amount of the insurance, attaching a clause making the loss, if any, payable to the mortgagee as its interest should appear. Held that, in the absence of fraud or collusion, the company could not deny liability on account of its agent's relation to such mortgagee."

See, also, *Fiske v. Royal Exchange Assurance Co.*, 100 Mo. App. 545, 75 S. W. 382.

Therefore we are of the opinion that Thane rightfully acted for the insurance companies, and that the policies sued on were valid.

[2] It is also contended that the judgment must be reversed because no proof of loss was filed within the time fixed by the policy, and that there was no waiver of the same by the insurance company. We think there is testimony from which the jury might have found that the proof of loss was waived. Smallwood was the adjuster of the insurance company, and was thereby vested with authority to ascertain the nature, extent, and cause of the loss, and to agree with Fuquay as to the amount that should be paid as an indemnity for the same. *German Insurance Co. v. Gibson*, 53 Ark. 494, 14 S. W. 672; *Lord v. Des Moines Fire Insurance Co.*, 99 Ark. 476, 138 S. W. 1008.

[3] Smallwood and Fuquay visited the place where the house had stood. Fuquay testified that Smallwood told him to prepare

estimates of the cost of rebuilding the house, and that, pursuant to his direction, he employed two firms of contractors to make such estimates, and paid them for it, and that he mailed these estimates, together with his own affidavit as to the amount which the house had cost him and the date of the fire, to the adjuster. It is true the adjuster denied this, but, as we have already seen, he had the power to waive the proof of loss, and the question of whether he had done so was fairly presented to the jury under proper instructions given by the court.

[4] In the case of *Bluthenthal v. Atkinson*, 93 Ark. 252, 124 S. W. 510, we held that where a letter has been properly mailed, there is a presumption that it was duly received by the person to whom it was addressed, but that such presumption may be rebutted. Here Fuquay testified that he mailed the estimates to the adjuster at his proper address before the time for filing the proof of loss had expired, and, under the decision just referred to, the question of whether or not it was received by the adjuster was one of fact for the jury.

[5] It is next contended that the policy was void because the property insured was a dwelling house and the plaintiff used it as a boarding house. The testimony on this point shows that the plaintiff did not keep a public boarding house, but that he did keep private boarders from time to time as he saw fit. The keeping of a boarding house is not prohibited by the policy in express terms. There is no reference to a boarding house in the trades or businesses denominated hazardous or extrahazardous. If the insurance companies have not seen fit to classify boarding houses as exposed to greater risks than ordinary dwelling houses, they cannot ask to avoid the policy on this ground. *Rafferty v. New Brunswick Fire Insurance Co.*, 18 N. J. Law, 480, 38 Am. Dec. 525. See, also, *Birmingham Waterworks Co. v. Truss*, 135 Ala. 530, 33 South. 657.

The undisputed evidence in the case before us showed that the property insured was the plaintiff's dwelling, and the fact that he sometimes kept boarders does not destroy its character as a dwelling.

[6] It is next contended that the policy should be avoided because the plaintiff kept oil in greater quantities than was permitted by the company. The adjuster had a list of the articles kept in the house by the plaintiff at the time he directed him to send him the estimates above referred to. The question of the waiver of forfeiture on this account was submitted to the jury under proper instructions.

Finally it is contended by counsel for the defendant that the penalty should not be recovered because no demand was made of them for the insurance. We do not agree with them in this contention. We have al-

ready concluded that Thane rightfully acted as agent for the insurance companies. The record shows that he made demand of the company for the amount due under the policies, and that the insurer himself made demand therefor by sending in the estimates as requested by the adjuster, and that the company absolutely refused payment of the policies.

Other assignments of error are pressed upon us for a reversal of the judgment; but, without discussing them in detail, we deem it sufficient to say that instructions embodying the principles of law above announced were given to the jury which fully and fairly submitted the respective theories of the parties.

The judgment will be affirmed.

EUREKA STONE CO. et al. v. ROACH et al. (No. 170.)

(Supreme Court of Arkansas. Oct. 18, 1915.)

1. REFORMATION OF INSTRUMENTS §45—EVIDENCE—SUFFICIENCY.

Where, in an action in which a reformation of a bond given to secure the return of mortgaged property removed from the state by consent was sought, certain officers of the mortgagor testified that it was the agreement that the property was to be returned within 70 days after demand, and that by mutual mistake the bond provided that it should be returned within 70 days after the date of the instrument, and that before the return of the machinery plaintiffs entered into negotiations looking to a sale of the property, while the mortgagee's administrator and one of the heirs testified in positive terms that the bond as written constituted the agreement entered into and that no mistake was made in writing it and denied that they had demanded a return after the expiration of the 70 days or that they had entered into negotiations with the mortgagor's officers for the sale of the machinery, a reformation was properly denied, as the evidence was too nearly evenly balanced and was not of that clear, unequivocal, and decisive character required.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 157-193; Dec. Dig. §45.]

2. REFORMATION OF INSTRUMENTS §45—EVIDENCE—SUFFICIENCY.

To justify or authorize the reformation of a written instrument for fraud or mistake, the evidence of such fraud or mistake must be clear, unequivocal, and decisive.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 157-193; Dec. Dig. §45.]

3. MORTGAGES §819—PAYMENT—EVIDENCE.

Where, in an action on a bond given to secure the return of mortgaged machinery removed from the state by agreement, it appeared that the mortgagor after the removal of the machinery executed a deed to the mortgagee's heirs to real estate and other personal property covered by the mortgage, but it was not contended that the machinery in question was embraced in the deed, and the mortgagee's administrator and one of the heirs who participated in the agreement looking to the execution of the deed testified that the machinery was not embraced or intended to be embraced therein and that the property conveyed lacked several thousand dollars of settling the mortgage

indebtedness, a finding that the conveyance was not in full satisfaction of the mortgage debt, as testified by the mortgagee's officers, was not against the preponderance of the evidence, and therefore could not be disturbed on appeal.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 855-863, 875, 913, 1356, 1366; Dec. Dig. § 319.]

Appeal from Carroll Chancery Court; T. H. Humphreys, Chancellor.

Action by James Roach, administrator, and others, against the Eureka Stone Company and others. Decree for plaintiffs, and defendants appeal. Affirmed.

Festus O. Butt, of Eureka Springs, for appellants. J. V. Walker, of Fayetteville, for appellees.

HART, J. Appellees instituted this action against appellants to recover on a bond. The facts are as follows: The Eureka Stone Company, a domestic corporation, was indebted to Fransiszka Massman in the sum of \$10,000. The debt was secured by a mortgage on all the real and personal property owned by the corporation. A certain channeling machine was included in the personal property. Fransiszka Massman died and James Roach became administrator of her estate. The corporation wished to use the channeling machine in a quarry it owned and operated in the state of Missouri and obtained permission from one of the heirs and from the administrator of the Massman estate to carry the machine there. The corporation, together with the other appellants, executed a bond in favor of the estate conditioned for the payment of \$600 if the channeling machine should be destroyed or not returned to Carroll county, Ark., within 70 days after the date of the bond. Appellants failed to return the machine within 70 days after the date of the bond, and appellees instituted this action to recover the amount of the bond. Appellants answered and asked for a reformation of the bond, alleging that the agreement was that the machinery should be returned within 70 days after demand made therefor. They also pleaded as a defense to the action that there had been a settlement of the amount owed by the mortgagor to the mortgagee. Appellants asked that the cause be transferred to equity, and this was done. The chancellor found the issues in favor of appellees, and from the decree entered of record appellants have duly prosecuted an appeal to this court.

[1] On the question of reformation, the president and secretary of the corporation testified that it was the agreement of the parties that the machinery was to be returned within 70 days after demand made therefor, and that by mutual mistake the language of the bond was that it should be returned within 70 days after the date of the instrument. They testified that they return-

ed the machine to Arkansas within 70 days after demand was made for it. They also testified that appellees entered into negotiations with them looking to a sale of the machinery before it was returned. The testimony of the president and secretary was corroborated by another official of the corporation who testified that the administrator and one of the heirs had talked to him about selling the machinery before its return. On the other hand, the administrator and the heir referred to testified in positive terms that the bond as written constituted the agreement entered into between the parties and stated that no mistake was made in writing it. They denied that they had demanded a return of the machinery after the 70 days from the date the bond had expired, and denied that they had entered into negotiations for the sale of the machinery with the officers of the appellant corporation.

[2] It is the settled rule of this court that, to justify or authorize the reformation of a written instrument on the ground of fraud or mistake, the evidence of such fraud or mistake must be clear, unequivocal, and decisive. *Hoffman v. Rice-Stix Dry Goods Co.*, 111 Ark. 205, 163 S. W. 520; *Tedford Auto Co. v. Thomas*, 108 Ark. 503, 158 S. W. 500; *Hearin v. Union Sawmill Co.*, 105 Ark. 455, 151 S. W. 1007; *Turner v. Todd*, 85 Ark. 62, 107 S. W. 181, and cases cited. Many other cases might be cited in support of the rule, but the rule is so well settled in this state as to make it unnecessary to do so. We have not attempted to set out in detail the testimony of the witnesses on the question of reformation, and do not deem it necessary to do so, but have only stated the substance of it. The testimony was not sufficient to meet the requirements of the rule just announced; it was too nearly evenly balanced and was not of that clear, unequivocal, and decisive character required by our decisions.

[3] Again, it is contended by counsel for appellants that the decree should be reversed because the mortgage indebtedness had been settled. The record shows that the mortgagor executed a deed to the heirs of the mortgagee to the real estate embraced in the mortgage and to all of the personal property situated thereon at the time of the execution of the instrument. This deed was executed after the channeling machine had been removed to the state of Missouri. It is not contended that the channeling machine was embraced in the deed, but it is the contention of counsel for appellants that the deed was in full satisfaction of the mortgage debt, and the officers of the corporation so testified. On the other hand, the administrator and one of the heirs who participated in agreement looking to the execution of the deed referred to testified that the channeling machine was not embraced in the deed and

was not intended to be embraced therein, and that the property conveyed lacked several thousand dollars of settling the mortgage indebtedness. The chancellor found this issue in favor of appellees, and we cannot say that his finding was against the preponderance of the evidence. Therefore, under the well-settled rule of this court, his finding of fact cannot be disturbed on appeal.

The decree will be affirmed.

COOK v. ST. LOUIS, I. M. & S. RY. CO.
(No. 178.)

(Supreme Court of Arkansas. Oct. 18, 1915.)

1. APPEAL AND ERROR \Leftrightarrow 927—PRESUMPTIONS—DIRECTED VERDICT—EVIDENCE.

In reviewing the direction of a verdict for defendant, the evidence for plaintiff must be given its highest probative force.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. \Leftrightarrow 927.]

2. CARRIERS \Leftrightarrow 280, 327—PERSONAL INJURIES—CARE REQUIRED.

A railroad and a person on a station platform waiting for a train are under the same duty to exercise ordinary care to avoid inflicting or receiving injury, and each may rightfully assume that the other will be guilty of no negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1093-1103, 1105, 1106, 1109, 1117, 1363-1366; Dec. Dig. \Leftrightarrow 280, 327.]

3. CARRIERS \Leftrightarrow 327 — PERSONAL INJURIES — PERSONS ON TRACK BY INVITATION.

Although a railroad places a cinder platform between its tracks, where there is a space of but $3\frac{1}{2}$ feet when trains are on both tracks, and thus there may be shown an invitation to use the platform, a person injured while there cannot set up the invited use, where it would be apparent to a reasonably prudent man exercising due care that the space was one of peril.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1363-1366; Dec. Dig. \Leftrightarrow 327.]

4. CARRIERS \Leftrightarrow 327 — PERSONAL INJURIES — CARE REQUIRED.

Although it was necessary in order to board a train, plaintiff cannot set up the fact in justification of his negligent presence in a place of danger, although, had he not been there, he would have missed his train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1363-1366; Dec. Dig. \Leftrightarrow 327.]

5. CARRIERS \Leftrightarrow 280—OPERATION—DUTY TO INVITEES.

Where plaintiff went to a railway station to board a train, and, in order to signal his train with a lantern, stood between two tracks, on one of which a passenger train distant about one-fourth of a mile was approaching, and on the other a freight train distant about one mile was approaching, the engineer of the freight was charged by statute with keeping a lookout, and if he failed to do so, and plaintiff was thereby injured, the railway company was liable for his negligence, since the plaintiff could not know whether the freight would stop, while the engineer did know.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1093-1103, 1105, 1106, 1109, 1117; Dec. Dig. \Leftrightarrow 280.]

6. CARRIERS \Leftrightarrow 347—OPERATION—DUTIES TO INVITEES—CONTRIBUTORY NEGLIGENCE.

Whether a space of $3\frac{1}{2}$ feet between moving trains at a station is a dangerous one, so as to

charge plaintiff, who went upon the space to board a train, with contributory negligence, is a question for the jury, especially where it appears that the space may have been more than ordinarily dangerous by reason of the speed at which another train was approaching.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. \Leftrightarrow 347.]

7. CARRIERS \Leftrightarrow 347—OPERATION—DUTIES TO INVITEES—CONTRIBUTORY NEGLIGENCE.

Whether plaintiff, standing in a space of $3\frac{1}{2}$ feet between moving trains for the purpose of boarding one train, was guilty of contributory negligence in failing to stand in the exact center of the space, is a question for the jury, dependent upon the conditions existing at the time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. \Leftrightarrow 347.]

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Action by William N. Cook against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for defendant on directed verdict, plaintiff appeals. Reversed and remanded.

Brundidge & Neelly, of Searcy, and Sam M. Wassell, of Little Rock, for appellant. P. R. Andrews, of Helena, and Troy Pace, of Little Rock, for appellee.

SMITH, J. Appellant was struck by one of appellee's trains, and sued to recover damages to compensate the injury sustained by him. On the trial of the case before a jury, after the appellant had rested his case, the court, upon motion of appellee, directed the jury to return a verdict in appellee's favor, and this appeal has been prosecuted from the judgment pronounced upon the verdict so returned.

[1] Giving appellant's evidence its highest probative force, as we must do in testing the correctness of the action of the court below, the facts in the case may be stated as follows:

The injury occurred at McRae, which was then an unincorporated village of some 200 persons, and, although appellee maintained a depot there, this was a flag stop station, and that only for local trains. The fast or through trains did not stop there, even upon signal. The line of railroad was double-tracked, the depot being to the east of the tracks, and there was a cinder platform between the depot and the east track for the purpose of accommodating passengers. Trains north-bound were run over the east track, the one next to the station, while south-bound trains ran over the west track. These double tracks had been in use for more than two years, and appellant lived there at the time they were installed and was acquainted with the conditions. The injury occurred about 9 o'clock on the night of November 18, 1913. Appellant went to the depot to take passage on the south-bound passenger train. He was accompanied by his daughter and her hus-

band, a Mr. Essig, and when they reached the depot they found it dark, and no one there to signal the passenger train to stop. Mr. Essig had a lantern, and when he heard the passenger train approaching he went between the two tracks and flagged this train. The tracks were straight for more than a mile in both directions, and while Mr. Essig was flagging the passenger train a freight train was approaching on the other track, the engines of the two trains passed each other at the point where Mr. Essig stood with his lantern, and when cars are standing on each track there is a space between them of from 3 to 3½ feet. The witnesses testified that when the passenger train was flagged it responded by blowing one long blast, whereupon appellant and his daughter crossed over between the trains, but before the freight train arrived Mrs. Essig recrossed the track and returned to the platform near the depot. The freight train made no response to the signal with the lantern, and passed through McRae at a speed variously estimated by the witnesses at from 30 to 40 miles per hour.

Prior to appellant's injury it was customary for passengers who desired to board south-bound trains to stand between these tracks as the train approached, and that this was the usual thing for persons to do who expected to take passage on south-bound trains, and this custom had been in force ever since the double track had been built up to the time of appellant's injury. At the time the passenger train was flagged, it was about a quarter of a mile away, while the freight train, which was approaching in the opposite direction, was then about one mile distant. Appellant and Mr. Essig did not know what the freight would do, but they got between the tracks, so that they would not miss the passenger train, and that they did not think there would be any danger, because they supposed the passenger train would stop for the passengers to get on, and that they thought the freight train would stop below the public crossing near the depot, for the reason that the lantern had been waived in plain view of the approaching freight train, and the engineer of that train would be aware of their presence and purpose. Appellant and Mr. Essig did not cross entirely over to the west side of the track, because there was a ditch there, and the train was a vestibuled one, and the cars were not opened on the west side, and the passenger train could have been entered only on the east side. Appellant knew that the passenger train made only very short stops at McRae, and he feared that he would miss the train if he was not in position to enter it immediately after it stopped. As the freight train passed the passenger train, appellant became panic-stricken and, although Mr. Essig sought to restrain him, he stepped away from the freight train far enough to be struck by the

beam on the passenger engine. Had he remained standing still, as Mr. Essig did, he would not have been injured; but he stepped back involuntarily because of his fright.

[2-4] It does not appear whether the court directed a verdict because the proof failed to show that the railroad company was guilty of any negligence, or because it did show that appellant was guilty of contributory negligence; but appellee insists that the verdict was properly directed in its favor under either view. We think the jury might very well have found from the evidence that appellant should not have gone between the trains, and such a finding would not be disturbed by us. But we cannot say that the jury must necessarily have taken this view of the evidence, and that reasonable minds could not fairly reach any conclusion, except that appellant was guilty of contributory negligence. The jury must have found, as testified to by appellant, that a custom existed prior to his injury for passengers to stand between the tracks as an approaching train was being flagged, and that the engineer of the freight train saw or should have seen appellant, and should have known his purpose in standing between the tracks.

The law sets up for both the railroad company and the appellant the same standard of duty, and that is to exercise ordinary care to avoid the infliction of an injury and to avoid being injured; but as to what would be ordinary care in a particular case depends upon the exigencies of that situation. In determining the questions of negligence and contributory negligence involved in this case, it is proper to bear in mind that both appellant and the operatives of the train had the right to assume that the other would be guilty of no negligent act, nor be guilty of contributory negligence. Applying these tests, it may be asked: Would a reasonably prudent man have had the right to believe that an invitation was extended under the circumstances to stand between the tracks as the trains approached each other? If there was such an invitation, then there was an implied assurance that the space between the tracks was safe. But there could be no such invitation or assurance if it appeared to a reasonably prudent person, exercising ordinary care for his own safety, that it was not safe to stand between the tracks; that is, appellant could not place himself in a position of peril, and excuse himself for being there by saying that he was invited there, if it was apparent to him in the exercise of ordinary care that the place was dangerous. And if he knew the place was dangerous he could not justify his occupancy of it by saying that he did so for the purpose of embarking on the passenger train when it stopped; and this is true, even though his action in not going between the trains might have resulted in his missing the train. Under these circumstances such a

manipulation of the trains as would have caused appellant to fail to catch the train would have conferred a cause of action on him on that account; but the fact that he would have had this cause of action for not being received as a passenger could not justify the commission of a negligent act.

[5] Before there could be any recovery in this case, it would be necessary for the jury first to find that the railroad company was guilty of some negligence in the operation of its freight train, as it is not claimed that there was any negligence in the operation of the passenger train. This negligence is said to consist in running the freight train at an excessive speed under the circumstances, and in failing to keep a proper lookout, and thereby discovering appellant's presence between the tracks. The lookout statute, approved May 26, 1911 (Laws 1911, p. 275), has been several times recently construed by this court. One of the latest of these cases is that of *Russell v. St. L. S. W. Ry. Co.*, 113 Ark. 353, 168 S. W. 135. In this case we said that mere proof of an injury to a person by the operation of a train is insufficient to establish liability under the lookout statute, and that there must be proof sufficient to warrant the finding that the presence of the injured party could and would have been known to the operatives of the train, and the injury averted by the keeping of the lookout and the exercise of care after discovering the presence of the person in peril. The evidence here meets the requirements of that case, because the engineer on the freight train must have seen the signals with the lantern, had he been keeping a lookout, and he would thereby have been charged with knowledge of the fact that appellant was standing between the tracks. Appellant did not know how far apart the trains were at the time he flagged the passenger train, nor did he know what action the freight train would take, while the engineer of the freight train, of course, knew what his own action would be, and had more definite information about the distance between the trains and where they would probably pass.

[6, 7] We think it cannot be said as a matter of law that the space between the tracks was necessarily a dangerous one, but that this is one of the questions of fact which should be passed upon by the jury. In determining that question the jury would have the right to take into consideration all the facts and circumstances in proof, including appellant's purpose in being there to become a passenger and his conduct while the trains were passing. If the place was necessarily a dangerous one, then appellant was guilty of contributory negligence and cannot recover, whatever may have been his purpose in being there. But if the place was not necessarily dangerous, but was made dangerous only by the rocking and swaying of the

freight train on account of its speed, then the jury would be warranted in finding that appellant was not guilty of contributory negligence by going between the tracks. In that event the further question would arise as to whether or not he was guilty of contributory negligence in not standing in the center of the space between the tracks, as Mr. Essig did, and in determining this question the jury would have the right to take into consideration the conditions existing at the time, creating an emergency which caused and excused the fright that was responsible for his act in stepping back in the way of the passenger train.

In the case of *C. R. I. & P. Ry. Co. v. Stepp*, 164 Fed. 785, 90 C. C. A. 431, 22 L. R. A. (N. S.) 350, the facts were as follows: There were double tracks running east and west, with a space between of 10 feet, and passengers were accustomed to get off and on trains on the north track on the south side. As deceased reached the depot, the west-bound train, which he intended to take, pulled in and stopped. It consisted of six coaches, and the locomotive was at a point 70 or 100 feet west of the depot, and was emitting smoke and steam, which was blown across the south track. On this south track another train was approaching from the west. Deceased crossed the south track and endeavored to board the west-bound train; but it was a vestibuled train, and the door of the car was closed. He hurried forward to the next car, and found that door also closed. The train was then moving, and deceased held to the handhold and tried to get on the train while it was in motion. He had some conversation with an employé on the rear platform, and then abandoned his efforts to gain admittance, and turned to go south to the station to wait for the next train. The second step brought him upon the south track, where he was struck by the other train, which was running at a speed of 40 to 50 miles per hour. The railway track was straight and unobstructed for a distance of more than a mile. Upon these facts the court said:

"It was also for the jury to say whether the defendant was guilty of negligence in running its train past the station at the high rate of speed which is admitted. Our attention is called to numerous cases in which it is stated that railroads are themselves to be the judges of the speed at which they will run their trains, and that their judgment as to the proper requirements on this subject cannot, as a matter of law, be held to constitute negligence. In the cases in which the language was used the situation involved the speed of trains in the open country, and as to those situations the language was entirely proper. But negligence depends upon circumstances. It is too plain for controversy that railroads cannot be given an unrestricted discretion as to the speed at which they will run trains through station grounds. At such points railroads must operate their road with due regard to the safety of the public, and, if the matter were to be determined as a matter of law, we should have no hesitancy in saying that it was plainly negligent for the defendant to run

its train past the station at Randolph, under the conditions existing there at the time, at the speed of 40 miles an hour."

And discussing the question of deceased's contributory negligence, the court further said:

"Was the deceased guilty of contributory negligence in failing to look and listen before attempting to cross the track upon which he met his death? It is conceded that he took neither of these precautions. If, however, he was entitled to the rights of a passenger while on the platform, he was not required to do so. It is now the settled rule of the federal courts that passengers using station premises for the purpose of taking or leaving trains have a right to assume that the place is one of safety, and to act upon that assumption. While they are not absolved from all care, they are not required to exercise that high degree of care which the law imposes upon travelers when approaching the intersection of a highway and a railroad. The traveler upon the highway has no right to assume that the railroad is a place of safety, or that trains will not be run over it while he is attempting to pass. On the contrary, the rule has been repeatedly declared that such a crossing is a place of danger, and that the traveler must approach it with the knowledge that the company may at any time be moving trains over its road. This is the ground of the difference between the rule as to a passenger while upon station grounds and a traveler upon the highway. The one has the right to believe that the place which he is using is one of safety, while the other is bound to know that the place which he is approaching is one of imminent danger. Upon the basis of this difference the rule is now firmly established that a passenger, before crossing a track while taking or leaving a train, is not required, as a matter of law, to look and listen for approaching trains. He is simply required to exercise reasonable care in the light of all the circumstances existing at the time, and whether he exercises that care is a question of fact for the jury. [Cases cited.] This rule is based upon the soundest considerations of public policy. While taking or leaving a train, the attention of passengers is necessarily absorbed in a multitude of considerations, which make it impossible for them to exercise a careful watchfulness for approaching trains. There is usually considerable noise at such places. Frequently there is the meeting or leaving of friends. As a rule there is also haste and confusion. These and many other familiar circumstances confuse the mind, and render watchfulness impossible. The situation of Mr. Stepp is itself an impressive illustration. He arrived at the station a little late, and hastened to take the train. He rushed from one platform to another to enter, but found all entrance to the train barred. With his mind bewildered by this experience, he turned to go to the depot to wait for the next train, and was immediately struck and killed. All the circumstances mentioned were such as would throw the ordinary person off his guard, and to hold that one so situated ought to exercise the same care

as a person approaching a highway crossing would be to confound situations that are fundamentally different and encourage carriers to disregard the safety of the public."

In the case of *Hays v. St. L., I. M. & S. R. Co.*, 102 Ark. 160, 143 S. W. 923, it was said:

"It has been ruled in numerous decisions of this court that it constitutes negligence per se for a person to go upon a railroad track without looking and listening for approaching trains, except where there is an implied invitation to go upon the track without taking these precautions, or where the situation is such that the person is, in the exercise of reasonable care, misled into believing that no engine or cars are expected."

And in the opinion in that case the court quoted with approval from the case of *St. L., I. M. & S. R. Co. v. Tomlinson*, 69 Ark. 489, 64 S. W. 347, the following language:

"But the case is different where the injured person comes on the track by the invitation of the railway company. In such a case he must still exercise ordinary care; but, as he has the right to rely to some extent upon an implied assurance of the company that the way is safe, the courts, not knowing to what extent his acts may be influenced by the conduct of the company, cannot in such a case say as a matter of law that the mere failure to look and listen is such negligence as precludes a recovery. If, then, a passenger or his escort is injured while attempting to pass an intervening track to reach a depot or train, when the circumstances justify him in believing that he is invited by the company to pass over the track, it becomes a question for the jury, after considering all the circumstances, to say whether or not he is guilty of a want of ordinary care."

While we recognize this as a border line case upon the question of liability, we are still of the opinion that the jury should have been permitted to say whether, under the circumstances, appellant, in the exercise of ordinary care, had the right to believe that an invitation was extended to him to occupy the space between the tracks as these trains approached each other, and if the jury should so find they may, in measuring appellant's subsequent conduct, take into consideration the implied assurance that the operatives of both trains knew of his presence and would not imperil his safety. But, as has been said, the jury would have no right to find that this invitation had been extended to become a passenger in the manner attempted by appellant, if they find that this attempt imperiled his safety.

The judgment of the court below will therefore be reversed, and the cause remanded.

GUNTHER v. CITY OF HOT SPRINGS.

(No. 174.)

(Supreme Court of Arkansas. Oct. 18, 1915.)

1. INTOXICATING LIQUORS \S 10—LICENSE TO SELL—POWER TO CONTROL.

Under Kirby's Dig. § 5438, giving municipalities power to license, regulate, tax, or suppress retail dramshops, and also wholesale liquor dealers, a city may impose a license fee upon both wholesale and retail selling, where both are conducted by the same person in the same room, and although sections 5109-5111, providing for the levy and collection of a state and county tax, expressly exempt a licensed retailer who wholesales from the payment of the wholesale license fee.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 7-12; Dec. Dig. \S 10.]

2. INTOXICATING LIQUORS \S 46—LICENSE TO SELL—REASONABLE FEE.

Where the statute authorizing municipalities to license, tax, or suppress retailers and wholesalers of liquor fixes no maximum fee which may be charged, an ordinance fixing the license fee cannot be void because the amount is unreasonable.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 48; Dec. Dig. \S 46.]

Appeal from Circuit Court, Garland County; Scott Wood, Judge.

A. J. Gunther was convicted of violating an ordinance of the City of Hot Springs. On appeal to the circuit court, he was again convicted, and he appeals. Affirmed.

Appellant was convicted for violating an ordinance of the city of Hot Springs requiring wholesale dealers in malt liquors, to pay a license of \$300, and appealed to the circuit court, where he was again convicted, from which judgment this appeal is prosecuted. The case was tried upon an agreed statement of facts and the ordinance fixing the license. By the terms of the ordinance each wholesale dealer in malt liquors was required to pay the sum of \$300 per year.

The appellant procured from the county court a license authorizing him to conduct a dramshop at 721 Central avenue, in the city of Hot Springs, Ark., for the year 1914. He also procured from the city a license to conduct a dramshop at the same place. The building in which he was authorized to retail liquors under said licenses consists of one storeroom fronting on Central avenue, in said city, and running through to Valley street, and was used both as a saloon or dramshop and as a storeroom for malt liquors, which he sold in wholesale quantities to other retail liquor dealers in the city, in barrels of not less than five gallons and cases of not less than three dozen bottles. He did not for said year procure a license as a wholesale dealer in malt liquors, either from the county or the city, but sold said liquors wholesale from his storeroom in which he

conducted a retail liquor business for which he had taken out license.

C. Floyd Huff, of Hot Springs, for appellant.

KIRBY, J. (after stating the facts as above). The sole question for determination on this appeal is whether a city can require of a dealer engaged in selling liquors wholesale and retail from the same storeroom who had paid license as a retail liquor dealer, both city and county, to pay license as a wholesale dealer in malt liquors.

[1] Municipal corporations are given authority under section 5438, Kirby's Digest (Act May 23, 1901), "to license, regulate, tax or suppress * * *" not only "tippling houses, dramshops," but also "any dealer in wines and liquors, by the quantity or otherwise, than as keeper of tippling houses and dramshops."

After it was decided in Tuck v. Town of Waldron, 31 Ark. 464, that the act of 1875 did not authorize cities and towns to require persons engaged in the sale of wines and liquors by the quantity or otherwise than as keepers of tippling houses or dramshops to pay license, the law was amended, granting them such power.

Even if it is true, as contended by appellant, that one who engages in business as a retail liquor dealer, after having paid the licenses required therefor, may engage at the same place in the sale of malt liquors wholesale without the payment of the state and county tax or license as a wholesale liquor dealer, it does not follow that he can so engage without the payment of the license required by the city as such wholesale dealer.

The statute of March 31, 1887 (sections 5109-5111, Kirby's Digest), providing for the levy and collection of a state and county tax on wholesale dealers in malt liquors, expressly excepts from its provisions those who have procured retail license as provided by law. The city of Hot Springs could doubtless have made such an exception, but it has not done so, and, having the power to require the payment of both licenses, the appellant was rightly convicted for selling malt liquors wholesale in violation of the ordinance, notwithstanding they were sold in the same room in which his retail business, which was duly licensed, was conducted.

[2] Neither is there any merit in appellant's contention that the ordinance is void because the license fee required is unreasonable, since no price is fixed in the statute authorizing the granting of licenses to wholesale and retail liquor dealers by municipalities. Wallace v. Cubanola, 70 Ark. 395, 68 S. W. 485; Siloam Springs v. Thompson, 41 Ark. 464.

The judgment is affirmed.

COOKSEY v. HARTZELL. (No. 164.)

(Supreme Court of Arkansas. Oct. 18, 1915.)

1. LOGS AND LOGGING §2—BONA FIDE PURCHASER—NOTICE—EVIDENCE.

Evidence held to show that defendant bought land with notice of plaintiff's prior purchase of the standing timber.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 1-5; Dec. Dig. §2.]

2. LOGS AND LOGGING §2—BONA FIDE PURCHASER—NOTICE—EVIDENCE.

That after defendant bought land he not only conceded plaintiff's ownership of the timber thereon and agreed to cut and remove it for him, but did so as to part of it, is corroboration of the testimony of defendant's vendor that defendant before he bought was informed of the prior sale of the timber.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 1-5; Dec. Dig. §2.]

3. LOGS AND LOGGING §3 — PURCHASE OF STANDING TIMBER—TIME TO REMOVE—INTERFERENCE.

The time limited to a purchaser of standing timber to remove it does not run during interference with his operations by the owner of the land.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. §3.]

Appeal from Sevier Chancery Court; Jas. D. Shaver, Chancellor.

Suit by George Cooksey against E. E. Hartzell. Decree for defendant, and plaintiff appeals. Reversed and remanded, with directions.

A. D. Du Laney, of Ashdown, for appellant. Steel, Lake & Head, of Texarkana, for appellee.

McCULLOCH, C. J. Appellant was engaged in the timber business in Sevier county, Ark., and on October 4, 1912, purchased from one J. G. Young the timber on a certain quarter section of land. Young and his wife executed a deed on that date conveying the timber to appellant and giving the right to cut and remove the same for a period of two years. The deed was not filed for record until May 17, 1913, and in the meantime Young sold and conveyed the land to appellee on February 18, 1913. This is an action instituted by appellant in the chancery court of Sevier county to secure an injunction against appellee's interference with appellant's employes in cutting and removing the timber. It is alleged in the complaint that appellee had notice at the time he purchased the land from Young of the prior sale of the timber to appellant, and that in August, 1913, he entered into an oral agreement with appellant's agent whereby he agreed for a stipulated price to remove the timber for appellant, and also agreed that, if he failed to do so within the period of two years prescribed in the deed of Young to appellant, the time should be extended for another year. Appellee in his answer denied that he had any notice when he purchased the land of the

prior sale of the timber to appellant. The chancellor decided the issues in appellee's favor, and dismissed the complaint for want of equity.

[1-3] We recognize the rule that on a disputed issue of fact in a chancery cause the finding of the chancellor should not be disturbed, unless found to be against the preponderance of the evidence, but in this case we are of the opinion, after a careful analysis of the testimony, that it preponderates clearly against the finding of the chancellor. Young testified positively that the day before he sold the land to appellee he told the latter that the timber had previously been sold and was owned by the Neal Springs Lumber Company. He explained that the reason he made that statement was because appellant wanted the deed made to the Neal Springs Lumber Company, and that he understood that appellant was operating in some way through or with that company. At any rate, he states positively that he told appellee that the timber had been sold. Appellee denied that, but admits that Young told him that the timber on a three-acre tract of land just across the creek from the timber in controversy was owned by the Neal Springs Lumber Company. Young has no interest in this controversy, so far as appears from the record, and, in addition to that, he is strongly corroborated by other testimony which shows that in August, 1913, appellee conceded appellant's ownership of the timber and entered into an agreement with the appellant, through his agent, Cleveland, to cut and haul the timber for a stipulated price. This was about two months after the appellant's deed had been put on record. Appellee did, in fact, cut and haul a lot of the timber for appellant and received pay for it. Some of the payments were as late as December 10, 1913. Appellee undertakes to explain this by stating that at the time he made the concession as to appellant's ownership he thought the deed had been placed of record before his purchase; but the fact remains that he not only conceded appellant's ownership and agreed to cut and remove the timber for the latter, but that he afterwards did cut and haul a lot of it, and this must be taken as corroboration of the testimony of Young to the effect that appellee knew when he purchased the land that the timber had previously been sold; in other words, he was put upon notice of appellant's ownership, and, even though the deed was unrecorded, his grantor's prior conveyance to appellant must prevail over his subsequent purchase. The timber deed, even though unrecorded, was good between the parties and against subsequent purchasers with notice. The testimony shows, furthermore, that after appellee had failed to carry out his oral agreement to remove the timber, appellant sent a crew of men, in the summer of 1914, on the land to

cut the timber, and that appellee interfered with them and caused their arrest. Appellant's time to remove the timber was limited, and he was entitled to a decree restraining appellee from interfering with the operations of removing the timber; and, of course, the time does not run against appellant's rights until the interference is removed.

The decree is reversed, and the cause remanded, with directions to enter a decree in favor of the appellant in accordance with his complaint.

WEAVER, County Judge, v. KING. (No. 176.)
(Supreme Court of Arkansas. Oct. 18, 1915.)

1. HIGHWAYS \S 95 — ROAD OVERSEERS — POWERS AND DUTIES.

The statutory provision, requiring road overseers to keep their roads in good condition, only requires an overseer to use all the facilities granted him by law for that purpose, and does not authorize him to incur an indebtedness in excess of the revenues of his district.

[Ed. Note.—For other cases, see Highways, Cent. Dig. \S 309-312; Dec. Dig. \S 95.]

2. HIGHWAYS \S 95—ROAD OVERSEERS—POWERS AND DUTIES.

Kirby's Dig. \S 7314, which is a part of the statute providing an optional system of working roads, provides that at the time the county court meets to levy taxes it shall consider whether the roads shall be worked and bridges built as provided by that act, and if it shall so order, the order shall stand for 12 months, and that at the end of 12 months, when the taxes are again to be levied, if the court desires to continue to work roads and repair and build bridges thereunder, another order shall be made. Section 7318, which is a part of the same law, provides that no contract shall be made by the county judge or county court for the building of bridges or the working of roads until after the county court has levied the taxes for roads and bridges, and not until an estimate shall be made of the amount of money that will be raised, and that all contracts made and to be made within one year from the date of the levy of the taxes shall be in amount not to exceed the estimated levy. *Held*, that no indebtedness should be made by a district which cannot be met during the year in which it was incurred and while the law is in operation, and therefore a road overseer has no authority to incur an indebtedness for work on the roads of his district in excess of the district's revenues.

[Ed. Note.—For other cases, see Highways, Cent. Dig. \S 309-312; Dec. Dig. \S 95.]

Appeal from Circuit Court, Franklin County; James Cochran, Judge.

Proceeding by T. C. King against William Weaver, County Judge, on a claim against the county. Judgment for the claimant, and the county appeals. Reversed and remanded, with directions.

Geo. W. Barham, of Ozark, for appellant.
Robt. J. White, of Paris, for appellee.

SMITH, J. Appellee was overseer of road district No. 24 of Franklin county, and filed a claim against that district at the October, 1914, term of the county court for the sum of \$313.97. This amount was made up of

various items for hired labor and teams and for appellee's own services, it being shown that appellee had paid, out of his own funds, the amount of the claims for hired labor and teams, and no point is made of the manner of the presentation of those claims. The claim was allowed by the county court in the sum of \$142.99, and the balance disallowed. An appeal was taken to the circuit court, where the entire claim was allowed, and the county has appealed from that judgment.

There is no material dispute as to the facts in the case. The roads of Franklin county are worked under the optional system of working roads set out in sections 7290 to 7323 of Kirby's Digest, known as the "Cotton Road Law." At the July, 1914, term of the county court a meeting of all the road overseers in the county was called, and this meeting was attended by appellee. At this meeting each road overseer was advised of the amount of money in the county treasury to the credit of his district, and appellee was advised that there was \$142.99 to the credit of his district, and each road overseer was directed not to expend any sum in excess of the amount in the treasury to the credit of his district. The roads in district No. 24 were in such condition that they could not be properly worked with the said sum of \$142.99, and appellee continued working said roads and repairing them until he had expended the full amount set out in the claim, which he filed with the county court for allowance.

[1] It is urged that the directions in the statute to road overseers to keep their roads in good condition contained, and was sufficient, authority for appellee to incur the indebtedness evidenced by the items set out in the claim filed for allowance. But we do not agree with appellee in this contention. The directions to road overseers to keep their roads in good repair cannot be construed to confer upon the overseers the unlimited authority to incur any expense necessary for this purpose. This direction must be held to mean that he shall use all the facilities granted him by law for that purpose, and his actions must be governed by the law under which he operates.

[2] This system of working the roads known as the "Cotton Road Law" is an optional system, and does not obtain in any county unless that county shall, at the meeting of the county court for the purpose of levying taxes, make appropriate orders for putting this law into effect. Such order, when so made, stands only for a period of 12 months, and unless this order is renewed at the following meeting, the provisions of this Cotton road law are no longer effective, and the roads must thereafter be worked under the general road laws. Section 7314 of Kirby's Digest.

Section 7318 of Kirby's Digest is a part of the Cotton road law, and it is there provided that no contract shall be made by the county judge or county court for the building of bridges or repairing the same, or for working roads, until after the county court has levied the taxes for roads and bridges under this act for the ensuing year, and then not until an estimate shall be made of the amount of money that will be raised by such levy and collection for roads and bridges within 12 months of the date of levy, and all contracts made and to be made within one year from date of the levy of taxes shall be in amount not to exceed the estimated levy. Section 7318 of Kirby's Digest. The letter of this section is so plain that we need not inquire what the other provisions of the act are to aid us in the construction of that section. But if such inquiry was made, it would be found, as we have shown by reference to section 7314 of Kirby's Digest, that this law can never be put in force for a longer period than 12 months, and that when the law has been put in force, the order to that effect must be renewed annually, and the provisions of the law, therefore, apply only during the period of time covered by such orders. Consequently no indebtedness should be made by a district which cannot be met during the year in which it was incurred and while the law is in operation. *Monroe County v. Brown*, 177 S. W. 43.

We conclude, therefore, that the road overseer had no authority to incur the indebtedness in excess of the district's revenues, and the judgment of the court below, allowing this excess, must be reversed, and the cause will be remanded, with directions to the court below to enter a judgment disallowing this excess.

HALL v. GAGE. (No. 168.)

(Supreme Court of Arkansas. Oct. 18, 1915.)

1. APPEAL AND ERROR ⇐1002—REVIEW—VERDICT.

In an action for damages to plaintiff's building by the falling of a wall on defendant's property, plaintiff's son who was pecuniarily interested in the building gave the only testimony as to the amount of damage which was not contradicted. On other matters, the son was contradicted. *Held*, that a judgment on a verdict for less damages than the amount claimed will not be disturbed, on the ground that the testimony as to damages was uncontradicted; the question of the credibility of witnesses being for the jury, and the son's credibility being affected by his interest and the contradiction of his other testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8935-3937; Dec. Dig. ⇐1002.]

2. APPEAL AND ERROR ⇐289—NEW TRIAL—NECESSITY.

An assignment of error complaining that the court refused to allow defendant to introduce evidence to prove a defense cannot be considered, where not made a ground for motion

for new trial; the matter being a proper subject for a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1691-1696; Dec. Dig. ⇐289.]

Appeal from Circuit Court, Garland County; Scott Wood, Judge.

Action by J. H. Hall against Vince Gage. From a judgment for plaintiff, plaintiff appeals, and defendant cross-appeals. Affirmed.

Davies & Davies, of Hot Springs, for appellant. C. Floyd Huff, of Hot Springs, for appellee.

HART, J. J. H. Hall and Vince Gage owned adjoining buildings in the city of Hot Springs, Ark., which were destroyed by fire on September 1, 1913. Hall began the erection of a new building, and just after it was completed the wall of the building belonging to Gage, which had been left standing after the fire, fell over and crushed the new building of Hall. Hall sued Gage to recover damages, and alleged that the damage to his building was due to the negligence of Gage in leaving his wall standing after the fire. This is the second appeal in the case. The judgment in favor of the defendant was reversed on the former appeal, and reference is made to that opinion for a more extended statement of the issues. See *Hall v. Gage*, 172 S. W. 833, L. R. A. 1915C, 704. On a retrial of the case the jury returned a verdict for the plaintiff, Hall, in the sum of \$350, and from the judgment rendered Hall has duly prosecuted an appeal to this court. Gage prosecuted a cross-appeal.

[1] The plaintiff in his complaint asked for damages in the sum of \$1,500. The jury returned a verdict in his favor for \$500. The plaintiff then asked for judgment for the full amount notwithstanding the verdict of the jury, and his contention here is that the court erred in not granting his request. In other words, he contends that under the undisputed evidence he was entitled to the amount sued for. We do not agree with him in this contention. It is true that no witness testified as to the amount of his damages, except his son, and that the jury might have found from the testimony of Hall's son that he was damaged in the sum of \$1,500, the amount sued for. But we do not think, under the circumstances, that it can be said that his testimony was undisputed. The plaintiff himself did not testify, and it appears from the testimony of his son that the son was interested with his father in the building which was destroyed. Both the questions asked by plaintiff's counsel and the answers made by the son indicate that the son was greatly interested in the building, and was therefore directly interested in the result of the lawsuit. Moreover, the witness described the condition of the walls and the kind of building which had been erected by his father and himself.

In other words, by the testimony elicited from him on his direct examination and cross-examination the jury were fully informed as to the character and kind of building erected and the probable damage thereto.

There was the added circumstance that the witness had testified as to other material issues, and had been flatly contradicted by the evidence adduced in behalf of the defendant. The jury were the sole judges of the credibility of the witnesses, and in weighing their testimony had a right to believe all or a part of the testimony of any witness. They had the right to receive that part of the testimony which they believed to be true, and to reject that part which they believed to be false. When all these circumstances are considered, we do not think it can be said that the testimony adduced in behalf of the plaintiff was uncontradicted, and that for that reason the judgment should be reversed, or that judgment should be rendered here in behalf of the plaintiff for the full amount sued for.

[2] On the part of the defendant it is contended that the judgment should be reversed, because he offered to prove that his wall had been blown down by an unusually violent windstorm, and thereby occasioned the damage to plaintiff's building, and the court refused to allow him to make this proof. We cannot pass upon this contention of the defendant. He did not file a motion for a new trial, and hence we cannot review the alleged assignment of error. The assignment complained of was a proper subject for a bill of exceptions; but, not having been made a ground for a motion for a new trial, we cannot consider it here. *Prairie Creek Coal Mining Co. v. Kittrell*, 106 Ark. 138, 153 S. W. 80; *Thomas v. Jackson*, 105 Ark. 353, 151 S. W. 521. Many other decisions might be cited, but the question has been so thoroughly settled by this court that further citation of authority is not necessary.

It follows that the judgment must be affirmed.

OKLAHOMA STATE BANK v. BANK OF CENTRAL ARKANSAS et al.

(No. 166.)

(Supreme Court of Arkansas. Oct. 18, 1915.)

1. MONEY RECEIVED — FOLLOWING FUNDS — RIGHTS OF INNOCENT PARTIES.

Money which has been misappropriated or obtained by fraud and afterwards paid to an innocent party cannot be recovered.

[Ed. Note.—For other cases, see *Money Received*, Cent. Dig. § 31; Dec. Dig. ¶ 9.]

2. BANKS AND BANKING — COLLECTIONS — BANK AS AGENT — RECOVERING BACK.

M. executed a note which was sent to a bank for collection. He drew a draft on plaintiff in favor of W., who, acting as his agent and participating in the fraudulent scheme, deposited it with such bank for collection with instructions to credit the amount to M. or, as claimed by him, to apply it on the note. M. by false representa-

tions induced plaintiff to pay this draft, and it was placed to M.'s credit on the books of the bank. Thereafter plaintiff informed the bank's cashier that M.'s conduct in the transaction was wrongful, and asked that the deposit be not disturbed until a suit could be commenced. W. thereafter directed the bank to apply the amount collected on the note, and the cashier stated that this would be done, indorsed the note as paid, and charged M.'s account with the amount, but subsequently erased the indorsement and credited the amount back to M. Held, that the bank collected the draft as M.'s agent, even assuming that it was directed to apply the amount collected on the note, and the amount, being recoverable by plaintiff from M., was likewise recoverable from the bank, even though the bank by placing the funds to M.'s credit constituted itself his debtor to that extent.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 539-546; Dec. Dig. ¶ 156.]

3. BANKS AND BANKING — COLLECTIONS — RECOVERING BACK.

Upon receiving notice that payment of the draft was wrongfully obtained, it was the bank's duty to hold the funds as those of plaintiff, and it had no right to pay them out to another party, and hence, though the acts of the cashier would have constituted an appropriation of such funds to the payment of the note had they stood to the credit of M., the funds belonging to plaintiff the bank could not be held to the appropriation of the funds to the payment of the note, but had a right to withdraw such attempted appropriation and plaintiff and not the holder of the note was entitled to the funds.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 571-573, 583-585; Dec. Dig. ¶ 165.]

Appeal from Lonoke Chancery Court; Jno. E. Martineau, Chancellor.

Action by the C. M. Keys Commission Company against T. J. Muse and others, in which a writ of garnishment was served on the Bank of Central Arkansas. From a decree in favor of plaintiff, the defendant Oklahoma State Bank appeals. Affirmed.

Geo. M. Chapline, of Lonoke, and John W. Newman, of Little Rock, for appellant. W. A. Leach, of Lonoke, for appellees.

MCCULLOCH, C. J. This action was instituted in the circuit court of Lonoke county, and, after the issues were joined by the pleadings, the case was by agreement of parties transferred to the chancery court of that county and proceeded there to a final decree. The plaintiff, C. M. Keys Commission Company, a corporation doing business at East St. Louis, Ill., claims an indebtedness against defendant T. J. Muse in the sum of \$1,166.30, of which the sum of \$1,150 was incurred by a draft drawn by Muse on said plaintiff in favor of one Ben Wildman, which said draft was deposited by Wildman for collection with the garnishee, Bank of Central Arkansas, at Lonoke, and paid by the plaintiff to said garnishee. R. F. Johnson and Oklahoma State Bank, a banking institution of Ada, Okl., were both joined as defendants, and a writ of garnishment was issued and served on the Bank of Central Arkansas. It

was alleged in the complaint that the defendant Muse fraudulently represented to the plaintiff that said draft was drawn for the price of cattle purchased and shipped to plaintiff, and that the draft was drawn for the purpose of obtaining funds to pay a note of Muse to Johnson which had been sent for collection by the Oklahoma State Bank to the Bank of Central Arkansas. It is further alleged that Johnson was the owner of the note, and that he was aware of the design of Muse to obtain money from the plaintiff on false representations concerning the purchase of cattle in order to secure the payment of the draft for use in applying on the note. Defendant Oklahoma State Bank filed an answer and cross-complaint claiming to be the owner of the note referred to in the complaint by assignment from Johnson, and alleging that said sum of \$1,150, together with the additional sum of \$220 also received by the Bank of Central Arkansas from Muse, had been applied on the note, and prayed for judgment against the Bank of Central Arkansas for the amount so applied on the note, but which had not in fact been remitted to said Oklahoma State Bank.

The facts of the case as developed in the testimony are as follows: The plaintiff was engaged in the cattle commission business at East St. Louis, and defendant Muse, who was operating as a cattle buyer in Oklahoma and Arkansas, opened up an account with the commission company for advances of money on payment of the drafts drawn on shipments of cattle which were to be sold on the market by the commission company for Muse. On September 23, 1913, Muse drew a draft on the plaintiff in favor of Ben Wildman for \$1,150, and deposited the same for collection with the Bank of Central Arkansas. The amount of this draft was passed to the credit of Muse on that day by the Bank of Central Arkansas, and the draft was forwarded for collection and promptly paid by plaintiff on presentation. Muse executed his negotiable promissory note to defendant R. F. Johnson for the sum of \$1,550, dated June 26, 1913, and payable October 1st after date. Johnson assigned the note before maturity to the Oklahoma State Bank, and on September 4, 1913, Oklahoma State Bank forwarded the note to the Bank of Central Arkansas for collection. This was done at the suggestion or upon the direction of Muse. The note was sent in the regular course of business with the usual instructions concerning the collection and return of the funds. Wildman testified that, when he deposited the draft with the Bank of Central Arkansas for collection, he instructed the cashier to credit the same upon the note; but that statement is disputed by the cashier, who in his testimony says that the instructions were merely to credit the amount to Muse, which he did, and furnished Wildman a deposit slip showing such a cred-

it to the account of Muse. On October 3d the cashier of the Oklahoma State Bank addressed a communication to the Bank of Central Arkansas concerning the Muse note which had been sent for collection, and inquired what amounts, if any, had been paid on the note, and what was thought of the prospect for an early collection. The cashier of the Bank of Central Arkansas answered, stating that a draft on St. Louis for \$1,150 had been sent for collection, and that the cashier thought that "everything will be all right this week." It appears from the testimony that at that time the Bank of Central Arkansas had received a report of the payment of the St. Louis draft, and that the money was then standing on the books of the bank to the credit of Muse.

Plaintiff sent one of its agents to Arkansas to look into the affairs of Muse, and said agent visited Des Arc, where Muse had been buying cattle, and also went to Lonoke on October 19th and called to see the cashier of the Bank of Central Arkansas and informed him of the condition of Muse's account with plaintiff and that Muse's conduct in the transaction was wrongful. This agent also informed the cashier of the Bank of Central Arkansas that a suit against Muse would be instituted, and asked that the deposit to Muse's credit be not disturbed until after the papers could be gotten out for a suit. Wildman called up the Bank of Central Arkansas from Des Arc on October 20th and gave instructions to apply the amount of the \$1,150 collection on the Muse note. This was done by Wildman upon instructions of Muse. Wildman testified that Muse instructed him to do so, and that statement is not controverted. The cashier made reply to Wildman that it would be done. The statement of the cashier was that he replied, "All right." The cashier thereupon made a pencil indorsement on the back of the note as follows: "Paid \$1150.00, 10-20-13." The cashier also made out a charge slip directing the sum of \$1,150 to be charged to Muse on his account. He placed the charge slip on the hook, and the bookkeeper subsequently entered it up on Muse's account, charging him with \$1,150. On the night of October 20th, the cashier consulted the attorney of the bank, who told him that, in view of the prospect of a suit, he had better not remit the proceeds to the Oklahoma State Bank, but should hold the same for further development. This suit was instituted on October 21, 1913, and the writ of garnishment was served on the Bank of Central Arkansas on that date. The next day (October 22d), the cashier erased the pencil indorsement on the note and caused the bookkeeper to credit the sum of \$1,150 back to Muse, and the account stands in that shape to this date. There was also a credit of \$220 to Muse's account, in addition to the \$1,150, and the chancellor rendered a decree in favor of the Oklahoma

State Bank for said amount of \$220, and that sum has thus been eliminated from the controversy. The chancellor decided that, at the time the garnishment was served, the funds standing to the credit of Muse had not been applied on the note owned by the Oklahoma State Bank and were therefore subject to the plaintiff's garnishment.

The evidence establishes beyond controversy the fact that Muse induced the plaintiff by false representations to pay the draft which he had drawn in favor of Wildman, and the evidence is also convincing that Wildman, who acted as agent of Muse, participated in the fraudulent scheme to secure the money from plaintiff. There is, however, no testimony tending to show that the defendant Oklahoma State Bank participated in this fraud, or that it was not an innocent purchaser of the Muse note for value before maturity. There is nothing in the record that would warrant a finding against the good faith of the Oklahoma State Bank in the transaction.

[1] It is, as contended by counsel for appellant, well settled by the authorities that money which has been misappropriated, or which has been obtained by fraud and afterwards paid to an innocent party, cannot be recovered. *Holly v. Missionary Society*, 180 U. S. 284, 21 Sup. Ct. 395, 45 L. Ed. 531. This results from the well-established rule that money cannot be recovered from one who in good faith took it in the due course of business. The reason on which the rule is founded is stated by the New York Court of Appeals in the case of *Hatch v. National Bank*, 147 N. Y. 184, 41 N. E. 403, as follows:

"This doctrine goes upon the ground that money has no earmarks; that in general it cannot be identified as chattels may be; and that to permit in every case of the payment of a debt an inquiry as to the source from which the debtor derived the money, and a recovery if shown to have been dishonestly acquired, would disorganize all business operations and entail an amount of risk and uncertainty which no enterprise could bear. The rule is founded upon a sound general policy, as well as upon that principle of justice which determines, as between innocent parties, upon whom the loss should fall under the existing circumstances."

[2, 3] But if we give full force to those well-settled principles, their operation does not prevent plaintiff from recovering the funds which it was induced by fraud to pay out. It is shown by the evidence that Wildman was the agent of Muse in the transaction and participated in the latter's fraudulent scheme to draw a draft and induce the plaintiff to part with its funds in payment thereof. Wildman indorsed the draft and turned it over to the Bank of Central Arkansas, and that bank, according to the testimony of the cashier, received the money for collection and credit to the account of Muse. In other words, the Bank of Central Arkansas became the agent of Muse for the collection of the draft, and when it received

the money it received it as Muse's agent. The case is really no stronger if we accept Wildman's statement that he delivered the draft to the Bank of Central Arkansas for collection and credit on the note, for even in that event the Bank of Central Arkansas was the agent of Muse for the purpose of collection, and it remained the funds of Muse until it was actually appropriated in the manner directed. Now, the Bank of Central Arkansas, as before stated, when it received the funds from plaintiff, received them as the funds of Muse; and if plaintiff is entitled to recover the funds from Muse, on account of the payment having been wrongfully procured by fraudulent misrepresentations, it can also recover from the Bank of Central Arkansas as Muse's agent. The fact that the bank placed the funds to Muse's credit, even though it thereby constituted itself the debtor of Muse to that extent, did not change the character of the transaction so as to prevent the plaintiff from recovering the funds as long as the same were held by the bank. As soon as the plaintiff gave notice to the bank that the payment of the draft had been wrongfully obtained, it was the duty of the bank to hold the funds as those of the plaintiff, and there was a right of action as for money had and received against the bank from that moment. *Arkansas National Bank v. Martin*, 110 Ark. 578, 163 S. W. 795.

The proof in this case is that, the day before the cashier of the Bank of Central Arkansas attempted to appropriate the funds to the note held by the Oklahoma State Bank, plaintiff's agent gave notice to the cashier of the Bank of Central Arkansas of Muse's wrongful conduct which procured the payment of the draft. According to the testimony of the cashier, there was enough said to him by the plaintiff's agent to put him upon notice that the funds had been wrongfully procured, and under those circumstances the bank had no right to pay the funds out to another party. *Arkansas National Bank v. Martin*, supra; *Carroll Co. Bank v. Rhodes*, 69 Ark. 43, 63 S. W. 68. In other words, under the proof which establishes beyond dispute that the payment of the funds was induced by fraud, the funds remained in fact the property of the plaintiff as the true owner, and, from the time that the Bank of Central Arkansas received information concerning the truth of the transaction, it knowingly held money which belonged to the plaintiff and not to Muse. The testimony of the cashier is that he made a pencil memorandum on the note showing the payment of the sum of \$1,150, and he charged that sum on Muse's account. He states that the reason he made the indorsement in pencil was that he did not regard it as final until he was ready to make a remittance of the money and cancel the note. If the funds had in fact been the property of Muse,

those acts of the cashier would have constituted an appropriation of the funds to the payment of the note, for the funds stood to the credit of Muse on the books of the bank, and Muse, through his agent, gave directions to make the appropriation in that way. *Daniel v. St. Louis National Bank*, 67 Ark. 223, 54 S. W. 214; *Nineteenth Ward Bank v. First National Bank of South Weymouth*, 184 Mass. 49, 67 N. E. 670; *First National Bank of Birmingham v. Gilbert*, 123 La. 845, 49 South. 593, 25 L. R. A. (N. S.) 631, 131 Am. St. Rep. 382; note to *Virginia-Carolina Chemical Co. v. Steen*, 34 L. R. A. (N. S.) 734; 2 *Michie on Banks & Banking*, p. 1414; *Howard v. Walker*, 92 Tenn. 452, 21 S. W. 897.

But an altogether different question is presented when we consider the transaction in the light of the fact that the funds did not really belong to Muse and ought not to have been appropriated to the payment of the note, for the cashier of the bank had received notice at that time that the funds were the property of the plaintiff, and therefore he had the right at any time before the note was canceled and the funds remitted to the Oklahoma State Bank to withdraw the erroneous appropriation, which he did and thereafter held the funds for the plaintiff as the rightful owner. The case stands

the same as if the cashier had attempted to appropriate funds of any other individual to the payment of the note and had gone far enough to make the pencil indorsement on the note but had decided not to do so and refrained from forwarding the funds. Certainly the bank would not under these circumstances be held to the appropriation of the funds of another person to the payment of this note; and, as we have seen that these funds did in fact belong to the plaintiff and not to Muse, the right of the cashier to withdraw the attempted appropriation for the payment of the note still existed.

The Bank of Central Arkansas was first brought into the case as garnishee, but it was made a defendant to the cross-complaint, and the cause was by consent transferred to equity, and the bank, as well as all other parties, was treated as a proper party to the action. We overlook, therefore, the form in which the liability of the bank was originally raised and look to the substance of the controversy as shown by the proof. Our conclusion is that upon those facts the plaintiff was entitled to recover the funds, and that defendant Oklahoma State Bank is not entitled to the funds which had been wrongfully secured from the plaintiff by Muse's fraudulent conduct.

The decree is therefore affirmed.

WELLS FARGO & CO. v. BENJAMIN.
(No. 2774.)

(Supreme Court of Texas. Oct. 27, 1915.)

1. NEGLIGENCE — 141—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—CHARGE.

In an action for personal injuries, where the pleadings and evidence raise the issue, the defendant is entitled to have a charge given, grouping the facts upon which he relies to establish contributory negligence; such being a substantial right which should be accorded him.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382-399; Dec. Dig. —141.]

2. NEGLIGENCE — 136—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In an action for personal injuries sustained by plaintiff by being struck by a box, which fell from a truck of defendant, defendant's instructions on contributory negligence were properly refused, where they failed to include the element of contribution to the injury received.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. —136.]

3. NEGLIGENCE — 136—CONTRIBUTORY NEGLIGENCE — ANTICIPATION — QUESTION OF FACT.

Where, in an action for personal injuries caused by a box falling from a truck of defendant upon plaintiff at a railway station, reasonable minds might differ under the evidence whether plaintiff anticipated the danger of standing or walking near the loaded truck, the question whether his act in so doing was negligence contributing to the injury was for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. —136.]

4. APPEAL AND ERROR — 216—CONTRIBUTORY NEGLIGENCE — INSTRUCTION — APPROACH TO FACTS—DUTY OF DEFENDANT.

Where, in an action for personal injuries, the court gave a correct charge upon the issues of contributory negligence, whether it applied the law to the facts as directly as necessary will not be determined, since its failure was a mere error of omission, and it was defendant's duty, if dissatisfied, to present a correct charge more directly applying the law to the facts.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. —216; Trial, Cent. Dig. §§ 627, 628.]

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by W. S. Benjamin to recover for personal injuries against Wells Fargo & Co. From a judgment of the Court of Civil Appeals (165 S. W. 120), affirming a judgment for plaintiff, defendant brings error. Affirmed.

Baker, Botts, Parker & Garwood, of Houston, Beard & Davidson, of Marshall, and Young & Stinchcomb, of Longview, for plaintiff in error. S. P. Jones, of Marshall, for defendant in error.

YANTIS, J. W. S. Benjamin, the defendant in error, recovered a judgment against Wells Fargo & Co., plaintiff in error, for personal injuries alleged to have been sustained in October, 1911, while he was on the platform of the Texas & Pacific Railway Company, at its passenger station at Marshall, Tex., where he had gone to make in-

quiry at the ticket office about passenger rates covering a trip which he had in contemplation. While on the platform, a box fell from one of the plaintiff in error's loaded trucks, and struck him in the right temple, from which his injuries are alleged to have resulted.

Two grounds of negligence were alleged to be the proximate cause of the injuries complained of: One, that the plaintiff in error negligently loaded said truck so as to permit and cause the box or crate to fall from the same; the other, that the plaintiff in error, its agents, servants, and employes, negligently handled and operated and managed said truck in such manner and way as to cause the said box or crate to fall from the truck and strike the plaintiff.

The plaintiff in error, being the defendant in the trial court, pleaded in defense contributory negligence on the part of the defendant in error, Benjamin, it alleging that he was guilty of contributory negligence in that he walked or stood by the truck of the plaintiff in error at such close proximity thereto as to permit a crate or box to fall off of the truck upon him; also, it alleged the injury to be the result of an unavoidable accident, in which it alleged that none of its employes were guilty of negligence. It also pleaded assumed risk, but the evidence did not warrant a submission of this issue to the jury, and no complaint is made here of the failure to submit such issue.

[1] The verdict and judgment are assailed because the court refused to give plaintiff in error's special charges Nos. 10, 12, and 13. The refusal to give these special charges presents the only questions for our determination, since we approve the conclusions reached by the Court of Civil Appeals upon each of the other assignments. It is contended by the plaintiff in error that it was entitled to have a charge given grouping the facts upon which it relied to establish contributory negligence, and that these charges did so. There can be no doubt but that in a proper case this is the correct rule, where the pleading and evidence make the issue, and where such is the case, it is a substantial right which should be accorded the litigant. It is unnecessary for us to determine whether such issue was raised by the pleading and evidence in this case, in view of the conclusion we have reached with reference to the accuracy of the charges requested. When a correct charge in such a case is presented, it should be given; but an erroneous charge, of course, should be refused. Whether the charges requested in this case were correct presents the main question for our determination.

[2] Defendant in error's special charge No. 10 is as follows:

"You are instructed that if you find from the evidence that the plaintiff was walking or standing by the moving truck, at the time he

was struck, and that a person of ordinary care, under the same circumstances, would not have walked or stood by it, you will find for the defendant, regardless of whether or not you find that one or more of the employes of the defendant was guilty of negligence in loading the truck or handling it."

This charge falls to require the jury to find that the negligence of the plaintiff, if the jury found that he was negligent, proximately contributed to his injuries. It instructs the jury, in substance, that if the plaintiff was negligent, in the manner set out, to find for the defendant. But to find the defendant in error guilty of negligence would not authorize the defeat of his recovery. If the defendant negligently inflicted injuries upon him, he should not be permitted to recover if he himself was guilty of negligence which proximately contributed to his injuries; but, assuming that he was guilty of negligence, this fact would be no bar to his recovery if it did not proximately contribute to his injuries. If each party to the suit was guilty of negligence, then it became a question for the jury to determine, the trial being had before a jury, whose negligence proximately caused the injury. The charge requested did not permit the jury to determine this question. It amounted to a peremptory charge in favor of the plaintiff in error, to the effect that if the defendant in error was guilty of negligence, then such negligence would defeat his recovery whether it proximately caused or contributed to his injuries or not. This could not be right. It would manifestly be a denial of justice to defeat his recovery on account of his own negligence if in fact it did not contribute to his injuries. It is right and just that one whose wrongful act causes a loss to be suffered should bear that loss, rather than that it should be borne by one who is blameless. And one who was at fault, but whose fault was futile in the result which followed, should not be defeated in favor of the one whose wrong actually produced the injury.

[3] There would be no warrant for a charge in which the court withdrew from the jury a question of fact and settled it conclusively as a matter of law, unless the facts were such that all reasonable minds would agree, and none differ on the subject. We hardly think it could be said that, under the facts and circumstances of this case, all reasonable minds would agree that if Benjamin was guilty of negligence by being near the truck, such negligence proximately contributed to his injuries. One's act is only a proximate cause of an injury when it could have been reasonably anticipated by him that some such injury would result from such act. Now, who should determine, the court or the jury, whether it was in contemplation of Benjamin that if he stood near the truck he would probably be injured? Plainly it is a question of fact, to be determined from the evidence introduced, and, being a question of fact, it was a jury question, and the trial

court would have no authority in law to decide it.

In this connection, it might be well to call attention to the fact that no evidence was offered tending to prove any special information the defendant in error had as to the danger of being injured if he stood or walked near the truck. There was no evidence to show that he had, in his entire life, known or heard of any one being injured by standing or walking near a loaded truck, on a depot platform, or by allowing a loaded truck to pass near him. So far as this record shows, there was nothing in the experience of his life that would convey information to him which would act as a warning that he should avoid passing near a loaded truck, or should avoid permitting one to pass near him. The record is silent as to any fact that would cause him to contemplate injury in going near the truck, or in permitting it to pass near him. And to the ordinary person it might seem entirely safe to pass near a loaded truck on a depot platform, or to allow one to pass near him, since he should not presume the negligent handling thereof, or expect an unavoidable accident connected therewith, and especially if it be that his own experience, as well as the experience of the traveling public, with which he was familiar, has been such as to advise him, that, instead of being attended with danger, such accidents are of rare occurrence, and seldom, if ever within his knowledge, have resulted in injury. At least, under such circumstances, it is a question about which reasonable minds might differ as to whether he should have anticipated danger of being injured. And when reasonable minds might differ about it, we are rightfully denied the privilege of declaring the act or omission to be negligence as a matter of law. In such a case the question is one of fact, and is within the peculiar province of the jury to determine.

It clearly follows that said special charge was erroneous, and it was not error on the part of the trial court to refuse to give it. *H. & T. C. Ry. Co. v. Kelly*, 13 Tex. Civ. App. 1, 34 S. W. 809, 46 S. W. 863; *G., C. & S. F. Ry. Co. v. Mangham*, 29 Tex. Civ. App. 486, 49 S. W. 80; *Railway Company v. Rogers*, 91 Tex. 52, 40 S. W. 956.

The same vice is contained in the plaintiff in error's special charge No. 12. It instructs the jury, in its concluding clause, that:

"If you find from the evidence that a person of ordinary care, under the same circumstances, would have avoided walking or standing in such close proximity to the truck that a crate or box falling therefrom would strike him, you will find for the defendant."

The plaintiff in error would not be entitled to a verdict in its favor upon this finding. If the jury found in its favor for all it contended, it would only find that the plaintiff was guilty of negligence in standing near the truck. It requires more than this to de-

feat his recovery, if he is otherwise entitled to one. It would take the further finding that such negligence contributed proximately to his injuries in order to entitle the plaintiff in error to defeat his alleged cause of action on the ground of contributory negligence.

The plaintiff in error's special charge No. 13, whose refusal is complained of, contains the same identical error. It instructs the jury, in its last sentence, as follows:

"If you find from the evidence that the plaintiff failed to see the approaching truck, with the load thereon, or that he saw the said truck and its load, but took no notice of it, but you further find that a person of ordinary care, situated as the plaintiff was when the truck was approaching him, would have seen the said loaded truck, and would have avoided walking or standing in such close proximity to it as to be struck by a falling crate or box, you will find for the defendant, regardless of whether or not any of its employees were guilty of negligence."

A verdict against the defendant in error is required by this charge, regardless of whether the plaintiff's negligence in the particulars specified in said charge contributed proximately to the injury.

[4] The trial court gave a correct charge upon these issues of contributory negligence. Whether it applied the law to the facts as directly as necessary we need not determine, since if it failed in this, it was an error of omission, and if the plaintiff in error wanted a more elaborate charge thereon, or a more direct application of the law to the facts, it was its duty to present a correct special charge covering the issues involved. Under such circumstances, if the requested charge is erroneous, the court should refuse it, and it would not constitute error to do so. *Railway v. Mangham*, 29 Tex. Civ. App. 486, 69 S. W. 80; *Railway v. Byas*, 12 Tex. Civ. App. 657, 35 S. W. 22; *Railway v. Shieder*, 88 Tex. 166, 30 S. W. 902, 28 L. R. A. 538.

We conclude that the judgment of the Court of Civil Appeals, and that of the district court, should be affirmed; and it is so ordered.

COULTRESS v. CITY OF SAN ANTONIO et al. (No. 2743.)

(Supreme Court of Texas. Oct. 27, 1915.)

1. MANDAMUS — WHEN APPLICABLE — PLAIN DUTY.

Mandamus will not lie to compel action by the courts, unless the duty to act is plain.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 37; Dec. Dig. § 10.]

2. COURTS — 247 — CERTIFICATION TO SUPREME COURT—CONFLICT.

Rev. St. 1911, art. 1623, providing that where a Court of Civil Appeals arrives at a decision in conflict with a prior decision of another Court of Civil Appeals, it shall certify the question of law with the record to the Supreme Court for adjudication, requires the certificate to be made only when the decision is in direct conflict with a prior decision; the test being whether "one would operate to overrule the other if both were rendered by the same

court," and the cases must be the same as to facts, pleading, and evidence, to require the certificate.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 487, 749, 751-754, 757, 759, 760, 762-764; Dec. Dig. § 247.]

3. COURTS — 247 — CERTIFICATION TO SUPREME COURT — PREVIOUS CONFLICTING DECISIONS — CONSTRUCTION.

A decision of a Court of Civil Appeals, holding that a policeman, wrongfully discharged, could not recover salary subsequently accruing, held, under the pleadings, issues, and evidence, and the peculiar provisions of the San Antonio city charter, not in conflict with the *Cabiness* and the *Albers* Cases, in which similar relief was granted, but under different charter provisions, so as to require certification to the the Supreme Court."

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 487, 749, 751-754, 757, 759, 760, 762-764; Dec. Dig. § 247; *Appeal and Error*, Cent. Dig. § 1773.]

Action by James Coultress against the City of San Antonio and others. Original application for mandamus. Writ denied.

D. A. McAskill, Joseph Ryan, and Theo. E. Simmang, all of San Antonio, for relator. George R. Gillette and Robt. G. Harris, both of San Antonio, for respondents.

HAWKINS, J. This action grows out of *City of San Antonio v. Coultress* (Civ. App.) 169 S. W. 917. Therein the county court for civil cases rendered judgment in favor of Coultress, but the Court of Civil Appeals for the Fourth Supreme Judicial District reversed that judgment and rendered judgment in favor of the city. Thereupon Coultress filed therein an application for a writ of error, which application we dismissed for want of jurisdiction, pursuant to the views of a majority of this court as enunciated in *Cole v. State ex rel. Cobolini*, 170 S. W. 1036, the case having originated in a county court. Subsequently, by motion in said Court of Civil Appeals, Coultress sought to have that court certify to this court certain questions of law which, said motion urged, had been decided differently by other Courts of Civil Appeals of this state; but said motion was overruled, and those questions have not been certified. Following said refusal to certify relator instituted here this original proceeding, under article 1623, R. S. 1911, praying for a writ of mandamus directed to said Court of Civil Appeals, and the Justices thereof, requiring them to certify, for our determination, those questions, which, for convenience, may be divided, as follows:

(1) "Whether the petition in this case is good on general demurrer."

(2) "And, if appellee, under the allegations of said petition, was an officer under the state law, charter and ordinances of the city of San Antonio, regularly appointed and qualified."

(3) "And the further question whether, under the allegations of said petition, the removal of appellee (Coultress) by the city marshal is in compliance with section 17 of the city's charter, providing that only the mayor can legally so remove, and therefore if it is material whether

appellee was an officer or only an employe or servant of the city, in a suit for recovery of salary, so long as he was not removed by the mayor in accordance with said section 17."

As grounds for mandamus relator alleges that said decision of said Court of Civil Appeals in the Coultrass Case is in conflict with the decision of the Court of Civil Appeals for the Fifth District in *City of Paris v. Cabiness*, 44 Tex. Civ. App. 587, 98 S. W. 925, and with the decision of the Court of Civil Appeals for the First District in *City of Houston v. Albers*, 32 Tex. Civ. App. 70, 73 S. W. 1085. The city of San Antonio has not answered, but the Chief Justice and the Associate Justices, respondents, answered, jointly, by general demurrer and special exceptions, and by general and special denial of the existence of such conflict upon any question of law.

[1] It is well settled, under our decisions, and generally, that unless the duty is plain, mandamus will not lie. *Glasscock v. Commissioner*, 3 Tex. 51, and cases cited; *Arberry v. Beavers*, 6 Tex. 457, 55 Am. Dec. 791; *Durrett v. Crosby*, 28 Tex. 688; *Tabor v. Commissioner*, 29 Tex. 508; *Railway v. Jarvis*, 80 Tex. 456, 15 S. W. 1089; *Teat v. McGaughey*, 85 Tex. 478, 22 S. W. 302; *De Poyster v. Baker*, 89 Tex. 155, 34 S. W. 106; *Erp v. Robison*, 155 S. W. 180, decided April 2, 1913, not yet officially reported.

[2] Assuming, in favor of relator, the sufficiency of his petition for mandamus, we come directly to the vital issue as to whether, within the meaning of article 1623, R. S., any such "conflict" really exists. If such conflict does exist, mandamus should be awarded; otherwise the writ should be denied. Article 1623 is as follows:

"Wherever, in any cause at any time pending in any of the Courts of Civil Appeals of the several supreme judicial districts of the state of Texas, any one of said courts may arrive at an opinion in the decision of any such cause that may be in conflict with the opinion heretofore rendered, or hereafter rendered, by some other Court of Civil Appeals in this state on any question of law, and such Court of Civil Appeals refuses to concur with the opinion so rendered by such other Court of Civil Appeals, it shall be the duty of such court failing to concur with the opinion in conflict with the opinion so arrived at by such court through its clerk, to transmit the question of law, duly certified to, involved in the cause wherein said conflict of opinion has arisen, together with the record or transcript in such cause, to the Supreme Court of the state of Texas for adjudication by the Supreme Court."

Whatever difficulties may arise, in a particular instance, in applying this article of the statute, we regard its meaning and legal effect as plain and well settled. The sole duty which it imposes upon a Court of Civil Appeals arises only when a decision of that court upon a question of law, actually involved in a cause before it, is in direct conflict with the decision of another Court of Civil Appeals upon that very question of law, arising upon an issue actually involved in a cause before it; the test being whether "one would

operate to overrule the other in case they were both rendered by the same court."

As long ago as 1896, upon an application for a writ of error, in construing article 941, R. S. 1895, afterward article 1522, R. S. 1911, which was amended by Acts 1913, p. 107 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1522), this court said:

"In this case the judgment of the district court was reversed and the cause remanded. Although the cause is sent back with instructions, the decision of the Court of Civil Appeals does not settle the case; nor is it so averred in the petition for the writ of error. But in order to show jurisdiction in this court it is alleged that the decision of the Court of Civil Appeals is in conflict with certain decisions of this court on two propositions announced in the opinion. We have examined the cases cited in support of the averment; and, while we find that there may be some apparent inconsistency between the propositions stated in the opinion in the present case and those announced in the cases referred to in the petition, we think that the present case is distinguishable from either of those cited, and that there is not that well-defined conflict between them which is necessary to give this court jurisdiction of a remanded cause. Therefore the application is dismissed for want of jurisdiction." *Bassett v. Sherrod*, 90 Tex. 32, 36 S. W. 400.

A few months afterward, in passing upon an application for writ of error, this court said:

"It is sought to give this court jurisdiction of the application under article 941, Revised Statutes, which reads as follows:

"All causes shall be carried up to the Supreme Court by writs of error upon final judgment, not on judgments reversing and remanding causes, except in the following cases, to wit:

"5. Cases in which a Court of Civil Appeals overrules its own decisions or the decision of another Court of Civil Appeals or of the Supreme Court."

"Under this statute the conflict between the decision of the court in question and that with which it is claimed to be in conflict must be of such a nature that one would operate to overrule the other in case they were both rendered by the same court. In other words, the decisions must be based practically upon the same state of facts and announce antagonistic conclusions. It is not sufficient to give jurisdiction that a Court of Civil Appeals may have misapplied a principle of law announced by a decision of another Court of Civil Appeals or of this court. In the two cases cited as being in conflict with the decision in the present case, the question of waiver arose upon exceptions to pleading, and in the course of the opinion a general proposition was laid down upon that question which might be considered as in conflict with the decision of the court in the case presented by this application, but the facts of the cases are so different that we do not consider the conflict to be such as under the statute gives us jurisdiction to grant a writ of error." *Sun Mutual Insurance Co. v. Roberts*, 90 Tex. 78, 37 S. W. 311.

We think that the same rule of construction should be applied to said article 1623. And in 1902, some five years after the two decisions last cited, this court did apply to that statute the same rule of construction which, previously, had been applied in the two cases mentioned, saying:

"We have held that in order to give this court jurisdiction of a reversed and remanded case on the ground of a conflict of decisions, there must

be a well-defined conflict (*Bassett v. Sherrod*, 90 Tex. 32 [38 S. W. 400]); and we think the same rule should apply to the construction of the statute which requires a Court of Civil Appeals to certify a question upon which its opinion conflicts with that of another Court of Civil Appeals." *McCurdy v. Conner*, 95 Tex. 246, 68 S. W. 664.

And during the same term this court denied a petition for mandamus upon the ground that the decision of the Court of Civil Appeals for the Fifth District, in *Kidd v. Truett*, County Attorney, 28 Tex. Civ. App. 618, 68 S. W. 310, to the effect that an election on prohibition of the sale of intoxicating liquors could not be held in a school district lying partly in a justice precinct in which prohibition had already been adopted did not present such "conflict" with certain previous decisions of another Court of Civil Appeals as to require such certification, saying:

"The cases relied upon by the relator are *State v. Harvey* [11 Tex. Civ. App. 691] 33 S. W. 885, and *Adams v. Kelley* [17 Tex. Civ. App. 479] 44 S. W. 530. Both decisions were by the Court of Civil Appeals for the Second Supreme Judicial District. In the former it was held that where an election had been held in the entire county, and as a result thereof prohibition had been adopted, another election in a precinct of the county, while prohibition was still in force in the entire county, was invalid. In the latter the ruling was in principle the same. There it was held that after an election under the local option law held for a county had resulted in favor of prohibition, the commissioners' court could not be compelled to order an election for a city in the county, although the result of the county election had not been declared. Clearly the decisions in these two cases, and the decision of the Court of Civil Appeals for the Fifth District, were upon very different questions. Because a local option election cannot be held in a subdivision of a large territory in which prohibition already exists is no conclusive argument against the validity of such an election in a certain district in a part of which only the sale of intoxicating liquors is already prohibited. Where the decision in a case is not necessarily conclusive of the decision in another, there can be no conflict." *Kidd v. Rainey*, 95 Tex. 556, 68 S. W. 507.

Again, in 1908, this court said:

"When one court decides a question one way, and another court makes a contrary ruling upon the same question, there is a conflict. Hence unless the question be the same, there can be no conflict. But counsel have labored in argument strenuously to show that the principles announced in the cases cited necessarily lead to a conclusion adverse to that arrived at by the Court of Civil Appeals in the present case. But we do not think that such is the fact. Besides, we are of opinion that the conflict must be upon the very question decided, and not in the reasoning by which the conclusion is reached." *McKay v. Conner*, 101 Tex. 313, 107 S. W. 45.

See, also, *Railway v. Willson*, 101 Tex. 269, 106 S. W. 325; *Railway v. Conner*, 100 Tex. 407, 100 S. W. 367; *Welch v. Weiss*, 99 Tex. 356, 90 S. W. 160; *Elder Dempster & Co. v. Railway*, 105 Tex. 628, 154 S. W. 977; *Booker-Jones Oil Co. v. Refining Co.* (Civ. App.) 132 S. W. 815.

[3] Applying the foregoing established principles, which so long and so often have been laid down by this court, what, if any, precise question of law which was decided in

the Coultriss Case was decided differently in the Cabiness Case or in the Albers Case, supra?

Said original suit of Coultriss was for salary and allowance for a period of time subsequent to his attempted discharge, to which amounts he claimed to be entitled as a de jure officer. His contention throughout that such was his status appears to be based upon what may be treated as two counts: (1) That the police force, embracing the office of patrolman, or policeman, was duly established by the city council, by ordinance, in compliance with the requirements of the special city charter, and that he was duly appointed to that office, took the oath, gave bond, and entered upon the discharge of the duties thereof. (2) That after his discharge, and after his name was dropped from the pay roll, the city council continued to make, for the support of the police force generally, although not for any particular office or person, monthly appropriations, in lump sums, of various amounts, which appropriations were based upon the pay rolls, and that about one month after he was discharged and his name dropped from the pay roll, the city council made an appropriation, in a lump sum, to pay for a new uniform for each member of the police department, said appropriation being on the basis of \$22.50 each for patrolmen or policemen therein. His petition alleged tender of his services from and after his discharge, although he did not thereafter actually serve upon the force.

The following extracts give the gist of the opinion of the Court of Civil Appeals in that case:

"Before the emoluments of an office may be recovered, it is necessary that the claimant therefor should show: First, that the office has been created and is in existence; and, second, his legal right thereto. He must show that he is an officer de jure. * * *

"Article 2 of the charter deals with the powers and duties of the city council, and the first section thereunder says, in part:

"Sec. 51. The city council * * * shall have power, by ordinance: * * *

"Sec. 65. To establish a police force and regulate the same. * * *

"Sec. 56. To create any office or agent deemed necessary for the good government and interest of the city. * * *

"Turn then back to section 20, and it reads:

"The city council, or a majority thereof, may act by resolution in all cases except where an ordinance is by this act required. * * *

"It is clearly stated that the council shall have power by ordinance to establish its police force. That means, and can only mean, that the council has that power when exercised in the manner prescribed, which is by ordinance. Section 20, giving the council power to act by resolution in all cases not otherwise required to be done by ordinance, must mean that where an ordinance is required, a resolution would be insufficient. The ordinance of the council of date March 2, 1903, wherein it was ordained that 'the police force of the city of San Antonio shall consist of one chief marshal and two assistant marshals, one police matron, and such detectives and mounted and unmounted patrolmen as the mayor and city council may deem necessary,' did not create the office of patrolman or policeman. * * * The only limitation is such num-

ber as the mayor and city council 'may deem proper.' The only logical result or inference from this is that the mayor may appoint, and the council, by a simple resolution ratifying the same, may confirm, as many patrolmen as may be desired; and this in the face of the charter provision that it shall be done by ordinance."

In the opinion overruling Coultrass' motion for a rehearing that court considered the contention that the above-mentioned ordinance of March 2, 1903, and an earlier ordinance which provided that "the police force of the city of San Antonio will consist of the following grades: City marshal (ex officio chief of police), assistant marshal or marshals and patrolmen," both of which ordinances were continued in force by the special charter of 1903, were not founded upon it, but upon the city's charter of 1870, and upon that point said: "But these ordinances would be in conflict with the charter of 1870 almost, if not entirely, as much as with the present charter or the charter of 1903," because it found that the charter of 1870 likewise required that the power of the city council "to establish, regulate and support night watch and police, and define the duties thereof," should be exercised "by ordinance" only. And the court added:

"So, whether we look at the proposition from the standpoint of the 1870 charter or the present one, there is practically no difference. The whole matter summed up is that the department must be established by an ordinance, and the office of policeman cannot be created by resolution."

In passing upon what we treat as the second count in plaintiff's petition, relating to appropriations, the court, in its original opinion, said:

"But the charter of the city was granted for the public good, and the powers of the council are defined in and circumscribed by that document. The city can only act as it is permitted to act in that legislative grant. That instrument says that the council shall act by ordinance in matters of this kind, and this it has not done. The doctrine of estoppel and ratification cannot aid that which never had a legal existence."

Briefly stated, the material holdings of of that court were:

(1) That neither the police force nor the office of patrolman, or policeman, had been created by the city council, "by ordinance," in compliance with the mandatory requirements of the city's special charter, and, consequently, Coultrass' appointment as patrolman, or policeman, made by the mayor, even when confirmed, according to custom in that city, as it was, by the city council, in the absence of a valid ordinance defining and limiting the number of patrolmen or policemen, was invalid; wherefore Coultrass was never, de jure, a patrolman or policeman of said city, and therefore was not entitled to recover compensation covering salary and allowance for a period of time during which he was not actually engaged in the performance of the duties of such patrolman or policeman.

(2) The fact that, after Coultrass was dis-

charged and his name dropped from the pay roll, the city council continued to make monthly, in lump sums, in varying amounts, the usual appropriations for the support of the police department, but without making any specific appropriation for him, or for any particular office or person, would not control Coultrass' status or establish his claim for compensation.

Really, the principal question of law there decided was this: Was that portion of the ordinance which relates to patrolmen, or policemen, in compliance with the requirements of the city charter, and therefore valid and effectual to create that office, although it failed to fix the number of patrolmen or policemen, but left the number to be determined otherwise than "by ordinance"? And that part of the decision goes no further than the determination of the legal effect or sufficiency of the ordinance for that purpose, holding, as a consequence of the decision that it was not legally sufficient therefor, that Coultrass was not a de jure officer, and therefore could not recover.

It is true that, incidentally, and as indicated by the last foregoing excerpt from its original opinion, the Court of Civil Appeals seems to have considered and treated as insufficient to support Coultrass' cause of action, under what we treat as his second count, his allegations relative to appropriations; but upon that phase of the case it should be noted and remembered: (a) That his petition in the trial court, as appears from the record before us, did not even allege that his name appeared upon any of the pay rolls upon which such appropriations were made, but, on the contrary, as pointed out in the opinion on rehearing, did allege that his name was dropped from the pay rolls at date of his discharge; and (b) that said holding upon said second count was evidently based upon the finding of fact set out in the original opinion that Coultrass' name was upon the pay rolls when said appropriations were made, and that, after said finding of fact was corrected on rehearing, that court seems not to have considered that phase of plaintiff's case as of any further consequence, making no reference to it in the opinion on motion for rehearing. Under these circumstances, it seems that there is little, if any, necessity for further considering the holding on said second count as a possible basis of conflict, even if it be treated as fairly embraced by said question 2.

An essential difference between the decision in the Coultrass Case and each of the other two decisions mentioned by relator as a basis of "conflict" lies in the fact that neither of the above-mentioned issues or holdings in the Coultrass Case—one relating to the validity, or at least the sufficiency, of a portion of a particular ordinance affecting the creation of the office when tested by the peculiar provisions of a particular special

city charter, and the other relating to the effect of appropriations made by the city council under certain peculiar circumstances—was involved in either of said other decisions. It seems clear, therefore, that there was no statutory conflict between the Coultrass decision and either of the other decisions.

And here it seems we might properly suspend consideration of the three decisions and deny the writ sought. However, we consider it advisable to consider and treat further, and somewhat in detail, the contentions of relator, and certain phases of each of said other decisions.

From the report of the Cabiness Case, it appears that the general demurrer was overruled by the trial court, but the report of the Albers Case does not state what, if any, action was taken by the trial court on the general demurrer. However, we will assume herein that in each instance, as claimed by relator, it was overruled. On appeal of the Cabiness Case it was distinctly held that the trial court did not err in overruling it, but if that point was decided on appeal in the Albers Case, that fact is not disclosed by the report. It is plain that, if it was not, on that point at least there was no conflict between the decision in the Coultrass Case and that in the Albers Case; but again will we assume that the claim of relator is correct, and that in the Albers Case, also, it was held, on appeal, that the trial court did not err in overruling the general demurrer.

The three questions will be considered serially:

First. The alleged conflict involved in question (1), above, relates solely to the sufficiency of the petitions when tested by general demurrer. Applied in comparing the Coultrass decision with the Cabiness decision, that question relates to petitions under widely variant charter provisions which, in each case, controlled the decision; wherefore, the cases presented by the petitions being essentially different, the opposite holdings as to the sufficiency of the respective petitions on the issue whether, as a consequence, plaintiff was or was not a *de jure* officer cannot fairly be considered a statutory "conflict."

The charter in the Coultrass Case was one of which by its terms the courts are required to take judicial notice, and was pleaded in plaintiff's petition. The charter in the Cabiness Case, it seems, was one of which the courts are not required to take judicial notice, but the report does not state that it was not specially pleaded in plaintiff's petition, and does show that the defendant pleaded certain sections of that charter, and that both the trial and the appellate court held said petition good against a general demurrer. Under these circumstances, we feel justified in assuming herein, as we do, that, along with the plaintiff's petition, the Paris charter was properly considered by both

courts in the Cabiness Case, as the San Antonio charter undoubtedly was in the Coultrass Case.

The nature of the petition in the Coultrass Case we have sufficiently indicated. In the Cabiness Case, as in the Coultrass Case, the suit was, indeed, by one claiming to be a policeman *de jure*, for compensation for a period of time subsequent to his attempted discharge, and there as in the Coultrass Case, the principal question of law involved was as to whether plaintiff had ever become a policeman *de jure*; but there that issue hung, not, as in the Coultrass Case, upon the sufficiency or insufficiency of an ordinance under the terms of a special charter requiring that the establishment of the police force by the city should be "by ordinance," but upon the construction to be given to a provision of a different charter, which might justly be construed and treated as creating the office of policeman, and which expressly conferred upon the city council power and authority "to appoint watchmen and policemen, and prescribe their duties and powers and compensation," without expressly providing that such powers should be exercised by ordinance, which quoted provision was held to be self-executing, requiring no resolution or ordinance of the city council to make it effective, from which analysis it clearly appears that the common question as to whether plaintiff ever became an officer *de jure* depended, in the respective cases, upon essentially different facts; in consequence of which difference the decisions in those cases upon that point, although announcing diametrically opposite conclusions as to the sufficiency of otherwise substantially similar petitions, do not present a "conflict" within contemplation of said article 1623.

Turning, under question 1, to the Albers Case, we find: The opinion in that case embodies no specific holding as to the sufficiency or effectiveness of any ordinance creating, at attempting to create, the office of policeman of the city of Houston. Nothing in the report of the case indicates that it was therein contended that any ordinance failed to comply with charter requirements. The decision therein justly may be said to have assumed the legal existence of that office, and, evidently, it was merely as a logical consequence of that assumption that it was held that, under the plaintiff's allegations, his tenure of office was valid, entitling him, as a *de jure* officer, to his full term, which, upon a construction of the charter and the applicable provisions of our state Constitution, was held to be "during efficient service and good behavior, for two years," and no longer; and it seems to have been in consequence of that latter holding, coupled with the fact that "there was neither allegation nor proof that he was ever reappointed to such office," that it was held that with the expiration of that original term Albers

ceased to be a policeman de jure, and that thereupon the liability of the city for his salary as such de jure officer terminated. And, under the facts of that case, as disclosed by said opinion, Albers having been paid in full for all services rendered during said two years and afterwards down to date of his discharge, it was really immaterial, on appeal, whether Albers, during that period, had been an officer de jure or an officer de facto; and, inasmuch as he had not been re-appointed after the expiration of his original term, it was likewise immaterial whether that office had any legal existence since, in any event, after the expiration of that term, he was therefore not an officer de jure, and consequently was not entitled to recover for services not actually rendered.

From a comparison of the opinion in the Albers Case with that in the Coultrass Case, and although in each instance the number of policemen had not been fixed by charter or ordinance, and in each instance the suit was by one claiming to be a policeman de jure for salary for a period of time subsequent to his discharge (the Albers suit being also for salary covering a period of suspension embracing 15 days prior to such discharge, but subsequent to expiration of his original two years' term of office), it seems too clear for argument that between them there is no statutory conflict upon any holding by the Court of Civil Appeals upon the general demurrer.

Second. Question 2 may be treated as including both counts of plaintiff's petition in the Coultrass Case, the first as presenting the theory of a de jure status resting upon allegations of compliance with all requirements of law, including charter and ordinances, coupled with regular appointment and qualification and with service in office, and the second as presenting the theory of a de jure status resting upon allegations of appointment and qualification and service as policeman down to date of discharge, coupled with subsequent recognition by the city, through its city council, of his status as a policeman, even though it be held that a strict compliance with law and charter provisions, including the establishment of the police force by the city council by an ordinance fixing its number, was lacking.

Upon the first branch of question 2 our views have been sufficiently expressed above in treating question No. 1, and a portion of what we said there applies to the second branch thereof. The second branch of that question rests, apparently, upon the idea that plaintiff's status was affected by action of the city authorities recognizing and treating him as a de jure officer. Applying it to the Cabiness Case, we are unable to find that plaintiff there contended, or that it was held, that, even though it should be decided that the office of policeman had not been properly created, or that his appointment was invalid, the other facts of the case were such

as to constitute him a policeman de jure, or entitle him to recover for services which he never rendered. In that opinion, referring to Cabiness, the court did, indeed say:

"He was recognized under the appointment made, and his salary paid by appellant for three months without objection, and without any question being raised concerning the legality of his appointment so far as disclosed by the record. Under these facts it seems clear that he became an officer de jure, and entitled to hold the office to which he had been appointed for two years, unless lawfully ousted."

But that portion cannot fairly be wrenched from its place in the context and considered separately as a basis of conflict in decisions. In considering the meaning and force of said excerpt, it must be remembered that the court was then dealing with the third assignment of error, which complained of the action of the trial court in sustaining special exceptions to and striking out portions of defendant's original answer, which set up the following defenses: (a) That the city council had never passed any ordinance or resolution making effective the charter powers relating to the creation of a police department or the appointment of policemen, and that neither the term of office nor the duties of policemen had been prescribed, and that policemen were subject to removal at will and without notice; (b) that, pursuant to said charter, the city council had adopted for its government rules which had been disregarded in the appointment of plaintiff to said office; (c) that, in consideration of his appointment as policeman, plaintiff contracted with defendant that either the city marshal or the city council might discharge plaintiff, at any time, with or without notice or cause. The actual viewpoint and conclusions of that court as to the merits of said pleas are more clearly shown as follows:

"We are of the opinion, however, that neither of the alleged grounds of defense mentioned constituted any sufficient reason for denying to appellee a recovery. Section 27 of appellant's charter conferred upon its city council the power and authority 'to appoint watchmen and policemen, and prescribe their duties and powers and compensation.' This provision of the charter was self-executing and required no resolution or ordinance of the city council to make it effective. Nor do we think mere irregularities in the proceedings by which appellee was appointed, if any, can be taken advantage of by the city and urged as distinct grounds upon which to defeat his otherwise right to recover the salary incident to said office. Besides, it does not appear that his discharge was based upon any such ground. He qualified and entered upon the discharge of his duties. He was recognized under the appointment made, and his salary paid by appellant for three months without objection, and without any question being raised concerning the legality of his appointment, so far as disclosed by the record. Under these facts it seems clear that he became an officer de jure, and entitled to hold the office to which he had been appointed for two years, unless lawfully ousted"; citing cases.

Undue stress should not be laid upon the statement that Cabiness was recognized under his appointment as a policeman, and received his salary for three months without

objection or question concerning the legality of his appointment. Evidently it was made in disposing of the city's contention (b) above, under the third assignment, which contention, in effect, assailed Cabiness' status as a de jure officer upon the ground that the irregularities there urged rendered his election to the office of policeman invalid, even though it should be held that the office had been duly created or recognized by the charter, that instrument being self-executing, and no ordinance being necessary to the existence of that office. And it was probably with that thought in mind, as well as with reference to the duration of Cabiness' term as a de jure officer, that the court cited *City of Houston v. Estes*, 35 Tex. Civ. App. 90, 79 S. W. 848, wherein *Estes* was held to have been an officer de jure despite certain irregularities in the giving of a bond, concerning which complaint was not seasonably made. In other words, it seems to us that the immediate purpose of the court there was merely to apply to said plea (b), concerning irregularities in the election or appointment of Cabiness, the principle which, in that cited case, had been applied to the qualification of *Estes*, that principle being that where the office exists legally, such mere irregularities, when acquiesced in, will not reduce to the status of a merely de facto officer the incumbent who, but for such irregularities, would be a de jure officer.

Furthermore, in considering the effect of the language found in said first excerpt, it should be constantly borne in mind that it followed the holding upon the city's contention (a), above, to the effect that the charter provision relating to the appointment of policemen was self-executing, requiring no resolution or ordinance by the city council to make it effective—a holding which, under the uncontradicted evidence, resulted in the further conclusions and holdings that "appellee was duly appointed or elected policeman * * * on the 27th day of April, 1903, by its city council and * * * qualified," which holdings together, and without regard to whether the city did or did not pay his salary for three months, constituted a reasonable and adequate predicate for the ultimate conclusion there announced by the court that, under the facts of the case, Cabiness clearly—

"became an officer de jure, and entitled to hold the office to which he had been appointed for two years, unless lawfully ousted."

Certainly the words, "became an officer de jure," would seem strangely inappropriate in defining the status of the incumbent of an alleged office which had no legal existence, and the words, "the office to which he had been appointed," would have been palpably inappropriate in that connection, and those expressions would hardly have been used by that learned court had its purpose been to there declare and hold that, in the absence of the legal existence of the office and an ap-

pointment thereto, which was at least substantially effectual although somewhat irregular, the recited facts that he was recognized and paid by the city as a policeman would constitute him an officer de jure, and entitle him to the emoluments of that office during its term.

Plainly, we conclude, the legal effect of the above quoted portion of said opinion, treating said third assignment and embracing said first excerpt, is to hold, merely: (a) That the three defenses therein mentioned had not been abandoned by failure to replead them, and were properly up for review, the city having seasonably made and duly brought up its exceptions to the action of the trial court in sustaining special exceptions to said defenses; but (b) that none of the three pleas was meritorious. The citation of cases was such, we think, as to support our conclusion. Consequently, so far as we have discovered, the decision in the Cabiness Case involves no holding whatever upon the point embraced by the second branch of question 2; wherefore it seems impossible for "conflict" to exist between that decision and that portion of the opinion in the *Coultriss* Case which we have treated as involving that point.

Nor does this second branch of question 2 seem to have been involved in the *Albers* Case, except in connection with the action of the city council upon *Albers'* appeal from the order discharging him, whereby that body—

"determined, by a vote of 10 to 2, that plaintiff had been wrongfully discharged from the service of the city, and it was recommended that he be reinstated in his former position and be paid in full for the time lost by him."

In that connection it must be remembered that *Albers'* allegations, relating to his appointment and confirmation, taking the oath of office, giving bond and approval thereof, referred, primarily, to his original term of office, which was held to be two years, and that upon the view that, under the charter and ordinances, there was no succession in the office of policeman pursuant to which he might continue in office until his successor qualified, coupled with the finding of fact that he was never reappointed, it was held that after the expiration of his term of office he was no longer an officer de jure.

Upon the effect, if any, of the above-mentioned action of the city council concerning *Albers'* discharge, no specific holding seems to have been made; but the plain purport of the decision seems to be that such action by the council, whether considered separately or in conjunction with the antecedent facts and circumstances of the case, including his declaredly valid appointment, qualification, and service for two years, was insufficient to make his status, after the expiration of that term, that of a de jure officer. Under the opinion in the *Albers* Case there is certainly no room to contend that therein it was held that action by the city author-

ities, even when considered in connection with the other facts of this case, constituted him an officer de jure, after expiration of the two years; hence, upon that feature, there is no conflict between that decision and the decision in the Coultrass Case. On the contrary, and even upon relator's assumption that Coultrass' petition alleged, and that the facts showed, the making by the city council, after date of his discharge, of specific appropriations for his salary, an assumption directly in the face of the final findings of fact, the effect of the decision in the Coultrass Case was that, nevertheless, he was not thereby, nor in connection with the other facts of that case, including his attempted appointment and qualification and service, constituted an officer de jure; and that holding as to the legal effect of the facts and circumstances upon Coultrass, status during the period of time covered by his claim for compensation was not in conflict, but was in strict harmony, with the decision upon the corresponding feature of the Albers Case.

Third. Coming, finally, to question 3, we find in the Coultrass appeal no holding on any question involving the legality of plaintiff's discharge common to that in either of the other two cases mentioned by relator; consequently there can be no conflict thereon. Question 3, as framed, involves, or assumes, a construction in the Coultrass Case of the legal effect of section 17 of the San Antonio special city charter. Manifestly that question of construction was not involved in the Cabiness Case, which arose under the Paris charter, nor in the Albers Case, which arose under the Houston charter, neither of which is shown to have contained an identical or even a similar provision. And it seems that the opinion in the Coultrass Case does not even attempt to construe said section 17; and, indeed, under the view which prevailed in that decision, and under the holding there made, which, as we have seen, was to the effect that Coultrass never became an officer de jure, the question of whether his attempted discharge was legal or not became and was wholly immaterial in that cause, just as the corresponding question was held to be immaterial in the Albers Case, the court having there held, as was held in the Coultrass Case, that plaintiff was not an officer de jure during the period of time covered by his claim for compensation, the plaintiff in each instance having received full pay for all services actually rendered. Indeed, in each of those cases, under the holdings made therein, respectively, any decision or holding therein as to the legality or illegality of plaintiff's discharge would have been dictum, upon which conflict under said article 1623 could not be predicated. In the Albers Case, said holding of imma-

teriality was the only one relating to discharge.

The appeal in the Cabiness Case involved three, and only three, issues relating to plaintiff's discharge: (a) Discharge pursuant to his said contract with the city therefor, which was held void as against public policy; (b) discharge by the city marshal, which the court found to have been without a hearing or trial, and held to have been without authority of law; (c) an incidental question as to whether the city had notice that plaintiff had been discharged by its city marshal, upon which it was held that the city had sufficient notice and adopted and ratified said act of discharge. Evidently none of those three questions, relating to discharge, was involved in the Coultrass Case; consequently there was no conflict thereon.

We deem it proper to suggest that, in the event of the filing of such actions in the future, the time of this court may be conserved by more definite and specific statements by relators, alleging conflict.

Because, in our opinion, relator's claim of conflict is without merit, the writ of mandamus is denied.

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A. A. FIELDER LUMBER CO. v. GAMBLE.
(No. 7403.)

(Court of Civil Appeals of Texas. Dallas.
Oct. 16, 1915.)

APPEAL AND ERROR \Leftrightarrow 781 — DETERMINATION OF MOOT CASE.

Where the controversy between the parties has been settled pending appeal, the appeal will be dismissed, the question being moot.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, 8122; Dec. Dig. \Leftrightarrow 781.]

Appeal from District Court, Grayson County; James P. Haven, Judge.

Action between the A. A. Fielder Lumber Company and J. R. Gamble. From a judgment for the latter, the former appeals. Appeal dismissed.

Webb & Webb, of Sherman, for appellant.

RAINEY, C. J. The subject-matter in controversy having been settled and determined by the parties since this appeal was perfected, there remains nothing but a moot question for this court to decide; such being the situation the court will not occupy its time by investigating the question raised for the mere purpose of determining who was right in the litigation.

Where parties have settled their controversies this court will not pass upon matters which have been settled by agreement. The subject-matter having ceased to exist, the case will be dismissed, and it is so ordered. *Ansley v. State*, 175 S. W. 470, decided by this court April 3, 1915.

SAN ANTONIO, U. & G. RY. CO. et al. v. YARBROUGH. (No. 5503.)

(Court of Civil Appeals of Texas. San Antonio. Oct. 13, 1915.)

1. APPEAL AND ERROR — 569 — ASSIGNMENTS OF ERROR — STATEMENT OF FACT — APPROVAL.

Without a statement of facts approved by the trial judge, assignments of error cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2530-2545; Dec. Dig. 569.]

2. TRIAL — 331 — VERDICT — DISPOSITION OF CROSS-ACTION.

In an action for conversion against a railroad and another to recover the value of property, with a cross-action setting up plaintiff's indebtedness to defendants, a verdict for plaintiff for \$600, construed in the light of a charge that the jury should find for plaintiff if he was not indebted to defendants or if his indebtedness was less than the amount of their indebtedness to him, removed all objections to the verdict on the ground of uncertainty and that it did not dispose of the cross-action.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 783; Dec. Dig. 331.]

3. JUDGMENT — 240 — VERDICT — JOINT AND SEVERAL LIABILITY.

Where the verdict found a joint liability against defendants, there was no error in a judgment decreeing a joint and several liability.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 423-425; Dec. Dig. 240.]

Appeal from District Court, Bexar County; W. F. Ezell, Judge.

Action by J. W. Yarbrough against the San Antonio, Uvalde & Gulf Railway Company and another, with cross-action by defendants. Judgment for plaintiff, and defendants appeal. Affirmed.

Williams & Hartman, of San Antonio, for appellants. Don A. Bliss, of San Antonio, for appellee.

FLY, C. J. Appellee instituted this suit to recover of the railway company and J. E. Franklin the value of certain tools and implements, which constituted a railroad contractor's outfit, which, it was alleged, had been converted to their use by appellants. The property was alleged to be worth the sum of \$2,700 and appellee also sought the recovery of \$1,000 as exemplary damages. The jury returned a verdict for \$600, and judgment was accordingly so rendered.

[1] The first assignment of error assails the verdict on the ground that the value of the property was not shown to be more than \$600, and that appellee was indebted to Franklin in a sum equal to that amount. The statement of facts filed in this case is not approved by the trial judge, and consequently cannot be considered by this court. In every instance the statement of facts must be approved by the trial judge. Rivers v. Campbell, 51 Tex. Civ. App. 103, 111 S. W. 190. Without a statement of facts, the assignment of error cannot be considered. The second,

fourth, fifth, and eighth assignments are also based on the evidence and must be overruled.

[2] The seventh assignment of error assails the verdict because it did not dispose of the cross-action of appellants. The verdict must be construed in the light of the charge which instructed the jury that they should find for appellee, if they found he was not indebted to appellants, or if the amount in which he was indebted was less than the amount in which appellants were indebted to him. That charge removes all objections to the verdict and makes it certain. The jury must necessarily have found that appellee was not indebted to appellants, or that, if he was, they owed him \$600 more than he owed them. Garrett v. Robinson, 93 Tex. 406, 55 S. W. 564; Bemus v. Donigan, 18 Tex. Civ. App. 125, 43 S. W. 1052; Cameron v. Lubbock, 147 S. W. 717.

[3] The judgment does not provide for a double recovery. Although the verdict found a joint liability against appellants, there was no error in the judgment decreeing a joint and several liability. Kuykendall v. Coulter, 7 Tex. Civ. App. 399, 26 S. W. 748; Railway v. Crump, 82 Tex. Civ. App. 222, 74 S. W. 335.

The judgment is affirmed.

OCCIDENT FIRE INS. CO. v. LINN.
(No. 7406.)

(Court of Civil Appeals of Texas. Dallas. Oct. 16, 1915.)

1. APPEAL AND ERROR — 770 — REVIEW — BRIEFS.

Under court rule 40 (142 S. W. xiv) an appellant's brief may be accepted as a proper presentation of the case, without examination of the record contained in the transcript, where appellee files no brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3106, 3107; Dec. Dig. 770.]

2. INSURANCE — 609 — FIRE INSURANCE — ACTIONS — EVIDENCE.

Where there was testimony by a second-hand piano dealer that he had examined the instrument insured for \$400, and considered its market value in the neighborhood from \$150 to \$200, and it did not appear whether the time referred to was before or after the fire, a requested charge that, the market value of the instrument not having been shown, plaintiff could not recover, was properly denied; it being as fair to assume that the testimony referred to the condition of the instrument after the fire as before.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. 609.]

3. INSURANCE — 658 — FIRE INSURANCE — ACTIONS — EVIDENCE.

Testimony as to the condition of the insured property more than 8½ months after the fire is inadmissible in an action on a fire policy, without a showing that the condition was the same then as immediately after the fire.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1639, 1690, 1694; Dec. Dig. 658.]

4. APPEAL AND ERROR ⇐1067—TRIAL ⇐208—REFUSAL OF INSTRUCTIONS.

Where the court erroneously denied a motion to strike incompetent evidence, the refusal of a charge to disregard such evidence was reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. ⇐1067; Trial, Cent. Dig. § 504; Dec. Dig. ⇐208.]

5. INSURANCE ⇐658—FIRE POLICIES—ACTIONS—EVIDENCE.

Where a piano was insured against fire, evidence in an action on the policy as to the cost of repairing its internal mechanism was improperly received, where there was no showing of that sort of damage.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1689, 1690, 1694; Dec. Dig. ⇐658.]

Appeal from Grayson County Court; J. Q. Adamson, Judge.

Action by W. C. Linn against the Occident Fire Insurance Company, begun in justice court, and appealed by defendant to county court. From a judgment there for plaintiff, defendant appeals. Reversed and remanded.

Crane & Crane, of Dallas, for appellant.

TALBOT, J. The appellee has filed no brief in this case, and we copy from appellant's brief the following statement of the nature and result thereof: W. C. Linn, appellee, as plaintiff, instituted a suit against appellant, the Occidental Fire Insurance Company, of Albuquerque, N. M., in the justice court, precinct No. 1, Grayson county, Tex., upon a policy of insurance in the sum of \$400, issued by appellant to his wife, Mrs. W. C. Linn, covering an upright Ellington piano located in appellee's residence in Sherman, Tex. He prayed for judgment for \$165 damages alleged to have been caused by fire and water to the piano in a fire which occurred on August 1, 1913, together with attorney's fees. Appellant admitted that the policy was issued and that a fire occurred, but denied that the damages sustained to the piano amounted to \$165. Trial before a jury in the justice's court resulted in judgment on April 21, 1914, for appellee in the sum of \$125, and attorney's fees, to which appellant excepted, and gave notice of appeal to the county court of Grayson county, Tex. Appeal bond was duly filed within the time allowed by law. In the county court the pleadings of the parties were the same as in justice's court, plaintiff praying for \$165 damages and attorney's fees, and defendant denying the amount of damage. The cause was tried before a jury, and resulted in a verdict for plaintiff in the sum of \$134, and the court entered judgment accordingly. Motion and amended motion for a new trial were filed within the time required by law, which were by the court in all things overruled, to which the defendant excepted, and gave notice of appeal to this court.

[1] Appellee having failed to file in this court any brief, we are authorized to re-

gard appellant's brief, under rule 40 prescribed by the Supreme Court (142 S. W. xiv), as a proper presentation of the case without an examination of the record as contained in the transcript.

[2] The first assignment of error presented in appellant's brief complains that the trial court erred in refusing to give the following special charge requested by it:

"The undisputed evidence shows that the piano covered by the policy sued on had a market value at Sherman, Tex., at the time the fire occurred. Plaintiff's measure of damages therefore is the difference between the market value of the piano immediately before the fire and immediately after it was damaged. There being no evidence as to what the market value of the piano was immediately after the fire, you are instructed that plaintiff has failed to prove the amount of his damage. You will therefore find a verdict for the defendant."

The assignment asserts the refusal of this charge was error:

"Because the undisputed evidence showed that the piano in controversy had a market value in Sherman, Tex., at the time the fire occurred, and the plaintiff's measure of damages was the difference between the market value of same immediately before the fire and immediately after the fire, which is more fully set out in defendant's bill of exception No. 5."

The evidence quoted in the statement under this assignment in support of the contention that there was no testimony showing what the market value of the piano was immediately after the fire is as follows: J. F. Kohler testified:

"I am in the piano business, tuning and selling, and have been for about 30 years at Sherman. I buy and sell and trade pianos, and handle secondhand pianos. * * * I examined the piano in Mr. Linn's house. It was an Ellington piano, made by the Baldwin Company, of Cincinnati. * * * I considered the market value of that piano in the neighborhood of \$150 or \$200. That is what would be a fair price for it."

The testimony of the witness Kohler, as thus quoted in appellant's brief, does not show at what time he regarded the market value of the piano in question to be \$150 or \$200. It will be observed that he says he examined the piano in Mr. Linn's house, but it does not appear whether this was before or after the fire which is charged to have damaged the piano; neither does it appear that in speaking of the market value of the piano he had reference to its market value before or after the fire. For aught the statement shows, he may have had reference to the market value of the piano immediately after the fire which the plaintiff claims damaged it. It is certainly just as reasonable to conclude that he was speaking of the value of the piano after the fire as that he was speaking of it before the fire. Indeed, the inference is stronger, we think, that he was speaking of the value of the piano after the fire. In this attitude of the testimony the appellant has not sustained its assignment asserting that there was no evidence showing the market value of the piano im-

mediately after the fire. In view of the condition of the evidence as thus pointed out, we would not be authorized to say, as against the ruling of the court, that there was no evidence showing the market value of the piano immediately after the fire, and the assignment must be overruled.

[3] Appellant's second assignment of error is as follows:

"The court erred in overruling and in refusing to sustain defendant's motion to exclude from the consideration of the jury all the testimony of the witness William Weiss as to the condition of the piano involved on the date of his examination of same, and the amount it would take to replace same in the condition it was before the fire, because the evidence clearly showed that such examination was made some 8½ months after the fire which damaged the piano, and there was no evidence in the record that the condition of the piano at the time of such examination was the same as it was immediately after the fire, because the evidence of such condition at the time of such examination was too remote to be evidence of the condition of said piano immediately after the fire; all of which is more specifically set out in defendant's bill of exception No. 1."

The proposition advanced under this assignment is that:

"The testimony as to the condition of a chattel of a witness who made an examination of same 8½ months after it had been damaged by fire is not admissible upon the issue of the amount of damage occasioned by the fire to show its condition immediately after the fire, in the absence of proof that its condition at the time of such examination was the same as it was immediately after the fire."

This assignment must be sustained. Appellant states a correct proposition of law under it, and purports to set forth in support of the assignment all the testimony bearing upon the question raised. This testimony shows that the witness Weiss made an examination of the piano 8 or 8½ months after the fire which damaged it, and there appears no evidence whatever showing or tending to show that the piano was in the same condition at the time of such examination as it was immediately after the fire. Without such evidence proof of the condition of the piano at the remote period of 8 or 8½ months after the alleged date of its injury for the purpose of showing the extent of the injury to it and the amount of plaintiff's damages in consequence thereof was inadmissible. In this connection, based upon the condition the piano was in when examined, the witness was permitted to state that it would cost \$75 to repolish and place the piano in first-class condition. It not appearing that the condition of the piano at the time it was examined by this witness was the same as it was immediately after the fire, the testimony complained of by appellant should have been excluded.

[4] In addition to its motion to have this testimony excluded, appellant sought by a requested special charge to have it withdrawn from the consideration of the jury. This charge was refused by the court, and its re-

fusal is made the basis of appellant's third assignment. Having refused to exclude the testimony upon appellant's motion made for that purpose, the denial of this charge was material error.

[5] It is also assigned that the court erred in permitting the witness O. L. Guinn to testify that it would cost \$25 to \$50 to buy or replace the inner action of upright grand Ellington pianos, and that it would cost about \$45 to restring an upright grand Ellington piano, and in refusing to sustain appellant's motion to exclude the testimony of said witness that it would cost "about \$5 extra to put in new tuning pins in an upright Ellington piano." Appellant contends and asserts, as propositions under the several assignments of error complaining of the foregoing rulings of the court, that there was no evidence showing that either the inner action or the strings or the tuning pins of the piano was damaged by the fire in question. The assignments complaining of the foregoing rulings of the court should, in our opinion, be sustained. Taking the statements of appellant as correctly presenting the evidence offered, there was, as contended by appellant, no evidence showing that either of the parts of the piano to which the testimony objected to related was damaged by the fire alleged to have caused injury to it. There being no such evidence, the admission of the testimony complained of was prejudicial error, and requires a reversal of the case. To correct the errors here referred to the appellant requested the court to charge the jury as follows:

"There being no evidence in the record in this cause as to what particular parts of the interior of the piano covered by the policy in suit were damaged, you are instructed that the court erred in permitting the witness O. L. Guinn to testify as to what the cost of replacing the 'action,' the cost of restringing same, and the cost of replacing the tuning pins of said piano would be, and you will disregard said testimony in arriving at your verdict."

The court refused this charge, and its refusal is assigned as error, upon the ground that there was no evidence in the record that the inner action, strings, or tuning pins were damaged by the fire. There being no such evidence, and the court having erred in admitting the testimony complained of, and having refused to strike it out upon motion of appellant, it was error to refuse the charge.

The judgment is reversed, and the cause remanded.

POSTAL TELEGRAPH CABLE CO. OF TEXAS v. DE KREKKO. (No. 5504.)

(Court of Civil Appeals of Texas. San Antonio. Oct. 13, 1915.)

1. EVIDENCE \Rightarrow 471 — OPINION — CURE BY CONTEXT.

In an action for rent, where the answer of a witness, although a portion of it, considered

alone, appeared to be his opinion as to the meaning of certain statements made by a third person, when considered as a whole merely stated what such person had said, its admission was proper.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471; Witnesses, Cent. Dig. § 834.]

2. LANDLORD AND TENANT § 231—SUBLETTING — CONTRACT — SUFFICIENCY OF EVIDENCE.

In an action for rent, evidence held to show that defendant, through its agent, made a contract to subrent the premises for one month, with an option to extend the contract to cover the term of plaintiff's lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 926-934; Dec. Dig. § 231.]

3. LANDLORD AND TENANT § 80—OPTION TO SUBLET—PERFORMANCE.

Where premises were sublet for one month, with the option, if satisfactory to extend the time of occupancy to one year, the term of the tenant's lease, the sublessee, by retaining the space longer than a month, signified its satisfaction, and abandoned its right to limit the contract to such period.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 254-257; Dec. Dig. § 80.]

4. JUDGMENT § 199 — JUDGMENT NON OBSTANTE VEREDICTO.

The court had no power to render judgment in disregard of the jury's findings; its power being limited to setting aside the verdict and granting new trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.]

Appeal from Bexar County Court for Civil Cases; John H. Clark, Judge.

Action by George De Krekko against the Postal Telegraph Cable Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

A. P. Wozencraft, of Dallas, and Cobbs, Eskridge & Cobbs, of San Antonio, for appellant. Engelking & James, of San Antonio, for appellee.

MOURSUND, J. Appellee sued appellant in justice's court, alleging that appellant, through its agent, W. E. Herring, leased certain premises from appellee for 11 months, agreeing to pay \$15 per month for the use thereof, and that it only paid the sum of \$60. Judgment was rendered in favor of plaintiff for \$105. An appeal was taken, and the trial resulted in a verdict and judgment in favor of plaintiff for \$105, with interest from March 1, 1914. No written pleadings were filed.

[1] Appellant complains of the admission of a portion of an answer of the witness G. De Krekko to a cross-interrogatory. When considered alone, this portion of the answer appears to be the opinion of the witness with regard to the meaning of certain statements made by Herring; but, when the entire answer is considered, it is obvious that the witness merely stated what Herring had said, namely, that they (meaning appellant company) would try the lease one month, and

if they remained over and above that month it would mean for them to stay for the year. The first assignment of error is overruled.

[2, 3] By the second assignment of error complaint is made of the overruling of defendant's motion for an instructed verdict; the contention being that the undisputed evidence showed that defendant was to take the space in plaintiff's store for a substation for one month, and that if it paid the first month then defendant was to take such space for the life of plaintiff's lease, and that the evidence showed that the business did not pay for the first month. Defendant's witness Herring did not undertake to testify regarding the terms of the contract made by him with plaintiff. Plaintiff testified on direct examination that Herring said, "I want to take that space for one month with the privilege of one year;" that Herring asked him how long his lease ran, and he told Herring one year, and that Herring then said, "That is satisfactory, and we will take it the same as your lease, if it is satisfactory at the end of the first month." Plaintiff's brother testified that Herring said they would try for one month, and if they continued over and above that month it meant for them to stay for the year. Defendant used and paid for the space for four months, without undertaking to make any other contract.

It is true that upon cross-examination plaintiff testified that he understood Herring was trying the business, and that he would take the space for the rest of the lease if the business paid. Upon redirect examination he again testified to the actual language used by Herring, which was in substance that, if the business was satisfactory and they did a good business, he would keep the space during the term of plaintiff's lease. This evidence clearly shows a contract to rent for one month, with an option to extend the contract to cover the term of plaintiff's lease. It shows clearly that defendant could abandon the premises at the end of the month, and the contract would be at an end; but it does not show that it could stay for four months, and then say that it had never become bound, except for one month, but had secretly been a tenant at will. It was never the intention of the parties that, if the business was unsatisfactory, or did not pay, defendant could act as if it was satisfactory, continue its possession, apparently exercise its option to lease for the remainder of plaintiff's term, and then, after four months, say it had never made a contract, except for one month. Under the terms of the contract, by exercising its option to retain the space longer than the month, defendant signified its satisfaction with the business done, and abandoned its right to limit the contract to one month. The court did not err in overruling defendant's motion for an instructed verdict, and the assignment is overruled.

[4] The third assignment complains of the refusal of a motion for judgment in favor of defendant notwithstanding the verdict. The court did not err in overruling the motion. If the undisputed evidence had shown the facts set out in the motion, the jury having made findings on the points relied upon by defendant, the court had no power to render judgment in disregard of such findings; its power being limited to setting aside the verdict and granting a new trial. *Fant v. Sullivan*, 152 S. W. 515.

The judgment is affirmed.

ABLON v. WHEELER & MOTTER MERCANTILE CO. (No. 7396).*

(Court of Civil Appeals of Texas. Dallas. June 19, 1915. On Motion to Certify to Supreme Court, Oct. 23, 1915.)

1. PLEADING \S 258—AMENDMENT OF ANSWER AT TRIAL.

There was no error in refusing to permit defendant during the trial to amend his answer by setting up a deed of trust and introducing a new defense based thereon, which would necessitate a continuance to enable plaintiff to meet it; all the facts and circumstances showing that defendant was put on inquiry and had sufficient time to have ascertained the exact condition of affairs, and that if he did not know it it was due to his negligence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. $\S\S$ 765-782; Dec. Dig. \S 258.]

2. TRIAL \S 250—INSTRUCTIONS—CONFORMITY TO ISSUES.

An instruction presenting an issue unauthorized by any pleading, or even by the evidence, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. $\S\S$ 584-586; Dec. Dig. \S 250.]

3. NEW TRIAL \S 102—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Defendant is not entitled to a new trial on the ground of newly discovered evidence, a deed of trust, of which the circumstances put him on inquiry.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. $\S\S$ 207, 210-214; Dec. Dig. \S 102.]

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Action by the Wheeler & Motter Mercantile Company against Ben Ablon. Judgment for plaintiff, and defendant appeals. Affirmed, and motion to certify questions overruled.

Carden, Starling, Carden, Hemphill & Wallace, Towne Young, Victor H. Hexter, and A. B. Lacy, all of Dallas, for appellant. Short & Feild, of Dallas, for appellee.

RAINEY, C. J. In June, 1907, J. W. Tobolowsky was engaged in the mercantile business at McAlester, Okl. Being financially involved, a petition in bankruptcy was filed against him. Tootle, Wheeler & Motter Mercantile Company, one of his creditors, agreed to help him. A convention of the creditors was had, who agreed to take 40 per cent. of their indebtedness in settlement, and said mercantile company agreed to advance the

money to pay the other creditors, if the full amount of its claim was secured. Said mercantile company advanced the money, and said creditors were paid their 40 per cent., and J. W. Tobolowsky executed to said mercantile company his two promissory notes, one for \$1,315 and the other for \$1,500, the latter signed by Ben Ablon, and the stock of goods of said Tobolowsky was placed in the hands of a trustee for sale to pay off said indebtedness. The note first falling due, \$1,315, was paid off, and the other was reduced in amount by payments to about \$900, when on October 30, 1911, appellee, successors to Tootle, Wheeler & Motter Mercantile Company, brought this suit against J. W. Tobolowsky and Ben Ablon to recover the balance due on the \$1,500 note. Tobolowsky was dismissed from the suit, and of which there is no question raised, and Ben Ablon is the only defendant. He pleaded that he signed the note as surety and that he did so with the understanding that the proceeds arising from the sale of the goods placed in the hands of the trustee should be first applied to the payment of the \$1,500 note, which was not done; that the note was procured by duress and fraud on the part of the mercantile company, in that they agreed to accept 40 per cent. of their indebtedness, as did the other creditors, but after the meeting of the creditors, and before they would advance the money to pay the other creditors, they required Tobolowsky to secure them in the full amount of their debt, which he did to prevent being forced into bankruptcy. A trial resulted in a judgment against Ablon, and he appeals.

[1] 1. On the trial, after the plaintiff and defendant had both introduced their direct testimony, plaintiff in rebuttal offered in evidence a deed of trust executed by J. W. Tobolowsky to J. J. Tushy, agent of the mercantile company, conveying the entire stock of merchandise, fixtures, etc., to be held in trust, with power of sale in the usual course, to keep the property insured, to replenish the stock, to pay expenses of running the business, and balance of the proceeds arising from the sales to be applied on said indebtedness. At this point in the trial defendant claimed that he knew nothing of said deed of trust, and asked leave of the court to amend his answer that he might set up in effect said deed of trust, that it was a security for said note, that the value of said security was in excess of said indebtedness, and that the same had been negligently dissipated by said mercantile company, but for which said note would have been paid off and discharged. The plaintiff objected to the filing of said amendment:

"Because said defendant had ample opportunity to obtain said deed of trust if he desired. J. W. Tobolowsky was his codefendant in this action and resided at McAlester, in the state of Oklahoma, as defendant well knew when said

deed of trust was executed. That it was filed for record on the 10th day of July, 1907, that this suit was brought on the — day of 19—, against defendant and J. W. Tobolowsky, and has been pending ever since. That said amendment, if allowed, introduced into the case a new defense, which would necessarily result in a continuance to enable the plaintiff to show that the goods mentioned in the notice were removed from Oklahoma without the plaintiff's knowledge and with the knowledge and consent of the defendant."

The court refused to permit defendant leave to file said trial amendment, to which action of the court in refusing defendant leave to amend the defendant then and there duly excepted. We are of the opinion that the court did not err in refusing to permit appellant to amend his answer as requested. He pleaded that the goods were placed in the hands of a trustee for sale, and that the note was to be paid out of the first proceeds of sale. Said deed of trust was properly recorded in Oklahoma. He was a nephew of J. W. Tobolowsky, and B. Tobolowsky, J. W. Tobolowsky's brother, was placed in charge of said goods for the purpose of disposing of the same, and several years elapsed before this suit was brought. All the facts and circumstances, we think, show that appellant was put upon inquiry and had sufficient time to have ascertained the exact condition of affairs; if he did not in fact actually know the true condition, it must be attributed to his own negligence.

[2] 2. The court did not err in refusing to give appellant's special charge to the effect to find for him if they believed plaintiff caused the surrender of securities sufficient to pay the said note to J. W. Tobolowsky, or, if not sufficient to satisfy the note, to credit the value of what was turned back on said note. There was no pleading by appellant that authorized the presentation of such an issue. Besides, there is no evidence showing the value of the goods returned to J. W. Tobolowsky.

[3] 3. The court did not err in failing to grant appellant's motion for a new trial on the ground of newly discovered evidence, which was the deed of trust introduced by plaintiff, and for which the appellant had asked leave to amend. As above stated, we think there was no just ground for appellant's being surprised, as the circumstances shows put him on inquiry, and our discussion of the question of refusal to allow appellant to amend applies to the question of newly discovered evidence.

4. On the issue pleaded by appellant that he signed said note as security with the understanding that the proceeds of sale of the goods should be first applied to the note here sued on, we will say that there was sufficient evidence to support the jury's verdict that there was no such understanding by the mercantile company or its agent.

5. We also think the evidence sustains and

authorizes the verdict on the question of duress and fraud.

There is no error in the charge of the court upon the burden of proof.

Finding no reversible error in the record, the judgment is affirmed.

On Motion to Certify to Supreme Court.

The appellant moves this court to certify this case to the Supreme Court, because in conflict with the opinions of the Courts of Civil Appeals at El Paso and at Ft. Worth. He states in his motion:

"This honorable court, through Chief Justice Rainey, in the above cause, on the question of principal and surety, held that though it was apparent of record that the creditor (the appellee in this cause), which was a trustee, and in the possession of securities held for the payment of the note sued on, negligently surrenders said securities to the principal debtor, and allows him to remove same out of the state, such action on the part of the creditor does not discharge the surety, nor release him pro tanto to the amount of such surrendered security."

In the opinion we used no such language as above set out, nor did we hold or intimate that such was not the law. What we held was that there was no pleading presenting such an issue. On the issue pleaded that appellant signed the note with the understanding that the proceeds of sale of the goods should first be applied to the note, the evidence was sufficient for the jury to find against him. We concluded that appellant signed the note without reference to what disposition was made of the goods.

The motion is overruled.

FWLER v. CARLISLE. (No. 7388.)

(Court of Civil Appeals of Texas. Dallas. Oct. 16, 1915.)

1. SALES — 53—REPRESENTATION — FACT OR OPINION—QUESTION OF FACT.

Whether a representation made by a seller was intended by him and understood by the buyer as an affirmation of a fact or a mere expression of opinion, in which latter case it, though untrue, is not ground for rescission, is a question of fact for the jury, or for the court exercising his jury function.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 145-151; Dec. Dig. —53.]

2. APPEAL AND ERROR — 731—ASSIGNMENTS OF ERROR.

Any assignment of error without support in the court's conclusions of fact, and which fails to challenge the correctness of such conclusions, presents no error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3017-3021; Dec. Dig. —731.]

Error from Wood County Court; R. E. Bozeman, Judge.

Action by M. E. Fowler against J. A. Carlisle. Judgment for defendant, and plaintiff brings error. Affirmed.

Jones & Jones, of Mineola, for plaintiff in error. Harris & Britton, of Quitman, for defendant in error.

RASBURY, J. In the court below plaintiff in error sued defendant in error to rescind a contract of sale and purchase entered into between the parties, and to recover the price paid for two mules on the ground that defendant in error had warranted them to be sound and strong while in fact one of the mules had been crippled when a colt and as a consequence was incapable of doing farm work for which defendant in error had warranted them. There was trial, without jury, resulting in judgment for the defendant in error, from which judgment this appeal was taken. The record contains no statement of facts, but the issues presented in the brief of plaintiff in error are based, as to the necessary facts, upon unchallenged conclusions of fact prepared and filed by the trial judge. These conclusions, essential to a consideration of the issues presented, are, in our own language and arrangement, in substance, as follows: Defendant in error raised the mule in question. When it was a few days old it was, in some manner unknown to defendant in error, injured and crippled in its hip, and as a result of such injuries limped for three or four months, defendant in error being aware of both the injury and the consequent limp. Plaintiff in error, who lived in Smith county, distant about 20 miles from defendant in error's home in Wood county, went to the latter's home and purchased the mules, together with harness for each, paying therefor \$475, which was the fair market value of the mules and harness. At the time of the sale defendant in error had, for a period of 2½ or 3 years worked the mule at all kinds of farm work without it ever having shown any lameness or hurt from the injury received when a colt, though the condition of the hip, as a result of the old injury, rendered it more susceptible to other injury, and at the time of the sale was, as matter of fact, sound for all kinds of farm work, but showed a slightly low hip. While plaintiff in error was examining the mule he remarked to defendant in error "that hip looks a little low," to which defendant in error replied, "I can hardly tell it, can you?" Plaintiff in error also asked defendant in error if the mule had been hurt or lame in that leg, to which defendant in error replied, "He has never been lame on me," which last statement plaintiff in error believed. Defendant in error did not inform plaintiff in error, nor was he informed otherwise, that the mule had been hurt when a colt, but such omission was not the concealment of a latent defect. The mule's low hip was open and patent, and was observed by plaintiff in error before he purchased the mule. He had noticed the mule resting its leg, with low hip, while in harness. At the time of the purchase plaintiff in error was accompanied by his father-in-law, who lived near defendant in error, and had known the mules all their lives, examined them at the time of the purchase, and

would have purchased them himself, although he had known of the injury to the mule when a colt. At the time of and before the sale was concluded, plaintiff in error requested defendant in error to guarantee the mules, but defendant in error refused to do so, and did not make any warranty as to the soundness or condition of the mules. Defendant in error did tell plaintiff in error that the mules were sound, but, having refused to guarantee them, such statement was made and accepted as the opinion of defendant in error, based upon his knowledge of the mules and not as a statement made to induce plaintiff in error to purchase. Nor was the statement that the low hip had never hurt or lamed the mule of defendant in error a false representation. After the purchase plaintiff in error put the mules upon road work too heavy for them, and in a few weeks thereafter the mule in question became lame in the low hip, since which time he has been unable to do regular farm work without showing lameness. At the time of trial the mule had an abnormal or enlarged condition of the bone near the hip joint, which could have been produced by a blow, strain, or overwork, and which will decrease the value of the mule approximately one-half, but the court was unable from the evidence to ascertain the cause of such condition.

[1] The first error assigned, and which, in effect, reviews all issues covered by all other assignments, is that the court in view of its findings of fact erred in rendering judgment for defendant in error. The proposition first urged is that when the vendor asserts that an animal offered for sale is not, as matter of fact, injured in a respect particularly inquired about, and it subsequently develops that the statement is untrue, the vendor is liable as in case of express warranty, notwithstanding there was an express refusal to warrant in any respect. Without attempting a discussion as broad as the proposition asserted, or conceding its entire correctness, and without attempting to recite all the exceptions or variations of the rule as stated, one of the well-settled exceptions in such cases is that the intention of the vendor in making such representation and the understanding of the representation by the vendee is a fact of prime importance in determining the right to rescind in such cases. And, it may be added, the intention of the vendor, and the understanding of the vendee, is a question of fact to be determined by the jury under appropriate charge by the court. In *Cole v. Carter*, 22 Tex. Civ. App. 457, 54 S. W. 914, it was said:

"As we understand the law upon the subject, if the representations made by the seller were intended and understood as the mere expression of an opinion, then the seller is not liable, although the representations may have been untrue. But when the representations, in whatever language they may be couched, are intended and understood as the affirmation of a fact material to the transaction, and the purchaser relies upon them as true, the seller will be held

liable if they be false. And when the representations are not in writing, and their purpose is not manifest and certain, the question should be left to the jury to determine whether or not the language used was intended and understood as the affirmation of a fact, or the mere expression of an opinion."

Applying the rule stated in the instant case, it will be seen, by reference to the court's conclusions of fact, that the court, not only found that defendant in error's statement in reference to the particular injury inquired about, i. e., the injury to the hip, was not a false representation, but that all representations made as to the soundness of the mules were opinions of defendant in error, and so understood and accepted by plaintiff in error. Such being the conclusions of fact by the court while in the exercise of his jury function, the assignment discloses no error, since such conclusions are not challenged, neither does the record contain a statement of facts upon which such challenge might be based.

It is next urged as a proposition of law that it is the duty of the vendor in the sale of personal property to disclose to the vendee all latent defects affecting the value of the article sold. It is asserted in such connection that the defendant in error not only failed in such duty, but concealed a latent defect in one of the mules. To sustain this claim plaintiff in error relies upon the finding of the court that defendant in error, when one of the mules was a colt, discovered it in an injured and crippled condition in the hip, due to causes unknown to defendant in error, and from which injury it limped for three or four months, notwithstanding which defendant in error at the time of the sale in effect stated that he could hardly notice the low hip, and that the mule never had gone lame on him. The court, however, in its conclusions of fact further found that such action of defendant in error was not the concealment of a latent defect, for the reason that the defect was open and patent and was observed by plaintiff in error. Further, the court found also that what defendant in error said concerning the effect of the injury on the mule was not a false representation. In other words, that defendant in error stated the truth when he represented to plaintiff in error that the low hip had never hurt the mule or caused it to limp while owned by defendant in error. Thus, while the rule of law stated by plaintiff in error may be conceded to be correct, it also has no support in the facts, and fails to disclose reversible error.

[2] The next proposition is, in effect, that the making of a false statement concerning the condition of personal property, which induces the purchase thereof, is ground for rescission. Generally speaking, the rule as stated is correct. The difficulty, however, lies in the fact that the proposition is also not supported by the court's conclusion. The

effect of the court's findings is that all representations made by defendant in error were merely the expression of his opinion, and that he never intended more than that, and that the plaintiff in error so understood it. Such being the condition of the record, any assignment without support in the court's conclusions of fact, or which fails to challenge the correctness of such conclusions in a proper manner, does not constitute reversible error.

For the reasons stated, the judgment is affirmed.

ROUNDS v. COLEMAN. (No. 876.)

(Court of Civil Appeals of Texas. Amarillo. Oct. 9, 1915.)

AFFIDAVITS \Leftrightarrow 14—AUTHORITY OF OFFICER—AFFIDAVIT IN LIEU OF APPEAL BOND.

An affidavit in lieu of an appeal bond sworn to before the judge of a county court of another state is defective, as the statutes give such an officer no authority to administer oaths and affirmations when taken without the state.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 58-60; Dec. Dig. \Leftrightarrow 14.]

Appeal from District Court, Collingsworth County; J. A. Nabors, Judge.

Action between Adelia T. Rounds and S. L. Coleman. From the judgment, Rounds appeals. Appeal dismissed.

J. M. Worten, of Pawhuska, Okl., and Templeton & Templeton, of Wellington, for appellant. R. H. Cocke, Jr., of Wellington, for appellee.

HENDRICKS, J. The affidavit in lieu of an appeal bond in the transcript in this appeal is purported to have been made before a judge of the county court of Tulsa county, Okl. We are unable to find in our statutes giving to such an officer any authority to administer oaths or affirmations when taken without this state, and the motion to dismiss the appeal on account of a defective affidavit is sustained, and the appeal is ordered dismissed.

BLAIR & HUGHES CO. v. WATKINS & KELLEY. (No. 746.)

(Court of Civil Appeals of Texas. Amarillo. Oct. 9, 1915.)

1. EVIDENCE \Leftrightarrow 434 — PAROL EVIDENCE — FRAUD INDUCING CONTRACT.

Although an order for goods shipped and refused, stipulates that all its conditions appear upon its face, parol evidence of fraudulent representations inducing the order that the goods could and would be delivered by a certain date, when not varying the terms of the instrument, is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. \Leftrightarrow 434.]

2. EVIDENCE \Leftrightarrow 419—PAROL EVIDENCE—CONSIDERATION.

Parol evidence is admissible to show the real consideration of a written contract, al-

though it contradicts the consideration named therein.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. ¶419.]

3. APPEAL AND ERROR ¶1001—MATTERS REVIEWABLE—VERDICT NOT SUPPORTED BY EVIDENCE.

Where the verdict of the jury is not supported by the evidence, the case will be reversed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. ¶1001.]

Appeal from Collingsworth County Court; R. H. Cocke, Judge.

Action by the Blair & Hughes Company against Watkins & Kelley. On motion for rehearing. Reversed and remanded.

R. H. Templeton, of Wellington, and Charles C. Huff, of Dallas, for appellant. J. L. Lackey, of Wellington, for appellees.

HALL, J. A review of the record has convinced us that we erred in affirming the judgment. Appellant company sued Watkins & Kelley, a copartnership, upon an account, for \$625. In its amended petition appellant alleged that on the 6th day of November, 1912, plaintiff entered into a written contract with the defendants, Watkins & Kelley, as follows:

"Blair & Hughes Company:

"Ship to Watkins & Kelley, Dodsonville, Texas, five hundred patterns bagging and ties, \$1.25 per pattern, f. o. b. Wichita Falls, Texas. Bill of Lading attached. There are no conditions attached to this sale other than those shown on this order and same is not subject to countermand under any circumstances. Sellers not liable for fulfillment of this order unless signed by purchaser.

"[Signed] Watkins & Kelley, Purchaser.
"Cheatham, Salesman for Sellers."

[1] Appellant further alleges that it shipped the bagging and ties to Watkins & Kelley consigned to Dodsonville, Tex., and sent the bill of lading with draft attached, as provided in said written order, and that defendants had refused to accept the shipment and pay for same when it arrived at Dodsonville.

Defendants alleged, in substance that on the 6th day of November, 1912, being in immediate need of bagging and ties for use at their gin at Madge, Okl., they met appellant's salesman, Cheatham, in Wellington, Tex., and inquired of him how long it would take said bagging and ties to reach Dodsonville; that Cheatham advised them that his house had the bagging and ties in stock, and could deliver same to defendants at Dodsonville by the following Monday, and that, if defendants would give him the order, he would phone his house and ascertain whether or not the goods were in stock at that time; that Cheatham did communicate by phone with plaintiffs, and afterwards advised defendants that the bagging and ties were in stock and could be shipped immediately; and

that the order was made upon said representations, but that the bagging and ties were not delivered on the following Monday, and were not shipped until November 15th. It is alleged that Cheatham's statements that the bagging and ties were in stock and would be shipped Monday were fraudulently made, and that defendants were induced thereby to give him the order.

Appellant contends that the court erred in admitting in evidence the testimony of appellee Watkins to prove the conversation and agreement with Cheatham before the written order for the goods was signed. The evidence shows that the order was not signed in Wellington, but was given on the train after Watkins and Cheatham left Wellington for Dodsonville. The admissibility of parol evidence to show fraud in matters of inducement as a defense to an action upon the contract is well settled in this state. The Court of Appeals and the Supreme Court, in *United States Gypsum Co. v. Shields*, 106 S. W. 724, and 101 Tex. 473, 108 S. W. 1165, discussed this question, and held that, although the contract of sale provides that the written order constitutes the entire contract, and that there are no verbal statements or agreements varying its terms, nevertheless evidence of fraudulent representations not tending to vary the terms of the writing by which the purchaser was induced to sign it is admissible. *Commonwealth Bonding & Casualty Co. v. Bomar*, 169 S. W. 1060; *Coons v. Lain*, 168 S. W. 981; *New York Life Insurance Co. v. Thomas*, 47 Tex. Civ. App. 149, 104 S. W. 1074; *Trinity Valley Trust Co. v. Stockwell*, 81 S. W. 793; *Turner v. Grobe*, 44 S. W. 598.

[2] Parol evidence is also admissible to show the real consideration for a written contract, when the consideration itself is not contractual, although the effect of such evidence is to contradict the consideration recited in the writing. *Watson v. Rice*, 166 S. W. 106.

The jury found, in reply to the first and second questions submitted by the court, that Watkins signed the order with the understanding that the bagging and ties should be delivered not later than Monday following the 6th day of November, 1912, and that such delivery should be made to Watkins & Kelley by that date. There is no testimony whatever in the record upon which to base such a finding.

[3] The remaining fact, upon which appellees defended, is the alleged fraudulent representation by Cheatham that appellants had the patterns on hand at that time in Wichita Falls. This issue was also submitted to the jury and they failed to agree. A great many immaterial issues were submitted to the jury; but there being no evidence to sustain the finding that appellants undertook to deliver the goods on or before Monday following the execution of the order, and the jury having failed to agree upon the is-

sue as to whether or not Cheatham fraudulently represented the goods to be in stock, there is nothing in the verdict upon which to base a judgment.

It is therefore reversed, and the cause remanded.

H. J. MURRELL & CO. v. EDWARDS et al.
(No. 823.)

(Court of Civil Appeals of Texas. Amarillo.
Oct. 16, 1915.)

1. ASSIGNMENTS ⇐100—ORDERS—REFUSAL TO PAY—SUBSISTING EQUITIES.

Where the drawer of an order to pay from funds collected by the drawee was indebted to the drawee and to the payee, but the debt to the drawee was prior to that to the payee, the order was subject to the debt to the drawee and to the drawee's equities against the drawer.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 177, 180; Dec. Dig. ⇐100.]

2. BILLS AND NOTES ⇐68—ORDERS—ACCEPTANCE.

The drawee of an order held not to have accepted the order by the words "the order shall have our attention" at an uncertain time.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 110-115; Dec. Dig. ⇐68.]

3. APPEAL AND ERROR ⇐927—PRESUMPTIONS—DISMISSAL—GROUNDS.

Although a plea that an action is prematurely brought is one in abatement and not in bar, and the suit, if dismissed on that ground, is erroneously dismissed, where there are other grounds for dismissal, in the absence of a record showing to the contrary it will be presumed that the dismissal was upon the valid grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 375b, 4024; Dec. Dig. ⇐927.]

Appeal from Deaf Smith County Court; Jas. A. Hughes, Judge.

Action by H. J. Murrell & Company against S. B. Edwards and another. From a judgment for defendants, the plaintiffs appeal. Affirmed.

Hoover & Dial, of Canadian, and Knight & Slayton, of Hereford, for appellants. W. H. Russell, of Hereford, for appellees.

HALL, J. Appellants instituted this suit to recover of S. B. Edwards and Geo. F. Caylor the sum of \$157.46. Appellants alleged that about the 20th day of October, 1913, defendant Caylor executed and delivered to it a certain order on S. B. Edwards, in the above amount, which the said Edwards agreed and became liable to pay, but which he had subsequently refused to pay. By consent of parties the cause of action was dismissed as to all defendants except Edwards. He answered by general and special denial of appellants' allegations and pleaded specially that prior to October 20, 1913, Caylor was indebted to him in the sum of several thousand dollars, and for the purpose of securing the payment of such sum had signed

and delivered to defendant a number of promissory notes and land contracts with the understanding and agreement that the defendant would collect the notes and close up the land deals and out of the proceeds arising therefrom pay himself the amount due from Caylor. It is further alleged that appellant was aware of these conditions at the time the order sued on was presented and at the time of the alleged acceptance, that there had not been a sufficient amount of said collateral collected to pay defendant, and that the suit was prematurely brought. Appellant filed a supplemental petition, denying the affirmative matters pleaded by defendant, and upon a trial before the court without a jury judgment was rendered in favor of Edwards that plaintiff take nothing by its suit.

The order from Caylor to Edwards is as follows:

"Hereford, Texas, 10/20/13.

"Edwards-McDonald Investment Co.: You will please pay to H. J. Murrell & Co., out of commissions due me when collected, one hundred fifty-seven and forty-six one-hundredths (\$157.46) dollars.
George F. Caylor."

The following day, appellants' attorneys notified Edwards-McDonald Investment Company of the execution of the above order and that it was given in settlement of a suit against Caylor in which garnishment proceedings had been served upon the Edwards-McDonald Investment Company. In said letter the following questions are asked:

"(1) Is the sum from you to Mr. Caylor due upon commissions owed by you to him? (2) Do you owe him sufficient to insure our payment after he has paid Dr. Caylor \$300.00? If you do not, will you pay our order before that of Dr. Caylor?"

The letter also states that the garnishment proceedings were filed before the execution of Dr. Caylor's order and that appellants would not be willing for Dr. Caylor's debt to have precedence.

On the 24th of October another letter was written by appellants' attorneys, notifying Edwards that they desired an answer to their former letter before court convened on the following Monday, in which this language is used:

"If you can accept the order given by George Caylor and it secures us sufficiently, then there will be no need for you to file an answer in the garnishment proceedings and we are willing to pass the matter for one week in order to get fixed."

On the following day Edwards replied as follows:

"We have your favor of the 21st, in which you state that George F. Caylor had given you an order on us for \$157.46. I am sure that Mr. Caylor will have sufficient funds coming to him when the deals are closed up to pay you this amount. Dr. Caylor's order was dated ahead of yours and we would not feel like paying this before his without his consent. If you can get his consent to let your order precede his it will be entirely satisfactory with us."

Appellants' attorneys immediately secured Dr. Caylor's consent that his order might be

postponed to the one given by George Caylor to appellants. On November 7th appellants' attorneys again wrote Edwards, using this language:

"In order that we may keep our record straight in this matter, we are asking you to favor us with a statement of your acceptance of this order and a statement as to the probable date when the commissions to George Caylor will be due."

To this letter Edwards replied as follows:

"Replying to your kind favor of the 7th will say that we have received your order on George F. Caylor and also your order from H. C. Caylor, permitting your order to take prestige over his. These orders will have our attention immediately upon the sale of notes which Mr. Caylor is interested in."

Following this letter, appellants' attorneys wrote Edwards several times with reference to the matter, urging a settlement and a reply to former letters, and nothing was heard from Edwards until July 14th, when he wrote as follows:

"I have your several letters and ask you to pardon my delay in answering. The fact is that I have had nothing definite to write. Since last fall we have had three of the deals which Caylor was interested in to fall down, and which will very materially affect the amount of his commission. We have been unable so far to sell any of our vendor's lien notes."

Later, on November 17, 1914, Edwards wrote appellants' attorneys that three of the trades in which Mr. Caylor was interested had not been consummated and that he would lose, on the securities taken from Caylor, several hundred dollars, regretting his inability to save appellants anything out of the commissions. This suit was then instituted, the above orders and correspondence introduced in evidence, together with the oral testimony of appellee Edwards, in substance as follows:

"About the time the order in question was given, George F. Caylor owed me about \$3,000. Since I received the order I have collected about \$1,000 on these notes. The notes were in our name, but George F. Caylor was interested in some commissions included in the notes. The \$1,000 collected represents the amount of the commissions from the notes, which would have belonged to George F. Caylor if he had not been indebted to us. He still owes us about \$2,000. \$1,000 was collected after the alleged acceptance of the order in question. There has been enough collected from the commission notes belonging to George F. Caylor to have paid the order in question if George F. Caylor had not owed anything. These collections of George F. Caylor's commission were made by me in September, 1914. I have never paid any part of the order sued on."

[1, 2] The effect of the order dated 10/20/13 was to assign to appellants \$157.46 out of any commissions which might be subsequently collected by Edwards for Geo. F. Caylor. This assignment, however, was subject to all the equities existing against the fund in favor of Edwards, and without a subsequent unconditional acceptance by him he had the right to reimburse himself for any amount due him from Caylor before he could be held to pay appellants anything. It appears from their letter of November 7, 1913, that no acceptance of the order had yet been made by Edwards, because in this letter they expressly ask for a statement of Edwards' acceptance. Edwards' reply is that the orders should have his attention immediately upon the sale of the notes. The rule is that when an acceptance is evidenced by separate writing its terms must be so clear as not to admit of doubt.

"Thus, where the drawer advised the drawee of the bill by letter, and the drawee replies that 'the bill shall have attention,' it was held that these words, taken by themselves, were not sufficiently positive and unequivocal to amount to actual acceptance, but that if it could be shown that such words were used for that purpose, and with that effect in dealings between the parties, then they might be regarded as an acceptance." 1 Parsons on Notes and Bills (2d Ed.) 286; 7 Cyc. 765 (2).

The record fails to show the dismissal of the garnishment proceedings against Edwards, neither is the issue of estoppel raised by the pleadings.

[3] Appellant insists that the court should have sustained its exceptions to appellee's plea, alleging that the suit had been prematurely filed. That the action has been prematurely brought is matter which should be pleaded in abatement rather than in bar; but if there was no acceptance of the order it is of no consequence whether the facts pleaded tending to show that the action was prematurely brought were or were not true. The trial judge filed no findings of fact or conclusions of law. In this state of the record, we do not know that he based his judgment upon the facts alleged by appellee showing that the suit had been prematurely brought, and in support of the judgment we must presume that the decree is based upon appellee's contention that the order had never been accepted by Edwards. Walker v. Cole, 89 Tex. 323, 84 S. W. 713; O'Fiel v. King, 23 S. W. 696.

The judgment must be affirmed.

**INTERNATIONAL FIRE INSURANCE CO.
v. BLACK. (No. 1492).***

(Court of Civil Appeals of Texas, Texarkana.
July 1, 1915. Rehearing Denied
Oct. 7, 1915.)

**1. INSURANCE — 76—ACTIONS ON POLICIES—
SUFFICIENCY OF EVIDENCE.**

Though in an action on an insurance policy the circumstantial evidence strongly tended to show that the agency of the person issuing the policy had terminated before its issuance, where he testified that his agency had not then terminated his testimony supported the trial court's finding in favor of plaintiff.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 101; Dec. Dig. —76.]

**2. APPEAL AND ERROR — 1010—REVIEW—
QUESTIONS OF FACT.**

The question for an appellate court is not whether findings of the trial court complained of are supported by a preponderance of the evidence, but whether or not there is any evidence to support them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. —1010.]

**3. INSURANCE — 78—AUTHORITY OF AGENT—
ESTOPPEL TO DENY.**

Where a party dealing with an insurance agent authorized to issue policies and having policies in his possession did not know of any restriction on his authority with respect to the territory in which he might write insurance or the classes of property which he might insure, he had a right to assume that the agent was authorized to issue the policy actually issued, and the insurance company was estopped from asserting the contrary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 108; Dec. Dig. —78.]

**4. ESTOPPEL — 114—NECESSITY OF PLEADING
—LACK OF OPPORTUNITY TO PLEAD.**

Plaintiff sued on a fire insurance policy, alleging that it was issued by defendant through its agent L. The answer denied that L. was defendant's agent and that he had authority to issue any such policy. Plaintiff showed that L. was defendant's agent to issue policies and that he had no knowledge of a limitation on L.'s authority as to the classes of property on which he could write insurance. *Held*, that the estoppel against defendant as to the agent's authority was available to plaintiff, since, while the general rule is that facts relied upon to establish an estoppel must be pleaded, such rule does not apply where the party asserting the estoppel has not had an opportunity to plead it.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 304; Dec. Dig. —114.]

**5. INSURANCE — 78—AUTHORITY OF AGENT—
EXTENT OF AUTHORITY.**

An insurance company's agent at M. in H. county, in applying for appointment, stated that the class of risks he would write would be among the best planters in H. county. The company replied that if he would take the agency they would endeavor to care for his country business if he would also give them some good city business. In an action on a policy issued by him covering farm property in another county about 18 miles from M., the company's secretary testified that the authority of agents was limited to their own town and its suburbs, that if the authority was greater than this special permission would have to be given, and that

no authority was extended in any case to an agent to operate outside of his county. *Held*, that the court was not bound to find that this custom was observed when such agent was appointed, but had a right to determine the question from the correspondence, which correspondence did not limit his authority to H. county.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 108; Dec. Dig. —78.]

Error from District Court, Panola County; W. O. Buford, Judge.

Action by S. C. Black against the International Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Locke & Locke, of Dallas, and Brooke & Woolworth, of Carthage, for plaintiff in error. Jno. W. Scott, of Marshall, and Frank Lawson, of Carthage, for defendant in error.

WILLSON, C. J. The suit was by defendant in error Black on a policy issued, he alleged, by plaintiff in error through its agent A. C. Littlejohn November 5, 1912, insuring his (Black's) dwelling house, situated on a farm in Panola county about 18 miles southeast of Marshall, in Harrison county, in the sum of \$2,000, and the contents thereof in the sum of \$1,000, against loss by fire. The house and its contents were destroyed by fire March 12, 1914, while the policy was in force, it was alleged. Plaintiff in error denied that it had ever issued such a policy as the one sued on, and denied that said Littlejohn was its agent. The trial was by the court without a jury, and resulted in judgment in favor of defendant in error for \$3,000, interest and costs.

That plaintiff in error on June 22, 1911, authorized Littlejohn to act as its agent at Marshall and furnished him the blank forms of policies, etc., it expected he would need in the transaction of its business, was not disputed. That the policy issued by him to defendant in error was one of plaintiff in error's policies was disputed, but we do not understand plaintiff in error to be in the attitude of questioning the sufficiency of the evidence relied upon to support the finding involved in the judgment, that the policy was issued on its behalf by Littlejohn as its agent. The contention of plaintiff in error is that the trial court erred in not rendering judgment in its favor, because, as it insists is true: (1) It appeared from "the great preponderance of the evidence" that Littlejohn was not its agent at the time he issued the policy; and (2) that, if it did appear that he was then its agent, it further conclusively appeared that as such he was without authority to issue its policies on farm property, without respect to where same was situated, and was without authority to issue its policies on property of any kind in Panola county.

[1. 2] Notwithstanding circumstantial evi-

dence strongly tending to show that Littlejohn's agency for plaintiff in error had terminated at the time he issued the policy sued upon, the trial court had a right to believe Littlejohn when, as a witness, he testified that his agency had not then terminated. As his testimony was sufficient to support the finding involved in the judgment to the contrary of the insistence of plaintiff in error, it is not for this court to say that the finding was opposed by a preponderance of the evidence and therefore wrong. The question for an appellate court is not whether findings of a trial court complained of "are supported by a preponderance of the evidence, but it is whether or not there is evidence to support them." *Wells v. Yarbrough*, 84 Tex. 860, 19 S. W. 865; *Koehler v. Cochran*, 19 Tex. Civ. App. 196, 47 S. W. 394.

[3, 4] In a letter dated January 12, 1912, plaintiff in error advised Littlejohn that "the international will not write farm property under the new management." It is not doubted that the effect of this letter, as between plaintiff in error and Littlejohn, was to deprive the latter of the right he had before he received it to issue policies of the former on farm property. But the fact that Littlejohn, because of the restriction in the letter referred to, was without authority to issue the policy sued upon, is not a reason why it should be held that plaintiff in error was not liable thereon; for it appears that defendant in error at the time he dealt with Littlejohn was ignorant of the restriction on his authority. Defendant in error therefore had a right to assume that Littlejohn, being empowered by plaintiff in error to issue its policies, was authorized to issue the one in question; and plaintiff in error should be held to be estopped from asserting to the contrary. 1 *Clark & Skyles on Law of Agency*, §§ 196, 206, 207, 208, 451; 1 *Cooley's Briefs on Law or Ins.* p. 347. Plaintiff in error, as we understand it, does not contend that the law is otherwise. Its contention is that the estoppel against it was not available to defendant in error because he did not plead it. Undoubtedly the general rule is that facts relied upon to establish an estoppel must be pleaded. *Insurance Co. v. Bank*, 17 Tex. Civ. App. 477, 43 S. W. 831; *Swayne v. Insurance Co.*, 49 S. W. 518; *Rail v. Bank*, 8 Tex. Civ. App. 557, 22 S. W. 865. But, it seems, the rule does not apply where the party asserting the estoppel has not had an opportunity to plead it. *Abbott's Trial Brief*, pp. 1640, 1644; *Schurtz v. Colvin*, 55 Ohio St. 274, 45 N. E. 527. Here defendant in error alleged that the policy was issued by plaintiff in error "by and through its agent A. C. Littlejohn." The answer of plaintiff in error to the allegation was as follows:

"Defendant * * * denies that A. C. Littlejohn was its agent, and denies that he had authority to issue any such policy of insurance."

As we construe the answer, it was merely a denial by plaintiff in error that Littlejohn was its agent at all. Defendant in error overcame that defense by proof showing that Littlejohn was its agent to issue policies at the time he issued the one in question. Had plaintiff in error defended on the ground that Littlejohn exceeded his authority as its agent when, in violation of its instructions not to issue policies on farm property, he issued the one sued upon, defendant in error would have been called upon to plead the facts constituting the estoppel, and doubtless he would have done so. We have found nothing in the record showing defendant in error to have had any knowledge of the limitation on Littlejohn's authority prior to the time the letter advising him that plaintiff in error would not issue policies on farm property was offered in evidence at the trial. It seems to us it would be unreasonable to hold, under the circumstances, that the case is within the rule invoked. We think it should be held, instead, that it is within the exception to the rule, and that the failure of defendant in error to plead the facts showing the estoppel proven is not a reason why the judgment should be reversed.

[5] We do not think it should be said to have conclusively appeared that Littlejohn was without authority to issue policies of plaintiff on property in Panola county. It is true that it appeared that he was plaintiff in error's agent "at Marshall," but we do not think that meant he could not issue its policies on property elsewhere than in that city. And plaintiff in error does not contend it did, but insists his authority was restricted to the issuance of its policies on property in Harrison county. The contention is based on correspondence between plaintiff in error's secretary at Ft. Worth and Littlejohn at Marshall, showing that Littlejohn in applying for appointment as agent of plaintiff in error to issue its policies on farm property assured it that the class of risks he would write would be "among the best planters in Harrison county;" that it replied as follows:

"At the present time we have no representative in your city. If you would take the agency of our company we would endeavor to care for such country business as would comply with our requirements, namely, owner, occupancy, brick flues and unincumbered. We would also take small lines on barns and contents not to exceed 25 per cent. of our line on dwellings and contents. If you would like to have the agency of our company on this basis, and would also give us some good city business to offset this country business without making us a specialty farm-writing company, I would be glad to plant with you."

That Littlejohn replied:

"I will be pleased to accept the agency for your company along the lines outlined by yourself. Please therefore furnish me with bond and contract, also register and policies, and any other supplies that you think I might need."

And that plaintiff in error replied:

"Agreeable to your request, I am handing you herewith bond, agency appointment blank, and shall request that you kindly execute and return to me, and also sign the receipt for supplies which have been forwarded to you under separate cover. Trusting to receive these papers, and in the meantime you are hereby authorized to proceed as our agent."

And on testimony of one Pillet, the acting secretary of plaintiff in error, as follows:

"In all cases the authority of the agents of International Fire Insurance Company was limited to their own town and probably to suburbs adjoining. If in any case the authority was greater than that, special permission would have to be given, in writing, by the company. No authority was extended in any case to an agent to operate outside of his county."

Pillet, it will be noted, did not pretend to know anything about the authority conferred upon Littlejohn further than was shown by the correspondence set out above. His testimony in that respect had reference to the custom of his company in appointing agents and defining their authority. We do not think the trial court was bound to believe and find that the custom was observed when Littlejohn was appointed, but think he had a right to determine the question from the showing made by the correspondence. So determining it, we think the trial court might reasonably have found as he did. It will be noted that in the letter appointing Littlejohn agent no restriction was placed on his authority as to the location of property to be insured by policies he might issue. If the restriction as claimed existed by force of the contract of agency as evidenced by the correspondence, it must have been because of the assurance in the letter of Littlejohn applying for the appointment that the class of risks he would write, if appointed, "would be among the best planters in Harrison county." It seems to us there would be as good reason for construing this assurance as operating to deny Littlejohn authority to issue plaintiff in error's policies on farm property to others than the "best planters" in Harrison county, as for construing it as operating to deny him authority to issue such policies only on property in Harrison county. We think the trial court might reasonably have concluded that plaintiff in error in the letter appointing Littlejohn its agent did not intend that the general authority thereby conferred upon him to act for it in the issuance of its policies on farm property was to be construed as so limited as to locality, by Littlejohn's letter applying for the agency, as to deny him authority to issue such policies on farm property outside of Harrison county. But if we are wrong about this, and if it should be said that it conclusively appeared that Littlejohn was without authority to issue the policy in question because the property covered by it was in Panola county, we do not think his lack of authority should be

held to have defeated a right on the part of defendant in error to recover on the policy as he did. For it appears from the record that defendant in error dealt with Littlejohn on the faith of his being what his possession of plaintiff in error's policies indicated him to be, to wit, its agent with authority to issue its policies, and in complete ignorance of any restriction on his authority as such agent. The judgment is affirmed.

McLEMORE v. BICKERSTAFF et al. *
(No. 1410.)

(Court of Civil Appeals of Texas. Texarkana.
July 8, 1915. Rehearing Denied
Oct. 7, 1915.)

1. JUDGMENT — 256 — CONFORMITY TO SPECIAL VERDICT.

Under Rev. St. arts. 1936, 1990, 1994, providing that a special verdict shall be conclusive as to the facts found, and that the court must conform its judgment thereto, the court must conform its judgment to the special findings of the jury.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. —256.]

2. DEEDS — 66 — DELIVERY — EVIDENCE — QUESTION FOR JURY.

Whether a deed was delivered, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 127, 633; Dec. Dig. —66.]

3. MORTGAGES — 139 — ABSOLUTE DEED AS MORTGAGE.

A mortgagee holds only a lien, which is merely a legal right to have recourse on the mortgaged property to satisfy his claim in case of default, and on condition broken he must foreclose, and the fact that the mortgage is evidenced by a deed, absolute on its face, does not change the rule.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 278; Dec. Dig. —139.]

4. MORTGAGES — 139 — VENDOR AND PURCHASER — 228 — ABSOLUTE DEED — TRANSFER OF PROPERTY — NOTICE.

One obtaining a conveyance from a grantee in a deed, absolute in form, but in fact a mortgage, acquires no title, unless he is a purchaser for value and without notice that the deed was a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 278, 728; Dec. Dig. —139; Vendor and Purchaser, Cent. Dig. §§ 495-501; Dec. Dig. —228.]

5. ESTOPPEL — 107 — TITLE BY ESTOPPEL — PLEADING AND PROOF.

One claiming title by estoppel must plead and prove the facts creating an estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 297; Dec. Dig. —107.]

6. ESTOPPEL — 58 — EQUITABLE ESTOPPEL — ELEMENTS.

An equitable estoppel cannot be invoked except to protect the party claiming its benefit from damage or loss resulting if the true facts should control, and one invoking the estoppel must point to some injury he will sustain if the true facts control.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 144, 145; Dec. Dig. —58.]

7. ESTOPPEL — 21 — DEEDS — ACTS CONSTITUTING.

A grantor in a deed, absolute in form but in fact a mortgage, signed as a witness a deed by the grantee to a third person. The third

person knew as much about the legal status of the title as the grantor did. The grantor did not encourage or advise the conveyance to the third person. *Held*, that the grantor was not estopped from asserting, as against the third person, that the deed executed by him to the grantee was a mortgage, though all the parties believed that the grantee had the legal title and could convey it.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 26; Dec. Dig. ¶21.]

8. MORTGAGES ¶34 — ABSOLUTE DEEDS AS MORTGAGES—PAROL AGREEMENT.

Where a deed, absolute in form, was a mortgage at its inception, no subsequent parol agreement of the parties could change its legal character.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 83; Dec. Dig. ¶84.]

9. VENDOR AND PURCHASER ¶232—CONVEYANCE BY MORTGAGEE OUT OF POSSESSION—TITLE ACQUIRED.

A conveyance by a mortgagee out of possession passes no title to the grantee.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 540-545, 548-562; Dec. Dig. ¶232.]

Error from District Court, Franklin County; H. F. O'Neal, Judge.

Trespass to try title by J. T. McLemore against Savannah Bickerstaff and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

A. L. Burford, of Texarkana, and R. T. Wilkinson, of Mt. Vernon, for plaintiff in error. Dinsmore, McMahon & Dinsmore, of Greenville, and R. E. Davenport, of Chickasha, Okl., for defendants in error.

HODGES, J. This suit was instituted in the form of an action of trespass to try title by the plaintiff in error against the defendants in error, to recover a tract of land situated in Franklin county. J. B. Bickerstaff is the common source of title, and the defendants in error are his children and only heirs. The plaintiff in error derails title through a deed from Bickerstaff to D. F. McLemore executed on January 29, 1889, and a conveyance from D. F. McLemore to himself executed in 1896. Among other defenses interposed by the defendants in error was a plea of limitation, based upon 10 years' adverse possession. J. B. Bickerstaff remained in possession of the property until his death, which occurred a short time before the institution of this suit, and after his death some of his children have continued to occupy the premises. The case was submitted to the jury upon special issues, and the following findings of fact made: (1) That the deed from Bickerstaff to D. F. McLemore in 1889, though absolute in form and purporting to convey the land in fee simple, was intended by the parties to be only a mortgage to secure McLemore in an indebtedness due him from Bickerstaff; (2) that a deed executed by D. F. McLemore in April, 1891, reconveying the land in controversy to Bickerstaff, was delivered and be-

came effective; (3) that Bickerstaff and his children have held peaceable and adverse possession of the land in controversy continuously since January 29, 1889. Upon those findings the court entered a judgment in favor of the defendants in error.

The first assignment presented is as follows:

"The court erred in rendering judgment for defendants and in overruling plaintiff's motion for judgment in his favor, notwithstanding the findings of the jury."

[1] It is not denied that the findings of the jury justified, if they did not demand, a judgment in favor of the defendants in error. But it is argued that the state of the evidence was such that the court should have ignored those findings and entered up a judgment in favor of the plaintiff in error. It has long been the settled law in this state that when a jury has been impaneled to try the issues of fact, the court is required to conform his judgment to the jury's findings. Rev. Civ. Stat. 1911, arts. 1986, 1990, 1994; *Ablowich v. Bank*, 95 Tex. 431, 67 S. W. 79; *Clark & Loftus v. Pearce*, 80 Tex. 151, 15 S. W. 787; *Western Union Tel. Co. v. Mitchell*, 89 Tex. 444, 35 S. W. 4; *Scott v. Farmers' & Merchants' Nat'l Bank* (Civ. App.) 66 S. W. 493; *Fant v. Sullivan* (Civ. App.) 152 S. W. 521.

[2] We might rest the affirmance of this judgment upon the disposition made of this assignment, for none of those remaining are presented in a manner which entitles them to consideration; but the plaintiff in error insists that the judgment is fundamentally erroneous because of the insufficiency of the evidence to support it. Conceding, for the sake of argument, that the absence of sufficient evidence to support a judgment is an error apparent upon the face of the record which may be considered without an assignment, we think the appeal is without merit. The evidence shows that in 1889 Bickerstaff was the owner of the land in controversy, together with two other tracts. He was in need of money, and procured a loan from D. F. McLemore and made the deed of January 29, 1889, for the purpose of securing McLemore in the loan advanced. In 1891 McLemore executed a deed reconveying this tract, and other lands not here involved, to Bickerstaff. There was considerable dispute as to whether or not this deed was ever delivered. McLemore admitted its execution, but says that it was the understanding that the deed was to be delivered when Bickerstaff paid the debt; that he failed to do this, and the deed never had been delivered. The deed was produced on the trial as coming from the custody of D. F. McLemore. Savannah Bickerstaff, one of the defendants in error, testified: That her father at his death left a number of papers relating to his business, which she turned over to Mr. Davenport, his attorney. Before doing this she looked over them and found an instru-

ment in the form of a deed, which related to the land in controversy, and to which J. B. Bickerstaff and D. F. McLemore were parties. She did not recollect the date, but did recall that it also had a certificate of acknowledgment from S. M. Speer. Davenport testified that Miss Bickerstaff brought to his office a number of her father's deeds and papers, which were examined by him. One of them, according to his description, appeared to be the deed from D. F. McLemore to J. B. Bickerstaff, reconveying the land in controversy. This deed mysteriously disappeared from his office the very day it was brought to him. That an issue of fact regarding the delivery of the deed of 1891 was presented and determined by the jury in favor of the defendants. This alone is sufficient to defeat the plaintiff's right of recovery.

[3-5] But if it should be assumed, as the plaintiff in error contends, that the deed from D. F. McLemore in 1891 was never in fact delivered, there is ample evidence in the record, about which there appears to be little or no dispute, which shows that the chain of title upon which the plaintiff in error relies is insufficient to support his claim of ownership. It was admitted in the argument before this court that the deed from Bickerstaff to McLemore executed in 1889 was only a mortgage, as found by the jury. Under a well-established rule in this state the mortgagee acquires no estate in or title to the mortgaged property which he may convey to another. He holds only a lien, which is merely a legal right to have recourse on the mortgaged property for the satisfaction of his debt in case of default. He cannot sue and recover the property in the event the condition is broken, but must seek a foreclosure of his lien and a sale of the property. The fact that the mortgage is evidenced by a deed absolute upon its face does not alter the rule. *Mann v. Falcon*, 25 Tex. 274; *Edrington v. Newland*, 57 Tex. 627; *Wiggins v. Wiggins*, 16 Tex. Civ. App. 335, 40 S. W. 645, and cases cited. It follows, then, that if D. F. McLemore had no title to convey, the plaintiff in error acquired none by the conveyance made to him in 1896, unless he occupied the position of a purchaser for value and without notice that the deed under which his grantor held was only a mortgage. *Stafford v. Stafford*, 29 Tex. Civ. App. 73, 71 S. W. 984; 1 *Jones on Mort.*, § 808. One who claims title by estoppel must plead and prove the facts which create an estoppel. There is in the evidence no pretense that the plaintiff in error was ignorant of the true character of the deed from Bickerstaff to D. F. McLemore; and, according to his own testimony, he paid no consideration for his conveyance. His deed recited a consideration of \$3,500 to be paid in two installments, but he admits that it was never the intention of the parties that those notes were to be paid;

they were given merely to prevent plaintiff in error from disposing of the land. The notes were afterwards returned to him, and D. F. McLemore afterwards made a will, devising the land to all of his children in equal portions. We then have the situation of a grantee who paid no consideration, and who had notice that his grantor had no right to convey, insisting upon a title by estoppel.

The evidence shows that the deed from D. F. McLemore to the plaintiff in error was signed by Bickerstaff as a witness, but was acknowledged before a notary public by the grantor. There was also evidence tending to show that Bickerstaff received a credit on his debt due to D. F. McLemore equal to the sum recited in the deed. It is insisted that these facts are sufficient to create an estoppel against the heirs of Bickerstaff, notwithstanding the notice to the plaintiff in error and his failure to pay a valuable consideration for the transfer.

[6] There are at least two satisfactory reasons why these facts do constitute an estoppel. First, because an equitable estoppel cannot be invoked except for the purpose of protecting the party claiming its benefit from some damage or loss which might result if the true state of the facts should control the determination of the controversy. The party who invokes estoppel must be able to point to some injury he will sustain, if the truth is told. Here the plaintiff in error parted with no consideration, and can lose nothing if it be shown that he got no title. The only injury of which he can complain is the failure to obtain something for nothing. The fact that in the transaction Bickerstaff may have secured a benefit, in the nature of a credit on his debt, does not alter the situation. An estoppel is interposed, not because one party has received a benefit from the transaction, but because another may be injured. The rules governing estoppel are not to be confused with those which govern ratification.

[7] The second reason is, because the plaintiff in error apparently knew as much about the legal status of the title to the land as did Bickerstaff. *Wortham v. Thompson*, 81 Tex. 348, 16 S. W. 1059. The fact that Bickerstaff signed the deed to the plaintiff in error as a witness, standing unexplained, tends merely to show that he consented to the transaction. It does not imply that he encouraged or advised it. We may assume as true that all of the parties believed that D. F. McLemore had the legal title to the land and could convey it to another, and that they desired to accomplish that particular end; it would still be nothing more than a mistake of law. It would not follow that Bickerstaff would be guilty of a wrong such as to preclude him or his heirs from thereafter stating the truth about the transaction.

[8] If the deed under which D. F. McLemore claimed was a mortgage at its incep-

tion it remained a mortgage, and no subsequent parol agreement of the parties could alter its legal character. *Keller v. Kirby*, 34 Tex. Civ. App. 404, 79 S. W. 82; *Ullman v. Devereux*, 46 Tex. Civ. App. 459, 102 S. W. 1163; *Hart v. Eppstein*, 71 Tex. 752, 10 S. W. 85.

[9] A conveyance by a mortgagee out of possession passes nothing. *Perkins v. Sterne*, 23 Tex. 561, 76 Am. Dec. 72; 1 Jones on Mort. § 808. The law will impute a knowledge of these rules as much to the plaintiff in error as to any other party to the transaction. There is nothing in the record to indicate that he was ignorant of them. The evidence also shows that Bickerstaff remained in the undisturbed possession of the land from a period antedating the deed of 1889 till his death, and that he appropriated the rents and revenues to his own use; that afterward his children continued to occupy the premises and to make the same use of them. While the evidence shows that Bickerstaff paid the taxes, he seems to have rendered the property for taxation in the name of McLemore. During the time he remained in possession he sold and conveyed portions of the land included in McLemore's deed. The finding of the jury that the defendants in error had completed the bar of limitation is not without support.

For reasons not necessary to state we have passed over several tenable objections urged by the defendants in error against the consideration of this case on its merits.

There is no error in the judgment, and it is affirmed.

WHITAKER et al. v. HILL et al. (No. 1511.)

(Court of Civil Appeals of Texas. Texarkana. July 7, 1915. Rehearing Denied Oct. 7, 1915.)

1. JUDGMENT — LIEN — RECORDING.

A judgment creditor may, notwithstanding an unrecorded deed by the debtor to a third person, acquire a lien on the land by complying with Vernon's Sayles' Ann. Civ. St. 1914, arts. 5614-5616, relating to judgment liens, or by levy of execution without knowing and without being chargeable with notice of the third person's title under articles 6827, 6828, and may, under article 6824, subject the land to his judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1368, 1369; Dec. Dig. ¶¶ 788.]

2. JUDGMENT — LIEN — RECORDING AND DOCKETING JUDGMENT — INDEX.

The indexing of the abstract of a judgment duly recorded is, under Vernon's Sayles' Ann. Civ. St. 1914, arts. 5614-5616, indispensable to the creation of a lien.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1327; Dec. Dig. ¶¶ 769.]

3. INJUNCTION — GRANTING OR DISSOLVING.

The court, in granting a temporary injunction or refusing to dissolve it, should require a case of probable right and probable danger to the right without the injunction, and its dis-

cretion should then be regulated by the balance of inconvenience or injury to the one party or the other.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306, 357-371; Dec. Dig. ¶¶ 136, 163.]

4. EXECUTION — GRANTING OR DISSOLVING.

In a suit to restrain an execution sale and to remove an abstract of a judgment as cloud on title, evidence held to show that execution creditor had notice of the rights of a purchaser under an unrecorded deed sufficient to justify granting of a temporary injunction and refusal to dissolve it.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 519-539; Dec. Dig. ¶¶ 172.]

Appeal from District Court, Cherokee County; L. D. Ginn, Judge.

Action by C. H. Hill and others against H. M. Whitaker and another. From an order refusing to dissolve a temporary injunction, defendants appeal. Affirmed.

Mrs. Rosa F. Osburn, one of the appellees, owned 254.8 acres of the Jose Maria Procella survey, situated partly in Cherokee, and partly in Smith county. In consideration of \$1,008.40 paid to her by C. H. Hill, another one of the appellees, and the execution and delivery to her by him of his four promissory notes for \$250 each, payable February 13, 1914, 1915, 1916, and 1917, respectively, Mrs. Osburn conveyed the land to said Hill by a general warranty deed dated February 13, 1913. The deed was not filed for record in Cherokee county until April 7, 1915. The notes made by Hill were secured by the vendor's lien retained on the land. Before any of them had matured Mrs. Osburn assigned the notes and her claim on the land to secure the payment thereof to D. F. Wilkinson, another one of the appellees. The note due February 13, 1914, was paid by Hill at its maturity. The others, except interest which had accrued thereon, had not been paid at the time the order appealed from was made. March 29, 1915, appellant H. M. Whitaker, having on February 11, 1915, obtained judgment against Mrs. Osburn for the sum of \$1,500, filed an abstract thereof in the office of the county clerk of Cherokee county, where 200 acres of the land was situated, and had same recorded. April 7, 1915, an alias execution previously issued on the judgment was levied on the 200 acres in Cherokee county by Forest Reagan, sheriff, who is the other appellee. Thereupon Mrs. Osburn, Hill, and Wilkinson commenced this suit against Whitaker and the sheriff to restrain the latter from advertising and selling the land and to have the cloud cast on the title of Hill there-to by the recording of the abstract and levy of the execution removed. The appeal is from an order made by the judge in vacation May 18, 1915, refusing to dissolve a temporary injunction he had granted May 1, 1915, restraining the sheriff from proceeding further under the execution pending a trial of the cause on its merits.

H. M. Whitaker, of Beaumont, and Norman, Shook & Gibson, of Rusk, for appellants. W. H. Clark, of Dallas, and Perkins & Perkins and Guinn & Guinn, all of Rusk, for appellees.

WILLSON, C. J. (after stating the facts as above). [1] That Hill owned the land at the time the abstract was recorded and at the time the execution was levied, and that Mrs. Osburn did not then or afterwards own it, is conceded to be true. But notwithstanding the fact that Hill owned it, Whitaker might have acquired a lien on the land by complying with the requirements of the statute with reference to judgment liens (articles 5614-5616, Vernon's Statutes), or by the levy of an execution, at a time when he did not have, and was not chargeable with, notice of the fact that Hill owned it (articles 6827, 6828, Vernon's Statutes), and be entitled by force of article 6824, Vernon's Statutes, to have it subjected to his judgment against Mrs. Osburn. *Grace v. Wade*, 45 Tex. 522.

[2] It appears that the abstract was duly recorded, but it does not appear from anything we have found in the record sent to this court that it was indexed as was required by the statute. Articles 5614-5616, Vernon's Statutes. As indexing the abstract was indispensable to the creation of a lien (*Nye v. Moody*, 70 Tex. 434, 8 S. W. 606; *Nye v. Gribble*, 70 Tex. 458, 8 S. W. 608; *Miller v. Koertge*, 70 Tex. 162, 7 S. W. 691, 8 Am. St. Rep. 587), it cannot be said to have appeared that Whitaker had acquired a judgment lien against the land.

[3, 4] But it appeared that the deed to Hill had not been filed for record at the time the execution was levied. Therefore, unless it further appeared that, notwithstanding the deed had not been so filed, Whitaker may have had, or been chargeable with, notice of Hill's claim, the judge erred when he overruled the motion to dissolve the injunction.

It was not pretended that Whitaker had actual notice of the fact that Hill claimed to own the land, but it was insisted that Hill had such possession thereof as charged Whitaker with notice of his rights.

In support of the contention testimony was offered showing that, during the fall of 1913, Hill and one O'Neal, who owned land adjoining the land in controversy, constructed a partition fence about 550 yards long, after clearing a space 10 to 12 feet wide for same, along the boundary line between them; that during the winter of 1913 and 1914 Hill opened up roads on the land in controversy and used timber thereon to make posts for fencing it; that in May, 1914, he deadened some of the timber thereon; that in August, 1914, he cleared up a site for a house he intended to build thereon, had a well dug on the site, cut timber on the land, and made logs to use in building a barn thereon, and cleared off the undergrowth on an old field on the land

preparatory to cultivating it; that Hill joined other citizens of the county in petitioning the commissioners' court to open up a public road along the north boundary line of the land, and gave a part thereof to the county as a right of way for the road; that he contracted with other parties to furnish them railroad ties, and from March 25 to April 17, 1915, had men on the land engaged in making the ties, and a man engaged in hauling same therefrom; and that it was understood by people living in the neighborhood in which the land was situated that Hill owned it.

Whitaker insists that the testimony just referred to was wholly insufficient to support a finding that Hill had such possession of the land as charged him with notice of Hill's claim of title to it. We will not discuss the testimony, nor undertake to determine whether, if the appeal was from a judgment based on such a finding on such evidence alone, after a trial of the cause on its merits, such a contention should be sustained or not. The appeal is not from that kind of a judgment, but, as before stated, is from an order of a judge made in vacation, refusing to dissolve a temporary injunction theretofore granted by him. It has been held that in granting such an injunction—

"all that the judge should, as a general rule, require, is a case of probable right and probable danger to that right without the interposition of the court; and his discretion should then be regulated by the balance of inconvenience or injury to the one party or the other." *Gas & Light Co. v. City of Memphis* (C. C.) 72 Fed. 952; *Improvement Co. v. Winsor*, 8 Wash. 490, 36 Pac. 441; 2 High on Injunctions, § 1696.

In passing upon a motion to dissolve such an injunction the action of the judge should, we think, be controlled by like considerations. We are not prepared to say that in overruling the motion the judge abused the discretion he possessed. Therefore the judgment will be affirmed.

SAN ANTONIO & A. P. RY. CO. v. SCHAEFFER. (No. 5505.)

(Court of Civil Appeals of Texas. San Antonio. Oct. 20, 1915.)

1. APPEAL AND ERROR ⇐1177 — REVERSAL — GRANTING NEW TRIAL.

Where the amended petition shows an amount beyond the jurisdiction of the trial court, but the record does not contain the original petition or show the amount originally sued for, the judgment will be reversed, and the cause remanded, instead of reversing and dismissing it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4604, 4606-4610; Dec. Dig. ⇐1177.]

2. DAMAGES ⇐69—INTEREST AS ELEMENT OF DAMAGE.

In an action in tort, interest is a part of the damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 137-140; Dec. Dig. ⇐69.]

Appeal from Bee County Court; T. M. Cox, Judge.

Action by A. R. Schaeffer against the San Antonio & Aransas Pass Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Proctor, Vandenberg, Crain & Mitchell, of Victoria, for appellant. John Baker, B. D. Tarlton, Jr., and H. S. Bonham, all of Beeville, for appellee.

CARL, J. This is a suit in tort for damages to an automobile, which damage is laid at \$975, together with legal interest thereon from July 3, 1912. The original petition does not appear in the transcript, but the petition upon which the cause was tried was filed subsequent to July 24, 1914. This petition does not disclose the amount sued for in the original petition.

[1] It has been the practice of this court, where the amended petition would show an amount beyond the jurisdiction of the trial court, and yet the record did not contain the original petition or show what the amount originally sued for was, to reverse the judgment and remand the cause, instead of reversing and dismissing it.

[2] It is well established that in an action in tort interest is a part of the damages. *Baker v. Smelser*, 88 Tex. 26, 29 S. W. 378, 33 L. R. A. 163; *Dwyer v. Bassett*, 29 S. W. 815; *Schulz v. Tessman*, 92 Tex. 488, 49 S. W. 1032; *Railway Co. v. Faulkner*, 118 S. W. 748; *Ry. Co. v. Flory*, 118 S. W. 1116; *Ry. Co. v. Womble*, 124 S. W. 111; *Crowdus et al. v. Kahn Tailoring Co.*, 136 S. W. 1136.

The judgment of the trial court is reversed, and the cause remanded.

BANKERS' TRUST CO. OF AMARILLO v. COOPER, MERRILL & LUMPKIN.

(No. 820.)

(Court of Civil Appeals of Texas. Amarillo. Oct. 16, 1915.)

1. CORPORATIONS — 657—FOREIGN CORPORATIONS—CONTRACTS—PERMIT TO DO BUSINESS.

A foreign corporation can incur liability on a contract of employment of an attorney made in the state, before it obtains a permit to do business in the state.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2356-2541, 2550, 2552-2554; Dec. Dig. 657.]

2. CORPORATIONS — 432—CONTRACT BY PRESIDENT—PRESUMPTION OF AUTHORITY.

It may be presumed that the president of a corporation, employing an attorney for it, was authorized to do so, its directors having thereafter met and conferred with the attorney in reference to legal matters, especially where the corporation, sued for the services, offers no evidence denying the president's authority.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. 432.]

3. CORPORATIONS — 425—CONTRACT BY OFFICERS—AUTHORITY—ESTOPPEL.

When officers of a corporation make a contract for it, which inures to its benefit, and the

results are enjoyed by it, it is estopped to deny the officers' authority to make the contract.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1697-1701, 1705; Dec. Dig. 425.]

4. TRIAL — 260—INSTRUCTIONS COVERED BY OTHERS.

Requested instructions, covered by others given, need not be given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. 260.]

5. APPEAL AND ERROR — 1068—HARMLESS ERROR—REFUSAL OF INSTRUCTION.

Refusal of an instruction that agreement was not binding was harmless; it being clear that the jury did not consider the agreement.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. 1068.]

6. TRIAL — 251—INSTRUCTIONS—CONFORMITY TO ISSUES—ESTOPPEL.

The question of estoppel not being raised by the pleadings, an instruction thereon is properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-596; Dec. Dig. 251.]

7. CORPORATIONS — 426—EMPLOYING ATTORNEYS—LIABILITY FOR SERVICES—FINANCE COMMITTEE.

After rights of attorneys to compensation for services performed for a corporation have accrued, it cannot avoid liability by placing the matter of disbursing funds and employing attorneys in the hands of a finance committee.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. 426.]

8. TRIAL — 252—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

An instruction, unauthorized by any evidence in the case, is properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. 252.]

Appeal from District Court, Potter County; J. N. Browning, Judge.

Action by Cooper, Merrill & Lumpkin against the Bankers' Trust Company of Amarillo, Texas. Judgment for plaintiffs, and defendant appeals. Affirmed.

R. E. Underwood, of Amarillo, and J. H. Synnott, of Dallas, for appellant. Jno. W. Veale, of Amarillo, and Del W. Harrington, of El Paso, for appellee.

HALL, J. Appellees, a firm of lawyers, sued appellant for \$2,632.65, alleging that appellant was a private corporation, chartered under the laws of the state of Arizona, July 16, 1912; that some time in the year 1912, acting through its duly authorized officers and agents, appellant employed appellees, as its attorneys, to generally advise said corporation in all legal matters pertaining to the conduct of its business, agreeing to pay appellees a reasonable sum for their services; that said services were rendered at the request of the then president and secretary of said corporation. The appellant's answer admits that it was chartered under the laws of Arizona, obtained a permit to transact business in Texas in January, 1913. There

was a general verdict in favor of the appellees in the sum of \$1,000.

The first two assignments of error challenge the sufficiency of the evidence to support the verdict and judgment. H. H. Cooper, a member of the firm, testified, in substance, as follows:

"Our firm was consulted in connection with our employment by the Bankers' Trust Company, by Mark Logan. We were consulted with reference to some matters of the Bankers' Trust Company, or rather I was consulted, and he sought my advice as secretary of that company, and I refused to advise him with reference to it because I understood that Mr. Penry was attorney for the company, and I told him that any advice given by me would have to come on request through their attorney, and I did not advise them because it was not asked by Mr. Penry. Later I was consulted by Mr. Le Master with reference to the same matter and made the same reply; then later Judge Penry, Le Master, and Logan all came to my office together. This was the latter part of September of the 1st of October, 1912. Le Master was president of the Bankers' Trust Company. After Judge Penry came and explained the situation to me, that he was not their attorney, except nominally, and that he was not willing to advise the people, and sought my advice in conjunction with them with reference to this matter, I agreed to consult and advise with them about the matter then under discussion. There was nothing said at that time as to the amount of the fee. When we discussed the matters I arrived at the conclusion as to how they should be handled, and reported to Mr. Penry and discussed it with him and the other gentlemen. During the discussion they proposed to have our firm represent the company generally and advise with them, and we had a general discussion of the question of the fee. I told them I could not even estimate the fee because I did not know what the work would be. It was then suggested by Mr. Le Master and Mr. Logan—and I think Judge Penry was present—that we go ahead and help the company and help them out of the difficulty and help them get the property into the possession of the company, and they would pay a reasonable fee when the work was completed."

That his firm examined abstracts of title and advised almost every day with the officers of the company, including some of the directors. That it had no permit to do business in Texas at that time, and one of the first things they discussed was the manner or method of securing the permit to do business in Texas so it could carry on its business and lend money on real estate. Upon investigation it was necessary to amend the Arizona charter, reducing the capital stock. That witness procured the amendment and assisted the officers in floating a loan of \$100,000. That he made a trip to Dallas with reference to the loan, examined many abstracts, wrote many deeds and other instruments, took a large number of notes for collection, and filed suit on several. That in January, 1913, he told Logan and Le Master that their fee was \$2,500 up to that time. They said the fee was entirely satisfactory and their services as counsel were continued.

[1, 2] Appellant insists under these assignments that the services rendered were at the instance of promoters and to assist promoters in perfecting the organization of the company. The record is clear, however, that the

charter is dated July 16, 1912. While a permit to do business in Texas might be a condition precedent to the right of the company to file suit in Texas, it was not necessary for appellant to have a permit before it could incur liabilities, make contracts for services and be sued in the state. *Home Forum B. O. v. Jones*, 20 Tex. Civ. App. 68, 48 S. W. 219, writ of error denied by Supreme Court, 93 Tex. 686, 50 S. W. xvi; *Southern Pacific Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441; *Western Union Telegraph Co. v. Clark*, 14 Tex. Civ. App. 563, 38 S. W. 225, writ of error denied by Supreme Court 93 Tex. 676, 38 S. W. 225. It is insisted that neither Logan nor Le Master had the right to employ appellees. During the time in which the services were rendered it appears that Logan and Le Master alternately filled the office of president, and it appears from the statement of facts that Logan was the originator and general manager of the affairs of the company. It is said in *Catlett v. Starr*, 70 Tex. 485, 7 S. W. 844:

"Corporations usually act through their president, or those representing him. When an act pertaining to the business of the company is performed by him, the presumption will be indulged that the act is legally done."

2 Purdy's Beach on Private Corporations announces the rule to be:

"An officer of a corporation may, by the acts of its directors or managers, be invested with capacity to bind the company, even beyond the scope of those powers which are inherent in his office; as, where in the general course of the company's business the directors or managers have permitted an officer to assume the control and direction of its affairs and have held him out to the public as its general agent." *Id.* § 779. "If a person assuming to act as agent of a corporation but without legal authority or an agent in excess of his proper authority make a contract and the corporation knowingly receive and obtain the benefit of it, this will be a ratification of the contract, and render the corporation liable as a party to it. In this manner ratification may be presumed of the acts of promoters, of the president, of a director, or other officer."

Section 203, Beach on Corporations, vol. 1, states the rule in this language:

"But a contract, regular on its face, executed on behalf of a corporation, and within the scope of its business by the president and secretary, is prima facie evidence of their authority to execute it, and in an action for its breach the burden of proof is on the party denying such authority."

The record shows that the directors and the finance committee, composed of the directors, met and conferred with appellees with reference to certain legal matters, and is sufficient to warrant the jury in presuming that Logan and Le Master were authorized to employ appellees, especially since appellant did not offer any evidence denying the authority of Le Master or Logan, as president, to make the contract of employment.

It is said in 7 R. C. L. §§ 437, 631, 635:

"It seems that the president has, by virtue of his office, authority to take charge of the litigation of the corporation, and power from the president of a corporation, authorizing an at-

torney to do certain acts on its behalf, will be presumed to have been authorized. * * * It seems that the president of a corporation will be presumed, in the absence of proof to the contrary, to have authority to direct the corporate litigation, and his power to employ an attorney to conduct the corporate litigation has frequently been sustained, in view of the nature of the authority vested in him. * * * The authority of officers or agents of a corporation to enter into contracts of employment and appoint agents on behalf of the corporation may be inferred from the manner in which they have been permitted to transact the business of the corporation. It is not necessary, in order to charge a corporation for services rendered, that the directors at a formal meeting should either have formally authorized or ratified the employment. Thus, while the president has no inherent authority to enter into contracts of employment on behalf of the corporation, still this authority usually will be inferred when he is intrusted with the general management of the business of the corporation; so, if an officer employs a person to perform services for the corporation and it is performed with the knowledge of the directors, and they receive the benefit of such services without objection, the corporation is liable upon an implied assumpsit."

The power of a president of a corporation to employ attorneys is discussed at great length in 2 Thompson's Corporation (2d Ed.) § 1433, in which the author cites *Dallas Ice Factory, etc., Co. v. Crawford*, 18 Tex. Civ. App. 176, 44 S. W. 875, and announces the rule that it may be said generally that such an officer or manager has authority to employ counsel, and in general to do whatever is necessary in any litigation in which the corporation is directly interested, and which may be regarded as essential or necessary in advancing or protecting the corporate interests, including the power to employ attorneys to attend to the current legal business of the corporation. *City of Austin v. Nichols*, 42 Tex. Civ. App. 5, 94 S. W. 336; *Bank v. Eustis*, 8 Tex. Civ. App. 350, 28 S. W. 227; *Tex. Mfg. Co. v. Fitzgerald*, 176 S. W. 891(6).

[3] Appellees invoke another rule, which we think may be applicable here, and which is that when the officers of a corporation have made a contract which inures to the benefit of the company, and the results of which are enjoyed by it, the company is estopped from denying that the officer so contracting was duly authorized. *First National Bank of Greenville v. Oil Co.*, 24 Tex. Civ. App. 645, 60 S. W. 828; *Waxahatchie National Bank v. Vickery*, 26 S. W. 876; *Hayward Lumber Co. v. Cox*, 104 S. W. 403; *Canadian Long Distance Telephone Co. v. Seiber*, 159 S. W. 897.

[4, 5] By its third assignment of error complaint is made of the action of the court in refusing to give special charge No. 3, to the effect that, if the jury believed from the evidence that at the time Logan, Le Master, and Penry had plaintiffs to perform services for appellant they were acting for the Amarillo Securities Investment Company or for themselves individually, and if the jury should further find that the agreement with plaintiffs that their fee should be \$2,500, and

they were acting for the Amarillo Securities Company or as individuals, the verdict should be for the defendants.

The fourth paragraph of the general charge is:

"If you find and believe from the evidence that the said Mark Logan, Mike C. Le Master, and J. L. Penry were not acting for the Bankers' Trust Company, at the time they engaged the services of plaintiffs (if they did engage them as alleged by plaintiffs), but were acting for themselves or for the Amarillo Securities Company, as promoters of the defendant company, and you further believe that plaintiffs' services were performed under such contract, then this defendant would not be liable for any services rendered for such promoters, and you will find for the defendants for all such services."

This paragraph of the general charge submits the same issue which the requested instruction presents in the first part. It is true the requested instruction presents the issue of the agreement between Logan, Le Master, and Penry on the one part and plaintiffs upon the other, that the fee of \$2,500 was reasonable. We do not find this issue submitted in the general charge, but since the verdict of the jury was for \$1,000 only, the omission, if error, is harmless, since it is clear that the jury did not consider the agreement as to the amount of the fee.

[6] Appellant insists that the court erred in overruling its fourth objection to the general charge and in refusing special instruction No. 6, upon the question of estoppel. There is evidence in the record tending to show that just before appellees presented their account for attorney's fees, Mark Logan had represented in an open meeting, at which appellees were present, that the company was not indebted to any one in any sum for attorney's fees, or otherwise. The question of estoppel is not raised by the pleadings, and the court could not properly have submitted it. *Howe v. O'Brien*, 45 S. W. 813; *Ford v. Warner*, 176 S. W. 885.

[7] The fifth assignment is based upon the refusal of the court to charge the jury that if they found that, before plaintiffs informed Logan and Le Master of the amount of their fee, a finance committee had been organized with full power to look after such things, the verdict should be for the defendant. The services of appellees, according to the record before us, were performed, in a large measure, before the appointment of a finance committee, and the liability of appellant had already attached. Appellant could not avoid liability by placing the matter of disbursing funds and employing attorneys in the hands of a finance committee after the rights of appellees had accrued. Besides, it is not clear from the record that the matter of employing attorneys rested with the finance committee.

[8] Appellant requested the court to charge the jury that if they should find from the evidence that at the time Mark Logan, Mike C. Le Master and J. L. Penry, or any of them, employed the plaintiffs to perform the serv-

ices sued for, and at the time they agreed that the amount charged was satisfactory, they, the said Logan, Le Master, and Penry were interested adversely to appellant, or if they were seeking to profit personally at the expense of appellant, and that the plaintiffs knew of such fact, to return a verdict for the defendants. We do not think this issue is raised by the pleadings. There is no testimony showing that appellees had any knowledge of any fraudulent designs on the part of Logan, Le Master, or Penry, if any such designs existed; nor does the evidence warrant the conclusion that in the employment of appellees, Logan, Le Master, or Penry were acting in their own interest and adversely to the interest of the company.

Finding no reversible error in the record, the judgment is affirmed.

RICHARDSON et al. v. PEDEN IRON & STEEL CO. (No. 477.)

(Court of Civil Appeals of Texas. El Paso. Oct. 21, 1915.)

APPEAL AND ERROR 6773—BRIEFS—FAILURE TO FILE—AFFIRMANCE.

Where appellants failed to file briefs in the Court of Civil Appeals within the time provided in a stipulation waiving the filing of such briefs in the trial court, and no error in law was apparent on the face of the record, the judgment would be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. 6773.]

Appeal from District Court, Harris County; Wm. Masterson, Judge.

Action by the Peden Iron & Steel Company against C. A. Richardson, Jr., and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Herbert W. Reed and Minor & Minor, all of Beaumont, for appellants. Baker, Botts, Parker & Garwood, of Houston, for appellee.

WALTHALL, J. Appellee, Peden Iron & Steel Company, brought this suit against appellants, C. A. Richardson, Jr., and John F. Goodhue, seeking recovery on a certain joint and several promissory note, executed and delivered by appellants to appellee in the sum of \$4,603.57, payable to the order of appellee, bearing interest, and providing for the payment of attorney's fees. The petition is in the usual form of suits on promissory notes.

Appellants appeared and filed separate answers and defenses. The case was tried to a jury. The court submitted the case to the jury on special issues, on each of which the jury made findings. On the return of the verdict the trial court rendered its judgment in favor of appellee and against appellants jointly and severally for the sum of \$2,892.93, with interest thereon from August 24, 1914,

at the rate of 8 per cent. per annum, and, as between appellants themselves, judgment in favor of John F. Goodhue against C. A. Richardson, by reason of his suretyship for said sum or such amount or such part thereof as he may have to pay in satisfaction of said judgment.

The appellants filed amended motion for a new trial, which being overruled, they gave notice and perfected an appeal to this court and gave a supersedeas bond, filed and approved by the clerk of the district court, with the Commonwealth Bonding & Casualty Insurance Company as surety. Attorneys for appellants and appellee filed in this court an agreement waiving the filing of briefs with the clerk of the trial court and the filing and giving notice of such filing by the clerk, and stipulating that it shall be sufficient if the attorneys for the appellants furnish a copy of their brief to appellee's attorneys and file copies thereof in the Court of Civil Appeals before February 15, 1915. The appellants have filed no briefs in this court, and appellee files a motion asking this court to enter an order affirming the judgment rendered in the lower court, and enter a judgment herein against the appellants and the surety on its supersedeas bond because of the failure to file briefs in this court.

We have carefully reviewed the record filed in this court, and, finding no error in law apparent on the face of the record, the judgment rendered in the trial court is affirmed, and now here rendered against the appellants and the said surety on the supersedeas bond.

ALLEN v. REED et al. (No. 409.)

(Court of Civil Appeals of Texas. El Paso. Oct. 14, 1915.)

1. APPEAL AND ERROR 6748 — ASSIGNMENT OF ERROR—NUMBERING—OMISSION—EFFECT.

Where the brief on appeal presents assignments of error that do not conform to the Court of Civil Appeals rules for submission and briefing of cases, they cannot be considered by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3058-3064; Dec. Dig. 6748.]

2. APPEAL AND ERROR 6680 — ASSIGNMENT OF ERROR—RECORD—FAILURE TO DISCLOSE—EFFECT.

An assignment of error asserting error in the overruling of a special demurrer cannot be considered where the record fails to show that any such demurrer was presented to the trial court, or that any action was taken thereon, and there is no bill of exception to the failure of the court to pass upon the demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2880-2882; Dec. Dig. 6680.]

3. APPEAL AND ERROR 6742—ASSIGNMENT OF ERROR—PROPOSITION—MOTION FOR NEW TRIAL—RECITAL.

The recital in the motion for a new trial that the court overruled a demurrer is not sufficient to raise error thereon, since rule 31 of the Courts of Civil Appeals (142 S. W. xiii) re-

quires a brief statement subjoined to the proposition in explanation and support thereof, referring to the page of the record where the order complained of is set out.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. ¶742.]

4. APPEAL AND ERROR ¶548—ASSIGNMENT OF ERROR—STATEMENT OF FACTS—ABSENCE—EFFECT.

An assignment of error questioning the validity of a verbal agreement as being without consideration cannot be considered, where it is not followed by propositions or any statement of fact from which the question can be determined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. ¶548.]

5. APPEAL AND ERROR ¶548—ISSUES—ANSWERS—RECORD—STATEMENT OF FACTS.

An assignment of error that the answers of the jury to special issues are against the weight of the evidence cannot be considered, in the absence of a statement of facts in the record from which the question can be determined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. ¶548.]

6. APPEAL AND ERROR ¶548—ASSIGNMENT OF ERROR—SPECIAL ISSUES—SUBMISSION—STATEMENT OF FACTS—ABSENCE—EFFECT.

An assignment of error attacking the action of the court in submitting special issues as irrelevant and immaterial is not in itself a proposition, and cannot be considered in the absence of a statement of facts in the record from which the question can be determined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. ¶548.]

7. APPEAL AND ERROR ¶742—ASSIGNMENT OF ERROR—PROPOSITION.

An assignment of error attacking the court's failure to submit an issue asserted to be "important and material" is not itself a proposition, and cannot be considered upon the mere statement, following the assignment, that "this issue was raised by the pleadings and was material."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. ¶742.]

8. APPEAL AND ERROR ¶548—ASSIGNMENT OF ERROR—EVIDENCE—ADMISSION—BILL OF EXCEPTIONS—STATEMENT OF FACTS.

An assignment of error in the admission of evidence cannot be considered, in the absence of a bill of exceptions to the action of the court in admitting the evidence or a statement of facts to show what the evidence admitted was.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. ¶548.]

9. APPEAL AND ERROR ¶548—ASSIGNMENT OF ERROR—EVIDENCE—STATEMENT OF FACTS.

An assignment of error asserting that plaintiff should have judgment upon the undisputed evidence cannot be considered, in the absence of a statement of facts disclosing what the evidence was.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. ¶548.]

10. APPEAL AND ERROR ¶742—ASSIGNMENT OF ERROR—PROPOSITION.

An assignment of error attacking the judgment entered as a great wrong and injustice to the plaintiff in permitting defendant to retain plaintiff's property, followed by a statement that, under the evidence, the plaintiff should have had judgment upon the verdict of the jury,

and that all other issues were immaterial and irrelevant to defeat the plaintiff's cause of action, is not a proposition presenting error for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. ¶742.]

Error from District Court, Harris County; Chas. E. Ashe, Judge.

Action by O. L. Allen against T. J. Reed and others for breach of contract. From a judgment for defendants, plaintiff brings error. Affirmed.

Dowell & Dowell, of Houston, for plaintiff in error. J. A. Camp, of Houston, for defendants in error.

WALTHALL, J. Plaintiff in error sued the defendants in error on an alleged breach of a written contract for the purchase of a sawmill, tools, fixtures, buildings and all paraphernalia located at the mill; the defendants agreeing to pay therefor by installments by delivering to plaintiff in error certain kinds and qualities of lumber at the times mentioned until the whole of the agreed amount of lumber, 175,000 feet, had been delivered. Plaintiff in error in his pleading admitted that defendants in error had made deliveries of 80,000 feet of lumber which he had received. There was a recognized indebtedness of the nature of a mortgage of \$1,000 on the property, owed by the plaintiff in error, stated in the contract, and to secure defendants in error against the payment of said debt, it was stated in the contract that defendants in error reserved the right to hold back and not deliver out of the last deliveries 100,000 feet of the lumber to be delivered under the contract until the said lien indebtedness was satisfied and released. Plaintiff in error asked judgment for the restoration to him of the property on the breach of the contract being made to appear, and, in the alternative, for judgment for the amount of the purchase price in money then unpaid. The defendants in error answered by demurrers, general and special, general and special denial, and by special answer alleged that since the execution of the written contract the parties to it had by mutual parol agreement postponed some of the deliveries of lumber mentioned in the written contract until the last deliveries of the lumber should be made at the times stated in the contract, and pleaded that deliveries of certain amounts of lumber had been made, and that they were ready and willing to deliver the balance due. They further pleaded that plaintiff in error had failed to pay the said \$1,000 indebtedness, and that parties at interest by suit had foreclosed said mortgage lien, and at foreclosure sale had bought in said property, and that defendants in error did not now own the property, and could not make title. They asked for damages resulting to them by reason of the failure of plaintiff in error to pay off the

said \$1,000 indebtedness and prevent a foreclosure of the said lien. Defendants in error made other defenses not necessary to further state.

Plaintiff in error filed a supplemental petition, in which appears demurrers, general and special, general and special denials, denial of any agreement to postpone the time of delivery of any lumber, alleged that plaintiff was the owner of the said \$1,000 indebtedness, denied responsibility of any damage to defendants in error, and pleaded other special matters of defense, in answer to the several matters pleaded by defendants in error. The pleadings are lengthy, and in the view we take of the case we need not further state the pleadings.

The court submitted the case to the jury on 29 special issues. The jury found the facts in favor of the defendants in error, and the court thereupon entered judgment in their favor, and the case is before us on writ of error.

[1] The plaintiff in error filed in the trial court a motion for a new trial, which the court overruled. Plaintiff in error in his brief presents 13 assignments of error, none of which can be considered by this court, because they do not conform to the rules for briefing and submitting cases. The assignments of error are not numbered as required by rule 29 (142 S. W. xii) for submission of cases in this court, so that we cannot refer to the assignments by number.

[2] The first assignment of error presented is the second ground in the motion for a new trial, which is presented as a proposition. It is as follows:

"The court erred in overruling of special demurrer No. 1 contained in the first supplemental petition of plaintiff to that portion of the answer of defendants setting up a verbal agreement in contravention of the written one, the said demurrer being as follows: All that portion of said answer setting up a verbal contract in contravention of said written contract is null and void, as the same is not permissible in law, the said verbal agreement being the extension of the delivery of the February and March, 1913, deliveries until the last deliveries, and also the same is without consideration."

The record filed in this court does not show that any demurrer contained in any pleading of the plaintiff in error was presented to the trial court, or that the court took any action thereon or made any order with reference thereto, nor is there any bill of exception to the failure or refusal of the court to pass upon any demurrer. If the court overruled the demurrer, as complained of in the assignment, the order of the court in doing so should be shown; otherwise it is waived.

[3] The recital of the action of the court in overruling a demurrer in the motion for a new trial is not sufficient. Rule 31 (142 S. W. xiii) requires that there shall be subjoined to the proposition a brief statement of such proceeding contained in the record as will be necessary to explain and support the proposition, referring to the page of the rec-

ord where this court can find the action or order of the court complained of. This has not been done, and, finding no such order, we must conclude that the court made no order overruling the demurrer, and that the demurrer was not acted on by the court, but was waived by the plaintiff.

[4] In the latter part of the assignment complaint is made that the verbal agreement complained of is without consideration. The assignment is not followed by propositions nor by any statement, except a copied extract from the petition. In the absence of a statement of facts, we cannot say that the verbal agreement is without consideration. The assignment cannot be considered.

The next three assignments of error, which we designate as assignments 2, 3, and 4, complain of the action of the court in overruling special demurrers numbered respectively 7, 9, and 15. The same criticism applies to these assignments as noted to the one above, and for the same reasons the assignments cannot be considered.

[5] The next four assignments of error complain of the answers the jury gave to special issues and say the answers are against the weight of the evidence. There is no statement of facts in the record, and we cannot know what the evidence was. These assignments are overruled.

[6] The next assignment of error complains of the action of the court in submitting to the jury 11 special issues, which the assignment asserts to be irrelevant and immaterial, and states what the evidence shows the facts to be. The assignment is not followed by any proposition singling out any issue involved in any of the matters submitted. We cannot, in the absence of a statement of facts, know what the evidence showed the facts to be. The assignment itself is not a proposition, and cannot be considered.

[7] The next assignment asserts error in the failure of the court to submit to the jury an issue which the assignment asserts to be "important and material." The assignment itself is not a proposition, and there is no proposition under the assignment disclosing the point claiming error. The only statement following this assignment is that "this issue was raised by the pleadings and was material." The assignment cannot be considered.

[8] The next assignment complains of error in admitting evidence, but there is no bill of exceptions in the record to the action of the court in admitting the evidence, and no statement of facts to show what the evidence admitted was. The assignment cannot be considered.

[9] The next assignment of error asserts what "the undisputed evidence in the case shows," and that because it does so show "the plaintiff should have judgment." We cannot consider this assignment, because there is no statement of facts, and we do not know what the evidence does show.

[10] The next and last assignment of error presented as a proposition is as follows:

"The judgment of the court as entered by the court on the verdict of the jury does plaintiff great wrong and injustice and permits the defendant to have and to hold his property and get the use and benefit of the same without paying therefor."

The statement following this assignment is an assertion that "under the pleadings in this case the plaintiff in error should have had judgment on the verdict of the jury for the undisputed nonpayment of the purchase money," and that "all issues other than this were immaterial and irrelevant to defeat the plaintiff's cause of action." Under this assignment is presented what plaintiff in error designated as "second proposition under twenty-sixth assignment of error," and states that:

"Plaintiff in error tendered to the court a judgment to be entered by it on the verdict of the jury in his favor which was as follows: [Then copies the judgment tendered.]"

The assignment itself is not a proposition, and what is presented as a proposition is not germane to the assignment, nor is either a proposition, specifically designating an error.

The judgment entered by the court is such as the issues presented in the pleading and the issues of fact found by the jury would warrant and sustain.

The assignment is overruled.

The case is affirmed.

J. W. CARTER MUSIC CO. v. BAILEY. (No. 481.)

(Court of Civil Appeals of Texas. El Paso.
Oct. 21, 1915.)

1. TRIAL \Leftrightarrow 25—ARGUMENT—RIGHT TO OPEN AND CLOSE.

Under Rev. St. 1911, art. 1953, providing that the party having, under the pleadings, the burden of proof on the whole case, shall be entitled to open and conclude the argument, and rule 31 for district and county courts (142 S. W. xx), providing that plaintiff shall have the right to open and conclude both in adducing evidence and in the argument, unless the burden of proof of the whole case under the pleadings rests upon defendant, or unless defendant shall admit that plaintiff has a good cause of action as set forth in the petition, except so far as it may be defeated by the facts of the answer constituting a good defense which may be established on the trial, where in an action on a note for the purchase price of a piano defendant answered by general denial and a special plea, setting up that the piano was purchased subject to his wife's approval, and that she did not approve thereof, but no admission as to the justice of plaintiff's cause of action was made, it was error to grant defendant the right to open and close the argument, though the court's charge imposed upon defendant the burden of proving his special plea, and, in effect, withdrew from the jury, and resolved in plaintiff's favor, the merits of its cause of action as set forth in the petition, and submitted only the issue raised by the special plea, as the question is not controlled by the charge, but by the state of the pleadings, or by the prescribed ad-

mission, and the general denial imposed the burden of proof on the whole case on plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44-75; Dec. Dig. \Leftrightarrow 25.]

2. APPEAL AND ERROR \Leftrightarrow 1046 — HARMLESS ERROR—DENIAL OF RIGHT TO OPEN AND CLOSE.

Error in permitting defendant to open and conclude the argument was material and necessitated a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4131, 4134; Dec. Dig. \Leftrightarrow 1046.]

Appeal from Harris County Court, at Law; Clark C. Wren, Judge.

Action by the J. W. Carter Music Company against N. Bailey. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Andrews, Streetman, Burns & Logue and R. H. Kelley, all of Houston, for appellant. Sam Schwartz, of Houston, for appellee.

HIGGINS, J. Appellant sued Bailey to recover upon the latter's note in sum of \$350, and to foreclose mortgage lien upon a piano, in part payment for which it was alleged the note was given.

Bailey answered by a general denial, special plea setting up that the piano was purchased subject to the approval of his wife, and by the terms of the agreement he was not required to accept and pay for the instrument unless his wife approved the same, that his wife did not approve of it, of which fact he notified appellant, and he was therefore not liable upon the instrument sued upon.

The jury was instructed that the burden of proof rested upon Bailey to prove by a preponderance of the evidence his contention that the sale of the piano was subject to his wife's approval. The only issue submitted for the jury's determination was whether it was agreed and understood by the parties, when the note sued upon was executed, that the sale of the piano was subject to the approval of defendant's wife. Upon an affirmative answer thereto, judgment was rendered in defendant's favor.

[1] Upon trial, and after close of the evidence (which was opened and concluded by plaintiff), defendant requested and was granted the right to open and close the argument. No admission whatever was made by defendant as to the justice of plaintiff's cause of action as provided by district and county court rule 31 (142 S. W. xx) and the right to open and conclude the argument was granted over plaintiff's protest. The case is here presented upon a single assignment complaining of the action of the court in this respect. The court erred. Its action was directly contrary to and in the face of article 1953, R. S., and the court rule above mentioned. *Smith v. Eastham*, 56 S. W. 218; *Halsell v. Neal*, 23 Tex. Civ. App. 26, 56 S.

W. 137; *Heath v. Bank*, 19 Tex. Civ. App. 63, 46 S. W. 123; *Caldwell v. Auto Sales Co.*, 158 S. W. 1030; *Blume v. Haney*, 128 S. W. 440.

Under the statute the party having under the pleadings the burden of proof on the whole case is entitled to open and conclude the argument. Defendant's general denial imposed this burden upon plaintiff. Upon the face of the pleadings he was thus entitled to open and close the argument. Notwithstanding the state of the pleadings, the right might have been acquired by defendant, had he made the admission as provided by rule 31. This he wholly failed to do. It is argued that, inasmuch as the court's charge imposed upon defendant the burden of proving his special plea and, in effect, withdrew from the jury and resolved in plaintiff's favor the merits of its cause of action as set forth in its petition, and submitted only the issue raised by the special plea, that therefore the defendant was properly granted the right to open and close the argument, or, in any event, the error was harmless. But the court's charge does not control the question. It is governed by the state of the pleadings as provided by statute, or an admission of the merits of plaintiff's cause of action as set forth in the petition as provided by rule 31.

[2] The error indicated is material, and necessitates a reversal. *Meade v. Logan*, 110 S. W. 188; *Hillboldt v. Waugh*, 47 S. W. 829; *Fain v. Nelms*, 113 S. W. 1002; *Harris v. Pinckney*, 55 S. W. 38.

Reversed and remanded.

WESTERN UNION TELEGRAPH CO. v SMITH et al (No. 5502.)

(Court of Civil Appeals of Texas. San Antonio. Oct. 20, 1915.)

1. CONTRACTS ⇨123 — AGREEMENTS — VALIDITY.

An agreement by a creditor who had charged the debtor with crime to receive the amount of the debt and stop prosecution would be illegal and void.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 633-653; Dec. Dig. ⇨123.]

2. TELEGRAPHS AND TELEPHONES ⇨48 — TRANSMISSION OF MESSAGES — CONVERSION OF MONEY.

A cousin of one charged with crime wired to the prosecuting attorney of the county to know whether there was any case against accused. The telegraph agent, posing as the prosecuting attorney, replied that the case was with the grand jury, and the cousin offered to pay the claim, which was the basis of the prosecution, in case it was stopped. The telegraph agent obtained possession of this money. Held that, as the condition of the agreement was illegal and void, and as title to the money did not leave accused's cousin until prosecution was stopped, the creditors of accused, who instituted prosecution, had no right of action against the telegraph company for the conversion.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 30; Dec. Dig. ⇨48.]

Appeal from Brazoria County Court; J. W. Munson, Judge.

Action by J. G. Smith and T. L. Smith, doing business as Smith Bros., against the Western Union Telegraph Company. From a judgment for plaintiffs, defendant appeals. Reversed and rendered.

Geo. H. Fearons, of New York City, and Hume & Hume, of Houston, for appellant. Masterson & Rucks, of Angleton, for appellees.

CARL, J. Appellees, J. G. and T. L. Smith, doing business in Brazoria county under the name of Smith Bros., sued the Western Union Telegraph Company in the justice court and recovered. The case was, on appeal, again tried in the county court, resulting in a verdict for appellees for \$125; the costs of that appeal being adjudged against appellees.

It is alleged that one R. G. Lightfoot was appellant's agent and operator, and while such, in the discharge of his duties, received and sent the following telegrams:

"Sept. 14th, 1907. To Prosecuting Attorney, Brazoria County, Brazoria, Texas. Any case in your hands against Charles Clayton wire. Answer my expense. C. T. Hays."

"Received at 9 coll. Brazoria, Tex. Sept. 15th, 1907. C. T. Hays, Hannibal, Mo., Sept. 15th, 1907. Matter with grand jury no report yet. R. C. Lightfoot."

"Sept. 15, 1907. To Mr. Lightfoot, Prosecuting Attorney, Brazoria, Texas. Will payment to Smith satisfy Smith and you and stop prosecuting. C. T. Hays."

"Received at 17 coll. Brazoria, Texas, Sept. 16th, 1907. C. T. Hays, Hannibal, Mo. One hundred twenty five dollars draft to my order will satisfy Smith and stop proceedings. Answer. Lightfoot."

"Sept. 16th, 1907. To Lightfoot, Prosecuting Attorney, Brazoria, Texas. Draft tomorrow. See letter. Telegram received after banking hours. C. T. Hays."

The letter referred to in the last telegram is as follows:

"Mr. Lightfoot, Prosecuting Attorney, Brazoria, Texas.—Dear Sir: Confirming telegram of last night, I inclose New York exchange for \$125 for liquidating the claim of Smith Bros. against Chas. Clayton and stopping prosecution against him.

"I am a cousin of Mr. Clayton. I want to say that this money has been raised for this purpose at considerable sacrifice. I therefore request of you and Smith Bros. that you make no mention to Mr. Clayton of this payment. And I would esteem it a special favor if Smith Bros. would make some attempt to collect from Mr. Clayton and forward me any collections they may be able to make.

"Thanking you for your courtesies in this matter, I remain, Yours truly C. T. Hays."

Smith Bros. allege that Charles Clayton owed them \$125, which the draft was intended to pay; but Lightfoot falsely and fraudulently represented himself to be the prosecuting attorney of Brazoria county, obtained the \$125, and converted it to his own use and benefit, thereby preventing them from collecting the debt Clayton owed. It

is not alleged that the prosecuting attorney of the county would have dismissed the prosecution of Clayton upon receipt of the \$125; but negligence is alleged in the company in failing to deliver the telegrams to the parties intended and in concealing the fraud of Lightfoot in representing himself to be such prosecuting officer.

[1,2] Hays sent the money, and sent it with a condition attached to it, even if it had reached the prosecuting attorney. This condition was that the prosecution be dismissed against Charles Clayton. Until that was done Smith Bros. had no claim on the money. It would not even have been subject to garnishment by them because Clayton is the man who owed them the debt, and this money was sent by Hays and belonged to him until delivered according to proposed contract by the prosecuting attorney. For that matter the condition attached to the delivery of the money was illegal and contrary to public policy, but that fact did not make it Smith Bros.' money. Hays may have had a cause of action against the company for failing to deliver his messages, and later when Lightfoot converted his money, but this could not have afforded appellees a cause of action. If Clayton owed them \$125, that debt was not discharged, and no act of appellant has put them in a worse attitude than they were before Hays parted with his money. There never was anything Smith Bros. could have stood upon to recover this money so sent, because it was never intended they should have it until the condition attached was complied with, and this condition they could not in law cause to be complied with, because it was illegal and void.

Too often the criminal courts of this state are sought to be used as collecting agencies, the aggrieved creditor rushing to the prosecuting attorney and making complaint, but later significantly suggesting to the culprit or his relatives that he really believes there is yet some good in the man, and if his money is paid, he will be satisfied and will stop the prosecution. And it is well that people know that the criminal courts are for one purpose, and the civil courts for a very different purpose. It is not intended by this to intimate that appellees have indulged in this reprehensible practice, but the writer has met this trouble so often in the office of prosecuting attorney that he could not refrain from saying something about it; and the court very kindly permitted the same.

The briefs of the parties contain no authorities, but on the subject of fraud of telegraph agents we have found very interesting reading in the following: Usher v. W. U. Telegraph Co., 122 Mo. App. 98, 98 S. W. 84; W. U. Telegraph Co. v. Uvalde Nat. Bank, 97 Tex. 219, 77 S. W. 603, 65 L. R. A. 805, 1 Ann. Cas. 573; W. U. Telegraph

Co. v. Schriver, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678.

It is therefore our conclusion that appellees had no cause of action against appellant, and the judgment should be reversed, and judgment here rendered in favor of appellant; and it is so ordered.

Reversed and rendered.

LOCKWOOD INV. CO. v. GEISELMAN.

(No. 479.)

(Court of Civil Appeals of Texas. El Paso.

Oct. 21, 1915.)

1. BOUNDARIES \Leftrightarrow 37 — ACTIONS — EVIDENCE.

In an action involving disputed boundary, evidence held to show that the plat, as made, was the result of a mistake of the draftsman, and that it was not intended to include in the addition in which plaintiff bought property unplatted property not belonging to plaintiff's grantor.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 184-194; Dec. Dig. \Leftrightarrow 37.]

2. VENDOR AND PURCHASER \Leftrightarrow 239 — BONA FIDE PURCHASER — RIGHTS OF.

Where the question was solely one of boundary, and plaintiff was not in possession of the land which it claimed, the bona fides of plaintiff's purchase or want of notice does not give him additional rights.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 583-600; Dec. Dig. \Leftrightarrow 239.]

Appeal from District Court, Harris County; J. W. Woods, Special Judge.

Trespass to try title by the Lockwood Investment Company against M. P. Geiselman. From a judgment for defendant, plaintiff appeals. Affirmed.

H. F. Ring, of Houston, for appellant. Fisher, Campbell & Amerman and W. F. Tarver, all of Houston, for appellee.

HIGGINS, J. Appellant brought this suit in trespass to try title to recover lots 1, 2, 10, 11, and 12 in block 49 in Foster's Second North addition to the city of Houston. It was alleged that the south line of block 49 was 410 feet north of the north line of blocks 106, 107, and 108 in the S. F. Noble addition to said city. Appellant has record title to the lots mentioned, and appellee, Geiselman, has record title to block 54 in said Foster addition. Block 54 is in the south tier of blocks of the Foster addition, and block 49 lies just north of 54 in the next tier of blocks. Appellant claims that the south line of the addition should be located further south than is claimed by appellee. If located as by appellant contended, it would fix the south line of the addition at the point alleged by appellant, and the lots claimed by it would be located on property claimed by and in possession of Geiselman. The question involved is one of boundary, the point at issue being the location of the south boundary line of the Foster addition. The land in

controversy is situate in the S. M. Harris grant. In 1852 Sarah Noble became the owner of a 100-acre tract in the southwest corner of the grant. Its north line ran east and west 260 varas. Its east line ran north and south 2,237 varas, and its west line was parallel thereto, and coincident with the west line of the grant. Upon the south it was bounded by Buffalo bayou. In 1867 all of the tract was platted and laid off into lots, blocks, and streets, except 7 or 8 acres of the north end; this unplatted portion being 260 varas east and west by 450 feet north and south. On February 28, 1874, James E. Foster became the owner of a 100-acre tract lying immediately north of and adjoining the Noble tract. It was rectangular in shape, 260 varas wide and 2,759 varas in length; its east and west lines being coincident with prolongations of the corresponding lines of the Noble tract. In November, 1874, there was filed for record the map of said Foster's Second North addition. There is no statement thereon to indicate what particular tract of land was intended to be platted, but it undoubtedly referred to the 100-acre tract which he had acquired lying north of the Noble addition. From the distances indicated on the map, it will be seen that the tract platted by said map was 6,030 feet in length by $722\frac{2}{10}$ feet in width, or $2,170\frac{3}{10}$ varas in length by 260 varas in width, which comprises exactly 100 acres in area.

The draftsman who prepared the plat of Foster's addition attempted to indicate thereon other additions which adjoin the same on the south and west, and in such manner indicated that the north tier of blocks of the Noble addition, as platted, lay immediately south of the Foster addition. The draftsman made no indication on the plat of the unplatted strip of the Noble tract lying between the Foster 100 acres and the Noble addition as platted, but indicated that the Foster addition came as far south as the Noble addition, which would place the Noble unplatted acreage within the land covered by the Foster addition plat.

The controlling question in the case thus reduces itself: Was the Foster addition, as shown by the recorded map, located immediately north of the Noble addition and covering the unplatted 7 or 8 acres in the northern part of the Noble tract, as is claimed by appellant, or was it located wholly upon and within the 100-acre tract then owned by Foster immediately north of the Noble 100-acre tract?

[1] In the court below the issue was resolved against appellant, and the sufficiency of the evidence to support this finding is raised by the first three propositions subjoined to the only assignment of error presented in this court. An examination of the evidence bearing upon the issue abundantly supports the finding. The only fact support-

ing appellant's contention is that the plat of the addition shows that it adjoins the northern tier of blocks in the Noble addition. This was a manifest and evident error on the part of the draftsman who drew the map of the Foster addition. It is quite apparent that after preparing the plat he simply undertook to indicate surrounding additions, and in referring to the Noble addition failed to indicate the unplatted portion in the north end of the tract. A number of similar mistakes were made with reference to other adjacent additions. Considering all the facts and surrounding circumstances as reflected by the record, we have no doubt that the plat of the Foster addition was intended to cover only the 100-acre tract which he owned, and that the south line thereof did not extend further south than the north line of the Noble tract.

[2] If we correctly interpret the remaining propositions of appellant, they are to the effect that he is entitled to recover the land in controversy as a purchaser without notice. We cannot see how any such question can be involved in this case. The issue is one of boundary alone, and, in the absence of recognition of line, or estoppel otherwise arising, it is not apparent to us how the bona fides of appellant's purchase, or his want of notice, can in any wise arise or be material.

Affirmed.

MOORE et al. v. TOYAH VALLEY IRR. CO. et al. (No. 492.)

(Court of Civil Appeals of Texas. El Paso. Oct. 14, 1915. Rehearing Denied Nov. 4, 1915. On Motion to Reinstate, Nov. 4, 1915.)

1. APPEAL AND ERROR \S 76—JUDGMENTS APPEALABLE—"FINAL JUDGMENT."

Where a judgment did not dispose of certain interveners, nor of the subject-matter sued for by them, and there was no order of dismissal as to them, the judgment was not such a "final judgment" as would support an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 426-428, 430, 431, 435-443; Dec. Dig. \S 76.

For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. PARTIES \S 40—PROPER PARTIES.

Where, in a suit for an injunction, certain parties filed a petition in intervention setting up that they were jointly interested with plaintiff in the lands and waters in controversy, they were under the allegations of their petition proper parties to the action.

[Ed. Note.—For other cases, see Parties, Cent. Dig. \S 60-63, 65-67; Dec. Dig. \S 40.]

On Motion to Reinstate.

3. JUDGMENT \S 297 — CORRECTION AND AMENDMENT—FAILURE OF ENTRY TO CONFORM TO JUDGMENT RENDERED.

Where the judgment actually rendered disposed of the rights of all parties to an action, but the judgment, as entered, did not correctly reflect and evidence the judgment rendered and failed to dispose of the rights of certain parties,

the court had authority to correct its minutes so as to show the judgment actually rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 581, 584-586; Dec. Dig. § 297.]

4. JUDGMENT § 1—"RENDITION" AND "ENTRY" OF JUDGMENT.

The "judgment" of a court is what the court pronounces; its "rendition" is the judicial act by which the court settles and declares the decision of the law upon the matters at issue; and its "entry" is the ministerial act by which the enduring evidence of the judicial act is afforded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1, 3, 4; Dec. Dig. § 1.

For other definitions, see Words and Phrases, First and Second Series, Entry; Judgment; Rendition of Judgment.]

5. JUDGMENT § 299—AMENDMENT OR CORRECTION—TIME FOR AMENDMENT.

Under Rev. St. 1911, art. 2015, providing that, where there shall be a mistake in the record of any judgment, the judge may in open court, and after notice of the application therefor to the parties interested, amend the same, and article 2016, providing that, where in the record of any judgment or decree there shall be a mistake, miscalculation, or misrecital of any sum or sums of money, or any names, and there shall be among the records any verdict or instrument of writing whereby the judgment may be safely amended, it shall be the duty of the court and the judge thereof in vacation on application of either party, to amend the judgment, where the judgment actually rendered disposed of the rights of all of the parties, but the judgment, as entered, did not dispose of the rights of certain parties, the correction of the judgment entry to conform to the judgment rendered could only be made at a subsequent term, and not in vacation; as article 2016 is limited to the particular errors in the record of the judgment therein indicated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 583-586; Dec. Dig. § 299.]

Appeal from District Court, Reeves County; S. J. Isaacks, Judge.

Action by Mrs. J. L. Moore against the Toyah Valley Irrigation Company and another in which J. T. Moore and others intervened as plaintiffs. Judgment for defendants, and plaintiffs appeal. Appeal dismissed.

Hefner & Cooke and J. W. Parker, all of Pecos, for appellants. Ross & Hubbard, W. A. Hudson, E. C. Canon, J. A. Buck, and J. E. Starley, all of Pecos, Capps, Cantey, Hanger & Short, of Ft. Worth, and J. A. Drane and Harry MacTlier, both of Pecos, for appellees.

HARPER, J. This suit for injunction was instituted by Mrs. J. L. Moore, originally, against the Toyah Valley Irrigation Company and A. J. Carpenter. Afterwards J. T., W. E., and E. A. Moore intervened in the case, in person or through Mrs. J. L. Moore, who is alleged to be their guardian (the petition does not exactly reveal which), setting up that they were jointly interested with plaintiff Moore in the lands and waters in controversy, and they filed pleadings and adopted those filed by Mrs. J. L. Moore.

[1] The decree entered by the trial court after hearing is not such a final judgment as is required by law to confer jurisdiction upon this court, in that it does not dispose of the parties (intervener) nor the subject-matter sued for by such parties. The parties J. T., W. E., and E. A. Moore have not been disposed of by the decree, nor by any order of dismissal; nor has the subject-matter of their suit been disposed of as to them by the judgment.

[2] Under the allegations in their petition in intervention, the said J. T., W. E., and E. A. Moore were proper parties to this action (Poster v. G., C. & S. F. Ry. Co., 91 Tex. 631, 45 S. W. 376), and, to make the decree final, there must be an order entered of record disposing of them as parties (Mendoza v. A., T. & S. F. Ry. Co., 62 S. W. 418¹), and likewise the decree of the court, in order to be such final judgment as will give this court jurisdiction to consider and determine the questions involved, must dispose of the pleas and issues of law and fact (Railway Co. v. Weld & Neville, 95 Tex. 278, 66 S. W. 1095).

It is therefore ordered that this cause be dismissed at the cost of appellants.

On Motion to Reinstate.

By motion appellants ask that their appeal, dismissed for want of a final judgment, be reinstated, for the reason that since the order of dismissal was entered a final judgment has been entered nunc pro tunc in the trial court, and further asks for a writ of certiorari to the clerk of the district court of Reeves county, Tex., to certify the record of the judgment as corrected.

The record filed in support of the motion shows that since the order of dismissal the appellants filed a motion in the district court containing the following:

"That * * * at the November term, 1914, * * * said cause was tried, and final judgment rendered, as appears from the docket entries and papers filed in said cause, disposing of the parties to said cause and the issues of law and fact raised by the parties thereto, that thereafter, and during the same term of said court, said judgment was duly recorded, but there was a clerical error in the record of said judgment, as so made, in this, that the said judgment does not dispose of the interveners, Mrs. J. L. Moore, as guardian, and the said J. T., W. E., and E. A. Moore, and does not dispose of the issues made by the pleading of said interveners, in that the record of said judgment omits the names of said interveners and omits reference to the issues made by their pleadings."

And by prayer they asked the court to amend or correct the judgment as indicated: Thereafter the judge in vacation, October 15, 1915, caused the judgment to be corrected as indicated.

[3, 4] It appears from the record that the

¹ Reported in full in the Southwestern Reporter; reported as a memorandum decision without opinion in 94 Tex. 660.

judgment originally rendered actually disposed of the rights of the interveners, and as a matter of fact, a final judgment was rendered. But the judgment, as entered, does not correctly reflect and evidence the judgment actually rendered. The distinction between the rendition of a judgment, and the entry thereof is stated by Judge Phillips in *Coleman v. Zapp*, 105 Tex. 491, at page 494, 151 S. W. 1040, at page 1041, as follows:

"The judgment of a court is what the court pronounces. Its rendition is the judicial act by which the court settles and declares the decision of the law upon the matters at issue. Its entry is the ministerial act by which the enduring evidence of the judicial act is afforded."

In the same case, 105 Tex. on page 496, 151 S. W. on page 1042, it is said by Judge Phillips:

"To correct in the trial court, after adjournment of the term, a judgment as rendered, an independent action is necessary, as its jurisdiction of the case is at an end. In the latter instance [i. e., a proceeding to correct or supply the minutes of the court so as to have them truly recite a judgment actually rendered] the court may, at a subsequent term, of its own motion or upon the application of parties, order the proper entry, because the inherent power that it possesses as a court over its own records endures for the sake of their verity."

It is thus seen that the trouble in this case is not that the court did not render a final judgment, but that it failed to enter a final judgment. The latter being the case, it is clear, under numerous authorities, that the court has authority to correct its minutes so as to show the judgment actually rendered. *Hamilton v. Joachim*, 160 S. W. 645, at page 647, and authorities there cited, and also *Yarbrough v. Etheredge*, 163 S. W. at page 999.

[5] It remains therefore only to be determined whether the correction of the minutes can be made in vacation, or must it be made by a nunc pro tunc order entered during term time. The only authority to amend a judgment entered in vacation is contained in articles 2016 and 2017, where it is provided that:

"Where in the record of any judgment or decree of any court there shall be any mistake, miscalculation, or misrecital of any sum or sums of money, or of any name or names, * * * it shall be the duty of the court in which such judgment or decree shall be rendered" to amend same.

Plainly, this cause does not fall within the terms of that article, because it is not any mistake, miscalculation, or misrecital of any name or names; but it is a plain case of failure to incorporate in the judgment entry a disposition of the rights of interveners. Construing article 2016, our courts in several cases have, in effect, held that only clerical errors may be corrected in vacation by virtue of this statute. See *Mansel v. Castles*, 54 S. W. 299; *Railway Co. v. Haynes*, 82 Tex. 448, 18 S. W. 605; *Hinzle v. Kempner*, 82 Tex. 617, at page 621, 18 S. W. 659; and

Taylor v. Doom, 43 Tex. Civ. App. 59, at page 63, 95 S. W. 4.

The statute which controls is article 2015, which reads that, where there is a mistake in the record of any judgment or decree, the judge may, in open court, and after notice of the application therefor has been given to the parties interested in such judgment or decree, amend the same according to the truth and justice of the case, and thereafter the execution shall conform to the judgment as rendered. This statute is a very much broader one than article 2016, and gives the trial judge unlimited authority to correct any mistake in the record of any judgment or decree, but it must be made in open court. As has been indicated, article 2016 has reference to corrections which may be made in vacation, and is limited to the particular errors in the record of the judgment therein indicated. So it is plain that the remedy of the parties in this case is to have the judgment entry corrected by an order made in open court nunc pro tunc at a subsequent term, under article 2015.

It appears from the motion in this case that all parties would prefer to have this case disposed of upon the present appeal. We at this time see no reason why it should not be done after a nunc pro tunc entry is made in the trial court, properly correcting the entry of the judgment, so as to dispose of all issues and parties, upon a motion which may be thereafter seasonably presented to reinstate the appeal.

The motion is in all things overruled.

LOCKNEY STATE BANK v. DAMRON. (No. 829.)

(Court of Civil Appeals of Texas. Amarillo.
Oct. 23, 1915.)

1. PRINCIPAL AND AGENT ⇨171 — UNAUTHORIZED ACTS—ACCEPTANCE OF BENEFITS.

A person or corporation cannot retain an advantage secured by fraud of one of its agents and accept the benefits of his act, without also adopting the means by which the advantage was procured, though the principal had no knowledge at the time what those means were.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 644-655; Dec. Dig. ⇨171.]

2. CANCELLATION OF INSTRUMENTS ⇨47 — GROUNDS FOR DENIAL OF RELIEF—FRAUD BY PLAINTIFF.

A woman suing for the cancellation of a note for \$3,300 given to a bank, who at the time it was signed was about 70 years old, ignorant, uneducated, and practically unable to read and write, testified that the cashier of the bank, who accompanied her grandson to her home to obtain her signature to the note, represented that it was for \$1,700; that he had also signed the note; that if she would sign it he would stand between her and all danger; that she had confidence in him, knew his position as cashier, and thought he was reliable and possessed property; that she understood he was representing the bank; and that she told them when she signed the note that she would not pay it, and they took it with the understand-

ing that she was not to pay it. *Held* that, assuming that an agreement that she would not be legally bound as a maker of the note would be fraudulent as to the bank and preclude equitable relief, the testimony was open to the construction that she understood that she was not to pay the note because of the cashier's agreement and representations that he would stand between her and all danger, in connection with her belief in his solvency, and, if such was the understanding, the contract was not fraudulent as to the bank, especially as, had it not been for the cashier's fraudulent representations, her obligation to the bank would not have been affected by this agreement, and the bank could not have been injured thereby.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 102, 103; Dec. Dig. §47.]

3. EVIDENCE §441 — PAROL EVIDENCE TO VARY WRITING.

The terms of a promissory note are conclusive of the contract, and cannot be changed by parol evidence that the note was executed with an understanding between the parties that it was never to be paid.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. §441.]

4. BILLS AND NOTES §103 — VALIDITY — FRAUD.

That the cashier of a bank to which a woman 70 years old, ignorant, uneducated, and practically unable to read and write, executed a note for \$3,300, represented to her that it was for \$1,700, that he had also signed the note, and that if she would sign it he would stand between her and all danger, constituted sufficient grounds for the cancellation of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 233-240; Dec. Dig. §103.]

Appeal from District Court, Motley County; Jo A. P. Dickson, Judge.

Suit by Mrs. S. A. Damron against the Lockney State Bank. Decree in favor of plaintiff, and defendant appeals. Affirmed.

Crudginton & Works, of Amarillo, for appellant. T. T. Bouldin, of Matador, for appellee.

HENDRICKS, J. The appellee, Mrs. S. A. Damron, instituted this suit against the appellant, the Lockney State Bank, for the purpose of canceling a note on its face for the sum of \$3,300, which at the time of the institution of the suit had not matured. Mrs. Damron, who signed the note, with her mark as signature, at the time was about 70 years of age, ignorant, uneducated, and practically unable to read and write. At the time of the execution of the note D. F. Jones, the grandson of Mrs. Damron, was indebted to the Lockney State Bank, and, with Garrison, cashier of the bank, visited the home of Mrs. Damron, several miles in the country, for the purpose of obtaining the signature of his grandmother upon the particular note. Mrs. Damron testified that antecedent to the execution of the note Mr. Garrison, the cashier of the bank, represented to her that the note was for \$1,700, and that he had also signed the note, and that if she would sign

it he would stand between her and all danger, and that if such representations had not been made by Mr. Garrison she would not have executed the paper, that they (evidently meaning Jones and Garrison) represented to her that this was an extension of another note, and that they simply wanted a little longer time upon the obligation and had plenty of cattle to settle the same. She said that she had confidence in Mr. Garrison, knew the position that he held in the bank at Lockney as cashier, and thought he was reliable and possessed of some property, that she understood that Mr. Garrison was representing the bank, and that she signed the note in order that Mr. Garrison could get the amount of money represented by the note from the bank, and further testified:

"I told them when I signed it [the note] that I would not pay it at all, and they took it with that understanding—that I was not to pay for it."

The trial court, without the assistance of a jury, canceled the note, and the assignment which we will discuss is one, in effect, that, Mrs. Damron having testified that she had an understanding that she was not to pay the note when they took it, and knowing that said note was being executed for the purpose of securing money from the bank for Garrison, she was guilty of such fraud as to preclude a recovery. The authorities principally cited to sustain this view are *Jines v. Astle*, 170 S. W. 1081, *Rushing v. Bank*, 162 S. W. 469, and *Hawkins v. Bank*, 175 S. W. 166, with the additional case of *Cotton v. Rand*, 93 Tex. 7, 51 S. W. 842, 53 S. W. 343, decided by the Supreme Court; the first three cases having been decided by this court.

Appellant also, as a subsidiary proposition under the above assignment, contends that Garrison having an interest in the appellant bank, that no representations or fraud of Garrison could be imputed to the bank.

[1] There may be a phase of this case that Garrison, reckoning it upon the representations he made to Mrs. Damron, if he informed her, and she so believed, that this was his note to the bank, and he was individually obtaining the money, such antagonism of interest, if it were true, might exist. However, in passing upon appellant's secondary proposition, there exists the applicable principle that a person or a corporation cannot retain an advantage secured by fraud of one of its agents and accept the benefits of his act without also adopting the means by which the advantage was procured, although the principal may have had no knowledge at the time what those means were. *American Nat. Bank v. Cruger*, 91 Tex. 446, 44 S. W. 278; *Allen v. Garrison*, 92 Tex. 546, 50 S. W. 335; *Cowboy State Bank & Trust Co. v. Guinn*, 160 S. W. 1105; *Commonwealth Bonding & Casualty Co. v. Bomar*, 169 S. W. 1063.

[2] Assuming argumentatively only that

an agreement, as construed by appellant to have been made in this case, is one the tendency of which is to permit the perpetration of a fraud as to preclude equitable consideration of rights by a participant, however, we think, resolving the testimony presumptively as the trial court resolved it, and the transaction, considering the evidence as a whole, that the authorities cited and the principle attempted to be held applicable are not pertinent. Appellant's construction and theory is, as we view it, that Mrs. Damron agreed with Garrison, and Garrison with her, that she would not be bound, in so far as any legal obligation is concerned, as a maker of the note. Such a construction is deducible from the testimony. However, there is another construction that Mrs. Damron understood that she was not to pay said note on account of the agreement and representations by Garrison with her belief in his solvency that he would stand between her and all danger upon the obligation, and for that reason she would not pay it.

"It is a well-established rule of construction that language in a contract which is susceptible of two constructions, one of which would render the contract illegal, and the other would make it lawful, that contract which would conform the contract to the law must be adopted." *Foard County v. Sandifer*, 105 Tex. 424, 151 S. W. 524.

Chief Justice Brown also said in that case, quoting from *Clark on Contracts*:

"Where a particular word, or the contract as a whole, is susceptible of two meanings, one of which will render the contract valid, and the other of which will render it invalid, the former will be adopted so as to uphold the contract."

It is clear to us that, if Garrison agreed with Mrs. Damron that she would not have to pay the note, on account of the assumption by him, as between them, of the whole liability for the paper, such contract had not a fraudulent tendency, nor, as far as this record suggests, would violate any rule of public policy to the extent that the same would be void, and constitute fraud upon the bank.

[3] Again, as presented in this record, could such a contract operate as a fraud upon the Lockney State Bank? The terms of a promissory note are conclusive of the contract and cannot be changed by parol evidence that the note was executed with an understanding between the parties that it was never to be paid. *Dolson v. De Ganahl*, 70 Tex. 620, 8 S. W. 321; *Roundtree v. Gilroy*, 57 Tex. 176, 180; *Self v. King*, 28 Tex. 552, 553; *Bailey v. Rockwall County Nat. Bank* (Civ. App.) 61 S. W. 530, 531.

If it were not for fraudulent representations Mrs. Damron could not impeach this note upon the character of agreement which appellant claims was made. Her obligation to the bank would be unequivocal, and stripped of the fraud that permits the woman to cancel the note, the bank could not have

been injured in law. If the representations had not been made, the mere agreement, if it existed as the appellant construes it, that she was not to be bound upon the note, would be unavailing as to deprive the bank of any rights whatever in law. If so, how could such contract have a tendency to operate as a fraud in law upon the bank? Without deciding it upon the consideration last suggested, we think, upon an interpretation of the record, susceptible of two meanings, and resolving it presumably as the trial court construed it, the assignment should be overruled. Other assignments we think unnecessary to discuss and are overruled.

[4] The trial court resolved the testimony as to representations of Garrison against the bank which constitute sufficient grounds for the cancellation. *Stacy v. Ross*, 27 Tex. 3, 84 Am. Dec. 604.

Affirmed.

MORRIS v. McSPADDEN et al. (No. 825.)*

(Court of Civil Appeals of Texas. Amarillo. Oct. 16, 1915. On Motion for Rehearing, Nov. 6, 1915.)

1. JUDGMENT \S 256—CONFORMITY TO SPECIAL FINDINGS—IMMATERIAL FINDINGS.

The issue found by the jury must or should respond to the issues presented by the pleadings, and, if they do not so respond, the issues so found should be regarded as immaterial, and not be considered in rendering the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 440-454; Dec. Dig. \S 256.]

2. TRIAL \S 366—SPECIAL ISSUES—REQUESTS—EXCEPTIONS BAD IN PART.

Where five special issues were requested on one paper, and refused as a whole, and an exception taken to the refusal of all five, and three of such issues were given substantially as requested, an assignment complaining of the refusal of the other two would not be considered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 875-878; Dec. Dig. \S 366.]

3. TRIAL \S 366—SPECIAL ISSUES—REQUESTS—EXCEPTIONS BAD IN PART.

A general exception to the refusal to give special charges en masse will be overruled, where part of them were embraced in the main charge as given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 875-878; Dec. Dig. \S 366.]

On Motion for Rehearing.

4. JUDGMENT \S 256—SUIT FOR ACCOUNTING—CONFORMITY TO FINDINGS.

Where, in a suit for an accounting between partners, the jury found the expenses paid out, who paid them, and what each paid, the losses sustained, the amounts received by each partner, and that defendant had received \$11,196.83½, which had not been accounted for, and further found that there was \$6,820.98 belonging to the partnership that had not been divided by agreement of the parties, though it had not been specifically pleaded that the partners had by agreement divided part of the funds, thereby requiring a division only of the remainder, the issue as to the amount not divided by agreement was immaterial, and the finding thereon could not defeat a verdict or recovery upon the amount found by a true accounting, and a judgment

against defendant for the amount due, as shown by the other findings, was not erroneous.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.]

Appeal from District Court, Potter County; J. N. Browning, Judge.

Action by W. A. McSpadden against R. A. Morris and another. From a judgment against defendant Morris, he appeals. Affirmed.

Lumpkin & Harrington, of Amarillo, and Cooper & Merrill, of Houston, for appellant. J. H. Synnott, of Dallas, and R. E. Underwood, of Amarillo, for appellees.

HUFF, C. J. W. A. McSpadden brought suit against R. A. Morris and Mike C. Le Master, alleging the existence of a partnership between the three parties in certain cattle transactions, and that certain profits were realized from their dealings, asking for an accounting, and to recover his proportional part of the partnership, which he alleges is one-third of the net profits. Le Master answered, denying under oath that he was one of the partners. R. A. Morris answered, admitting partnership between himself and McSpadden, alleging that he was to receive two-thirds and McSpadden one-third of the net profits, and also asking for an accounting. The case was tried before a jury and submitted upon special issues, which issues and answers thereto are as follows:

"First. Was the defendant Mike C. Le Master, a member of the partnership firm of Morris & McSpadden? Let your answer be 'Yes' or 'No.' Answer: No.

"Second. What were the gross receipts, or total in money, of the partnership of Morris & McSpadden, received from the sale of contracts and cattle? Let your answer be in figures of dollars and cents. Answer: Total gross receipts, \$100,835.00. Total gross profits, \$13,447.50.

"Third. What sum of money paid out and expended by each one of the partners, as expenses, on account of several lots or herds of cattle contracted for or not contracted for, for the firm? Answer: Morris, \$1,135.66%. McSpadden, \$210.00.

"Fourth. How much were the total commissions paid out for and on account of the cattle contracted for and sales made of same on account of the firm? Answer: Commissions, \$382.50.

"Fifth. What were the losses, if any, incurred on account of cattle contracted for for the firm? Answer: \$1,000.00.

"Seventh. What other sums, if any, were expended and paid out by each individual member of the firm for and on account of the firm business? Answer: \$47.50 paid for steer, paid by Morris.

"Eighth. What amounts have been received by the individual partners, composing the firm of Morris & McSpadden, from the partnership fund? Answer: Morris, \$12,832.50—\$1,135.66% = \$11,196.83%. McSpadden \$1,115.00.

"Ninth. Are there any cattle bought for the firm of Morris & McSpadden yet unsold that are likely to ever be realized upon? If so, how many and what is their probable value? Answer: No.

"Tenth. Are there any funds belonging to the partnership that have not been divided by agree-

ment of the parties? If yes, what is the amount? Answer: Yes; \$6,820.98.

"Eleventh. Was an accounting and settlement of said partnership intentionally delayed or refused by either of the partners? If yes, which one of them delayed the settlement? Answer: Yes; Morris.

"Twelfth. What was the earliest date that an accounting and settlement of said partnership could reasonably have been had between the interested parties? Answer: October, 1913.

"Thirteenth. How much, if any, of the funds received on account of the partnership has defendant Morris received and not accounted for to said joint business? Answer: \$11,196.83%."

Both parties moved for a judgment on the findings. The trial court rendered judgment on McSpadden's motion, and on the findings of the jury, for the sum of \$2,806.98, being the principal and interest against Morris. The facts and admissions are sufficient to warrant the court in finding that there was a partnership between Morris and McSpadden and that McSpadden was entitled to one-third and Morris two-thirds of the net profits.

[1] Appellant's first and second assignments are to the effect that the court erred in rendering judgment upon the special findings of the jury, and ignoring their findings as to special issue No. 10, because the judgment is in conflict and not based on said issue. We find no allegation that there was any division of partnership funds by agreement of the partners, and therefore the issue submitted by No. 10 was immaterial in considering the settlement of the partnership accounts. The finding of the jury that there were \$6,820.98 on hand, which had theretofore been undivided by agreement, is doubtless unintelligible, for the reason that the jury took into consideration a division by agreement not pleaded, and deducted that amount from the fund found to be in Morris' hands belonging to the partnership. The issue found by the jury must or should respond to the issues presented by the pleadings, and, if they do not so respond, the issues so found should be regarded as immaterial, and should not be considered in rendering the judgment. *Ætna Accident & Liability Co. v. White*, 177 S. W. 162; *Krenz v. Strohmeir*, 177 S. W. 178. The other findings of the jury support the judgment of the court; in fact, there is no complaint made as to the other findings of the jury, or that the judgment of the court is not supported thereby, further than that it should have been rendered in accordance with the jury's finding on issue No. 10. Assignments Nos. 1 and 2 are therefore overruled.

[2, 3] The third and fourth assignments complain of the action of the court in refusing to submit special issues Nos. 3 and 4. These special issues were requested with three others, which were given by the court substantially as requested, and in fact the two issues assigned as not being submitted are substantially covered by other issues sub-

mitted by the court. The appellant's bill of exceptions shows that all five of these issues were requested on one paper and refused as a whole, and the exception taken to the action of the court in refusing to give all five of the issues. Where a general exception is taken to the refusal of the court to give special charges en masse, the exception will be overruled, where it appears part of them are embraced in the main charge of the court given to the jury. *Hovey v. Sanders*, 174 S. W. 1025. The appellees' exceptions to these assignments will be sustained. We believe, however, the main charge submitted the issues requested by special issues Nos. 8 and 4, and that they are so nearly substantially the same that no injury is shown, even if we considered the assignments.

The fifth and sixth assignments are overruled, for the reasons given in overruling the first and second assignments. We find no such error assigned as will require a reversal of the case.

Affirmed.

On Motion for Rehearing.

As suggested by appellant, this suit was simply a case of accounting between partners. The issue thereby presented was the net profit in the business and a proper division of the same, and, to ascertain this, the losses sustained, the money paid out by each, and the amount each partner had in hand of the partnership funds were the issues included in the pleadings.

[4] The jury, by their findings, found the expenses paid out in the partnership, and who paid them, and what each paid. They found the losses that had been sustained in certain transactions, and the amount which was then on hand, and they found and answered to the thirteenth issue the amount that Morris then had on hand of the partnership funds, which he had not accounted for to the partnership. These findings clearly gave appellee a right to the amount of the judgment rendered. In an accounting, he should have paid, according to the findings of the jury, the amount of the judgment to appellee. If the partners had, by an agreement, divided part of the funds, which should not have been taken into an accounting, thereby requiring a division only of the remainder, after deducting the amount divided by agreement, this agreement should have been specifically pleaded, and in the absence of such a pleading it was not an issue for the jury, and should not have been submitted, and, as submitted, it was upon an immaterial issue, and the findings could not affect the true balance found upon a true accounting of the partnership affairs. Such findings upon an immaterial issue, when not in the case pleaded, ought not to defeat a verdict or a recovery upon the amount found by a true accounting. In the case of *Kelley v.*

Ward, 94 Tex. 289, 60 S. W. 311, the Supreme Court said:

"The finding of immaterial facts cannot be made ground for reversal, if the judgment is not in conflict with the findings upon material issues."

See, also, *Railway Co. v. Bender*, 32 Tex. Civ. App. 568, 75 S. W. 561; *Coons v. Lain*, 168 S. W. 981.

The motion will be overruled.

LOCKHART v. STATE (No. 3679.)
(Court of Criminal Appeals of Texas. Oct. 13, 1915.)

CRIMINAL LAW §1090—MATTERS REVIEWABLE—RESERVATION OF GROUNDS.

Where there is neither statement of facts nor bill of exceptions, and the only ground of a motion for new trial is that the verdict is contrary to the law and evidence, the ruling thereon cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. §1090.]

Appeal from Johnson County Court; B. Jay Jackson, Judge.

Dennis Lockhart was convicted of violating the local option law, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of violating the local option law; his punishment being assessed at a fine of \$50 and 30 days' imprisonment in the county jail.

This record is before us without a statement of facts or bill of exceptions. The only ground of the motion for new trial is that the verdict of the jury is contrary to the law and against the evidence. This cannot be revised or reviewed in the absence of the evidence.

The judgment is affirmed.

GARZA v. STATE (No. 3693.)
(Court of Criminal Appeals of Texas. Oct. 13, 1915.)

CRIMINAL LAW §1114—APPEAL—MATTERS REVIEWABLE—PRESERVATION OF GROUNDS.

Where the record on appeal contains no statement of facts, bill of exceptions, or motion for new trial, no question is presented which can be reviewed by the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2918, 2921; Dec. Dig. §1114.]

Appeal from Bexar County Court; Nelson Lytle, Judge.

P. T. Garza was convicted of aggravated assault, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of aggravated assault; his punishment being assessed at a fine of \$100 and 90 days' imprisonment in the county jail.

The record is before us without a statement of facts or bill of exceptions, nor does the record contain a motion for new trial.

The judgment is affirmed.

LAWSON v. STATE. (No. 3681.)

(Court of Criminal Appeals of Texas. Oct. 13, 1915.)

CRIMINAL LAW §1090—RECORD ON APPEAL—NEW TRIAL.

Where the record on appeal contains neither statement of facts nor bills of exceptions, but there is a motion for a new trial based upon erroneous ruling on facts and evidence, no question is presented which can be reviewed by the court, since a statement of the evidence is necessary for ruling on the motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.]

Appeal from District Court, Shelby County; W. C. Buford, Judge.

Mrs. S. E. Lawson was convicted of violating the local option law, and she appeals. Affirmed.

See, also, 179 S. W. 557.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of violating the local option law; her punishment being assessed at one year's confinement in the penitentiary.

This record is before us without a statement of facts or bill of exceptions. There are two grounds set up in the motion for new trial why the judgment is erroneous: First, that the court erred in refusing defendant's motion to return a verdict of not guilty for the want of sufficient evidence, because it is shown that the prosecuting witness, Payne, was drunk at the time of the transaction charged against appellant, and to such an extent that his mind was incapable of stating sufficient facts connectedly that show a sale, and the other evidence showed there was in law no sale of intoxicating liquors by defendant to Payne. Second ground of the motion is that the verdict is not sustained by the evidence and is contrary to the law. In the absence of the evidence, we are unable to revise these two grounds.

As the matter is presented, the judgment will be affirmed.

LAWSON v. STATE. (No. 3680.)

(Court of Criminal Appeals of Texas. Oct. 13, 1915.)

Appeal from District Court, Shelby County; W. C. Buford, Judge.

Mrs. S. E. Lawson was convicted of selling liquor in prohibition territory, and she appeals. Affirmed.

See, also, 179 S. W. 557.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. The indictment charges appellant with selling liquor in prohibition territory. When tried, she was adjudged guilty. As the record contains neither a statement of facts nor any bill of exceptions, the judgment is affirmed.

LAWSON v. STATE. (No. 3682.)

(Court of Criminal Appeals of Texas. Oct. 13, 1915.)

Appeal from District Court, Shelby County; W. C. Buford, Judge.

Mrs. S. E. Lawson was convicted for unlawfully selling intoxicating liquor in prohibition territory, and she appeals. Affirmed.

See, also, 179 S. W. 557.

C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Mrs. Lawson appeals from a conviction for unlawfully selling intoxicating liquor in prohibition territory, wherein her punishment was assessed at the lowest prescribed by law.

There is no statement of facts or bill of exceptions in the record, and no question is raised which can be considered in the absence of these. The judgment is therefore affirmed.

DIETER v. STATE. (No. 3692.)

(Court of Criminal Appeals of Texas. Oct. 13, 1915.)

1. ASSAULT AND BATTERY §97—VERDICT—SPECIFYING DEGREE OF OFFENSE.

Where on a trial for assault the court submitted both aggravated and simple assault, and the jury imposed a fine of \$25, which would be the maximum for simple assault, and the minimum for aggravated assault, they should have specified in the verdict the degree of which accused was convicted.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 151; Dec. Dig. § 97.]

2. CRIMINAL LAW §622—SEPARATE TRIAL OF CODEFENDANTS—RIGHT TO SEVERANCE.

Where an application by a person charged with assault for a severance in order that an important witness for defendant, who was separately charged with the same offense, might be first tried, was in accordance with the law, it should have been granted, and its denial was reversible error, as the court had no authority to decide in advance whether the jury would acquit such witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380-1383, 1385, 1386, 1388-1390; Dec. Dig. § 622.]

3. CRIMINAL LAW §419, 420—EVIDENCE—PROVOCATION—HEARSAY.

On a trial for assault it was error to exclude defendant's testimony that he assaulted the prosecuting witness because he was informed by his wife and others that the prosecuting witness had committed rape on her, it appearing that the wife told him about this only a few days before the trouble arose, and that the trouble arose at the first meeting after defendant learned of the rape, as insulting conduct towards a female relative can be shown by this character of testimony, and the rule of hearsay does not apply, especially as the statute itself provides in regard to such conduct that a killing must occur at the time of the happening of such conduct if defendant is present or as soon as he meets

with the insulting party after being "informed" thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. ¶¶ 419, 420.]

Appeal from Floyd County Court; E. P. Thompson, Judge.

George Dieter was convicted of assault, and he appeals. Reversed and remanded.

Graham & Graham, of Plainview, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. [1] The jury failed to specify in their verdict whether defendant was convicted of aggravated or simple assault; both being submitted by the court. A fine of \$25 would be the maximum for simple assault, and the minimum for aggravated assault. The punishment was assessed at \$25 in this case. The court submitted both degrees of assault in his charge to the jury. He was correct in submitting these two phases of the law under the evidence. Upon another trial this should not be permitted. The jury should specify of what degree appellant is convicted. We note this in passing, so that it may not again occur.

[2] When the case was called for trial, appellant filed his application for severance. Another party, whose name is Viegel, was separately charged with the same offense, and the evidence shows that he was present at the time of the assault by appellant upon the alleged injured party, whose name is Ratjen. The motion for severance was in accordance with the law, and should have been granted. If we go to the statement of facts, we find the state's contention was that Viegel, being present, was encouraging the defendant to make the assault. This was denied by the defendant, and testimony introduced to show this was not true. This developed on the trial of the case in the introduction of evidence, but, be that as it may, the jury, under the facts, could easily have acquitted Viegel, and may have done so. In any event, the court had no authority to decide this question on motion for severance in advance. Viegel should have been tried first, and, had a verdict of not guilty occurred in his case, he would have been a very important witness for the defendant, because he was present and saw the whole transaction. It is further shown in the record that Viegel was offered as a witness, and on the state's objection his testimony was not permitted to go to the jury because of the pendency of the prosecution against him for this same offense. This necessarily requires a reversal of the judgment.

[3] While appellant was testifying in his own behalf, he was asked why it was that he made the assault on Ratjen. The court sustained the state's objection, and appellant was not permitted to answer. Had he been permitted to answer, he would have stated that he was informed by his wife and others

that Ratjen had been guilty of rape on her (his wife); that his wife told him about it only a few days before the trouble arose. This was their first meeting after he had learned of the rape of his wife, which testimony was excluded by the court. The defendant urged objection. The court approves this bill, with the statement that the jury was withdrawn, and the questions propounded to the witness and the answers elicited showed that the testimony was purely hearsay, and the court thereupon sustained the objections by the state on the ground and excluded the testimony. The court was in error. Insulting conduct towards a female relative can be shown by this character of testimony. All the authorities so hold wherever the question has arisen. The statute itself provides that in regard to insulting conduct the killing must occur at the time of the happening of the insulting conduct, if defendant is present and witnesses it, or as soon as he meets with the insulting party after being informed of that fact. The rule of hearsay does not apply. The statute makes an exception with reference to this character of testimony.

The judgment is reversed, and the cause remanded.

WHITEFIELD v. STATE. (No. 3666.)

(Court of Criminal Appeals of Texas. Oct. 13, 1915.)

1. INDICTMENT AND INFORMATION ¶128 — DIFFERENT COUNTS—SAME OFFENSE.

It was permissible for an indictment to charge in one count a theft from two persons and in another count a theft of the same property from one of such persons, in order to meet any phase of the evidence that might be introduced with reference to the ownership, control, and management of the stolen property, and there was no merit in the contention that the two counts charged a felony, because the aggregate value of the property, as stated in the two counts, was \$55.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 403-413; Dec. Dig. ¶128.]

2. CRIMINAL LAW ¶737—ISSUES—VENUE.

Where on a trial in M. county for theft the evidence showed that the property was taken at Z., in that county, by some one, and that defendant, when the property was taken from his person in G. county, said that he got it from a "kid" at Z., there was no question of venue in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1703, 1704, 1706; Dec. Dig. ¶737.]

3. CRIMINAL LAW ¶829 — INSTRUCTIONS — REQUESTS—POSSESSION OF STOLEN PROPERTY AND EXPLANATION.

On a trial for theft the court refused an instruction that possession alone was not sufficient to warrant a conviction for theft; that possession of property recently stolen was only a circumstance which might be considered in arriving at a conclusion as to defendant's guilt or innocence, but that, in order to justify conviction upon such evidence alone, the possession must be recent after the theft, must be the personal and exclusive possession of defendant,

and involve a conscious assertion of ownership by him, and must be unaccompanied by any reasonable explanation by defendant of such possession; that if the stolen property was found in defendant's possession recently after the theft, and if, when such possession by him was first called in question, he gave an explanation of such possession that was natural, reasonable, and probably true, it devolved upon the state to show that such explanation was false; and that, if the state failed to show this beyond a reasonable doubt, defendant must be acquitted. The court gave an unobjectionable charge on circumstantial evidence, and, at defendant's request, charged that, although stolen property was found in defendant's possession, that fact would not be sufficient to convict him; that defendant had a right to give a reasonable explanation of his possession, and if the jury found from the evidence that he gave a reasonable explanation, they should acquit him; and that, if they believed the property was stolen by either defendant or B., but had a reasonable doubt whether the defendant or B. took it, they should acquit. *Held*, that the instructions given sufficiently presented this issue to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ¶ 829.]

4. LARCENY ¶77 — INSTRUCTIONS — POSSESSION OF STOLEN PROPERTY AND EXPLANATION.

It is the safer and better way to apply the law to the identical explanation given by accused of his possession of stolen property, and to charge that, if the jury believe that accused obtained the property as he stated he did, by purchase, trade, or otherwise, or if they have a reasonable doubt of it, they should acquit.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 199, 202-204; Dec. Dig. ¶ 77.]

5. LARCENY ¶27—RECEIVING STOLEN PROPERTY—CRIMINAL LIABILITY.

A person not connected with the original taking of property is not guilty of theft, even though he received the stolen property knowing it to have been stolen.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 55-57; Dec. Dig. ¶ 27.]

Appeal from Madison County Court; Joe E. Webb, Judge.

Douglass Whitfield was convicted of theft, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. [1] The indictment contains two counts; one charging the theft from Ben Payne and Bob Payne. The second charges the theft from Ben Payne. The property alleged to have been stolen is the same in each count, to wit, one watch of the value of \$15, another watch of the value of \$10, and a locket of the value of \$2.50. This was proper pleadings to meet any phase of the evidence that might be presented with reference to the consent of the owner of the property, or the person in exclusive control and management of it. There is, therefore, no merit in the contention of appellant to the effect that the two counts charged a felony, in that the aggregate amount was \$55. The property in each count is the same, and the counts were intended to meet any phase of evidence that might be introduced with reference to the ownership, control, and

management. There is also a contention that the transcript from the district to the county court is irregular; among other things, that it did not have the signature of the district judge, and was not filed, etc. On examination of the transcript we think it is in compliance with the law.

[2] The question of venue was sought to be raised in the case by charges and in motion for a new trial. We do not think there is any merit in either proposition. The usual rule is prescribed by statute that, unless the question of venue forms an important issue on the trial of the case before the jury, it will be presumed to have been proved, and, unless it becomes an issue on the trial before the jury as to the question of venue, then the record must show by proper bill of exceptions the matters as sought to be presented in order to take advantage of that question. From any standpoint we do not believe, under the facts of this case, it was a question in the case. The evidence is clear that the property was taken in Madison county by somebody. There was a ball game in the little town of Zulch, which is in Madison county. The Payne Bros. owned a drug store, and Ben Payne was manager of it, and had been for three years. The morning after the game had been played Payne discovered the fact that his watches and locket were gone. He and the officers at once became alert and went to Shiro, in the adjoining county, Grimes, where it seems defendant lived. Leaving Shiro on another road, they met appellant in the road, perhaps in Grimes county, but it may be conceded that he was not in Madison county at the time they met him. From his person they took one of the watches and the locket. At the time they arrested him for the theft of this property he asked them why they were arresting him. They told him, and he then made the statement that he got the watch from a "kid" at Zulch. This was where the theft occurred. We do not think the question of venue is in such position here as to be considered in the nature of a reversible error. The property was taken in Madison county. Appellant admitted he was in possession of it in Madison county, at Zulch, explaining his possession by stating he got it from a boy whom he denominated a "kid." The court therefore was not in error in any of these matters complained of as to the question of venue.

[3-5] Appellant requested the court to instruct the jury:

"That possession alone is not sufficient to warrant a conviction of a person charged with theft. Possession of property recently stolen is only a circumstance which may be considered by the jury in arriving at the conclusion as to the guilt or innocence of the defendant; but in order to justify a conviction upon such evidence alone, such possession must be recent after the theft, must be the personal and exclusive possession of the defendant, and involve a conscious

assertion of ownership by him, and must be unaccompanied by any reasonable explanation by the defendant of such possession; and, if the property of Payne Bros., as described in the indictment, was stolen, and the defendant was found in possession of same recently after the theft, if, when such possession by him was first called in question, he gave an explanation of such possession that was natural, reasonable, and probably true, it then devolves upon the state to show that such explanation was false, and, if the state fails to show same to be false beyond a reasonable doubt, the defendant must be acquitted, and you will so say by your verdict."

This was refused. The court gave a charge on circumstantial evidence, to which no objection was urged, and also gave the following special charge at the request of appellant:

"That, although the stolen property was found in the possession of the defendant, that fact would not be sufficient to convict him, and that the defendant had a right to give a reasonable explanation of how he came in possession of the said stolen property. Therefore, if you find from the evidence that defendant gave a reasonable explanation for his possession of the stolen property, you will acquit the defendant, and so say by your verdict."

He also gave the following charge at the request of appellant:

"You are instructed that, if you find from the evidence beyond a reasonable doubt that the property alleged to have been stolen was taken from the owner without his knowledge or consent, and you further find from the evidence that the defendant or Frank Bay took said property, but have a reasonable doubt whether the defendant or Frank Bay took same, you will acquit the defendant, and say by your verdict not guilty."

We think these charges sufficiently presented this issue to the jury. Appellant's explanation did not specify from whom he obtained the goods, but his statement was that he got it from a kid at Zulch. This court, in quite a number of decisions, has approved the form of special charge given by the court at appellant's request, instead of the lengthy one refused by the court. It has been held, however, that such matters can be presented by such a charge as requested by appellant and refused by the court, but it has also been held that, where the charge given more pertinently and directly presents the question, it is sufficient without giving the other, and in fact the briefer, shorter, and more terse charge has been approved, as being correct and less confusing, or as being less calculated to confuse the jury with reference to the law of such a state of case. We are still of the opinion that the safer and better way to present the question to the jury is by applying pertinently the law to the identical explanation given by the accused where that is an issue. If he says he bought the property from some one, it would be sufficient to say to the jury, if they should believe that appellant obtained the property as he stated he did, either by purchase or trade, or whatever the explanation may be, or if they had a reason-

able doubt of it, then they should acquit. No jury could be misled by such a charge, and an intelligent jury would readily comprehend such a charge. If appellant bought the property, or obtained it from another party, and was not connected with the original taking, of course, he would not be guilty of theft, even though he might have received stolen property knowing it to have been stolen. So a pertinent application of the law to the facts that he did so receive it from the other party after it was stolen would be sufficient, whether he was guilty of receiving it, or whether he bought it in good faith, or whether he bought it at all in any faith. The proposition is that he was not connected with the original taking. If not connected with the original taking in a guilty manner, he could not be guilty of theft, and this would be true whether he received the stolen property, knowing it to have been stolen, or whether he acquired it innocently after such knowledge. The accused citizen must be tried under the allegations of the indictment, and not on some other statement of fact not in accord with and supporting the allegations of the indictment.

Finding no reversible error in the record, the judgment is affirmed.

GOLSON v. STATE. (No. 8731.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915.)

CRIMINAL LAW §260—APPEAL FROM JUSTICE—FINAL JUDGMENT.

Where, on a complaint charging accused with boarding a freight train with intent to obtain a free ride and without lawful business thereon or the consent of the conductor, he was convicted in justice court and a fine imposed, there was a final judgment, warranting appeal to and trial de novo the county court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 567-609; Dec. Dig. §260.]

Appeal from Henderson County Court; C. D. Owen, Judge.

L. E. Golson, being convicted in justice court of crime, appealed to the county court, and from a judgment of dismissal, he again appeals. Reversed and remanded.

Miller & Miller, of Athens, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. This case arose in the justice court, and the conviction there occurred, and a fine of \$5 imposed and all costs of court.

The complaint charged the defendant with boarding a freight train on the track of the St. Louis & Southwestern Railway Company, with intent to obtain a free ride, and without any lawful business thereon, and without the consent of the conductor in charge of said train. Motion was made in the county court

to dismiss the appeal for want of final judgment, and sustained by the court. Notice of appeal was given to this court. The Assistant Attorney General asks this court to dismiss this case because there was no final judgment in the justice court, and that the action of the county court in dismissing the appeal was correct. This motion cannot be sustained. The judgment is a sufficient final judgment, and the county court should have entertained jurisdiction and tried the case *de novo*. *Terry v. State*, 30 Tex. App. 408, 17 S. W. 1075; *Ex parte Dickerson*, 30 Tex. App. 448, 17 S. W. 1076; *Ex parte Cox*, 53 Tex. Cr. R. 241, 109 S. W. 369; *Ex parte Williford*, 50 Tex. Cr. R. 418, 100 S. W. 919; *Ex parte White*, 50 Tex. Cr. R. 474, 98 S. W. 850; *Ex parte Crawford*, 36 Tex. Cr. R. 182, 36 S. W. 92. Some of these cases are not directly in point, but all bear on the question, and all approve *Ex parte Dickerson*, *supra*.

For the reasons indicated the judgment is reversed, and the cause remanded for trial *de novo* in the county court.

DIXON v. STATE. (No. 3711.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915.)

1. CRIMINAL LAW —1097—APPEAL—STATEMENT OF FACTS.

Without statement of facts, the grounds of a motion for new trial relating to the insufficiency of the evidence, to the improper conduct of counsel, and to the erroneous admission of evidence, cannot be reviewed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2862, 2864, 2926, 2934, 2938, 2939, 2941, 2942, 2947; Dec. Dig. —1097.]

2. CRIMINAL LAW —1184—TRIAL—SENTENCE—INDETERMINATE SENTENCE.

Where, contrary to the Indeterminate Sentence Law (Acts 33d Leg. c. 132, amended by Acts 33d Leg. [Ex. Sess.] c. 5), accused was sentenced to a definite term of imprisonment, the judgment will be reformed so as to comply with the law, and affirmed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3199, 3200; Dec. Dig. —1184.]

Appeal from District Court, Atascosa County; F. G. Chambliss, Judge.

J. W. Dixon was convicted of rape, and he appeals. Reformed and affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of rape, his punishment being assessed at 25 years' confinement in the penitentiary.

[1, 2] Neither any bill of exceptions nor a statement of facts is incorporated in the record. The only ground of the motion for new trial relates to matters that cannot be considered in the absence of a statement of facts. The first ground in the motion is that the state was permitted to prove that the alleged ravished woman was of weak mind, there being no allegation in the indictment

that she was a woman of weak intellect. The second ground of the motion is that, while the defendant was on the witness stand testifying in his own behalf, the district attorney, in a loud and angry tone of voice, called the defendant a liar. There is another ground, that the evidence is insufficient. There is nothing in the record to verify these statements, and therefore they cannot be considered. The court, in passing sentence, however, failed to recognize the statute with reference to the indeterminate sentence; the sentence being for 25 years. The judgment will be reformed so as to conform to the indeterminate sentence statute, and made to read that the punishment shall not be more than 25 nor less than 5 years.

The judgment is reformed and affirmed.

THOMPSON v. STATE. (No. 3718.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915.)

1. CRIMINAL LAW —134—CHANGE OF VENUE—EXTENSION OF TIME TO CONTEST MOTION.

It is not error to allow time to file a contest to defendant's motion for a change of venue, nor to extend the time for verification when the contest is not at first sworn to, since it cannot in any way prejudice the defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 243, 251, 252; Dec. Dig. —134.]

2. CRIMINAL LAW —134—CHANGE OF VENUE—EVIDENCE.

Where defendant, on his motion to change the venue, produced only one witness, who swore that the defendant could not get a fair and impartial trial, while another of his witnesses swore the contrary, and all of the state's witnesses also swore that he could, it was not error to refuse the change.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 243, 251, 252; Dec. Dig. —134.]

3. JURY —146—SELECTION OF JURY—ABSENCE OF VENIREMEN—EFFECT.

Where veniremen failed to appear and answer as their names were called in impaneling the jury, but were later called and examined, and the defendant exhausted only 12 of his 15 peremptory challenges, there was no error in proceeding with the trial.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 631; Dec. Dig. —146.]

4. CRIMINAL LAW —1121—APPEAL AND ERROR—MATTERS REVIEWABLE.

Accused's bill of exceptions to an order overruling his motion for directed acquittal on the ground that venue was not shown presents no question for review, where the evidence on that point is not in the bill.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2938, 2939; Dec. Dig. —1121.]

5. CRIMINAL LAW —1144—APPEAL—PRESUMPTIONS.

Where the record omits evidence on the question of qualification of a juror, on defendant's exception to the denial of his motion to discharge the jury for want of qualifications of a juror must be presumed to have been proper.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. —1144.]

6. CRIMINAL LAW — 829 — TRIAL — INSTRUCTIONS — REQUESTS — SELF-DEFENSE.

Where, in a prosecution for murder, the court's charge embraced every proper question of self-defense, instructions on the same question requested by the defendant were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ¶ 829.]

Appeal from District Court, Freestone County; A. M. Blackmon, Judge.

Floyd Thompson was convicted of murder, and he appeals. Affirmed.

Homer L. Baughman, of Ft. Worth, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of murder, and the death penalty assessed. It is unnecessary to give but a brief statement of what the evidence, with certainty, establishes.

Appellant was a young negro man just about grown. He made his home with his father, who was a farmer and lived on a farm several miles in a southeastern direction from Fairfield, the county seat of Freestone county. Appellant seemed to have no special business, had no crop to work, or at least did not work any of his own. He seemed to have worked around in the neighborhood, hunted a good deal, and loitered around generally. Deceased, J. I. Casey, lived at Fairfield. Some time before the killing he and appellant swapped horses, whereby appellant became indebted to deceased for \$55, and to secure it gave deceased a mortgage on the horse he at that time got from deceased and other property, including a crop which he claimed he was to raise during 1914. Just before the killing, which occurred on Sunday May 24, 1914, Casey ascertained appellant had no crop and was not working any that belonged to him. He thereupon on said date rode horseback down to see appellant, and did see him. He did not find him at his father's, but at another place a few miles from his father's. The evidence clearly justified the jury to believe that Casey, a few days before, had endeavored to get appellant to deliver said horse to him in satisfaction of the debt, which appellant refused outright to do. When Casey found him on that Sunday morning, he induced him to agree to surrender the horse to Casey in satisfaction of his debt and mortgage. The horse at the time was either at appellant's father's home in the pasture or in another pasture at or adjoining his father's. When appellant and Casey separated, Casey was horseback, and had to ride around circuitous roads several miles to reach appellant's father's, which he did, to get the horse. Appellant, however, being afoot, could cut across the fields and country, and did do so, and reach where the horse was, traveling not so far, which he did. At the house where he stayed the night before, where Casey found him, he had with

him a big six-shooter. Between there and his father's he had left at a neighbor's a shotgun. In going to where the horse was he took this six-shooter along with him, and also went by and got his shotgun, and took that too. When Casey reached his father's to get the horse, he found his father and his father's wife at the house, told them his mission, and his father went with him in search of the horse wholly unarmed. The testimony clearly justified the jury to believe that appellant, knowing Casey would hunt for the horse in his father's premises, would not find him there, but would find him in a pasture of another near by, secreted himself in an old, abandoned, vacant house, and, when Casey got in shooting distance of him, fired upon and killed him without Casey knowing he was there or intended any such act. Casey was on his horse when he was shot. Appellant shot at him twice at the time in quick succession. Casey's horse ran some distance when Casey was shot before he fell from the horse. The testimony also clearly authorized the jury to believe and find that, when Casey fell off his horse dead, appellant in a few minutes went up to where his body was and fired two other shots with a shotgun in Casey's body, thereby shooting off practically the whole of his face and all of his teeth out, and, as some of the witnesses said, nearly shooting his head off. He then carried the body across a fence into a pasture where there was a considerable pool of water. He tied a rope around the neck of deceased and around the horn of the saddle on the horse of deceased, and dragged the body some distance to this pool of water, and then dumped the body into the pool, where the body sank out of sight. He then hid both his pistol and shotgun in the woods near where the killing occurred, where they were both found by the state's witnesses and officers, identified and introduced in evidence on the trial of the cause. Where all these things occurred was a somewhat secluded place and in the woods. In these woods at the time appellant tied and secreted deceased's horse, and kept him there until some time that night, when he got on him and rode him several miles in an attempt to escape, and then turned the horse loose, where he was found by a neighbor the next morning. Appellant fled and evaded arrest, although diligent search was made for him, until perhaps about the 1st of January following when he was found at Ft. Worth, going under an assumed name, arrested, identified, and taken back to Freestone county, where this trial occurred.

When Casey did not return home that Sunday night his wife became uneasy, and notified the officers and friends of her fear that he had been foully dealt with. The officers and citizens in the community near where the killing occurred, of course, became aroused, and, in different bodies, began searching

for Casey, but did not find his body until some time Monday. When Casey left home he had \$30 or \$40. When his body was found his pockets had been turned inside out, and no money could be found. The neighbors and officers then began a search over the whole community for appellant, but did not find him. Among other negroes, they arrested his father and confined him and them in jail for awhile. It seems after an investigation they turned him and all the others out, and became satisfied that appellant was the guilty party. Still later his father was killed. On the trial appellant claimed that he first shot Casey or at him twice in self-defense, and that his father, not he, afterwards went to the body of Casey where it had fallen and shot the shotgun into his body, with the result as described, and that his father, and not he, dragged the body and put it in the pool of water. His claimed self-defense was submitted by the court's charge in the most favorable light to him, and the jury found against him, as they unquestionably should have done under the circumstances. The state also clearly disproved that his father shot the last two shots into the body of deceased, and that his father dragged the body and put it in the pool, but, on the contrary, established with certainty that he, and not his father, did this. He fled the country; his father did not. Appellant, as stated, was arrested about January 1, 1915, taken back to Fairfield, placed in jail, and kept there until his trial occurred on April 22, 1915.

[1] When the case was called for trial appellant made a motion to change the venue. When this was presented, the state asked for time to file a contest, which the court allowed. It seems the contest was not at first sworn to. When this was shown, the state again asked the court for time to do this, which the court granted. There was no error in the court's action, and no possible injury to appellant is shown by his action. *Raw v. State*, 33 Tex. Cr. R. 24, 24 S. W. 293.

[2] The court then heard the testimony on his said motion. He introduced but a few witnesses. Only one of the witnesses on this hearing testified that, in his opinion, appellant could not get a fair and impartial trial; while another one of his witnesses as distinctly swore the reverse. The state introduced more than a dozen witnesses, all of whom testified the reverse of appellant's contention. There can be no question but that the state proved the reverse of appellant's contention, and the judge, under the evidence, without doubt, correctly overruled his motion for a change of venue and all the questions incident thereto.

[3] During the progress of impaneling the jury several veniremen failed to appear and

answer when their names were called. Appellant, in effect, thereupon objected to proceeding further until these absent veniremen were produced in the order in which their names appeared on the list. The court, in approving appellant's bill on this subject, stated that in each instance the court ordered an attachment for the juror, and that later each of the jurors who were absent when their names were called were produced and passed upon in the usual way; that the defendant exhausted but 12 of his 15 peremptory challenges. As held in all the cases, unnecessary to collate, the court's action was correct and presented no error whatever.

[4] When the state closed its evidence in chief, appellant made a motion for an instructed acquittal, because the state had not proved venue. The bill in no way states what this evidence was, and is wholly insufficient on that account to present any error. However, the evidence as a whole, without any question, was clearly sufficient to prove venue. Besides, one witness swore positively the killing occurred in Freestone county.

[5] Appellant also made a motion, it seems after the jury had been duly organized and the trial proceeded with, to discharge the jurors and jury because he claimed that one of them was not a qualified juror. The court heard evidence on this subject and overruled his motion. What that evidence was is in no way disclosed by the record. Doubtless, if it had been, it would have clearly required the court to overrule the motion. We must presume, under the law, that the court's action was correct.

[6] Appellant requested several special charges on the subject of his claimed self-defense. The court correctly refused to give any of them because, as stated by the judge, his main charge embraced every question on the subject which was necessary or proper for the court to give. We think it entirely unnecessary to copy any of his special charges or that of the court, for, as stated above, the court submitted his claimed self-defense in a most favorable light to him on every point which the evidence would have authorized or suggested.

This being a death penalty case, we have given the record, the statement of facts, and appellant's brief thorough consideration. We think the evidence establishes without any sort of doubt appellant's guilt; that the case was in every way fairly and carefully tried without any error against him having been committed.

It is therefore our duty to affirm the case, which we do.

DODD v. STATE. (No. 3720.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915.)

1. CRIMINAL LAW 1069—APPEAL—FINALITY OF JUDGMENT.

No appeal can be taken in criminal cases until sentence is pronounced, since sentence is the final judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2691-2699; Dec. Dig. 1069.]

2. CRIMINAL LAW 1023 — JUDGMENT AND SENTENCE—ENTRY IN VACATION.

Where accused gave notice of appeal, before sentence, and the court then adjourned and the judge sentenced the defendant in vacation, the sentence is not a final judgment, upon which an appeal can be rested, since the judge in vacation is not authorized to pronounce sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598; Dec. Dig. 1023.]

Appeal from District Court, Hunt County; Wm. Pierson, Judge.

Jim Dodd was convicted of burglary, and he appeals. Appeal dismissed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of burglary, his punishment being assessed at two years' confinement in the penitentiary.

[1, 2] The term of court at which appellant was tried adjourned without a sentence. In vacation and in chambers the judge entered the sentence. This under our statute is the final judgment, and an appeal to this court cannot lie until sentence has been pronounced. Sentence must be pronounced during the term of the court at which the judgment is rendered, or, if not then done, at a subsequent term of the court. The court cannot sentence a defendant in vacation. When court adjourned his authority over the case ceased, where notice of appeal had been given to this court, except in cases specially provided by statute. This pronouncing of sentence is not authorized in vacation, nor is it authorized at any time except during a term of the court. The Assistant Attorney General moves to dismiss the appeal for this reason, and it must be sustained.

The appeal therefore is dismissed.

LONG v. STATE. (No. 3673.)

(Court of Criminal Appeals of Texas. Oct. 18, 1915.)

CRIMINAL LAW 938—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Upon his trial for seduction, which resulted in a conviction, defendant's sole defense was that prosecutrix was not chaste at the time of the alleged seduction. On the trial the witnesses, being excluded under the rule, a bystander who had heard the evidence afterwards volunteered that he had seen prosecutrix in an act of sexual intercourse, but his evidence was not

taken, when he was called, because of a misunderstanding between court and counsel as to the court's decision as to the effect of the rule. Aside from one witness, who testified to intercourse with the prosecutrix, but was strongly discredited, there was no evidence of unchastity. Defendant moved for a new trial for newly discovered evidence of other acts of intercourse which corroborated the witness who testified. Defendant swore that he had no notice of the existence of the new testimony. *Held*, that a new trial should have been granted, since all such evidence was difficult of discovery, bears directly on the issue, and its weight and credit are for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2315, 2317; Dec. Dig. 938.]

Prendergast, P. J., dissenting.

Appeal from District Court, Franklin County; J. A. Ward, Judge.

Dan Long was convicted of seduction. From a judgment overruling his motion for new trial for newly discovered evidence he appeals. Reversed.

R. T. Wilkinson, H. L. Wilkinson, L. W. Davidson, and B. O. Shurtleff, all of Mt. Vernon, and C. E. Sheppard, of Sulphur Springs, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of seduction, and his punishment assessed at two years' confinement in the state penitentiary.

Miss Ethel Hightower, the alleged seduced young lady, by her testimony makes a plain case of seduction. She is fully corroborated as to the promise of marriage and act of intercourse, Jim Williams testifying that appellant had admitted to him he was engaged to marry Miss Hightower during the Christmas holidays, and also had admitted the acts of intercourse. Appellant did not testify, nor offer any proof tending to disprove this state of facts, but rested his defense on the proposition that Miss Hightower was not a chaste and virtuous woman at the time he carnally knew her. The evidence makes a plain case of seduction—acts of intercourse, while appellant was engaged to marry the young lady, she yielding her virtue out of love and affection for appellant, having implicit faith and confidence in him.

There are many errors assigned, but after a careful review of the record we are of the opinion that none of them present error, unless it be that the court erred in refusing to permit the witness Leroy Davis to testify, and erred in refusing to grant a new trial on account of newly discovered testimony. As said before, the defense of defendant was that Miss Hightower was not a chaste and virtuous woman at the time he had carnal knowledge of her. When the case was called for trial, the rule was demanded. The court notified counsel they must call all their witnesses, as he would strictly enforce the rule. Leroy Davis had

not been summoned as a witness, and he was not called, sworn, and placed under the rule. He remained in the courtroom and heard the witnesses testify until the evening recess. It was made plain by the testimony by this time that the defense of appellant was that Miss Hightower had been guilty of acts of intercourse with other men prior to the time that appellant had become engaged to marry her. During the evening recess Leroy Davis approached appellant's counsel and told him that about three years before the trial, on a certain Sunday night, on the road between Mt. Vernon and Purley, he saw Thurman Davis and Ethel Hightower have sexual intercourse with each other. When court convened for the night session, appellant's counsel explained the facts to the court and called the witness. Appellant insists he then called him to testify, and offered him as a witness. The court states he thought counsel was calling the witness to have him placed under the rule, and that he swore the witness, and ordered him to go out under the rule. It is undisputed that at this time the state objected to Leroy Davis testifying, and the court called counsel's attention to the fact that at the beginning of the trial he had stated the rule would be strictly enforced. Counsel received the impression that the court sustained the objection made by the state. The court says he did not so intend his remarks, but expected the witness to be again called, when he would rule on whether or not he would be permitted to testify, after preliminary investigation. The witness did not testify, and was not again called. As during the trial no witness had testified about whether or not Thurman Davis had ever had sexual intercourse with Miss Hightower, and the witness' testimony being on a most material issue in the case, it would have been error to have refused to permit him to testify. If he had heard witnesses testify in regard to what he would be called upon to testify in regard to, and his testimony be of a supporting nature, a different issue would be presented. But his testimony that he proposed to give was as to a new alleged fact, about which no witness had been questioned, and under the circumstances shown by this record, it is apparent that appellant was deprived of testimony material to his defense, as the court contends, through misapprehension of his counsel of the court's ruling. The affidavit of the witness accompanies the record that he would have so testified had he been permitted to do so.

Again, attached to the motion for a new trial is the affidavit of Will McDonald that in the fall of 1912 he saw Miss Hightower and Clyde Anderson in a buggy together, going towards Miss Hightower's home; that

in a hollow near Jack Ferguson's he saw them stop the buggy; that Miss Hightower was sitting on the edge of the buggy seat with her legs spraddled apart, and Anderson was between her legs as if they were in the act of intercourse. Clyde Anderson testified on the trial to an act of sexual intercourse with Miss Hightower at this time and place. The state severely attacked his testimony, by offering testimony that Anderson had been paid \$100 to so testify, and thus materially weakened his testimony. McDonald's testimony would have supported Anderson's testimony, and had a tendency to show that Miss Hightower was not a virtuous girl. Appellant shows he was not aware of the testimony of McDonald until after the trial, and McDonald says he told no one of what he had seen until after the trial.

Guy Barrett attaches an affidavit, in which he says he would have testified, if called as a witness, that he was with Miss Hightower at a picnic at Clearwater in 1912, and on the way home they went out into the bushes and engaged in an act of sexual intercourse. Such testimony as this one cannot ascertain unless it is voluntarily told. Appellant swears positively he was in possession of no information that would have put him on notice that McDonald and Barrett would have so testified.

The state offered rebuttal affidavits which would have a strong tendency to show that the testimony of Barrett and McDonald is unworthy of credit, and the court was authorized to take this into consideration in passing on the motion for new trial. But it strikes us, as appellant on the trial was deprived of the testimony of Leroy Davis, and these two new witnesses come forward now and say they would testify to facts which would support the defensive theory of appellant, that he should have been granted a new trial.

The sole issue, as made by appellant on the trial, was that Miss Hightower was not a virtuous female. All this testimony bears directly on that issue, and it is that character of testimony one would have no notice of until informed of it.

As before said, we do not think the other assignments present error, but, taking the view of this newly discovered testimony that we do, and that in this state the credit to be given a witness, and the weight to be given his testimony, is a question for the jury and not the court, we are of the opinion the court erred in not granting a new trial.

The judgment is reversed, and the cause remanded.

PRENDERGAST, P. J., dissents.

DICKIE v. STATE. (No. 3700.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915.)

ASSAULT AND BATTERY §91—PROSECUTION—EVIDENCE.

Evidence held to warrant a conviction of assault.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 136; Dec. Dig. §91.]

Appeal from Throckmorton County Court; B. F. Thorp, Judge.

A. Dickie was convicted of simple assault, and he appeals. Affirmed.

T. J. Wright, of Throckmorton, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of a simple assault, and his punishment assessed at a fine of \$5. There were no exceptions reserved to the introduction of testimony, and no exception reserved to the charge of the court as given. The only special charge requested was given. So the only question we can pass on is the sufficiency of the testimony.

Jim Woodard testified that appellant came to the farm where he was at work (he being a tenant of appellant) and began a conversation about some differences between them. After passing a few words, he says appellant said to him, "If you will come across the fence I will stamp hell out of you;" that he started, when appellant struck at him with a club about four feet long and as large as his arm. If the jury believed this state of facts, it constituted an assault. Of course, appellant's testimony presents an entirely different state of case; but the defense's issues were presented in language chosen by appellant, the court giving the special charge requested.

The judgment is affirmed.

MUNOZ v. STATE. (No. 3710.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915.)

1. CRIMINAL LAW §1054—APPEAL—EXCEPTIONS—NECESSITY.

The court on appeal cannot review the admission of evidence, alleged as ground for a new trial, to which no exceptions were preserved on the trial below.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2662-2664; Dec. Dig. § 1054.]

2. CRIMINAL LAW §762—TRIAL—INSTRUCTIONS—OPINION OF COURT.

An instruction that appellant "stands charged by indictment with the offense of the murder of S. G., alleged to have been committed by him," does not suggest to the jury the opinion of the court that the defendant was guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. §762.]

3. CRIMINAL LAW §1137—TRIAL—INSTRUCTIONS—INVITED ERROR.

Where the court, on defendant's request, charges that his failure to testify shall not be taken as a circumstance against him, defendant cannot show error in the invited charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.]

Appeal from District Court, Atascosa County; F. G. Chambliss, Judge.

Romaldo Munoz was convicted of murder, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of murder, and his punishment assessed at 25 years' confinement in the state penitentiary.

[1] As there was no exception reserved to the introduction of the testimony of the witness John Slomshinski, the complaint in regard to same, in the motion for new trial, does not present the matter in a way we can review the action of the court.

[2] In the beginning paragraph of the charge of the court he informed the jury that:

"Appellant stands charged by indictment with the offense of the murder of Sapiiano Gonzales, alleged to have been committed by him."

This does not suggest to the jury that in the opinion of the court appellant was guilty, as contended in the complaint, of the charge.

[3] As appellant requested the court to instruct the jury that his failure to testify should not be taken as a circumstance against him, certainly the court so doing presents no error.

The judgment is affirmed.

LUTTRELL v. STATE. (No. 3720.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915.)

INTOXICATING LIQUORS §236—PROHIBITION TERRITORY—PURSUING OCCUPATION—EVIDENCE.

Evidence, on a prosecution for pursuing the business of selling intoxicating liquor in prohibition territory, held to support a conviction, especially when aided by plea of guilty.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.]

Appeal from District Court, Lamar County; Ben H. Denton, Judge.

Hugh Luttrell was convicted, and appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of the offense of pursuing the occupation of selling intoxicating liquors in prohibition territory. He entered a plea of guilty, and

asked that his sentence be suspended. The jury declined to do so, but on the other hand recommended it be not suspended. He appealed the case, and now insists the testimony is insufficient to support a verdict. Will Webb says he went to Dallas and brought back and delivered to appellant two cases of whisky, and a barrel of beer—\$51 worth. Tiff Gordon also testifies to the same fact. W. A. Carey, M. A. Townsend, and others testify to purchasing beer and whisky from appellant at his cold drink stand. Deputy Sheriff Mitchell testifies to raiding appellant's place of business and finding over 200 pints of whisky, 150 quarts of whisky, and a large amount of beer in bottles.

The evidence supports the verdict, especially when aided by the plea of guilty.

The judgment is affirmed.

MILES v. STATE. (No. 3727.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915.)

1. WEAPONS ⚡17 — CARRYING WEAPONS—PROSECUTION—INSTRUCTIONS.

Defendant, charged with carrying a pistol, produced evidence that the pistol was defective, and that it could not be fired, and requested an instruction that if the jury so believed, they should acquit him. The judge refused in any way to submit the issue thus made. *Held*, that the question was for the jury, and refusal to submit it to the jury was error.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. §§ 22-33; Dec. Dig. ⚡17.]

2. WEAPONS ⚡8 — CARRYING PISTOLS—DEFECTIVE PISTOL.

It is not an offense to carry a pistol either so defectively manufactured or in such bad repair that it cannot be fired at all.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 7; Dec. Dig. ⚡8.]

Appeal from Ellis County Court; W. M. Tidwell, Judge.

Lee Miles was convicted of carrying a pistol, and appeals. Reversed and remanded.

J. C. Lumpkins, of Waxahachie, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of carrying a pistol, and fined \$100. The testimony showed he carried, at the time alleged, what all the witnesses called a pistol, and so did he. He and other witnesses further testified that it would not shoot and could not be made to shoot, and that they had both before, and about the time he was charged with carrying it, and soon afterwards, tried time and again to shoot it, but it would not shoot and could not be made to shoot; that the plunger was so short it would not strike the cap and explode the cartridge.

[1] Appellant, in due time, prepared in writing and presented to the judge special charges, submitting to the jury, in effect, that if they believed from the evidence the

pistol was so defective in the particular claimed that it could not be fired or discharged, and could not be used for the purpose for which pistols are manufactured and sold, to acquit him. The judge refused all his special charges submitting this issue, and expressly refused to submit that issue at all. Appellant timely excepted to the court's charge and to the court's refusal to give any of his said charges, by proper billia. It may be the judge did not believe appellant and his witnesses on this point, as the pistol was itself introduced in evidence, and it may be the jury also might not have believed them. However, we believe it was necessary for the court, by proper charge, to submit the question to the jury for them to decide it. He could not do so himself, whatever his belief as to the facts.

[2] Possibly this exact question has not been before decided by this court, but the decisions are that it is not an offense to carry a pistol if it is so out of repair that it cannot be fired at all, and this, it seems, would include the fact, if so, that it was so defectively manufactured that it could not be fired at all. *Cook v. State*, 11 Tex. App. 19; *Blackburn v. State*, 58 Tex. Cr. R. 48, 124 S. W. 668; *Farris v. State*, 64 Tex. Cr. R. 530, 144 S. W. 249. Other cases are to the same effect. It was not held, nor intended to be held otherwise, in *Steele v. State*, 73 Tex. Cr. R. 352, 166 S. W. 511.

The judgment is reversed, and the cause remanded.

Ex parte LONG. (No. 3714.)

(Court of Criminal Appeals of Texas. Oct. 13, 1915. Rehearing Denied Nov. 3, 1915.)

1. HABEAS CORPUS ⚡85—PROCEEDINGS—NECESSITY OF EVIDENCE.

No evidence being offered to sustain the allegations of applicant for writ of habeas corpus, it must be presumed that the judgment committing him for contempt was correct.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. ⚡85.]

2. HABEAS CORPUS ⚡113 — STATEMENT OF FACTS.

A transcript of the stenographer's notes attached to an application for writ of habeas corpus, not being agreed to by the attorneys nor approved by the judge as a statement of facts, cannot be considered as such.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 102-115; Dec. Dig. ⚡113.]

Original habeas corpus proceeding by W. J. Long. Applicant remanded to custody.

T. C. Hutchings, of Mt. Pleasant, for applicant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. In vacation Long applied to one of the judges of this court for a writ of habeas corpus, alleging that he was illegally restrained of his liberty, in that, in substance, the court required him, as a

witness in the trial of a felony case against another, to answer certain questions "Yes" or "No," when he claimed that he did not remember and could not so answer. The application was granted, and the cause set down for hearing by the court on the 6th inst. The sheriff, who had custody of Long when the writ was granted, duly made his return thereon, showing that he held him in custody by virtue of a proper process and judgment of the district court of Titus county in three separate and distinct judgments at different times, copies of which judgments he attached, and which show that, in the trial of a felony case against Wert McGee in that court, Long was duly sworn as a witness for the state, and was properly asked by the state's attorney if he had seen said McGee on the date that McGee was alleged to have sold him whisky; that he stated he did not remember, and then he was asked if he had bought any whisky from Wert McGee in said county on that date, and that he answered that he did not remember; that the jury was retired, and the court admonished him that he must answer the question "Yes" or "No," and when the jury was brought back he was again asked the questions, and the court, in the judgment, stated:

"And the said witness refused to answer the said question and willfully evaded the same," and "the court then and there heard other evidence as to the matter, and was and is now of the opinion that the said witness willfully and deliberately refused to answer the said questions, and was then and there and now is guilty of willful contempt of court committed in the immediate presence of the court"

—and thereupon adjudged him guilty of contempt of court, and properly in the judgment ordered that he be punished therefor by confinement in the jail for three days and a fine of \$100, and until he should pay the fine and costs.

[1] No evidence whatever was offered or heard by this court to sustain applicant's allegations for the writ of habeas corpus. It has been uniformly and many times held by this court that under the circumstances this court must presume, and will, and does, that the judgment of the lower court was correct. We cite only some of the cases. *Ex parte Naill*, 59 Tex. Cr. R. 140, 127 S. W. 1031; *Ex parte Thomas*, 65 Tex. Cr. R. 533, 145 S. W. 601; *Ex parte Basham*, 65 Tex. Cr. R. 537, 145 S. W. 619; *Ex parte Northern*, 63 Tex. Cr. R. 275, 140 S. W. 95.

[2] There is attached to Long's application for the writ of habeas corpus what purports to be a transcript of the stenographer's notes of the testimony and the proceedings of the court at the respective times he was adjudged guilty of contempt and ordered confined and fined therein as stated. This stenographer's transcript is in no way agreed to by any of the attorneys in the case, and is not approved in any way by the judge as a statement of facts in the matter. It cannot, therefore, be

considered by us as such. However, we might say that we have read it, and, even if we could consider it, we think it does not sufficiently show that the orders of the judge were not authorized or wrong.

It is therefore ordered by this court that the said Long be remanded to the custody of the sheriff of Titus county, to be held by the sheriff in accordance with the several judgments of contempt against him.

REYNA et al. v. STATE. (No. 3699.)
(Court of Criminal Appeals of Texas. Oct. 20, 1915.)

LARCENY \Leftrightarrow 55 — PROSECUTION — EVIDENCE — SUFFICIENCY.

In a prosecution for cattle theft, evidence held insufficient to show that defendants who participated in the butchering of the animal and the carrying away of the meat were guilty of theft.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. \Leftrightarrow 55.]

Appeal from District Court, Cameron County; W. B. Hopkins, Judge.

Luis Reyna and another were convicted of cattle theft, and they appeal. Reversed and remanded.

Webster & Green and E. L. Kowalski, all of Brownsville, and Lyndsay D. Hawkins, of Austin, for appellants. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellants were convicted of cattle theft, the punishment of Luis Reyna being assessed at three years, and that of Nicario Reyna at four years' confinement in the penitentiary.

The state's case, on the point on which this appeal hinges, was made by the testimony of the witness O'Neal. He testified that the defendant Luis Reyna and his brother were working for him in his lettuce patch; that about 10 o'clock on the morning of the day of the alleged theft a Mexican named Herrera came by where they were at work driving a yearling, which is shown to be the one alleged to have been stolen, and that Luis Reyna went to the fence and had a short conversation with Herrera. That evening the two Reynas failed to return in accordance with what he said was their contract; at least Luis Reyna had the contract to haul lettuce for him to the depot; that he did not return, and that he, O'Neal, carried the lettuce himself. Subsequently, in walking across his lettuce patch or field, he discovered suspicious circumstances, and he went into the brush some distance away, and while he does not mention specifically these three parties, Herrera and the two Reynas, still the idea is conveyed he saw them doing things he did not understand exactly, and he phoned an officer at Brownsville, who came out. Investigating this matter, they found where this animal had been butchered, and later Nica-

rio Reyna disclosed to the officers where the hide was buried, and he went with them and they unearthed the hide. It proved to be the hide of the animal that Herrera was driving in the morning. Appellant Luis Reyna had gone out there in his wagon, and after the animal was butchered the meat was put in his wagon and hauled to his house and put under his shed. This was covered by some grass and wood, and it was found in that condition in the wagon bed by the officer. The alleged owner Trevino testified he lived about $3\frac{1}{2}$ miles from O'Neal's, and the butchering was about three-quarters of a mile still further on. Trevino is the alleged owner, and while the property did not belong to him, the evidence is that he had control and management of it, and the ownership, therefore, is sufficiently alleged.

Luis Reyna took the stand in his own behalf and testified in opposition to O'Neal's testimony, stating he did not have a conversation with Herrera about the animal as detailed by O'Neal, and that he had no contract with Mr. O'Neal to haul lettuce for him, and that he worked for O'Neal until 12 or 12:30 o'clock and went home, and that evening he wanted some wood and went out to haul it; that in going along an old road he ascertained the fact that this animal was being butchered by his brother and Herrera, and he went where they were and inquired why they had killed the animal. He finally agreed he would take the meat home, which he did, by placing it in his wagon, and placing wood in the wagon over the meat and putting some grass on the wood. O'Neal testified that when he was going across his lettuce patch he heard this wagon and followed it, and that was the occasion of his ascertaining the fact that the animal was butchered. This testimony would seem to corroborate Luis Reyna that he was not present at the time of the beginning of the butchering of the animal; but, under the view we take of this record, this is not a very important fact, except, in a general way, that it goes to show that he was not connected with the original taking. This is the substance of the case.

The record has been read carefully to ascertain the fact if the two Reynas were connected with the original taking. If not, they could not be guilty of stealing this animal. After Herrera had taken the animal and their connection began with it after it had been driven the distance indicated, their subsequent connection with it would not make them guilty as principals. There must be evidence to connect them with the original taking in some way in order to constitute them the takers. If when Herrera took the animal he drove it as indicated by O'Neal, and the Reynas' first intimation or knowledge of that fact was the conversation between Luis Reyna and Herrera, as indicated by O'Neal, that is not sufficient to show him connected with the original taking. He might be guilty of

receiving the stolen meat, if his first connection with the matter was where the animal was slaughtered and after it had been slaughtered. It may be that if he had an agreement with Herrera to help him slaughter the animal and went there for that purpose, he would be guilty of receiving the animal himself after it was stolen.

The court submitted the question alone of theft, giving a general formal charge on principals. A special charge was requested, to the effect that, unless defendants were connected with the original taking, they would not be guilty; that they might be guilty of receiving stolen property. The language of the charge is not repeated, but this was the substance. The contention here is: First, the court should have charged the jury on circumstantial evidence; and, second, should have charged the jury, unless they were connected with the original taking, they would not be guilty of theft, but might be guilty of receiving stolen property. There was no bill of exceptions reserved to any ruling of the court, nor was an exception reserved to the court's charge, except in the motion for new trial. The writer is of opinion that it was fundamental error to submit to the jury the idea and theory of theft in this case under the facts, and in refusing to give the other charge. It is a fundamental error, that can be noticed on appeal, that a court authorizes a conviction on facts not shown by the witnesses. But be that as it may, the evidence is not sufficient to show appellants had any connection with the original taking. Herrera had evidently stolen the animal and driven it from Trevino's $3\frac{1}{2}$ miles, and three-quarters of a mile further, where it was slaughtered, and that appellant at the time that the animal was taken, and for two hours or more after Herrera passed with the animal, was working for Mr. O'Neal. If the evidence is in doubt, it is better to charge accessory and receiving stolen property in different counts.

The evidence not being sufficient, it is ordered that this judgment be reversed, and the cause remanded.

HARPER and PRENDERGAST, JJ., agree that the evidence is not sufficient to convict of theft, but do not agree the charge is fundamentally erroneous.

ENGMAN v. STATE (No. 3712.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915.)

1. INTOXICATING LIQUORS \Leftrightarrow 223—CRIMINAL PROSECUTIONS—ADMISSIBILITY OF EVIDENCE.

On a trial for selling whisky in prohibition territory, the time and place where the prosecuting witness claimed to have bought the whisky from accused were directly in issue and properly shown.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 263-274; Dec. Dig. \Leftrightarrow 223.]

2. INTOXICATING LIQUORS \Leftrightarrow 226 — CRIMINAL PROSECUTIONS—ADMISSIBILITY OF EVIDENCE.

On a trial for selling whisky in prohibition territory, the state was properly permitted to prove, by a witness other than the witness to whom the sale was made, the location of a building in which accused had a room when the sale occurred, and that when he was in such room he noticed two beds, a washstand, and a center table therein; this evidently being for the purpose of identifying the room where the alleged sale occurred.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 268-274; Dec. Dig. \Leftrightarrow 226.]

Appeal from District Court, Potter County; Hugh L. Umphres, Judge.

Frank Engman was convicted of selling whisky in prohibition territory, and he appeals. Affirmed.

Lumpkin & Harrington, of Amarillo, and Cooper & Merrill, of Houston, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for selling whisky in prohibition territory, and his punishment assessed at the lowest prescribed by law. The evidence, while disputed, was amply sufficient to sustain the verdict. It showed a sale by appellant as alleged.

Appellant's first bill of exceptions complains of some remarks by the judge to the jury, after delivering his written charge to them, giving them some directions. What the judge said to the jury was in no way prejudicial to appellant, and presents no error. Tyrone v. State, 180 S. W. 125, and authorities therein cited.

Appellant has a bill complaining that the court permitted the witness, to whom the indictment alleged appellant sold whisky to testify to other sales to him. The state objects to the bill as insufficient to require the court to pass upon the question. And it also contends that the testimony shown by the bill shows clearly that the witness did not testify to any other sale than that alleged in the indictment. We think both contentions by the state are well taken. The witness did not testify to any other sale to him by appellant, even if we could consider the bill.

[1, 2] The other bills are also objected to by the state as insufficient. Even if we could consider them, or any of them, they present no error. The question of the time said state's witness claimed he purchased, and the location where he claimed he bought the whisky from appellant, was directly in issue and proper to be shown. The court permitted the state to prove by another witness the location of the building in which the appellant had a room when the sale occurred, and over his objection, permitted the witness to tell that he noticed two beds, a washstand, and center table in the room when he was in it. Evidently this was for the purpose of identifying the room where the alleged sale

occurred. Under no circumstances would it be reversible error for the court to permit such evidence. There is nothing else raised requiring discussion.

The judgment is affirmed.

CHAPMAN v. STATE. (No. 3723.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915.)

1. CRIMINAL LAW \Leftrightarrow 597 — CONTINUANCE—RIGHT TO CONTINUANCE.

In a prosecution for bigamy, the defense was that accused's first wife had informed him she had procured a divorce. At the time of the trial she was living in New Mexico, and after process was returned accused was unable to procure her deposition on interrogatories before trial. Another witness as to accused being informed of the alleged divorce was also absent. The genuineness of a letter written by the first wife, informing accused of the divorce, was attacked. *Held* that, as it was accused's first application for a continuance, it should have been granted, even though he was not diligent, particularly as the wife made affidavit to the genuineness of the letter, and jurors stated, had they believed it to be genuine, they would have acquitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1331, 1332; Dec. Dig. \Leftrightarrow 597.]

2. CRIMINAL LAW \Leftrightarrow 957—TRIAL—VERDICT.

A conviction cannot be impeached by affidavits of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2392-2395; Dec. Dig. \Leftrightarrow 957.]

3. CRIMINAL LAW \Leftrightarrow 596 — CONTINUANCE — CUMULATIVE EVIDENCE.

The rule against cumulative evidence does not apply to a first application of accused for a continuance, nor is it applied with strictness where the only witnesses on the part of accused present are nearly related to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1328-1330; Dec. Dig. \Leftrightarrow 596.]

4. BIGAMY \Leftrightarrow 1—WHAT CONSTITUTES.

One who marries another under the honest belief that he has been divorced from his first wife is not guilty of bigamy.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 1-15; Dec. Dig. \Leftrightarrow 1.]

Appeal from District Court, Lamar County; Ben H. Denton, Judge.

Albert Chapman was convicted of bigamy, and he appeals. Reversed and remanded.

Chas. Roach and Lattimore & Hutchison, all of Paris, and Ramsey, Black & Ramsey, of Austin, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of bigamy, his punishment being assessed at three years' confinement in the penitentiary.

[1, 2] One of the serious questions, and perhaps the most serious question, in the case, was the action of the court with reference to the application for a continuance as originally presented, and a subsequent action in overruling the motion for new trial in connection with this application for continuance.

The evidence shows that the defendant married Laura Purvis in 1903, and they had some children, and that they separated and were not living together for three years or more, and in 1911, in July, he married Miss Grayson in Lamar county; the previous marriage to Miss Purvis having occurred in Erath county. His application was based upon the absence of Roy Johnson and his former wife, Laura Chapman. The court evidently overruled the application on account of want of what he deemed sufficient diligence. The case went to trial. On the trial of the case it was testified that his former wife had written appellant's mother to the effect that she had a divorce. It also developed that Roy Johnson had informed defendant that his wife had been divorced. He also himself introduced a letter, having taken the stand in his own behalf, from his first wife, Laura, informing him of the fact that she had obtained a divorce from him and the custody of the children. This letter was introduced and went before the jury as evidence. This letter was attacked, and it was sought to show it was a forgery, and there was testimony introduced to that effect by some of his relatives, especially a brother-in-law. The letter received by appellant was dated June 25, 1911, and is in the following language:

"Purvis, Texas, June 25, 1911.

"A. A. Chapman: I will write a few lines to let you know that the children are well and doing well, and I want to say that I have got my divorce from you, and you are no longer mine, so I will close. You write the children. Good bye.
Laura Chapman."

The affidavit filed by Laura Chapman is as follows:

"State of New Mexico, County of Roosevelt.

"Personally appeared before me, the undersigned authority, Laura Chapman, and, being sworn, deposes and says that: 'I was the wife of A. A. Chapman, and I wrote him a letter under date of June 25, 1911, while I was at Purvis, Tex., and addressed same to him at Eastline, Tex., and in this letter I told him the following': [Then follows the letter above copied.]"

This is sworn to by Laura Chapman on 27th day of April, 1915, before C. M. Compton, Jr., notary public in and for Roosevelt county, state of New Mexico. The following letter is also attached to the motion for new trial:

"Mr. Chas. Roach, Paris, Texas—Kind Sir: I will write you a few lines in regard to Alfred's case. I had a letter from Mr. Lipscomb this morning, and will send all to you now. There isn't but one thing I want to ask: Did Alfred really marry another woman in Ft. Worth, or is it false? I think I should know the truth, and if I could see Alfred he would not hesitate to tell me. I have two lawyers here, two brothers, that will do all in their power free gratis; so any time I or the Messrs. Compton can do anything, can't hesitate to call on us, and any time I am needed on the stand and can possibly get there I will be there in person. I could do more there than I can here, and have wrote for more evidence in Stephenville, Tex. I guess I will get their evidence soon; Mr. Jim Sagesor and H. P. Ogen, a Baptist minister.

I want to impeach my brothers and brother-in-law both, if possible. I was a slave for all the relations before I was married, and they wanted me to continue same, and Alfred objected; so they hate him, and it would be to the height of their ambition to pen him. They have even made those threats. They did not want me to marry Alfred; they said he was only a kid, and would not know how to take care of me. My father did not say one word, and was satisfied with my marriage; my brothers first raised a kick, and then Palmer, and then my mother thinks what the sons failed to know are marked out. Her and the six boys wore the pants, and dad is left out. Oh, that isn't half I can tell; things that would make a jury flinch. He was not treated even as good as a good dog, much less a human. They disgusted him against me! I could see the change coming on every day I was with him; that is why I don't blame him. I love Alfred just as well to-day as I did the day I was married to him. Tell him I say hello; to be good. He is in my mind always.
From Laura Chapman."

The brother-in-law she mentioned testified that the letter was a forgery. Turney was related by marriage; Laura Chapman being his niece. Appellant's brother-in-law was named Purvis, and he was a brother of Laura Chapman, whose maiden name was Laura Purvis, and he testified that the letter introduced in evidence was not in her handwriting.

If it be conceded that the diligence was not sufficient, or in strict compliance with the law, it may be replied this is the first application for a continuance, and that his former wife, Laura, was living in New Mexico at the time, and that process was issued for her, it seems, and returned not found; at least, she was not obtained at the trial. After the conviction, communication was secured, and she made the affidavit that the letter introduced in evidence was genuine, and that she wrote it. In connection with that, this letter that she writes to appellant's attorney, Mr. Roach, was introduced, showing that she communicated with the district attorney, Mr. Lipscomb, with reference to these matters. Several jurors filed affidavits that, if they had believed the letter introduced in evidence was genuine, they would have acquitted the appellant without hesitancy; but, in view of the fact that some of the evidence showed it was not in her handwriting and a forgery, this decided the case against appellant. These affidavits of jurors cannot impeach their verdict, and are mentioned in a general statement of the motion for new trial.

Believing that his wife was at Portales, N. M., appellant prepared interrogatories to send out to take her depositions. These were filed, but not in time to secure her testimony. Process was issued for Roy Johnson as well, and he was not obtained. As before stated, diligence is not always the controlling criterion of first application for continuance. A fair trial of the innocence or guilt of the party is guaranteed, and ought to be guaranteed, by the laws of Texas, and even if diligence is not sufficient, if upon

motion for new trial it is shown that the absent evidence is true and material, a new trial should be awarded. The affidavit of his wife shows that the letter was not a forgery; that she in fact did write the letter. It may be stated in this connection that the divorce had not been granted at the time she wrote. Subsequently she did obtain a divorce; but it had not been obtained at the time she wrote the letter to her husband.

[3] The rule of cumulative evidence, which seems to have entered somewhat into the trial of the case below, from the viewpoint of this record, does not obtain in applications for first continuance. It is only on second and subsequent applications that the rule of cumulative evidence finds a place in our criminal practice and procedure. There is another rule that this court has followed; that is, where the defendant is relying upon himself or his immediate relatives, that the rule with reference to cumulative testimony is not regarded with that strictness that it would be if the witnesses who testified are in no wise related to him. This is based upon the theory that his mother, who testified for him in this case, had received a letter also from her daughter-in-law to the effect that she was divorced, and that defendant himself would be much more interested in the result of the trial than others, and perhaps to the extent that their testimony should be more closely scrutinized. The inducement under such circumstances would be stronger to prevaricate than to state the truth. In view of the affidavit and statements in the letter to Mr. Roach by Laura Chapman of the genuineness of the letter, and that it was not a forgery, and in view of the whole record and the situation of this case as presented, both before the jury and in the record before this court, entitles this appellant to another trial. If Laura Chapman should take the stand and testify, as she has sworn she would, that she wrote that letter, and it was not a forgery; if the jurors who filed affidavits in the case are worthy of credit, and there is nothing to indicate that they are not first-class citizens, appellant would be acquitted.

[4] If he believed at the time that he married the second time that he was divorced from his first wife, he had a right to marry. If the divorce had actually occurred prior to the time of his marriage, of course, there would be no objection to his second marriage. If he believed it, and was laboring under such mistake of fact as to induce him to believe he was a divorced man, he still would not be guilty, and the verdict of the jury should have been in his favor. Laura Chapman's testimony, if in accordance with her affidavit, ought to settle that question, and it seems the jury settled it against defendant because of the fact that

his brother-in-law had sworn that the letter was not in the handwriting of his sister. We believe this record presents itself in such shape appellant has not had a fair trial that he ought to have had, and under this showing he is entitled to another hearing, and it ought to be and is awarded him.

The judgment is reversed, and the cause remanded.

PRENDERGAST, P. J. I agree to a reversal, because I think, under the circumstances, a new trial should have been granted; but I do not agree to all that is said in the opinion.

TINKER v. STATE. (No. 3676.)

(Court of Criminal Appeals of Texas. Oct. 13, 1915. Rehearing Denied Nov. 3, 1915.)

1. INDICTMENT AND INFORMATION — 110 — REQUISITES—SUFFICIENCY.

An indictment alleging, in substance, that the defendant, "on or about the 18th day of October, one thousand nine hundred and thirteen, and anterior to the presentment of this indictment, in the county of Scurry and state of Texas, did then and there unlawfully and willfully set fire to and burn the house of Oz Smith, there situate," follows Pen. Code 1911, art. 1200 et seq. defining the offense of arson, and is sufficient in law, sufficiently describes the burned house, and gives specific notice of the offense charged.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. —110.]

2. CRIMINAL LAW — 1091—APPEAL—MATTERS REVIEWABLE—EXCEPTIONS.

Under White's Ann. Code Cr. Proc. § 857, requiring bills of exceptions to be full and explicit, and section 1123, providing that no resort to inference to discover their meaning can be had, a bill of exceptions showing merely the substance of the evidence objected to and failing to show when the objection was made or what the other evidence was is insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2824, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. —1091.]

3. ARSON — 30 — TRIAL — IDENTIFICATION OF PROPERTY—SUFFICIENCY.

The title of burned property is never in issue in arson and may be shown by oral evidence; absolute proof by deed not being essential.

[Ed. Note.—For other cases, see Arson, Cent. Dig. § 61; Dec. Dig. —30.]

4. CRIMINAL LAW — 1169—APPEAL—MATTERS REVIEWABLE—HARMLESS ERROR.

Although it is error to admit oral evidence that a certain person insured burned property, and at the same time exclude the policy of insurance in showing ownership, the error is harmless, and is not a cause for reversal, especially where other evidence showed ownership.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. —1169.]

5. CRIMINAL LAW — 676 — TRIAL — CUMULATIVE EVIDENCE.

Where a given fact is sufficiently shown by a number of witnesses, it is not error to exclude testimony of another witness which is merely cumulative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1608; Dec. Dig. —676.]

6. ARSON **⚡25—EVIDENCE—ADMISSIBILITY.**

It is not error in a prosecution for arson to exclude copies of deeds tending to show title of the burned property in another than the person named in the indictment, where it is not claimed that possession or claim of possession by another can be shown; possession being a criterion as to certainty of description.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 52-54; Dec. Dig. **⚡25.**]

7. INDICTMENT AND INFORMATION **⚡133 — SUFFICIENCY.**

An indictment cannot be shown to be defective by evidence, but is tested as a pleading under the law applicable.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 454-468; Dec. Dig. **⚡133.**]

8. CRIMINAL LAW **⚡1091—APPEAL AND ERROR—BILL OF EXCEPTIONS—CONCLUSIONS.**

A bill of exceptions to the conduct of a prosecuting attorney which states only appellant's conclusions, and not facts, does not show reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2824, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. **⚡1091.**]

9. CRIMINAL LAW **⚡1159—APPEAL AND ERROR—MATTERS REVIEWABLE.**

Where there is a conflict in the evidence, but the evidence will sustain the verdict as rendered, the court on appeal will not set the verdict aside.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. **⚡1159.**]

Appeal from District Court, Scurry County; John B. Thomas, Judge.

A. E. Tinker was convicted of arson, and he appeals. Affirmed.

Smith & Spiller, of Snyder, for appellant.
C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of arson, and his punishment assessed at the lowest prescribed by law.

[1] With the necessary beginning and ending allegations, the indictment averred:

"That A. E. Tinker, on or about the 18th day of October, one thousand nine hundred and thirteen, and anterior to the presentment of this indictment, in the county of Scurry and state of Texas, did then and there unlawfully and willfully set fire to and burn the house of Oz Smith, there situated."

It follows the statute (P. C. art. 1200 et seq.) prescribing the offense and the approved form (Willson's Forms [4th Ed.] p. 278), and is clearly sufficient against all of appellant's objections to the effect: (1) The indictment was insufficient in law; (2) it did not sufficiently describe the burned house; (3) it did not give him specific notice of the crime charged; and (4) that the description of the burned property is vague and uncertain.

[2, 3] He has some bills of exceptions to the admission and exclusion of evidence. His first on this subject merely states that on the trial "the state introduced the following

testimony, to wit: That a gin was burned in the town of Snyder, Scurry county, Tex., on or about the 18th day of October, 1913, and that the said gin belonged to Oz Smith," and that he objected for the same reason he gave in his motion to quash the indictment. What witness so testified, or what other evidence was introduced, is not stated. Unquestionably under the rules (section 857, p. 557, and section 1123, p. 732, White's Ann. C. C. P.; James v. State, 63 Tex. Cr. R. 75, 138 S. W. 612; Ortiz v. State, 151 S. W. 1058; Best v. State, 164 S. W. 997; Arnold v. State, 168 S. W. 125) this bill cannot properly be considered. However, there is no doubt that such evidence was admissible. It has always been held in this state that the title to the burned property in this offense is never in issue, and that it is not essential that any deed to the alleged owner be introduced in evidence, but that oral evidence of the possession and ownership is always admissible. Allen v. State, 62 Tex. Cr. R. 506, 137 S. W. 1133, and cases there cited. See, also, section 1335, White's Ann. P. C. 1901, p. 522.

[4] Mr. McConnell, a local insurance agent, testified, in effect, that Oz Smith, the alleged owner of the burned gin, insured it. Appellant objected to this evidence because said Smith had other houses, and the indictment did not aver the burned house was a gin, and the insurance policy was the best evidence. The court did not permit any evidence of the contents of the policy. This evidence was admissible just like any other fact would be which showed said Smith owned, claimed, or was in possession of the gin. Besides, said Smith himself, without any objection by appellant, testified fully the same thing. This court, in Wagner v. State, 53 Tex. Cr. R. 307, 109 S. W. 169, said:

"It is well settled in this state that the erroneous admission of testimony is not cause for reversal if the same fact is proven by other testimony not objected to"—citing many cases.

See, also, Bailey v. State, 69 Tex. Cr. R. 484, 150 S. W. 915, and Christie v. State, 60 Tex. Cr. R. 602, 155 S. W. 541. Again, the uncontroverted testimony of a large number of witnesses, including that of appellant himself, established that said Smith's said gin was burned on the night of October 18, 1913. Every witness identified the burned gin as that of said Smith. Appellant cites us to some arson cases where it seems to have been held that it was necessary to introduce the insurance policy to show that the burned house was insured, but those cases are not in point, for they were where the owner was indicted for burning his own insured house.

[5] Appellant also objected because he claims the court would not permit him to introduce testimony that a certain brand of whisky came from Lt Chapman, an important state witness, and that he only handled that brand. The court refers to the statement of facts, which shows that a great deal

of testimony was introduced by various witnesses to that effect.

[6] Appellant has another bill complaining that the court erred in refusing to permit him to introduce in evidence copies of three deeds from Leroy Johnson, all conveying the said gin property to three distinct persons, "one conveying the property before it was conveyed to Oz Smith, another conveying the property to Oz Smith, and another a sheriff's deed conveying the property as that of Leroy Johnson to Continental Gin Company, after the date of the deed to Smith," claiming, "These deeds show that the property was evidently in controversy." The court qualified the bill as follows:

"The defendant offered some deeds which were refused by the court, as the court could not inquire into exact title to the property; the state having proved by a deed that Smith claimed the property and was claiming the property at the time it burned."

This is the full bill, without quoting it. The bill in no way pretends to claim that he would or could introduce any evidence whatever to show, or tend to show, that any person whomsoever, other than said Smith, set up any claim whatever to said property, or was in possession thereof, or claimed possession of it, or that any other, except said Smith, owned it. But the testimony, and all of it, without any contradiction whatever, overwhelmingly established that said Smith alone owned said gin, and had for a number of years. He alone had run it in previous years during the ginning season, and repaired it to run for 1914, but had run it partly ginning one bale during that season before it was burned. We think this bill shows no error. Even if said copies of deeds, as claimed by appellant, could have been held to show that "the property was in controversy," that would not have made them admissible, without showing that some one other than said Smith was in possession, or at least claimed possession, and there is not even such pretense by the bill or otherwise in this record. The title to the property is not, and was not, an issue. *Allen v. State*, supra.

[7] The indictment could not be shown to be defective by evidence that said Smith owned other houses than said gin, and at some other time he had had houses burned.

"The indictment * * * must be tested by itself under the law, as a pleading. It can neither be supported nor defeated as such by what evidence is introduced on the trial." *Ritter v. State*, 176 S. W. 730.

[8] By other bills appellant complains of the manners and attitude of the district attorney in cross-examining a witness. These are very general, and, as stated by the court, are appellant's mere conclusions, and not approved in the bill as facts. They point out no reversible error.

[9] No other questions are raised requiring discussion. We have carefully studied the

statement of facts. There was conflict in the evidence. But the testimony of the state, if believed by the jury, as it evidently was, was amply sufficient to sustain the verdict. That it may have authorized his acquittal, if the jury had believed him and his witnesses, would not authorize or justify this court to set the verdict aside.

The judgment is affirmed.

VINSON v. STATE. (No. 3719.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915.)

1. CRIMINAL LAW — 1064 — APPEAL — RESERVATION OF GROUNDS OF REVIEW — MOTION FOR NEW TRIAL.

It is the rule in all the appellate courts of this state that all grounds relied on to present error must be contained in the motion for a new trial filed in the court below, or in bills of exceptions filed in that court, especially in view of rule 101a for district and county courts (159 S. W. xi), providing that all errors not directly specified in the motion for a new trial shall be waived.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2676-2684; Dec. Dig. — 1064.]

2. COURTS — 78 — RULES OF COURT — FORCE.

The Constitution and laws authorize the Supreme Court to adopt rules for the government of all the courts of the state, and such rules govern when not in conflict with some statutory provision.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 274, 276-281; Dec. Dig. — 78.]

3. CRIMINAL LAW — 1038 — APPEAL — RESERVATION OF GROUNDS OF REVIEW — OBJECTIONS AND EXCEPTIONS.

The statute requiring the charge to be submitted to counsel, and requiring counsel to direct the attention of the court to any portion of the charge objected to, or to the failure of the charge to present any issue fully or correctly, or its failure to present all the issues raised by the evidence, prescribes a rule which the Legislature had a right to prescribe, and appellate courts can neither ignore nor emasculate such provision.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2646; Dec. Dig. — 1038.]

4. CRIMINAL LAW — 1129 — APPEAL — RECORD — ASSIGNMENTS OF ERROR.

Assignments of error, filed in vacation, have no place in a transcript in a criminal case, as the motion for a new trial alone will be looked to.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2964-2984; Dec. Dig. — 1129.]

5. CRIMINAL LAW — 1064 — APPEAL — RESERVATION OF GROUNDS OF REVIEW — MOTION FOR NEW TRIAL.

A ground in a motion for a new trial, alleging that the court erred in its charge to the jury, but not attempting to point out any error, is too general to receive consideration.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2676-2684; Dec. Dig. — 1064.]

6. WITNESSES — 286 — EXAMINATION — RE-DIRECT EXAMINATION.

Where, on a trial for assault to murder, a witness, who claimed that he, and not accused, cut the prosecuting witness, stated on cross-ex-

amination that that was the first time he had so testified, that he was a witness before the grand jury, that he was not asked whether or not he cut the prosecuting witness, and that at that time he said nothing about it, as he did not desire to incriminate himself, a question on redirect examination as to whether he had ever before testified on oath about who cut the prosecuting witness was wholly immaterial, as he had made it plain in his testimony that he had never stated who cut the prosecuting witness before testifying on the trial.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 930, 994-999; Dec. Dig. ¶ 283.]

7. CRIMINAL LAW ¶ 683—EVIDENCE—REBUTTAL.

Where, on a trial for assault to murder, a witness who testified that he, and not accused, assaulted N., the prosecuting witness, testified that he did not know what kind of clothes N. had on, or what kind of a coat, that he had on dark clothes, but he did not know whether they were black or not, or whether N. had a lantern in his hand or not, it was permissible to allow N. to testify in rebuttal that he had a lantern in his hand, and that he had on no coat, but was dressed in a pair of blue pants and a corduroy vest.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1615-1617; Dec. Dig. ¶ 683.]

8. CRIMINAL LAW ¶ 1038—APPEAL—RESERVATION OF GROUNDS OF REVIEW — OBJECTIONS AND EXCEPTIONS.

Under Code Cr. Proc. art. 743, providing that, when the requirements of the eight preceding articles have been disregarded, the judgment shall not be reversed, unless the error was calculated to injure defendant's rights, which error shall be excepted to at the time of the trial, or on a motion for a new trial, where the charge presented defendant's contention made on the trial of the case, and defendant neither complained thereof at the time, nor requested any special charges, he could not afterwards complain of its failure to present a different contention.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2646; Dec. Dig. ¶ 1038.]

Appeal from District Court, Grayson County; M. H. Garnett, Judge.

Dick Vinson was convicted of assault to murder, and he appeals. Affirmed.

H. P. Abney, B. W. Cornelius, and Head, Dillard, Smith, Maxey & Head, all of Sherman, for appellant. C. O. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of assault to murder, and his punishment assessed at two years' confinement in the state penitentiary.

[1-4] The term of court at which appellant was tried adjourned on the 15th day of May, 1915. Two months thereafter, July 15, 1915, in vacation, appellant filed what are termed "assignments of error," and in which he complains of the charge of the court as given, for the first time. On the trial of the case no special charges were requested, and no exception reserved to the charge of the court. In the motion for a new trial there is no attempt made to point out any error in the charge, but in the "assignments of error," filed after the court had adjourned, several para-

graphs of the charge are alleged to be erroneous, and the brief filed in this cause by able counsel deals almost exclusively with what they claim in the assignments of error to be errors in the charge of the court, but which were not complained of in the motion for a new trial. Why is a motion for a new trial required to be filed? It is to enable the trial court to correct his own errors, if errors there be, in the trial of the case, and it is not fair to the trial court to seek to present error in the record to this court to which his attention was not called. It is the rule in this state in all the appellate courts now that all grounds relied on to present error must be contained in the motion for a new trial filed in the court below. The rules adopted by the Supreme Court now provide:

"All errors not directly specified in the motion for a new trial shall be waived." Rule 101a (159 S. W. xi).

The Constitution and laws of this state authorize the Supreme Court to adopt rules for the government of all the courts in this state, and such rules govern, when not in conflict with some statutory provision. Of course, it is provided that fundamental error may be presented at any time. But in the brief no fundamental error in the proceedings is pointed out. The indictment charges the offense of which appellant was convicted. The charge of the court submits this offense to the jury, and while it may not have submitted all the issues made by the testimony in a manner entirely satisfactory to appellant at this time, apparently it did so at the time of the trial, for no complaint was then made, and no special charges were requested.

In *Ross v. State*, 170 S. W. 305, we had occasion to review the decisions of our appellate courts since the Legislature has seen proper to provide that the charge of the court must be submitted to counsel before being read to the jury, and if counsel object to any portion thereof, or do not think it presents any issue fully or correctly, or does not present all the issues raised by the evidence, it shall be the duty of counsel to at that time, in writing, direct the attention of the court to such error of omission or commission. This rule the Legislature had the right to prescribe, and if it is thought not to be in the interest of justice, application should be made to the Legislature to change it, and not expect the appellate courts to ignore or emasculate this legislative provision. Assignments of error, filed in vacation, have no place in a transcript in a criminal case. The motion for a new trial is what we look to, and that alone. *Harvey v. State*, 57 Tex. Cr. R. 7, 121 S. W. 605; *Jones v. State*, 55 Tex. Cr. R. 207, 116 S. W. 1147; *Veas v. State*, 55 Tex. Cr. R. 125, 114 S. W. 830; *Sue v. State*, 52 Tex. Cr. R. 122, 105 S. W. 804. In *Sue v. State* this court said:

"We wish * * * to again repeat, what we have frequently said, that it is a useless con-

sumption of paper and an unnecessary incumbrance of the record to put an assignment of errors in a record sent to this court. Article 723 of the Code of Criminal Procedure limits our consideration to assignments in the motion for a new trial and to bills of exceptions. We cannot take cognizance of any assignment of errors that is not thus placed in the record. Therefore we again urge the bar of Texas not to incumber the records sent to this court with any more assignments of errors. No complaint of the charge of the court, or ruling of the court, can be considered by us, unless said complaint is embodied either in a motion for a new trial or in a bill of exceptions."

[5] Thus it is seen we must and can consider only such matters as are complained of in the motion for a new trial and bills of exceptions filed in the court below. In the motion for a new trial, the first complaint is: "The court erred in its charge to the jury." That is all of the ground; no error is attempted to be pointed out to the trial court, and under all the decisions of this court, the Supreme Court, and the Court of Civil Appeals, this is too general an allegation to receive consideration. The rules also provide that such an assignment shall not be considered.

The next three grounds assert that the evidence is insufficient to sustain the verdict. The evidence offered in behalf of the state would show, if believed, that appellant, in the nighttime, slipped up behind H. C. Nelms and inflicted an almost fatal wound. Without going into details, we hold the state's evidence fully supports the verdict, and would sustain a much more severe penalty than was assessed.

[6] The only other ground in the motion for a new trial alleges:

"The court erred in the admission of evidence upon the trial hereof, to which appellant at the time duly excepted, as is shown by the several bills of exceptions filed herein and constituting a part of the record."

To say the least, this is a rather general assignment, for no bills of exception had been filed at that time, and the two found in the record were not filed until some six weeks after the motion for new trial had been overruled and court had adjourned for the term. One of them refers to testimony excluded, and not to testimony admitted, on the trial. On the trial of this case Meek testified that he, and not appellant, was the person who cut Nelms. On cross-examination he was asked if this was not the first time he had so testified, and he answered that it was. He was asked if he was not a witness before the grand jury, and he answered that he was, and said that he was not asked about whether or not he cut Nelms; that he did not at that time say anything about it, as he did not desire to incriminate himself. On redirect examination, he was asked if he had ever before this time, on oath, testified

about who cut Nelms. As the witness had made it plain in his testimony that he had never stated who cut Nelms before testifying on this trial, the fact he had never before been called on to swear in regard thereto would be wholly immaterial.

[7] The only other bill of exceptions in the record claims the court erred in permitting H. C. Nelms to be recalled as a witness and testify that on the night he was cut he "wore a pair of blue pants and corduroy vest." Meek, the witness who on this trial claimed he was the man who cut Nelms, testified:

"I do not know what kind of clothes he had on. I do not know what kind of coat. He had on dark clothes. I do not know whether they were black or not. Don't know whether he had a lantern in his hand or not."

In rebuttal of this testimony it was permissible to allow Nelms to testify that he had a lantern in his hand, and state he had on no coat, and was dressed in a pair of blue pants and a corduroy vest.

[8] As before said, the court's charge may not have been framed to present all the issues, as appellant, after adjournment, has concluded he would like to have had them presented. On the trial of the case, he seemed to have contended that, if Meek cut Nelms, he should be acquitted, and the court instructed the jury:

"If you should believe from the evidence that there was a sudden fuss between the train crew of which H. C. Nelms was a party and certain persons at Whitesboro on the occasion in question, and that there was no previous understanding or agreement between the defendant and Bill Meek to engage in such fuss with the train crew, and that during the difficulty Bill Meek cut the said Nelms with a knife, or if you have a reasonable doubt as to this matter, you should find the defendant not guilty."

This seems to have presented the issue as contended for on the trial of the case, and article 743 was amended for the specific purpose of preventing a different contention being made after the trial to that made on the trial. If appellant could now, at this late day, complain of the charge, we are frank to say that the court should have instructed the jury that if Nelms struck Meek with a pick, and it reasonably appeared to appellant that Meek's life was in danger, or it appeared to him that Meek was in danger of suffering serious bodily injury at the hands of Nelms, he would have the right to use all necessary force to prevent such an assault. But appellant made no such contention at the time of the trial. His whole theory then was that he did not cut Nelms, that Meek did cut him under circumstances for which he could in no way be held responsible, and this contention was submitted to the jury in a way that was satisfactory to appellant and his counsel at that time.

The judgment is affirmed.

STERK et ux. v. REDMAN.

(Court of Appeals of Kentucky. Nov. 12, 1915.)

FRAUDULENT CONVEYANCES ¶206 — EXISTING LIABILITIES.

One having, before making a transfer of his property without consideration, made a contract for purchase of goods, his liability for the price is one existing at the time of the transfer, even as to goods thereafter received under the contract, within Ky. St. § 1907, declaring such a transfer void as to all his then existing liabilities.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 629, 630; Dec. Dig. ¶206.]

Appeal from Circuit Court, Marion County.

Action by J. A. Sterk and wife against William Redman. From a judgment for defendant on his counterclaim against plaintiff and his cross-petition against plaintiff's wife, plaintiffs appeal. Affirmed.

S. A. Russell, of Lebanon, for appellants.
Hugh P. Cooper, of Lebanon, for appellee.

TURNER, J. In 1912 appellant J. A. Sterk was a barrel manufacturer at Lebanon, Ky., and appellee, William Redman, was a stave dealer at Glasgow, Ky. After some correspondence between them, on the 14th day of December, 1912, Sterk went to Glasgow, and that day examined certain stacks of staves which Redman had on his yards at that place, and they at the time entered into the following written contract:

"Articles of agreement made and entered into this 14th day of December, 1912, between Joe A. Sterk, of Lebanon, Ky., party of the first part and William Redman, of Glasgow, Barren county, Ky., party of the second part.

"Whereas, the said party of the first part agrees to pay party of the second part \$73.00 per 1,000 pcs. f. o. b. Glasgow for the sawed whisky staves 7/8x35" all cut-offs and dead culls to be laid out when loaded, staves to be straight count after dead culls are laid out, and to be paid for every thirty days from date of invoice."

On the 17th of December, 1912, Sterk received the first car load shipment of 12,625 staves, which he promptly paid for, according to the terms of the contract, on the 17th day of January, 1913. In the letter sending this check he suggested that it was about time he was receiving another shipment. On the 21st day of January, 1913, he received a second car load containing 16,125 staves, and, without ever having paid for the second car load, he received on February 18, 1913, a third car load containing 12,893 staves. About the time of the receipt of the second car load, or shortly thereafter, Sterk made complaint to Redman that many of the staves in the first car were defective, and not suited for making whisky barrels, and there was some correspondence between them on this subject; but, notwithstanding this complaint, Sterk received the third car load, as stated, on the 18th day of February.

The two last car loads not having been paid for no further shipments were made by Red-

man, and certain negotiations were pending between the parties looking to a settlement of their differences, during which Redman offered to take back the unused staves, numbering about 19,000, at the contract price, and credit Sterk by the same, but this offer was refused. Pending the controversy between the parties, and on the 29th of January, 1913, Sterk conveyed to his wife for the recited consideration of \$1 and other valuable considerations all of his visible property of every kind, including his business.

In November, 1913, J. A. Sterk instituted this action against Redman, wherein he sought damages by reason of the alleged breach by Redman of said contract, alleging that he had bought from Redman, under his contract, and Redman was to deliver to him, only sound, merchantable, white oak whisky barrel staves; that the written contract above quoted was only a memorandum, and was not the whole contract between the parties; that Redman knew that he bought the staves only for the purpose of making whisky barrels, and that he made no other kind of barrels; that the staves so furnished him were defective and rotten, and many of them unfit for the purpose for which they were bought; that at the time he had a contract with a distillery company to furnish to it whisky barrels; and that a large percentage of the barrels so made out of the staves furnished him by Redman were unfit for the purpose, and were rejected by the distillery company.

Redman answered, denying the material allegations of the plaintiff's petition, and alleged that the written contract was the whole contract between the parties; that the staves shipped to Sterk were the same which had been inspected by him before they were purchased; and that he (Redman) had, under the terms of the contract, thrown out of such car load shipments all of the cut-offs and dead culls in so far as they could be detected. He made his answer a counterclaim against J. A. Sterk and sought damages against him by reason of his failure to comply with his contract and accept and pay for all the staves so purchased by him, which at the time were estimated by the party to be from 60,000 to 100,000. He prayed judgment for the two last car loads of staves at the contract price, made his answer a cross-petition against Sterk's wife, and prayed that the conveyance by Sterk to her on the 29th of January, 1913, be set aside as fraudulent, and that such judgment as he might recover against Sterk be adjudged a lien on the property therein conveyed.

The cause was transferred to the equity docket, a great mass of conflicting evidence taken, and the court upon a final hearing entered a judgment for the defendant on his counterclaim for the contract price of the

two car loads of staves, to be credited by \$438, set aside the conveyance from Sterk to his wife, and gave to Redman a lien upon the property for the payment of his debt.

Under the express terms of section 1907 of the Kentucky Statutes the conveyance by Sterk to his wife was void as to Redman's debt. The contract was made between Redman and Sterk on the 14th day of December, 1912, and the liability grew out of that contract, and necessarily the conveyance of his property, without consideration, on the 29th of January, 1913, to his wife during the existence of this liability, was void as to Redman's debt.

The other questions involved are purely questions of fact. A great mass of testimony was taken, and seems to have been given careful consideration by the chancellor below, and he credited Sterk by \$438, which represented 6,000 bad staves in the three car loads at the contract price.

Our examination of the evidence convinces us that his judgment on the merits is substantially correct, and it is affirmed.

SHUEY v. TRAPP et al.

(Court of Appeals of Kentucky. Nov. 12, 1915.)

1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — ASSESSMENT OF BENEFITS.

Under Ky. St. § 3566, providing, relative to cities of the fourth class, that the cost of reconstructing or repairing public ways, streets, or alleys shall be borne exclusively by the city, and section 3566, providing that the cost of making sidewalks, including curbing and guttering, whether by original construction or by reconstruction, shall be apportioned to the front foot as owned by the parties fronting the improvement, the cost of curbing and guttering a street was properly assessed against the abutting owners, though done in connection with the reconstruction of the carriageway, and not in connection with the construction or reconstruction of sidewalks.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1008, 1017; Dec. Dig. § 414.]

2. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — ASSESSMENT OF BENEFITS.

A city voted to issue bonds for the purpose of reconstructing a street, and the board of councilmen provided for the issuance of such bonds by an ordinance which recited in its title that the issuance of the bonds was for the purpose of reconstructing such street with "vitrified brick paving * * * and 6-inch cement curb and 16-inch brick gutter," but which did not refer in its body to the curbing and guttering. The proceeds of the bonds were paid to the contractor as compensation for reconstructing the street, exclusive of the curbing and guttering, and a special tax was assessed on the abutting property to cover the cost of such curbing and guttering. *Held*, that the proceeds of the bonds were not intended to cover the cost of the curbing and guttering, notwithstanding the title of such ordinance, and the assessment of such cost against the abutting property did not constitute double taxation, though the abutting

property would be liable as other property for the taxes necessary to redeem the bonds.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1003, 1004; Dec. Dig. § 407.]

Appeal from Circuit Court, Campbell County.

Action by Angeline Shuey against Daniel Trapp and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Judson A. Shuey, of Newport, for appellant. William A. Burkamp, of Newport, for appellee Trapp. E. E. Kelly, of Newport, for appellee city of Dayton.

CLAY, C. Plaintiff, Angeline Shuey, the owner of certain lots on Sixth avenue in the city of Dayton, a town of the fourth class, brought this action against the city of Dayton and Daniel Trapp, contractor, to enjoin the city from levying a special improvement tax on her property and to quiet her title thereto. Being denied the relief prayed for, plaintiff appeals.

The facts are as follows:

On August 5, 1912, the board of councilmen of the city of Dayton by a resolution duly submitted to the qualified voters of said city the question, to wit:

"Shall the city of Dayton, Kentucky, incur an indebtedness amounting to twenty thousand dollars, by issuing the bonds of said city, bearing interest at the rate of four per cent. per annum, for the purpose of reconstructing Sixth avenue, through said city, from the west corporation line, or O'Fallon avenue, to the east line of Main street?"

At an election held on November 5, 1912, the proposition was carried by a vote of more than two-thirds of the qualified voters voting in said election. On January 20, 1913, the board of councilmen enacted an ordinance providing for the issuance of the bonds. The title of the ordinance provides for the issuance and sale of bonds "for the purpose of reconstructing Sixth avenue with vitrified brick paving, concrete foundation, and 6-inch cement curb and 16-inch brick gutter, laid on 6-inch concrete base, from," etc. In the body of the ordinance no reference is made to the curbing or guttering.

On February 3, 1913, an ordinance was enacted providing for the reconstruction of Sixth avenue with vitrified brick paving, concrete foundation, 6-inch concrete curb, and 16-inch vitrified brick gutter. The ordinance provided that the work should be done at the cost of the city, with the exception of the cost of the curb and gutter, which should be assessed against the owners of the abutting property. Bids were advertised for, and Daniel Trapp was the successful bidder. On February 24, 1913, he entered into a contract with the city to do the work according to the plans and specifications. After the work was completed, according to contract, the board of councilmen levied a special tax on the abutting property for the cost of the

curb and gutter. The city paid the contractor the sum of \$20,000 for the reconstruction of the street, excluding the curb and gutter.

[1] Section 3565 of the Kentucky Statutes, being a part of the charter of cities of the fourth class, provides:

"The cost of reconstructing public ways, streets or alleys, or repairing of the same, and the cost of making footway crossings, shall be borne exclusively by the city."

Section 3566 of the Kentucky Statutes provides:

"The cost of making sidewalks, including curbing and guttering, whether by original construction or by reconstruction, shall be apportioned to the front foot as owned by the parties respectively fronting said improvements, except that each corner lot shall have its sidewalk intersection included in its frontage."

It is the contention of the plaintiff that, where the work of construction or reconstruction of curbing and guttering is done in connection with the construction or reconstruction of sidewalks, the cost thereof is properly assessable on the abutting property; but where such work is done as a part of the reconstruction of the carriageway, it is properly a part of the carriageway and should be paid for by the city. This precise question was before the court in the recent case of *Weber v. Knepfle*, 166 Ky. 228, 179 S. W. 19. In rejecting a similar contention the court said:

"The ordinance in the case at bar distinctly separated the carriageway improvement and the curbing and guttering improvement, and provided that the one should be paid for by the city and the other by the property holders, as seems to have been unmistakably contemplated by the provisions of the charter quoted. The mere fact that in a single ordinance the council provided for the reconstruction of the carriageway and for the reconstruction of the curbing and guttering does not make the latter a part of the former. It must be given the same effect as if the two improvements had been provided for in separate and distinct ordinances."

[2] But plaintiff contends that the bonds were issued for the purpose of paying for the entire improvement, and that it would be double taxation to assess the cost of the curbing and guttering against the abutting property owners. The question submitted to the voters was whether or not the bonds should be issued to pay for the reconstruction of Sixth avenue. No mention was made of the curbing and guttering. While in the ordinance providing for the issuance of the bonds the title does refer to the curbing and guttering, the body of the act, which controls, simply provides for the issuance of bonds for the purpose of reconstructing the street, without referring to the curbing and guttering. In addition to this fact, the evidence shows that the proceeds of the bonds were paid to the contractor as compensation for the reconstruction of the street, excluding the curbing and guttering, and a special tax was assessed on the abutting property to cover the cost of the curbing and guttering.

Under these circumstances, it cannot be said that the proceeds of the bonds were intended to cover both the reconstruction of the carriageway and the cost of the curbing and guttering. It is clear that plaintiff's property will be liable, in connection with all the other property in the city, for such taxes as may be necessary to redeem the bonds issued for the reconstruction of the carriageway, and liable for special assessment for the cost of the curbing and guttering, which was not paid out of the proceeds of the bonds, and which, under the statute, is clearly assessable against the abutting property holders. It is manifest, therefore, that plaintiff's property will not be subject to double taxation for the same purpose. It is merely liable for one improvement, which is an obligation of the entire city, and for another improvement, which, by the express terms of the statute, has to be borne by the abutting property owners.

Judgment affirmed.

MEECE et al. v. COLYER et al.

(Court of Appeals of Kentucky. Nov. 9, 1915.)

1. APPEAL AND ERROR ⇐1009—REVIEW—FINDINGS.

In an action to set aside a conveyance, the evidence being conflicting, the chancellor's finding of the grantor's mental capacity must be accepted on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. ⇐1009.]

2. FRAUD ⇐50—BURDEN OF PROOF.

The general rule is that one who charges fraud has the burden of making out his case.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 46, 47; Dec. Dig. ⇐50.]

3. DEEDS ⇐196—VALIDITY—BURDEN OF PROOF.

Where a conveyance is voluntary and without consideration or upon an inadequate consideration, and there is a relation of trust and confidence between the parties, the burden is upon the grantee to prove that the grantor acted freely and understandingly.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 587-593, 649; Dec. Dig. ⇐196.]

4. DEEDS ⇐196—VALIDITY—PRESUMPTION—CONFIDENTIAL RELATIONS.

The mere fact that the grantor and the grantee were uncle and nephew does not establish such a confidential relation as would give rise to the presumption of fraud.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 587-593, 649; Dec. Dig. ⇐196.]

5. DEEDS ⇐17—VALIDITY—CONSIDERATION.

The fact that the grantor conveying the land in consideration that the grantee should care for him during his lifetime lived only 68 days thereafter did not render the consideration inadequate; the test being whether the conveyance was fair and reasonable when made.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 20-37; Dec. Dig. ⇐17.]

Appeal from Circuit Court, Pulaski County.

Action by Mary B. Meece and J. C. Meece, as guardian, etc., against Walter Colyer and

others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Virgil P. Smith, of Somerset, for appellants. Wesley & Brown, of Somerset, for appellees.

NUNN, J. [1] This is an action by Mary B. Meece, a daughter of W. F. Richardson, and by her husband, J. C. Meece, as guardian for the infant children of W. F. Richardson. The purpose of the action was to set aside a conveyance made by Richardson to the appellee on the ground of mental incapacity, undue influence, and inadequate consideration.

W. F. Richardson conveyed to his nephew, Colyer, the appellee, 32 acres of land, in consideration that Colyer would "care and provide for the said W. F. Richardson as long as he lived, furnish him suitable food and raiment, wait on him during his sickness, properly bury him, and erect a tombstone to his grave suitable and appropriate." The witnesses estimate the value of the land at from \$12 to \$20 per acre.

Colyer's mother was a sister to Richardson. She owned an undivided interest in the land, and joined in the conveyance to her son. Colyer had a little money and some personal property, altogether amounting to not more than \$300, and at the time he made the conveyance he executed a will devising all of his personal property to Mrs. Colyer. Whether this was intended as compensation for the release of her interest in the land is not made clear by the record. Anyhow, Colyer at once moved to the place and carried out his part of the contract. Richardson was a widower when he made the conveyance, and had been living there alone for many months, afflicted with Bright's disease and dropsy. He lived 68 days after the conveyance. Before making the trade with Colyer, he offered to convey it to his son-in-law, Meece, the appellant, if Meece would move there and take care of him. Meece would not move to the Richardson place, but offered to give Richardson a home with him at the Meece place if Richardson would make the conveyance. Richardson insisted that he wanted to live and die at his own home. Richardson's wife died about a year before the conveyance, but they had been living apart for 14 or 15 years. There is testimony that they were divorced, although upon what ground and at whose instance the record does not disclose. Meece married Richardson's oldest daughter about 4 or 5 years before this controversy arose, and after that time Richardson's wife and infant children lived with Meece. Meece did a good part by them, but the question here is not one of compensation to him out of the Richardson estate. Richardson was sent to the asylum as a lunatic three times, and each time kept there from 2 to 4 months, but his last release was more than 10 years before he made the

deed to Colyer. About a month before the deed another inquest was held in the Pulaski circuit court, where he was adjudged to be sane and restored to his property rights. Eighteen witnesses testify that during the last 10 years of his life he was of sound mind and capable of transacting business. Five witnesses testify to the contrary, but, even if there was no other evidence in the case, and he had never been adjudged a lunatic, the evidence of these five witnesses would not be controlling or convincing. There was no evidence of undue influence. The court upheld the conveyance and dismissed the petition. Under this state of facts we must, of course, accept the finding of the chancellor on the question of mental incapacity.

But appellant contends that the court erred in failing to set aside the deed on the ground of undue influence. Although there is no evidence of undue influence, appellant argues that the burden was upon the grantee to show that the deed was made freely and understandingly.

[2, 3] The general rule is that one who charges fraud has the burden of making out his case. But, where the conveyance is voluntary and without consideration, or an inadequate consideration, the burden is upon the grantee to prove that the grantor acted freely and understandingly, where there is a relation of trust and confidence between the parties, such as attorney and client, guardian and ward, or parent and child. As illustrating this exception to the general rule, the following cases are in point: *Hoeb v. Maschiot*, 140 Ky. 330, 131 S. W. 23; *Shacklette v. Goodall*, 151 Ky. 20, 151 S. W. 23.

[4, 5] But here the facts are not sufficient to raise a presumption of fraud. The mere fact that the parties were of kin does not establish such a confidential relation as will give rise to the presumption of fraud. The fact that Richardson only lived 68 days after the deed does not render the consideration inadequate, although the obligation imposed upon the grantee was perhaps made less onerous. As said in the case of *Dunaway v. Dunaway*, 105 S. W. 137, 32 Ky. Law Rep. 29:

"The test is: Was it fair and reasonable when entered into? The grantor might have lived several years longer than he did, and at the time the deed was made, it seemed likely that he would live for several years. In view of the condition of the grantor's health, because of his physical infirmity, and the probability that he would in time become more and more helpless, and a charge of constant care and attention, the agreement of the grantee to support him the balance of his life, and to decently inter him, made a sufficient consideration to uphold the deed."

The evidence makes it clear that the land conveyed was not an excessive payment for the services rendered by Colyer during the 68 days that he waited upon and provided for Richardson.

The judgment is affirmed.

ALLEN'S ADM'R v. PACIFIC MUT. LIFE INS. CO.

(Court of Appeals of Kentucky. Nov. 9, 1915.)

INSURANCE ⚡114—**ACCIDENT POLICIES—INSURABLE INTEREST—BENEFICIARY.**

Where deceased procured an accident policy which named as the beneficiary a woman to whom deceased was related neither by blood nor marriage, though she was designated as his wife, and deceased paid all of the premiums, the beneficiary was entitled to the amount due under the policy, though she had no insurable interest in deceased's life.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 136-138; Dec. Dig. ⚡114.]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

Action by Leon Allen's administrator against the Pacific Mutual Life Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

C. B. Shimer and Geo. E. Phillips, both of Covington, and A. C. Hall, of Newport, for appellant. Barbour & Bassmann, of Newport, for appellee.

CARROLL, J. On January 26, 1912, the appellee insurance company issued to Leon Allen, upon his request and application, a policy of accident insurance in which it agreed to pay "to the insured or his beneficiary, Mrs. Clara Allen, his wife, or in the event of her prior death, to the executors, administrators, or assigns of the insured," the principal sum of \$1,000, in the event the insured came to his death by accidental causes.

This suit was brought by the administrator of Allen to recover the sum of \$1,000, on the ground that he had come to his death from accidental causes within the meaning of the policy. The petition further averred that:

"Said Clara Allen, designated in said policy of insurance as the wife of said insured and as the beneficiary of said policy, was not and is not the wife of said Leon Allen, and was not related to him by blood or marriage, and was not a creditor of said insured, nor was she the affianced wife of said insured."

It was further averred that all the premiums due on the policy had been paid by Leon Allen in the manner and at the times required by the policy contract, and that the company had not paid to Clara Allen any part of the sum stipulated in the contract.

The lower court sustained a general demurrer to the petition, and the administrator appeals.

The administrator is endeavoring to collect the money due under the contract upon the theory that Clara Allen had no insurable interest in the life of the insured, and, as the contract could not be enforced for her benefit, the estate of the insured was entitled to the insurance. But if, as averred in the petition, the contract was procured by, and all the premiums due on the policy were paid by, the insured, he had the right

to designate Clara Allen as the beneficiary, and she was entitled, upon his death, to recover the amount due under the policy, although she had no insurable interest in his life. This question has been settled by this court in *Hess v. Segenfelder*, 127 Ky. 348, 105 S. W. 476, 14 L. R. A. (N. S.) 1172, 128 Am. St. Rep. 343; *Rupp v. Western Life Indemnity Co.*, 138 Ky. 18, 127 S. W. 490, 29 L. R. A. (N. S.) 675.

As the beneficiary named in the policy is entitled to the insurance, it necessarily follows that the administrator cannot recover it for the estate, and therefore the judgment dismissing his suit is affirmed.

MOTTLEY v. ROEMER et al.

(Court of Appeals of Kentucky. Nov. 9, 1915.)

VENDOR AND PURCHASER ⚡285—**ENFORCEMENT OF LIEN—MATURITY OF NOTES—JUDGMENT.**

In an action to enforce the lien of a judgment creditor who had purchased at an execution sale and obtained a lien subordinate to the liens of the assignees of defendant's seven purchase-money notes, making such assignees parties defendant and calling upon them to assert their liens, where it appeared that only two of the notes had matured, a judgment that the land was indivisible, without materially impairing its value and for its sale, was invalid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 800-807; Dec. Dig. ⚡285.]

Appeal from Circuit Court, Warren County.

Action to enforce a lien by E. Roemer against J. F. Mottley and others, with cross-petition by the other defendants. From a judgment and order of sale, defendant Mottley appeals. Reversed.

Bradburn & Basham, of Bowling Green, for appellant. Wright & McElroy, of Bowling Green, for appellees.

HANNAH, J. This appeal involves the same matters as the case of *Roemer v. Mottley*, 164 Ky. 313, 175 S. W. 645. J. F. Mottley bought of R. B. Chaney and others, on December 5, 1911, a tract of land in Warren county, containing 128 acres, for which he paid \$1,500 in cash and executed seven promissory lien notes, each in the sum of \$223.45, and due on the 1st days of January of the years 1913 to 1919, both included. These notes were sold and transferred by the vendors of the land to James T. Blewett; and Blewett sold and transferred the second note to Warren Lodge No. 225 I. O. O. F. of Rockfield. In August, 1913, appellee Roemer sued Mottley in the Warren quarterly court and obtained a judgment against him in the sum of \$195.45, execution upon which he caused to issue from the office of the clerk of the Warren circuit court, and to be levied upon the 128 acres of land mentioned. At the execution sale, Roemer became the purchaser, for the sum of \$243.02, the amount of the debt, in-

terest, and costs. The land being already incumbered with the purchase-money lien notes, Roemer by his purchase at execution sale obtained only a lien thereon subordinate to the purchase-money liens of Blewett and the Warren Lodge. Kentucky Statutes, § 1709, subsec. 1. On February 3, 1914, Roemer instituted this action in the Warren circuit court against Mottley, to enforce the lien so obtained by him. Blewett and the lodge were made parties defendant as other lienholders, and called upon to assert their liens. They answered on March 3, 1914, and set up the seven notes heretofore mentioned, making their answer a cross-petition against Mottley, and praying for an enforcement of their liens. This pleading was filed March 3, 1914; and on the same day Mottley filed his answer to Roemer's petition, asserting that the debt due him was created after the purchase of the land in question, and that he was entitled to a homestead therein as against Roemer's debt. By reply filed on March 14, 1914, the plaintiff Roemer denied that Mottley was a bona fide housekeeper, or entitled to a homestead exemption. On the same day, March 14, 1914, a judgment was entered, wherein it was adjudged by the court that the land involved was indivisible, without materially impairing its value, and that a sale thereof be had for the purpose of satisfying the liens of Blewett and the lodge. No sale was ordered in satisfaction of Roemer's lien; the question of the priority of his lien over the homestead right of the defendant, Mottley, and the question of Mottley's right to a homestead in the land in question, were both reserved for future adjudication. The land was appraised at \$3,000; and at the sale it was bid in by the plaintiff Roemer for \$2,000. Mottley thereupon filed exceptions to the report of sale. The chancellor sustained the exceptions, and set the sale aside. On appeal from the judgment setting the sale aside, the action of the chancellor was approved by this court on the ground that it was error to order a sale of the land until the maturity of all the notes. *Roemer v. Mottley*, supra.

This present appeal is from the original judgment and order of sale, and is prosecuted by Mottley. It was pending when the other appeal was decided by this court; but, for some reason, a consolidation of the two appeals was not sought.

There is nothing in the record before us that shows any right to a judgment on all the notes. At the time this judgment was rendered, only two of the seven notes had matured, and the other five were not yet due. See *Leopold v. Furber*, 84 Ky. 214, 1 S. W. 404, 8 Ky. Law Rep. 198; *Gentry v. Walker*, 93 Ky. 407, 20 S. W. 291, 14 Ky. Law Rep. 351; *Gunn v. Orndorff*, 67 S. W. 372, 68 S. W. 461, 23 Ky. Law Rep. 2369.

The judgment is therefore reversed.

LUCAS LAND & LUMBER CO. v. COOK'S ADM'R.

(Court of Appeals of Kentucky. Nov. 9, 1915.)

1. MASTER AND SERVANT §103—INJURY TO SERVANT—MASTER'S LIABILITY.

Whatever was done in attempting to replace a log, whereby the sawyer was killed, being actually done by him, or supervised and directed by him, the men working with him obeying his signals or orders, the master was not liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 175; Dec. Dig. § 103.]

2. MASTER AND SERVANT §129—INJURY TO SERVANT—PROXIMATE CAUSE.

The act of a servant, while hauling logs into a sawmill, in striking a log, moving it out of place on the skidway, was not the proximate cause of the sawyer's injury while attempting to replace it, there being no causal connection between it and the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 257-263; Dec. Dig. § 129.]

3. MASTER AND SERVANT §115—SAFE PLACE TO WORK.

There is no failure to furnish a sawyer a reasonably safe place to work, the mill being built in the way sawmills are usually and generally built, and containing no dangerous places beyond such as are necessarily found in all sawmills.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 205, 206; Dec. Dig. § 115.]

4. NEGLIGENCE §121—NECESSITY OF PROOF.

Negligence will not be presumed, but must be alleged and proven.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.]

Appeal from Circuit Court, McCracken County.

Action by William H. Cook's Administrator against the Lucas Land & Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed.

Wheeler & Hughes and Berry & Grassham, all of Paducah, for appellant. Hendrick & Nichols, of Paducah, and James T. Miller, of Nashville, Tenn., for appellee.

MILLER, C. J. This is an appeal from a judgment of the McCracken circuit court which awarded the appellee, as the administrator of the estate of W. H. Cook, deceased, the sum of \$8,500 damages against the appellant, for having negligently caused the death of said Cook.

The petition charges that Cook came to his death: (1) By reason of the gross negligence and carelessness of the other employes of appellant, who were laboring in a different line of employment from Cook; (2) from the defective machinery and appliances with which he was working; and (3) from the appellant's failure to provide Cook with a reasonably safe place within which to do his work.

Henry Schnuck, appellant's foreman, was also made a defendant, but he was relieved

of all blame by a peremptory instruction given by the court at the conclusion of the evidence.

For a reversal appellant insists there was no evidence of negligence upon the part of the appellant, that Cook's death was caused solely by his own negligence, and, consequently, that its motion for an instruction, peremptorily directing the jury to find for the defendant, should have been sustained.

The testimony is quite vague and fragmentary in many essential particulars; but, as we read it, the following facts appear:

Appellant's mill is located on the bank of the Tennessee river, at Paducah, and Cook had worked as sawyer in the mill for quite a while. The logs which he handled were cut by a belt saw. The logs were brought up into the mill from the river on a log car, which was pulled along a track with a cable that coiled around a large drum, or "bull wheel," in the mill, which was operated by steam power. When Cook was engaged in sawing a log, and in his regular position, the saw was at his right side, and a little in front of him. And, running along in front of him, on a track, was the saw carriage, which was operated by steam, and controlled by a lever at Cook's right hand. At his left side were the "skids" or "skidway," a slightly sloping platform, on which the logs were placed before being rolled onto the carriage for the sawyer. Behind the skidway, on a track parallel to the track on which the saw carriage moved, the log car above mentioned brought the logs up from the river, and, when the logs reached the mill, they would be rolled off on the skidway.

Between Cook and the saw machinery at his right, there was a wooden partition. The saw carriage was propelled by steam, at a rapid speed, along a steel track, and was used to convey the logs to and from the steel belt saw that sawed them into lumber. In front of Cook and within his reach, there were two levers and a foot tread. With the foot tread he threw the logs from the skidway onto the saw carriage; with one of the levers he operated what is called the "niggerhead," which was used to adjust the log after it had been thrown onto the saw carriage; and he used the other lever, as above stated, to control the movements of the saw carriage along the track in front of him.

Upon the occasion of the accident, the log car had been pulled up from the river with a load of logs, and when it entered the mill, the end of one of the logs on the car struck the end of a log lying on the skidway, and knocked or pushed it about 3 feet out of its original position, and so as to interfere with Cook's operations as sawyer. One end of this log was off the skidway and rested against the wooden partition which separated Cook from the saw machinery. When Cook discovered this danger, he motioned to one or

more of the employes, directing them to place a chain around the log in order to drag it back to its proper place on the skidway. This chain was attached to a pulley overhead. After the chain had been attached to the log, Cook took a stick and attempted to press or push the end of the log with it, or, perhaps, to hold the end in position. But when the power was applied to the chain pulley under Cook's signals and directions, the end of the log nearest him swung round, struck the unlocked lever, which controlled the saw carriage, pushed against the stick Cook was using, and caused him to step back and place one foot in the track along which the carriage passed, or in some way, to get in the path of the carriage. The log evidently struck Cook and the lever about the same time, knocking Cook onto the carriage and causing the lever to release the saw carriage and start it forward at a rapid speed towards the saw, which was running at full speed. Cook was carried against the saw, and so badly mangled that he died in a few minutes thereafter.

To sustain the charge of negligence, appellee insists that the place where Cook was doing his work was unprotected; that there was nothing between the place where Cook was required to stand and the skidway, except a post about 18 inches high and about 10 feet to his rear, which afforded him practically no protection from the logs on the skidway. This fact, in connection with the act of another employe in hauling the log from the river so as to strike the end of the other log and throw it out of position on the skidway, constitute practically all the acts of negligence charged against the appellant.

It further appears that the lever which controlled the saw carriage was left unlocked by Cook when he attempted to have the log removed, and that it was the practice, if not the duty of the sawyer, to lock the lever whenever he left it beyond his reach, or control.

[1, 2] From a careful reading of all the evidence, we are clearly of opinion that it not only fails to show any defective appliances, or other facts tending to prove that appellant was negligent, but it shows beyond question that whatever was done at the time of the accident was either actually done, or supervised and directed by Cook. He was in charge of the sawing operations, and the proof of the appellee shows that Cook initiated the movement which resulted in his death. The act of the man in charge of the log car in permitting the log on the car to strike the end of another log lying on the skidway and knock it out of place was not the proximate cause of Cook's death. It might have remained in that position on the skidway indefinitely without causing injury to any one, if Cook had not attempted to remove it. In order to establish proximate cause, it is necessary that a causal connection be shown between the negligent act and the injury. The

act must have been the cause which produced the injury. The injury was caused, in this case, by the independent and subsequent act of Cook.

Moreover, all the work done in the mill in connection with the placing of logs was necessarily done with a view of placing the logs where the sawyer could handle them, and the proof clearly shows that the men working with Cook obeyed his signals or spoken orders, to accomplish that purpose. See *Red River Lumber Co. v. Newkirk*, 12 Ky. Law Rep. 635.

[3] The claim that appellant failed to furnish Cook with a reasonably safe place in which to do his work is not sustained by the proof. On the contrary, the proof shows that appellant's mill was built in the way that sawmills are usually and generally built, and contained no dangerous places beyond such as are necessarily found in all sawmills. It is impossible to avoid the conclusion that the one controlling act that caused this unfortunate accident to Cook was his act in attempting to remove the log.

[4] This court has repeatedly held, in conformity with the weight of authority generally, that negligence will not be presumed; it must be alleged and proved. 25 Cyc. 1446; *Johnston's Adm'r v. East Tennessee, Virginia & Georgia Ry. Co.*, 30 S. W. 415, 17 Ky. Law Rep. 67; *L. & N. R. Co. v. McGary's Adm'r*, 104 Ky. 509, 47 S. W. 440, 20 Ky. Law Rep. 691; *Vissman v. Southern Ry. Co.*, 89 S. W. 502, 28 Ky. Law Rep. 429, 2 L. R. A. (N. S.) 469; *Rellance Textile Works v. Williams*, 136 Ky. 579, 122 S. W. 207, 124 S. W. 850.

We conclude, therefore, as was aptly said in *Louisville Gas Co. v. Kaufman-Straus & Co.*, 105 Ky. 158, 48 S. W. 434, 20 Ky. Law Rep. 1069, that the evidence is not sufficient to authorize a judgment transferring the money or property of the defendant to the possession and profit of the plaintiff, and that the circuit court should have sustained appellant's motion for a peremptory instruction, directing the jury to find for the defendant. Judgment reversed.

WHITAKER et al. v. WHITAKER'S ADM'R. (Court of Appeals of Kentucky. Nov. 10, 1915.)

1. WILLS §714 — CONSTRUCTION — INTEREST DEVEISED — SATISFACTION OF CLAIMS.

Where a testator who used his wife's money in acquiring land, and executed an instrument reciting his indebtedness, thereafter devised to her the land in fee, together with a life estate in all of his other property, and the widow, though she survived her husband several years, made no attempt to enforce the obligation, the devise in fee will be deemed a satisfaction of her lien on such land, under the rule that, where a devise is equal or greater in value than a claim against the testator, it will be deemed a satisfaction, and in view of the fact that a court of chancery will, after a long lapse of years when the parties in interest have died, give

such effect to old transactions as the parties by their conduct have given, this being particularly true in the instant case, as the couple were childless.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1698-1708; Dec. Dig. §714.]

2. WILLS §439 — CONSTRUCTION — PURPOSE OF CONSTRUCTION.

The only purpose of rules of construction is to give effect to the intent of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. §439.]

Appeal from Circuit Court, Boone County.

Action by Sarah F. Whitaker's administrator against Mary L. Whitaker and others. From a judgment for plaintiff, defendants appeal. Reversed, with directions to dismiss.

Clore, Dickerson & Clayton, of Cincinnati, Ohio, for appellants. S. Gaines, of Burlington, for appellee.

TURNER, J. In 1882 Thomas S. Whitaker and Sarah F. Whitaker had been married for several years, and lived upon his farm of about 300 acres in Boone county. They did not then have, and never had, any children. At that time he bought another tract of land of about 38 acres, known as the Gaines farm, and in paying for same used \$1,200 of her money. They moved to the Gaines farm, and lived there until his death, in 1908. After his death there was found among his papers the following instrument:

"\$1,200.00

"Boone County, Kentucky, May 5th, 1885.

"Due Sarah F. Whitaker twelve hundred (\$1,200.00) dollars on demand, it being the amount she paid on the land at Gainesville bought of A. S. Gaines. Witness my hand and seal.
Thomas S. Whitaker."

Thomas S. Whitaker left a will, by the terms of which he devised to his wife in fee the Gaines farm of about 38 acres, above referred to, and also devised to her for life the 300-acre farm upon which they had formerly lived, and devised to her for life all of his personal estate. The value of the Gaines farm was \$3,000 or more, and the value of the 300-acre tract about \$10,000, and his surplus personal property after the settlement of his estate amounted to something over \$4,000. The wife was named as executrix in the will, but declined to qualify, whereupon her nephew, J. M. Grant, qualified as administrator with the will annexed, and proceeded to, and did, settle the estate.

Shortly after the death of Thomas S. Whitaker the paper dated May 5, 1885, was turned over to her by the administrator, and, although she had possession of the paper until her death in May, 1912, it was never verified by her or presented as a claim against the estate of her husband during her lifetime. After her death the same J. M. Grant qualified as her administrator, verified this claim, and brought this equitable action against the devisees in remainder of the 300-acre tract of land, and seeks to subject same to the payment of the claim. The lower

court entered a judgment for the plaintiff, and adjudged the same to be a lien upon the 300-acre tract, and the devisees in remainder have appealed.

The only question necessary to be passed upon is whether the devise by the husband to the wife of the Gaines farm is to be treated as a satisfaction of her claim. Whitaker in his will first provided for the payment of all his just debts and funeral expenses. He then gave to his wife in fee the Gaines farm. He then gave to her the 300-acre farm for life, and in remainder gave it to his two brothers and the children of his deceased sister. He then gave her all of his personal property for life, and in remainder to his heirs. This will was dated in June, 1906, more than 24 years after the purchase of the Gaines farm, and more than 21 years after the execution by him of the paper above quoted. That paper was found among his effects after his death, and it does not appear that his wife ever had possession of the same until then. In his will he does not mention any debt owing to his wife, nor does he refer in any manner to the fact that she had furnished any part of the money to pay for the Gaines farm.

[1,2] There are many exceptions to the general equitable rule that, where a legacy or devise is equal to or greater in value than a claim against the testator, the legacy or devise will be deemed a satisfaction; in fact, there is a tendency of the courts to seize upon very slight circumstance out of which to make an exception to the rule. For instance, the rule will not be applied where the legacy is of less value than the debt; nor where there is a difference in the time of payment of the debt and the legacy; nor where they are of a different nature as to the subject-matter; nor where there is an express direction in the will for the payment of debts. *Cloud v. Clinkenbeard's Ex'rs*, 8 B. Mon. 397, 48 Am. Dec. 397. These exceptions, however, are all based upon the idea that they evidence a purpose by the testator that the bequest or devise shall be treated as a bonus, rather than a satisfaction of the claim.

But the facts of this case do not bring it within any of these exceptions; the value of the devise is largely in excess of the claim. The devise and the claim refer to the same subject-matter, for the paper quoted shows that the money which the wife had advanced was used in paying for the property which was devised to her. The claim had been long since due at the time of his death, and the devise took effect at his death. Nor can the general direction in his will to pay his debts, under the circumstances of this case, be deemed to operate as an exception to the general rule; for, in the first place, it is apparent that he was not treating this claim held by his wife as an ordinary claim against his estate, but was treating it, as is unmistakably shown by the

paper dated the 5th of May, 1885, as an equitable lien which she had against the Gaines farm, into which her money had gone, and it is not unnatural that when he came to make his will 24 years later he should treat the devise to her in fee of the Gaines farm, worth more than her lien upon it, as a satisfaction of her claim. In the next place, the subsequent conduct of the widow, who survived her husband 4 years, and, being cognizant of all the facts and in possession of this paper, stood by and saw his estate fully settled without verifying or presenting this claim for payment, is inconsistent with any other view than that she treated, and knew that her husband intended, the devise to her of the Gaines farm in fee as a satisfaction of this claim.

There is no safer or more salutary equitable rule than that the chancellor, after a long lapse of years, when the parties directly in interest have all died, will give such effect to the old transactions between them as they themselves by their conduct have given. It is not unfair to assume, from the tender and intimate relations which existed between this old couple, that the wife after his death knew that he intended the devise of the Gaines farm to her to be in satisfaction of her claim, and, so knowing, and being a conscientious woman, declined to present her claim; at any rate, no other effect in law can be given to her failure to do so. We have carefully examined all of the cases in this state wherein exceptions to the general equitable rule have been applied, and in none of them do we find the facts to be in anywise similar to those in this case.

The case of *Cloud v. Clinkenbeard's Ex'rs* was an action by the plaintiff on an implied promise to pay for services rendered, and the executors sought to defeat a recovery by relying upon the provisions of the decedent's will wherein he had bequeathed the claimant \$500 and some specific personal property. In that case the bequests were less in value than the indebtedness and made payable at a different time, and it was held that they were not to be deemed to be given in satisfaction of the debt.

The case of *Lisle v. Tribble*, 92 Ky. 304, 17 S. W. 742, 13 Ky. Law Rep. 595, was where the husband died owing his wife \$1,000, evidenced by note. After his death she brought a suit on the note, and the lower court gave her judgment for the amount of the note, but credited it by the value of certain personal property which he had bequeathed to his wife in his will. This the court said was error, because the value of the personal property was less than the amount of the debt, and because the presumption of satisfaction will not arise where the devise is of a different nature from the subject-matter of the indebtedness, and because the testator had made a provision in his will

for the payment of his just debts. But in that case the claim of the wife was an ordinary or general claim against his estate, and did not represent a lien upon any particular property, and the circumstances were such that he would be presumed to have intended to provide for the payment of her debt as well as all others; it being a general debt, and not being a lien upon any particular property nor directly connected with or associated with any particular property held in his name.

The case of *Buckner's Adm'r v. Martin*, 158 Ky. 522, 165 S. W. 665, L. R. A. 1915B, 1156, was where a mother devised to her unmarried daughter a defeasible fee in certain property worth twice as much as the mother owed the daughter as her guardian, and it was held that this devise was not intended as a satisfaction of the debt she owed as guardian.

In our view, the facts of this case do not bring it within any of the exceptions to the equitable rule. The husband nearly a quarter of a century after his wife's money had been invested in the Gaines farm, during which period he had recognized the fact that she had a lien thereon, when he came to make his will, instead of providing otherwise for the payment of this money, devised specifically to her in fee the tract of land upon which she had a lien, and the wife, although she lived for four years after his death, failed to verify or to present any claim against his estate on that account, presumably because she knew the devise was intended as a satisfaction. To permit her estate, after her death, to subject the land held by the remaindermen under her husband's will would be to thwart not only the testator's purpose, but his wife's as well. Where a testator devises to his wife specific property upon which she has a lien, the property being of greater value than the lien, then being childless, and it is apparent from his will that he intends that the remainder of his property at her death shall go to his kindred, the devise will be treated as a satisfaction of the lien, and particularly where he has been otherwise generous with his wife, who after his death acquiesced in the devise and treated it as in satisfaction, and failed in her lifetime to verify and file her claim against his estate for the amount of the claim. The rule is only one of construction, and all rules of construction in determining what wills mean must give way before the intention of the testator, when it can be fairly ascertained. In this case the wife had no children. She was not only given the fee-simple title to the Gaines place, but was given for life all his property of every kind, which doubtless furnished her an income far in excess of her needs. The testator, after thus generously providing for her, plainly next considered his own blood relatives, for he gave them, after the expira-

tion of her life estate, all of his property, except the Gaines place, which she had helped to pay for. In the light of these conditions, and the fact that his widow by her conduct after his death herself so construed his will, it would plainly do violence to his purpose to say that he intended his wife to have the Gaines farm and, in addition, to exact from his kindred the payment of her claim out of their remainder in the other land. The devise in fee of the land upon which she had a lien, being greater in value than the lien, must, under such conditions, be deemed in satisfaction of such claim, notwithstanding the direction for the payment of debts; for it is apparent that he did not consider this claim a debt at the time he simultaneously devised her the fee in the Gaines farm, upon which it was a lien.

The judgment is reversed, with directions to dismiss plaintiff's petition.

PHILLIPS v. CORBIN & FANNIN.

(Court of Appeals of Kentucky. Nov. 10, 1915.)

1. MASTER AND SERVANT §125 — MASTER'S LIABILITY—APPLIANCES FOR WORK.

While a master is bound to furnish the servant reasonably safe appliances for work and to exercise diligence to keep them in a reasonably safe condition, he is liable for injury from a defect only when he knows of such defect, or should have known of it by the exercise of ordinary care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 243-251; Dec. Dig. § 125.]

2. TRIAL §296—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In a servant's action for injury, where plaintiff's evidence showed a defect in the machinery, and defendant's evidence was that the machine was not defective, and that plaintiff was negligent, and the instructions defined negligence and ordinary care and stated that it was the master's duty to furnish reasonably safe appliances for work, and that on his failure to do so, resulting in the servant's injury, he would be liable, an instruction that if the servant was injured by failing to exercise that degree of care for his own safety which a person of his age and experience would ordinarily use under like circumstances, and but for want of such care the injury would not have occurred, he could not recover, read with the other instructions, was not misleading, as it merely indicated that the contributory negligence referred to was not any negligence arising from knowingly operating defective machinery.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 706-713, 715, 716, 718; Dec. Dig. § 296.]

3. MASTER AND SERVANT §206 — MASTER'S LIABILITY—ASSUMPTION OF RISK.

The dangers which a servant assumes when he undertakes his work are those inherent in the work and growing out of it; in other words the necessary dangers.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 550; Dec. Dig. § 206.]

4. MASTER AND SERVANT §217 — MASTER'S LIABILITY—ASSUMPTION OF RISK—DEFECTS.

In a contract of employment a servant never assumes risks arising from the use of defective tools and appliances unless he knows of

the defect, or it is so obvious that his work will make it known to him, and he continues regardless of the defect; and, if he knows of the defect, or it is obvious to him, he must exercise ordinary care to save himself from injury from it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. ☞ 217.]

5. MASTER AND SERVANT ☞103—MASTER'S DUTY—TOOLS AND APPLIANCES—DELEGATION.

The master's duty of providing reasonably safe tools and appliances for work and exercising ordinary care to keep them reasonably safe is one which he cannot escape by delegating to another.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. ☞103.]

6. APPEAL AND ERROR ☞1064 —, HARMLESS ERROR—INSTRUCTIONS.

In a servant's action for injury, error in an instruction, making him assume the dangers of a defective appliance if by ordinary care he could have known of the danger therefrom, was not prejudicial, where he testified that he knew of the alleged defect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. ☞1064.]

Appeal from Circuit Court, Pike County.

Action by Eli Phillips against Corbin & Fannin. Judgment for defendant and plaintiff appeals. Affirmed.

J. S. Cline, of Pikeville, for appellant.
Roscoe Vanover, of Pikeville, for appellee.

HURT, J. The appellant, Eli Phillips, who was a young man 27 years of age, was employed by the appellees, Corbin & Fannin, in the operation of what is called a "lister," being a portion of the machinery of a mill, which was used in the manufacturing of staves for the making of barrels. The operation of the mill and the persons engaged in working at it were under the direction of Corbin, and Fannin resided at another place. The "lister" is a portion of the machinery of the mill, designed and used for the purpose of removing knots and rough edges from the sides of the stave bolts. It is constructed of four posts, four inches in width and the same in thickness, which were joined together near their ends by crosspieces of timber, thus making a frame with four sides, each of which was of the same width and height. Across the top of the frame a mandrel was extended, which rested upon the top pieces of the frame, and upon each side was fitted into "boxing" made of cast or iron, which was attached to the top pieces of the frame, and thus held the mandrel in position. A small circular saw, about eight inches in diameter, was fitted upon the mandrel. The mandrel passed through the saw at its center. The mandrel was connected with the motive power of the mill by a belt or other contrivance, which caused the mandrel to revolve, and thus gave action to the saw. Upon the top of the mandrel a small table was fixed. Through a slit in the table the saw revolved.

About two inches of the saw protruded above the table, and the remainder of the saw was beneath the table. The work of "lister" the stave bolts was accomplished by the operator taking the bolt in his hands and pressing it against the saw, when the saw would cut off the portion desired. A small guidepost was attached to the table, at a distance of three or four inches from the saw, to control the action of the bolt and the portion cut off, to prevent it turning backward toward the operator, and a narrow piece of board was nailed upon the side of the table to prevent the hands of the operator from coming in contact with the saw underneath the table. The work did not require on the part of the operator any great degree of skill, and the knowledge of how to do the work efficiently was acquired in a very short period of time, but the work from the nature of doing it and the appliances used was inherently and necessarily attended with considerable danger to the hands of the operator, if he failed to be careful and to observe his actions and the saw closely.

The appellant, while engaged in operating the "lister" as a servant of the appellees, suffered the misfortune of his hand coming into contact with the saw, which injured three of his fingers. This occurred on the 28th day of July, 1911. On the 18th day of July, 1912, he filed this petition, in ordinary, and thereafter an amended petition against the appellees, in which he claimed that the appellees negligently and carelessly failed to use ordinary care to provide him with a reasonably safe place in which to work, and reasonably safe appliances with which to do the work; that the table upon which the saw was operated had become defective and unsafe, and in "lister" the stave bolts vibrated and shook; that an arm of the saw frame had become defective and loose, and by reason of the defective and unsafe condition of the table and arm of the saw frame, his hand was thrown against the saw and permanently injured; that he was inexperienced in the work, and was put to work with these defective appliances without being instructed as to the nature of the work or the manner in which it should be performed; that the appellees and their servants superior in authority to him knew, or could with the exercise of ordinary care have known, of the defective condition of the table and saw frame, and that the condition of same was not known to him, and could not have been known by him by the exercise of ordinary care. He sought to recover the sum of \$3,000 in damages.

The allegations of the petition and amended petition were all traversed either by answer or of record, and in addition the appellees pleaded that appellant was negligent and careless, and his injuries were caused by his own negligence, and but for such negligence

upon his part he would not have suffered same, and, furthermore, pleaded that the dangers which resulted in the injuries to appellant were incident to the labor in which he was engaged, and were known to him at and before his injuries or employment, and that they were such as were assumed by the appellant when he sought and was given the employment. The allegations in regard to contributory negligence and assumed risk were controverted upon the record.

The trial of the case resulted in a finding by the jury in favor of the appellees, and a judgment was rendered accordingly. The appellant moved to set aside the verdict and judgment and to grant him a new trial, which being overruled, he has appealed to this court.

The appellant insists that he ought to be granted a new trial because of errors made by the court, prejudicial to his substantial rights, in giving to the jury the instructions 3 and 4, to which he objected at the time, and, his objections being overruled, he excepted. The instructions were given by the court upon its own motion; and, to determine whether any error prejudicial to appellant's substantial rights was made in the giving of instructions, it will be necessary to consider the evidence heard upon the trial. The appellant, testifying for himself, stated that he was 27 years of age; that he had engaged, before the time of his injuries, in working at different duties about the mill, and had seen the "lister" in operation, but had given it no consideration; that he was not shown or instructed as to the work or how it should be performed before engaging in it; that he had worked at "lister" stave bolts for only one day and a half of another day, when he received the injuries; that a brace, which supported the mandrel upon one end, was loose; that he discovered that it was loose, at once, after he commenced to work; that it fell down three or four times during the time he was employed, and that he would place it in position again; that when the brace would fall down, this would cause the saw to incline to one side; that the brace fell and caused the saw to incline to one side while he was "lister" a stave bolt, and the strip, being cut from the side of the bolt, broke off, and that this had the effect of throwing his hand against the saw, underneath the table, and injuring his hand. He does not claim or state in his evidence that there was anything unsafe about the place in which he was assigned to work, or that the table vibrated or shook, or that there was anything defective about the appliances, except in regard to the brace. He furthermore stated that, at the times that the brace fell down, the appellee, Corbin, was in the mill and supervising and directing the operations of it, but he did not call the attention of Corbin to the unsafe condition of the "lister," arising from the defec-

tive condition of the brace, but he informed Holbrook of it, who was a hand working at the mill, and whom he says had the duty of looking after the machinery, but who does not appear to have had any authority and whom he did not call as a witness. He does not claim or show that there was anything about the operation of "lister" the staves or the machine with which he was not acquainted at the time of the injury. He was wearing a pair of gloves at the time he was injured, but stated that he had not been informed by any one that it was dangerous to wear gloves in doing such work. He admits having been warned by Cager Spradlin, a workman at the mill, that the work was dangerous and to be careful. He further stated that after he was injured, about 3 o'clock p. m., another proceeded with the operation of "lister" the stave bolts, until the coming of night; that he knew of the unsafe condition of the machinery by reason of the brace being loose and calculated to fall down during the operation of the machine, before the time of his injury, but did not know that the effect of its falling down would be to throw his hand against the saw.

The appellees introduced evidence which conducted to prove that appellant had been engaged in operating the "lister" 8 days, instead of 1½ days, at the time of his injury; that before he was permitted to begin "lister" the stave bolts, Corbin, one of the appellees, went with him and showed him the nature of the work and how to perform it, and cautioned him that the work was dangerous if he did not exercise great care; that at the time of the injury the machine was in perfect repair; that there was no brace which would fall down, or could possibly fall down; that the machine had been in use for some years before, and without any repairs, and the use of it was continued for several months after the injury; that the appellant was careless in his work, and so much so that other persons engaged at the mill, before his injury, cautioned him in regard to it; that he did his work with canvas gloves upon his hands, and that he had been warned that to do so was unsafe and dangerous; that the appellant's work did not necessitate his putting his hands underneath the table at all.

[1] The court gave to the jury instructions, by the first of which it defined negligence and ordinary care. By the second instruction, the jury was, in substance, told that it was the duty of the appellees to furnish appellant with appliances which were reasonably safe with which to perform his work, and if the appellees negligently furnished to appellant a table, upon which the saw was operated, that was defective and vibrated and shook, or that a brace of it was defective or loose, and that appellant was injured thereby, it should find for appellant, and, also, fix the measure of his damages. This

instruction seems to have been more favorable to appellant than he was entitled to. While it is a primary duty of the employer to furnish the servant reasonably safe appliances with which to work, and to exercise diligence to keep them in a reasonably safe condition, he is liable to the servant, for damages resulting from such defects, only when he knew of the defective condition of the appliances, or should have known of it by the exercise of ordinary care, in his duty to know of their condition.

[2] By the third instruction the jury was told, in substance, that if the appellant suffered injury by failing to exercise that degree of care for his own safety, in the use and operation of the saw and table, which a person of his age, capacity, and experience would ordinarily use under like or similar circumstances, and but for want of such care upon his part, the injury would not have occurred, it should find for appellees. In the light of instruction No. 2, the contributory negligence referred to in the above instruction, as a defense to appellant's cause of action, does not constitute a defense to any claim for injuries suffered by appellant on account of the alleged defective appliances with which he was working, but applies to his negligence in failing to exercise care for his own safety, in the manner of his doing his work and operating the saw, without reference to whether its condition was defective or otherwise. While this view of the law governing the case might have been more aptly stated, it does not appear that the jury could have been misled, when all of the instructions are considered together, as the instruction clearly indicates that the contributory negligence referred to is not any negligence which would arise from knowingly operating defective and unsafe machinery by the appellant.

[3] By the fourth instruction the jury were advised, in substance, that in undertaking the services for which appellant was engaged, he assumed all the risks ordinarily incident to the performance of such services, and that it was his duty to exercise ordinary care to protect himself from dangers incident to the employment, and if the appellant knew, or by the exercise of ordinary care could have known, that there was danger from the defective appliances upon which the saw was operated, and with such knowledge, or means of knowledge, continued to work at the saw, and failed to take reasonable care to avert the danger, and was thereby injured, the law was for the appellees, and the jury should find for them. This instruction was erroneous, in that it made the appellant to assume the dangers of an alleged defective appliance with which he was assigned to work, if by the exercise of ordinary care he could have known of the danger arising from the defect. The dangers which a servant assumes when he undertakes a work for an

employer are such as are inherent in the work and grow out of its nature and, in fact, are necessary dangers, and the servant, in the contract, undertakes the risks arising from such necessary dangers.

[4, 5] In a contract of employment, a servant never assumes risks which arise from the use of defective tools and appliances provided for him with which to do his work. He has the right to assume that the master will perform his duty of providing him reasonably safe tools and appliances with which to work, and will exercise ordinary care to keep them reasonably safe. In fact, this is a duty the master cannot escape by delegating it to another. It seems that in *Ashland Coal & Iron Co. v. Wallace*, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207, 19 Ky. Law Rep. 853, such an instruction as the above was approved with reference to the safety of a place in which to work, but in adjudications subsequent that rule has not been adhered to. The rule which applies to risks assumed by a servant, arising from defective appliances, is that the servant does not assume a risk from a danger arising from a defective tool or appliance unless he knows of the defect and danger, or it is so obvious that the performance of his duties will make it known to him, and he then continues regardless of the defect and danger. If he knows of the defect and danger, or they are so obvious that the performance of his duties will make them known to him, he must exercise ordinary care to save himself from injury from them. *Ahrens & Ott Mfg. Co. v. Rellihan*, 82 S. W. 993, 26 Ky. Law Rep. 919; *Covington Saw & Mill Mfg. Co. v. Clark*, 116 Ky. 461, 76 S. W. 348, 25 Ky. Law Rep. 694; *Ohio Valley R. R. Co. v. McKinley*, 33 S. W. 186, 17 Ky. Law Rep. 1028; *Henderson Tobacco Co. v. Wheeler*, 116 Ky. 322, 76 S. W. 34, 25 Ky. Law Rep. 495; *Crab Tree Coal Min. Co. v. Samples' Adm'r*, 72 S. W. 24, 24 Ky. Law Rep. 1704; *A. & E. Enc. of Law*, vol. 20, p. 55; *Pfisterer v. Peter*, 117 Ky. 501, 78 S. W. 450, 25 Ky. Law Rep. 1605.

[6] The instruction, however, could not have been prejudicial to the substantial rights of appellant, since appellant testified that he was fully cognizant of the alleged defects in the appliances to which he attributes his injury, and it is apparent that, if in the condition which appellant claims it to have been, the danger from it was obvious and patent, and the jury did not have to consider whether he could have known same by the exercise of ordinary care for his safety, since there was no testimony upon the subject except that of appellant, and there was no controversy as to his knowledge of the defects alleged by him.

There being no error to the substantial rights of appellant, the judgment is therefore affirmed.

HANNAH, J., not sitting.

**STEARNS COAL & LUMBER CO. v.
CALHOUN.***

(Court of Appeals of Kentucky. Nov. 9, 1915.)

1. MASTER AND SERVANT ⇨285—ACTION FOR INJURY—QUESTION FOR JURY—PROXIMATE CAUSE.

On evidence in an action for personal injury while cutting coal with a punching machine, *held*, that whether the machine's defective condition was the proximate cause of the injury was for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1018, 1035, 1043, 1053; Dec. Dig. ⇨285.]

2. MASTER AND SERVANT ⇨217 — MASTER'S LIABILITY—ASSUMPTION OF RISK—APPRECIATION OF DANGER.

To prevent a recovery in a servant's action for injury on the ground of his assumption of risk, it is not sufficient to show merely that he knew of the defective condition of a machine, or that it was clearly observable; but it must be shown that the danger therefrom was appreciated by him.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. ⇨217.]

3. MASTER AND SERVANT ⇨205 — PERSONAL INJURY—ASSUMPTION OF RISK—ASSURANCE OF SAFETY.

Where the master's electrician had repaired its coal-punching machine and assured a servant that it was all right, the servant might rely thereon and continue its use, unless the danger was so obvious that an ordinarily prudent person would refuse to work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 547-549; Dec. Dig. ⇨205.]

4. MASTER AND SERVANT ⇨288—PERSONAL INJURY—QUESTION FOR JURY—ASSUMPTION OF RISK.

On evidence in a servant's action for injury while running a coal-punching machine, *held*, that whether he assumed the risk was for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1088; Dec. Dig. ⇨288.]

5. TRIAL ⇨255—EVIDENCE—LIMITATION TO SPECIFIC PURPOSE—REQUEST FOR INSTRUCTION.

While an instruction that life tables, admitted in evidence in a servant's action for injury, were competent only to show his expectancy of life, should have been given on request of either party, a failure to so instruct was not error, where no request was made.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 627-641; Dec. Dig. ⇨255.]

Appeal from Circuit Court, McCreary County.

Action by Mart Calhoun against the Stearns Coal & Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. N. Sharp, of Knoxville, Tenn., for appellant. John W. Rawlings and Robert Harding, both of Danville, and John W. Sampson, of Whitley City, for appellee.

CLAY, C. In this action for damages for personal injuries, plaintiff, Mart Calhoun, recovered of defendant, the Stearns Coal &

Lumber Company, a verdict and judgment for \$1,500. The defendant appeals.

At the time of the injury plaintiff was engaged in cutting coal with a Sullivan punching machine. The machine weighs about 900 pounds, is 16 inches in diameter, and has a wheel on each side by which it is moved. The machine is placed on a board about 10 feet long and 40 inches wide. The pick which cuts the coal is operated by means of a piston, which pushes in and out. The machine is operated by compressed air, and is put in motion by means of a throttle valve. The pick runs through a shield, and there is a sleeve that holds the pick. The operator of the machine sits at the rear. When the air is turned on, both the machine part and the piston work. According to plaintiff's evidence, the machine would not work. He and Ben Strunk, a fellow workman, rolled the machine back. The piston would not slip out, and plaintiff caught the sleeve with his foot for the purpose of making it start. In some way he was thrown down, with his feet in front, and three of his toes were cut off. The machine had been out of order the day before, and was taken out by the electrician for the purpose of repairing it. The electrician told plaintiff that he had fixed it and it was all right. At the time of the accident plaintiff had been working with it about an hour, and it had stopped two or three times before. On cross-examination, plaintiff stated that he and Strunk were partners on the contract. He had been running a coal-cutting machine for about 20 months. He knew, if the air was turned on, that the machine would move. Every time they would set the machine on a new board, the needle hung up. The only thing wrong with the machine at the time of the accident was the fact that the needle would not pull out. While it had been working that morning, it would not work right. His partner, Ben Strunk, turned on the air. If the machine had not started so quickly, he would have taken his foot off. Plaintiff further says that, if the machine had been in good order, it would not have injured him. It was necessary for him to put his foot on the sleeve that morning, as he had been doing. If the machine had been in good order, it would not have jumped so hard. It was the starting of the machine that caused him to be jerked around and his foot thrown in front of the pick.

[1] There might be some merit in defendant's contention that the defect in the machine was the occasion and not the cause of the accident, if the proof merely conduced to show that the turning on of the air, which was done by a fellow servant, was the real cause of the accident. Plaintiff's evidence, however, is to the effect that, if the machine had been in good order, it would have worked smoothly when the air was turned on, and, had it worked smoothly, the accident would not have occurred. Being out of or-

der, the turning on of the air caused the machine to start with a jerk; and, according to plaintiff, the jerk is what caused the accident. In view of this evidence, and of the further fact that the jury had before it a cut of the machine, by which its operation was explained, we conclude, that the question whether or not the defective condition of the machine was the proximate cause of the injury was for the jury.

[2-4] The further point is made that, as the machine had stopped two or three times before, its defective condition was known to plaintiff, and as he, with knowledge of that condition, continued to work with the machine, he assumed the risk, and cannot recover. To prevent a recovery in a case like this, it is not sufficient to show merely that the plaintiff knew of the defective condition, or that it was clearly observable. In addition thereto, it must be shown that the danger from such condition was known, or clearly observable, and appreciated by him. *C. & O. Ry. Co. v. De Atley*, 159 Ky. 687, 167 S. W. 933. Though the evidence conduces to show that the machine had stopped on two or three occasions that morning, it does not appear that when it was started it began to move with such violence that the danger therefrom was clearly observable. Furthermore, the electrician, who repaired the machine, assured plaintiff that it was all right. That being true, plaintiff had the right to rely on the assurance thus given, and to continue to use the machine, unless the danger was so obvious that an ordinarily prudent person would refuse to work. Under these circumstances, it cannot be said, as a matter of law, that plaintiff assumed the risk.

[5] Another error relied on is the failure of the trial court to admonish the jury that the life tables, which were admitted as evidence, were competent only for the purpose of showing the probable duration of life. While we have ruled that such an instruction should be given when requested by either party (*L. & N. R. Co. v. Irby*, 141 Ky. 145, 132 S. W. 393), a failure so to instruct is not error, where no such request is made.

Judgment affirmed.

WASHINGTON LIFE INS. CO. v. COMMONWEALTH, by, etc.

(Court of Appeals of Kentucky. Nov. 9, 1915.)

CONSTITUTIONAL LAW § 206, 229, 283—TAXATION § 113 — DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS.

Ky. St. §§ 4226, 4230a, imposing a tax on premiums collected by life companies and authorizing the collection of the tax after such a company has voluntarily ceased to do business in the state, are not in violation of the fourteenth amendment to the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 625-648, 683, 891, 892, 904-906; Dec. Dig. § 206, 229, 283; Taxation, Cent. Dig. § 207; Dec. Dig. § 113.]

Appeal from Circuit Court, Franklin County.

Action by the Commonwealth of Kentucky, by its Auditor of Public Accounts, against the Washington Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

Frank Ewing, of Pittsburgh, Pa., Kohn, Bingham, Sloss & Spindle, of Louisville, and J. C. W. Beckham, of Frankfort, for appellant. James Garnett, Atty. Gen., and Jno. A. Judy, of Mt. Sterling, for the Commonwealth.

CARROLL, J. This is the second appeal of this case. The former opinion may be found in 159 Ky. 581, 167 S. W. 872. On this appeal it is conceded by the commonwealth that it was error to give interest on the judgment from January 31, 1909, as interest should only have been allowed from January 31, 1910, and that for this error the judgment must be reversed.

The only other question in the case is the contention that sections 4226, 4230a, of the Kentucky Statutes are violative of the fourteenth amendment to the federal Constitution, and therefore void, and, this being so, the insurance company is not liable for any part of the tax sought to be collected, as the right of the state to collect the tax rests entirely on sections 4226 and 4230a.

In 1906 the Legislature enacted, in connection with other statutes on the subject of insurance, the section that is now 4230a of the Kentucky Statutes. This section, which is merely supplementary to 4226, provides:

"Any insurance company that has been authorized to transact business in this state shall continue to make the reports required herein as long as it collects any premiums as provided for herein, and shall pay taxes thereon, even after it has voluntarily ceased to write insurance in the state or has withdrawn therefrom, or its license suspended or revoked by the insurance commissioner, and for failure to make report of the premiums collected and pay the taxes due thereon, shall be fined five hundred dollars for such offense."

The Washington Life Insurance Company continued to do business in this state until December 30, 1908, when it withdrew from the state, and reinsured its policy holders in this state in the Pittsburg Life & Trust Company, a Pennsylvania corporation. It appears that since December 30, 1908, the Washington Life has not done any business in this state, but the premiums on the business it did in this state before its withdrawal were paid in 1908 and thereafter, by the policy holders, to the Pittsburg Life & Trust Company, which has never done any business in the state, and the purpose of this suit on the part of the commonwealth was to collect from the Washington Life the tax due on the premiums paid by policy holders to the Pittsburg Life & Trust Company after the withdrawal of the Washington Life from this

state and the reinsurance of its policy holders in the Pittsburg Life & Trust Company.

We think the question presented in this case, that sections 4226 and 4230a of the Kentucky Statutes are void because in violation of the fourteenth amendment to the Constitution of the United States, cannot be sustained. *Com. v. Provident Savings Life Assurance Society*, 155 Ky. 197, 159 S. W. 698; *Com. v. Illinois Life Insurance Co.*, 159 Ky. 589, 167 S. W. 909; *Com. v. Washington Life Insurance Co.*, 159 Ky. 581, 167 S. W. 872; *Provident Savings Life Assurance Co. v. Com.*, 160 Ky. 16, 169 S. W. 551.

We, therefore, expressly hold that these sections, and neither of them, violate the federal Constitution, but for the purpose of having the error as to interest corrected, the judgment must be reversed; and it is so ordered.

SPECKERT v. RAY, Judge.

(Court of Appeals of Kentucky. Nov. 10, 1915.)

1. PROHIBITION \S 3, 10—RIGHT TO WRIT.

The writ of prohibition may be issued by a circuit court against an inferior court, or by an appellate court against a circuit court, where the inferior or circuit court is attempting to act out of jurisdiction, or the writ is the only adequate remedy to which the party applying therefor can resort.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. $\S\S$ 4-19, 37-56; Dec. Dig. \S 3, 10.]

2. MANDAMUS \S 34—WRITS—RIGHT TO,

In an action pending in the circuit court the judge sustained a motion to quash the return upon service of summons, on the ground that the defendant was not served. Const. \S 110, authorizes the Court of Appeals to issue such writs as may be necessary to give it general control of inferior jurisdictions. *Held*, that as the circuit judge had exercised his discretion and made a finding on the facts, mandamus would not lie to compel him to decide otherwise, though petitioner, plaintiff in the action, had no adequate remedy by appeal, for the purpose of the writ of mandamus is merely to command action and not to coerce the discretion of the lower court, and if petitioner desired to take no further steps, the lower court would doubtless have dismissed the suit.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 77; Dec. Dig. \S 34.]

Petition by Rosalee Speckert for writ of mandamus against Charles T. Ray, Judge. Petition denied.

David R. Castleman and Pryor & Castleman, all of Louisville, for plaintiff. Humphrey, Middleton & Humphrey, of Louisville, for appellee.

SETTLE, J. The plaintiff, Rosalee Speckert, seeks in this action a writ of mandamus to compel the defendant, Charles T. Ray, judge of the Jefferson circuit court, common pleas branch, fourth division, to try an action pending in his court, wherein she is plaintiff and the Old Dominion Steamship Company is defendant; the writ being asked in this court. The case has been submitted

on a general demurrer filed to the petition by the defendant, which seems to present all questions raised by the parties.

It appears from the averments of the petition, and is admitted by the demurrer, that the action pending in the Jefferson circuit court, of which the defendant, Charles T. Ray, is the presiding judge, was brought to recover of the Old Dominion Steamship Company damages for alleged insult and maltreatment sustained by the plaintiff at the hands of its servants and employes while a passenger on one of its steamships sailing from Norfolk, Va., to New York, of which they were in charge. It further appears from the petition that the plaintiff, in August, 1914, purchased of the Louisville agent of the Chesapeake & Ohio Railway Company a ticket from Louisville to New York, which entitled her to be carried as a passenger from Louisville to Norfolk, Va., over the line of the railway company and from Norfolk to New York on the steamship of the Old Dominion Steamship Company. Two summonses were issued against the Old Dominion Steamship Company upon the filing of the petition, one of which was served upon R. E. Parsons, who is the district passenger agent of the Chesapeake & Ohio Railway Company at Louisville. The other was served upon C. A. Pennington, the superintendent of terminals of the Louisville & Jeffersonville Bridge Company, which terminals are used by the Chesapeake & Ohio Railway Company at Louisville. The return upon the first summons was as follows:

"Executed December 29, 1914, on Old Dominion Steamship Company by delivering a copy of the within summons to Robert E. Parsons, agent of said company, he being chief officer found in this county at this time, he refusing to accept same. C. J. Cronan, S. J. C., by E. D. Waters, D. S."

The return upon the second summons was as follows:

"Executed January 2, 1915, on defendant Old Dominion Steamship Company by delivering a true copy of the within summons to C. A. Pennington, the chief agent of the Chesapeake & Ohio Railway Company found in this county, and which said railway company, as the agent of said defendant, in charge of its business in this county. C. J. Cronan, S. J. C., by C. Mueller, D. S."

The Old Dominion Steamship Company, entered its special appearance and made a motion to quash the return upon each of these summonses, and in support of the motion filed the affidavits of Parsons and Pennington. Plaintiff, as against the motion, filed her own affidavit. The circuit court, after considering the motion to quash, sustained it, to which ruling plaintiff excepted. Thereafter the plaintiff entered a motion to set aside the order quashing the return on each summons, and that the case be set on the docket for trial. This motion was also overruled by the circuit court, to which ruling the plaintiff excepted. No further orders were entered or steps taken in the case.

The affidavit of Parsons contains the statements that the Chesapeake & Ohio Railway Company operates passenger trains from Louisville to Norfolk, Va.; that the old Dominion Steamship Company is a nonresident corporation, separate and distinct from the Chesapeake & Ohio Railway Company, and that it operates a steamship line over which passengers and freight are transported from Norfolk, Va., to New York; that he (Parsons) is not, and was not at the time the summons was served on him, the agent in Kentucky of the Old Dominion Steamship Company, and that it has never had any officer or agent in Kentucky; that in selling tickets like that purchased by the plaintiff, the Chesapeake & Ohio Railway Company acts for itself as far as the transportation on its line is concerned, and sells tickets for the connecting carrier, Old Dominion Steamship Company, as far as the transportation of passengers on the line of the latter is concerned; and that each line acts independently in the matter of such transportation. The affidavit of Pennington contains the statements that, though the terminals of the Louisville & Jeffersonville Bridge Company, of which he is the superintendent, are used by the Chesapeake & Ohio Railway Company at Louisville, that company bills freight from Louisville to New York over the Chesapeake & Ohio Railway to Newport News and over the Old Dominion Steamship Company from Newport News to New York, according to the usual custom of freight transportation; that each company acts separately and not jointly in regard to such traffic; that he (Pennington) is not, and has never been, the agent of the Old Dominion Steamship Company in this state; and that company has never had an officer or agent in this state.

The counter affidavit of the plaintiff was to the effect that in purchasing the ticket in question from R. E. Parsons, he held himself out as the agent in this state of the Old Dominion Steamship Company; that as the agent of the Chesapeake & Ohio Railway Company he kept in the office of that company at Louisville pamphlets and advertising matter of the Old Dominion Steamship Company, and that the Chesapeake & Ohio Railway Company solicits freight and passenger business for the Old Dominion Steamship Company; moreover, that subsequent to the infliction upon her by the servants of the latter company of the injuries complained of in the petition, Parsons, acting for it, entered into negotiations with her looking to the settlement of her claim for damages.

After the filing of the affidavit of the plaintiff there was filed by the defendant a supplemental affidavit of Parsons, in which it was denied that he had any negotiations with plaintiff regarding her claim for damages, or that he was authorized by the Old Dominion Steamship Company to negotiate with her; that all railroads kept pamphlets in their ticket offices, showing their connecting

lines all over the United States, the time of arrival and departure of trains, etc.; that when a person, desiring to go to New York, applies at the ticket office of the Chesapeake & Ohio Railway Company, the agent of that company solicits such person to travel over its line as far as Norfolk, Va., and represents at the time that it has a connection at Norfolk for New York, via the Old Dominion Steamship Company, and that a through ticket from Louisville to New York by the steamship company's line can be obtained in the Louisville office of the Chesapeake & Ohio Railway Company, and also freight transportation.

It does not seem to be claimed by the plaintiff that the service of process on Pennington is good, but it is insisted for her that the service of Parsons is valid and sufficient to give the circuit court jurisdiction in the action as to the Old Dominion Steamship Company. The two questions presented for decision by the record in this case are: (1) Whether the writ of mandamus will lie to compel a judicial officer to decide that service of process, which he had already adjudged insufficient, is good; (2) whether, if mandamus is the proper remedy, the service of process had on the defendant, Old Dominion Steamship Company, is good, and therefore sufficient to give the circuit court jurisdiction to entertain and try the action.

[1, 2] It is not claimed in the instant case that the defendant judge refused to act at all. On the contrary it is conceded that he entertained the case for the purpose of considering the single question presented to him, that is, whether the service of process was good or bad, and that he did decide it; and, the decision being that the service was not good, an order was entered quashing the return. The only meaning of the plaintiff's complaint is that the decision was adverse to her interest and therefore incorrect, for which reason she asks the writ of mandamus, to compel a different decision of the question, and one that will be favorable to her. In other words, what the plaintiff now seeks is, not that the judge of the circuit court be required to take action, but that he act in a manner that will deprive him of the discretion with which he is clothed as a judicial officer by the law.

Section 110 of the Constitution provides that the Court of Appeals shall have power to issue such writs as may be necessary to give it general control of inferior jurisdictions. We have never held that the above provision of the Constitution authorizes this court to exercise the power of determining questions that necessarily belong to courts of original jurisdiction and over which they have complete control, subject to an appeal to this court, where an appeal is allowed. The writ of mandamus cannot be issued to compel an inferior court to decide a matter in any particular manner. The chief office of the writ, as applied to courts, is to com-

pel action by them; but where, as in the instant case, the petition of the plaintiff alleges that the court acted, but acted in a way different from what the plaintiff desired, this court is without power to interfere to the extent of compelling, by mandamus, such action or decision on the part of the circuit court as will deprive it of the discretion conferred upon it by law. As said in *Commonwealth v. McCrone*, 153 Ky. 296, 155 S. W. 369:

"The general principle which applies to the issue of a writ of mandamus is familiar. It may be issued to compel the performance of a ministerial act, but not to control discretion. It may also issue against a tribunal, or one who acts in a judicial capacity, to require it or him to proceed, but the manner of proceeding must be left to his or its discretion. If the case here presented were one in which the fiscal court of Campbell county had refused to act at all, the writ would lie to compel it to do so, but it would have to be left to its discretion to consent or refuse its consent to the appointment to the office of county road engineer of the person named by the county judge therefor. But such is not the case; the fiscal court did act, and a majority of its members by voting refused to consent to the appellant Traver's appointment to the office of county road engineer; this being true, they cannot again be required to vote upon the question whether they will consent to the appointment of Traver."

There cannot be found a clearer or more concise statement of the doctrine in question than is contained in the following excerpt from the opinion in *City of Louisville v. Kean*, 18 B. Mon. 9:

"But the doctrine seems to be well settled that when the inferior tribunal or the subordinate public agents have a discretion over the subject-matter, that discretion cannot be controlled by mandamus, although it may have been improperly exercised. If there be a refusal to act upon the subject, or to pass upon the question on which such discretion is to be exercised, then the writ may be used to enforce obedience to the law; but when the question has been passed upon, it will not be used for the purpose of correcting the decision." *Board of Trustees v. McCrory*, 132 Ky. 89, 116 S. W. 323, 21 L. R. A. (N. S.) 563.

One of the later cases on this question is that of *Commonwealth on Relation, etc., v. Weissinger*, Judge, 143 Ky. 368, 136 S. W. 875, in the opinion of which it is said:

"The only question presented by the record is, did the Jefferson county court have power to vacate and set aside the judgment by default? If it did not have jurisdiction to vacate and set aside the default judgment, the writ of prohibition should have been granted; on the other hand, if it did have jurisdiction, the writ should be denied. If the county court had power to vacate the judgment, it is wholly immaterial whether the reasons for so doing were sufficient or not; and so we will not inquire into the sufficiency of the reason, as a writ of prohibition will not lie to restrain an inferior tribunal from acting within its jurisdiction, however erroneous its action may be." *Goldsmith v. Owen*, Judge, 95 Ky. 420, 26 S. W. 8, 16 Ky. Law Rep. 806; *L. S. L. & B. A. v. Harbeson*, Judge, 51 S. W. 787, 21 Ky. Law Rep. 278; *Weaver v. Toney*, 107 Ky. 426, 54 S. W. 732, 21 Ky. Law Rep. 1157, 50 L. R. A. 105; *Galbraith v. Williams*, 106 Ky. 431, 50 S. W. 686, 21 Ky. Law Rep. 79; *Schobarg, etc., v. Manson*, 110 Ky. 483, 61

S. W. 999, 22 Ky. Law Rep. 1892; *Carter County v. Mobley*, 150 Ky. 482, 150 S. W. 497.

We do not overlook the fact that in some jurisdictions it has been held that where a court declines jurisdiction by mistake of law, erroneously deciding as a matter of law and not as a decision upon the facts that it has no jurisdiction, and either declines to proceed or disposes of the case, the general rule has been announced that a mandamus to proceed will lie from any higher court having supervisory jurisdiction, unless there is a specific and adequate remedy by appeal or writ of error. But in so far as we have been enabled to discover, it has never been held that mandamus will issue to review the decision of a lower court which has refused jurisdiction after determination of a question of fact. In some of the cases a distinction is made between a refusal to take jurisdiction *ab initio* and a determination that there is no jurisdiction, it being held that where the court has acted and judicially determined that it has no jurisdiction, its determination cannot be reviewed; appeal or writ of error being in such case the proper remedy. *Cahill v. San Francisco Superior Court*, 145 Cal. 42, 78 Pac. 467; *People v. Garnett*, 130 Ill. 340, 23 N. E. 331; *State v. Judges Orleans Parish Court of Appeals*, 105 La. 217, 29 South. 816; *State v. Smith*, 105 Mo. 6, 16 S. W. 1052; *Nevada Central Railroad Co. v. Lander County District Court*, 21 Nev. 409, 32 Pac. 673; *Commonwealth v. Judges Philadelphia County C. Pl.*, 3 Bin. (Pa.) 273; *In re Key*, 189 U. S. 84, 23 Sup. Ct. 624, 47 L. Ed. 720; *In re Morrison*, 147 U. S. 14, 13 Sup. Ct. 246, 37 L. Ed. 60. In most of the states, however, the doctrine is, as held in this jurisdiction, that if an inferior tribunal has a discretion and proceeds to exercise it, its discretion cannot be controlled by mandamus; but if it has a discretion and refuses to exercise it, it can be compelled to do so, though not in any particular direction.

It is insisted for the plaintiff that she is entitled to the mandamus sought on the ground that there is no other adequate means of relief open to her. This ground of relief has so frequently been recognized in this jurisdiction, in applications for the writ of prohibition, that it may be said to be a well-established rule that the writ of prohibition may be issued by the circuit court against an inferior court, or by the appellate court against a circuit court, where the inferior or circuit court is attempting to act out of its jurisdiction, or where the writ of prohibition is the only adequate remedy to which the party applying therefor can resort. *Cullins et al. v. Williams et al.*, 156 Ky. 57, 160 S. W. 733; *Arnold v. Shields*, 5 Dana, 18, 30 Am. Dec. 669; *Pennington v. Woolfolk*, 79 Ky. 13; *N. N. & M. V. Co. v. McBrayer*, 15 Ky. Law Rep. 399; *Clark County Court v. Warner*, 116 Ky. 801, 76 S. W. 828, 25 Ky. Law Rep. 857; *McCann v. City of Louisville*, 63 S. W. 446, 23 Ky. Law Rep. 558; *Rush, etc., v.*

Denhardt, 188 Ky. 288, 127 S. W. 785, Ann. Cas. 1912A, 1199.

In the cases relied on by the plaintiff, no such state of facts as here presented will be found. That of Equitable Life Insurance Co. v. Hardin, 166 Ky. 53, 178 S. W. 1155, deals wholly with the writ of prohibition, and the writ was granted because the wrong complained of would have resulted in irreparable injury to the plaintiff, and there was no other adequate remedy to which he could have resorted.

In *Carey v. Sampson*, Judge, 150 Ky. 460, 150 S. W. 531, Carey sought from this court a writ of prohibition to prevent Sampson, judge of the circuit court, from trying him under an indictment for practicing medicine without a license, the punishment for which offense is a fine not exceeding \$50. The grounds chiefly urged by Carey for the writ were that, as Sampson had said in advance of a trial that he intended to find him guilty and would fine him, and there could be no appeal from the maximum fine to be assessed against him, in the absence of the writ of prohibition asked, he would be left without any adequate remedy. In denying the writ we held that the fact that no appeal is given by law from the judgment of an inferior court cannot affect the question of the propriety of the Court of Appeals' granting a writ of prohibition, since the legislative department of the state has the power of limiting the jurisdiction of this court as to appeals; the right of appeal being not an inherent right, but one that may be granted as a matter of grace, or withheld by the Legislature, in the exercise of its discretion. In the opinion it is, among other things, said:

"In determining whether there is an adequate remedy, each case must be adjudged upon its merits. In *Rush v. Denhardt*, 138 Ky. 245 [127 S. W. 787, Ann. Cas. 1912A, 1199], this court said: 'If we should once lay down the rule that application by original proceeding might be made to us to stay the hand of the inferior jurisdictions, whenever in the opinion of counsel the ruling was prejudicial, although it might not leave the complainant without adequate remedy, we would have much of our time occupied in the settlement of questions that could be brought before us in the regular way by appeal. Inferior courts would be obstructed in the hearing and disposal of cases, and much confusion and uncertainty would follow.'"

"In the case before us the only element entering into the charge that plaintiff has no adequate remedy is the fact that no appeal will lie from the judgment which the circuit judge will render against him, because the fine will be for an amount not within the jurisdiction of this court. The case, therefore, is on all fours with that of the *Standard Oil Co. v. Linn*, Judge [32 S. W. 932] 17 Ky. Law Rep. 833, where the Oil Company, having been proceeded against under 65 separate indictments for buying and receiving empty coal oil barrels without having first erased therefrom the inspector's brand, which had been placed on them as required by law, applied to this court for a writ of prohibition to arrest the proceedings. In overruling the application, this court, speaking through Chief Justice Pryor, said: 'The basis of the motion rests upon the ground that his decision may be adverse to the defendant, and as the fine is

for an amount not within the jurisdiction of this court, no appeal can be prosecuted from his judgment. It has long been held, and in fact, no ruling to the contrary can be found, that such a writ issued only to prevent the inferior tribunal from exercising, or attempting to exercise, a jurisdiction that does not belong to it. * * * Section 110 of the Constitution provides that this court "shall have power to issue such writs as may be necessary to give it general control of inferior jurisdictions." Under this provision it is claimed this court may rightfully exercise the power of determining, not only the question of jurisdiction in the inferior court, but may go so far as to determine questions that necessarily belong to courts of original jurisdiction, and over which they have complete control, subject to an appeal to this court where an appeal is allowed. It is not contended the circuit court is without jurisdiction to try these indictments, and it must be conceded it has full and complete power to determine all questions pertaining to the trial made by counsel on either side. With such a latitudinous construction given this provision of the Constitution as we are asked to give, this court would convert itself into a tribunal of original jurisdiction, and in every case, as to the validity of indictments, or of the sufficiency of any pleading in a civil action, this court could interfere and direct the inferior court as to what the judgment should be. If the statute imposing the penalty in such cases has been repealed the court below has the jurisdiction to so decide, or if the indictment or proceeding is defective the same power exists, so that there can be no reason for this court to interfere with the exercise of the rightful jurisdiction of any court except in cases where appeals are prosecuted, and it is only in cases where the inferior tribunal is beyond the bounds of its jurisdiction that this writ should go. The fact that no appeal is given cannot affect the question, because the legislative department of the state has the power of limiting the jurisdiction of this court as to appeals."

Here the question whether the plaintiff, in case of a refusal of the mandamus, has any other adequate means of relief cannot be considered, for there was a hearing of proof by the circuit court and decision that the service of process was not sufficient to bring the Old Dominion Steamship Company before the court. If correct in this decision, the court could not proceed to try the case, owing to its not having obtained jurisdiction of the person of the defendant. The question determined was jurisdictional, in the decision of which there was a complete exercise of the discretion of the court, which cannot be interfered with by the writ of mandamus; nor can the decision itself be reviewed by this court on an application for such writ.

If, as claimed by the plaintiff, the circuit judge erred in the decision rendered, that fact would not authorize the granting of the mandamus; or if, as further claimed by her, she were without right of appeal from the decision, or other adequate remedy, the granting of the mandamus would be equally unauthorized; as in either event we would be confronted with the fact that the circuit judge had a discretion over the subject-matter involved in the question decided, and that, in making the decision, he exercised such discretion, for which reasons no power exists in this court to compel, by mandamus, a different decision.

We are unconvinced of the soundness of the plaintiff's contention that she has no other adequate remedy than the one here applied for. If, after the quashing of the return on the summons, she had advised the judge of the circuit court that she proposed taking no further step in the case, he doubtless would have entered judgment dismissing the action for want of jurisdiction of the person of the defendant, from which judgment, upon reserving the necessary exception, she could have taken an appeal to this court, and thereby obtained a review of the rulings of the circuit judge complained of.

Our conclusion that the plaintiff has not shown herself entitled to the writ of mandamus asked renders unnecessary and, indeed, improper the decision of the second question urged by her, viz., whether the service of summons was legally had upon the Old Dominion Steamship Company; so that question is not passed on.

For the reasons indicated, the demurrer to the petition is sustained, the writ of mandamus refused, and the action dismissed.

COMMONWEALTH v. BOARD OF EDUCATION OF METHODIST EPISCOPAL CHURCH.

(Court of Appeals of Kentucky. Nov. 10, 1915.)

1. TAXATION \S 242—EXEMPTIONS—EDUCATIONAL INSTITUTIONS.

An office building owned by a board of education of a church conference and used in part for offices for the owner, the rent from the remainder being employed in the partial support of a college maintained by the conference in another city, such college not being a religious school, and no preference being given to the children of parents who were members of the church owning the office building, and having no theological course, nor requiring doctrinal or religious qualifications from the teachers, is exempt from taxation under Const. \S 170, providing that institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education, shall be exempt from taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. $\S\S$ 394-403; Dec. Dig. \S 242.]

2. TAXATION \S 242—EXEMPTIONS—INSTITUTIONS OF LEARNING.

The fact that a college operated and maintained by a church gives preference to students who are candidates for the ministry in the church, the college being otherwise nonsectarian, does not deprive it of its character as an institution of education within Const. \S 170, providing that institutions of education when used or employed for gain shall be exempt from taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. $\S\S$ 394-403; Dec. Dig. \S 242.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by the Commonwealth of Kentucky against the Board of Education of the Methodist Episcopal Church. Judgment for defendant, and plaintiff appeals. Affirmed.

M. J. Holt and A. Scott Bullitt, both of Louisville, for appellant. Helm Bruce and Bruce & Bullitt, all of Louisville, for appellee.

MILLER, C. J. [1] The commonwealth brought this action to have the Kenyon Building, in the city of Louisville, assessed for taxation for the years 1906 to 1910, both included. The Kenyon Building is a modern, up-to-date office building, containing 87 offices. One of these offices is occupied by the appellee's agent in charge of the building, and the remaining 86 offices are rented to business men. The property is worth about \$200,000, and brings a gross annual rental of from \$16,000 to \$18,000. It was devised to the appellee, the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, by Mrs. Fannie Speed. The appellee is a corporation, having in charge the educational work of the Methodist Episcopal Church in Kentucky. The corporation was created by a special charter of the General Assembly, approved January 15, 1867. Acts 1867, vol. 2, p. 622. Its governing board is made up of laymen and Methodist ministers.

By the eighth clause of appellee's charter it is given control of all property constituting the educational fund of the Kentucky Annual Conference; and by the tenth section the administration of the fund is provided for in the way usual in charitable institutions of this character. By the eleventh clause of the charter it is directed that all the net interest, dividends, and rent arising from said fund shall be used by the appellee, under the general direction of the conference, in the payment of the salaries of teachers and the cost of administration of any school or schools that may have been established or maintained by the board, or in aid of worthy youths of either sex struggling to acquire an education, preference being given in the case of such aid-afforded students to such licentiates or candidates for the ministry as may be properly recommended by the quarterly conference of the circuit or station where they hold membership.

The defendant corporation conducts a school called Union College, at Barbourville, in Knox county, and uses the rents derived from the Kenyon Building in its support. Union College is not a religious school, but is a regular educational school, and no preference is given to children of parents who are members of the Methodist Church. It has no theological course, but is a secular school of the character indicated by its name. And, although Union College charges a tuition fee, it appears from the proof that this fee is far from covering the operating expenses of the school, which are supplemented by funds derived from other sources. The income derived from the Kenyon Building constitutes about two-thirds of the entire income

of the board. Some of the teachers in Union College are Methodists, some are Presbyterians, and one is a member of the Christian Church; and all are paid salaries for their services. The course taught is a regular academic course, equivalent to that of the Louisville high school, and a collegiate course having a curriculum similar to colleges of that character. No question is ever asked a teacher concerning his religious affiliation, and no doctrinal features of the Methodist Church are taught, although Union College is under the auspices and operation and management of the Methodist Episcopal Church, because that church owns the property. The religious teachings consist of chapel exercises every morning.

The chancellor was of opinion that the Kenyon Building, considering its ownership and the use to which its rents were applied, was not subject to taxation; and, having dismissed the petition, the commonwealth appeals.

Section 170 of the Constitution, in so far as it is material to this case, reads as follows:

"There shall be exempt from taxation * * * institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education."

Whether the Kenyon Building is exempt from taxation depends upon the character of the appellee corporation and the use to which it puts said property, or its income derived therefrom. It will be observed that so much of section 170 of the Constitution as is above quoted exempts from taxation two classes of property: (1) Institutions of purely public charity; and (2) institutions of education, not used or employed for gain by any person or corporation, the income thereof being devoted solely to the cause of education. It is not necessary in this opinion to consider whether the appellee is an institution of purely public charity, since we are of opinion it clearly comes within the second clause of exemptions above referred to, in that it is an institution of education whose property is not used or employed for gain, and the income thereof is devoted solely to the cause of education. In considering this question of exemption from taxation, it would be useless to discuss the cases decided under the Constitution of 1850, since section 170 of the present Constitution of 1891 made a change in this respect, and is, of course, controlling.

The meaning, scope, and effect of section 170 of the present Constitution was discussed at great length by this court in 1897 in the cases of Trustees of Kentucky Female Orphan School, of Midway, v. City of Louisville, 100 Ky. 470, 36 S. W. 921, 19 Ky. Law Rep. 1091, 40 L. R. A. 119; City of Louisville v. Southern Baptist Theological Seminary, 100 Ky. 506, 36 S. W. 995, 19 Ky. Law Rep. 1100; City of Louisville v. Board of Trustees of

Nazareth Literary Benevolent Institution, 100 Ky. 519, 36 S. W. 994, 19 Ky. Law Rep. 1102; and the subsequent case of Commonwealth v. Berea College, decided in 1912, and reported in 149 Ky. 96, 147 S. W. 929.

It is sufficient to say, in passing, that the case of Widows' and Orphans' Home v. Bosworth, 112 Ky. 200, 65 S. W. 591, 23 Ky. Law Rep. 1506, relied upon by counsel for appellant, was expressly overruled in Widows' and Orphans' Home v. Commonwealth, 126 Ky. 386, 400, 103 S. W. 354, 31 Ky. Law Rep. 775, 16 L. R. A. (N. S.) 829; and also that the dissenting opinions in the Midway Orphan School Case and the Southern Baptist Theological Seminary Case, supra, are not to be now considered, unless this court should be of opinion that the decisions in those cases should be departed from. Indeed, counsel for appellant concedes that, if the law is as it was declared by the court in the majority opinion in the Midway Orphan School Case, and the like cases above mentioned, the judgment of the circuit court must be affirmed; but he now asks that those cases be overruled, although they have repeatedly been approved and followed by this court.

It has often been held by this court that the phrases "institution of purely public charity," or "institution of education," used in section 170 of the Constitution, embrace not only the buildings actually used in teaching, or actually used in administering charity, but that they also embrace all the property of the institution, wherever situated. This appears from the following language taken from the opinion in the Midway Female Orphan School Case, supra:

"We think, therefore, a proper construction of the language used in the section requires the exemption of the entire property of this institution, wherever situated, and in whatever form its investments may be found." 100 Ky. 489, 36 S. W. 925, 19 Ky. Law Rep. 1091, 40 L. R. A. 119.

In that case the school was located at Midway, while the property which the city of Louisville sought to assess was, of course, located within the corporate limits of the city of Louisville.

At the same time the court decided the case of the Southern Baptist Theological Seminary, reported in the same volume, which likewise involved the question of the right of the state to impose a tax on the property of the seminary located in Louisville, and certain lands and property not actually used in teaching, and some of which was situated in a distant county. The same ruling was there made, and all the property of the seminary, wherever located, was declared exempt from taxation. The reason for the ruling was, that it was the use to which the property, or the income therefrom, was put, that exempted it from taxation. The use of the property and income for the purposes of education, although it was sectarian, exempted it from taxation under section 170 of the Constitution.

In *Commonwealth v. Gray*, 115 Ky. 665, 74 S. W. 702, 25 Ky. Law Rep. 52, this court reaffirmed the *Midway Orphan School Case* and the *Baptist Theological Seminary Case*, as to the meaning of the word "institution," and called attention to the fact that the mere ownership of a building in which a school might be conducted, without the ownership of other property from which a revenue could be derived, might leave the institution entirely unable, for lack of money, to conduct the school. In speaking upon that subject, the court said:

"It is not a complete definition to define 'institution' as simply a building or a plant or a body corporate. It may be all of these, but, more broadly speaking, it is that which is set up, provided, ordained, established, or set apart for a particular end, especially of a public character or affecting the community. So, when money or other property is set apart, the exclusive use and income of which is to be applied to the cause of education or pedagogy, the property impressed with that character becomes an institution, without regard to the particular form of its investment. When the dedicator, in his munificence, sets apart property or a fund to this end, the people, in a kindred spirit, have declared by their organic law that such property, when so used without gain or profit to the giver or owner, shall be exempt from taxation." 115 Ky. 666, 74 S. W. 702, 25 Ky. Law Rep. 52.

Again, in *Commonwealth v. Pollit*, 76 S. W. 412, 25 Ky. Law Rep. 790, a fund of \$12,000 held by trustees for the benefit of a school district was held exempt from taxation, because the income from it was devoted solely to the cause of education.

In *Commonwealth v. Young Men's Christian Association*, 116 Ky. 711, 76 S. W. 522, 25 Ky. Law Rep. 940, 105 Am. St. Rep. 234, this court again approved the ruling in the *Midway Orphan School Case*, supra, and held that certain property belonging to the Young Men's Christian Association in Louisville, but which was not actually used in operating the institution, was exempt from taxation because it was a part of the institution.

Again, in *Louisville College of Pharmacy v. City of Louisville*, 82 S. W. 610, 26 Ky. Law Rep. 825, where a part of the appellant's building was used by it for teaching purposes, and the remainder thereof was rented out to tenants, this court again reaffirmed the *Midway Orphan School Case*, supra, and held the entire property exempt.

To the same effect see *German Gymnastic Association v. Louisville*, 117 Ky. 958, 80 S. W. 201, 25 Ky. Law Rep. 2105, 65 L. R. A. 120, 111 Am. St. Rep. 287; *Norton v. Trustees*, 118 Ky. 836, 82 S. W. 621, 26 Ky. Law Rep. 846; *Commonwealth v. Hamilton College*, 125 Ky. 330, 101 S. W. 405; and *Book Agents of Methodist Episcopal Church South v. Hinton*, 92 Tenn. 188, 21 S. W. 321, 19 L. R. A. 289.

There can be no question, therefore, that this case comes within the rule laid down in the several cases above cited.

[2] It is insisted, however, that Union College is a sectarian school, and for that reason

property used in its support does not come within the rule above announced. There is no such qualifying restriction in the language giving the exemption; it speaks of "institutions of education"—not of nonsectarian institutions of education. The proof shows, moreover, that the only sense in which Union College may be said to be a sectarian school is the fact that it is owned by the Board of Education of the Methodist Church. But it further appears from the proof that its sectarian character begins and ends with its ownership. Belief in the doctrines of the Methodist Church is not made an essential for admission to the school, either as student or as teacher. In none of the divisions or branches of its curriculum are any of the doctrinal features of the Methodist Church taught in contradistinction from other denominations. As heretofore stated, the religious teachings consist of chapel exercises in the morning and the fact that the school is under Christian influences. Counsel for appellant, however, refer to that provision in section 11 of the amended articles of incorporation, which gives a preference to candidates for the ministry who may be "recommended by the quarterly conference of the circuit or station where they hold membership," and contend that this feature of the charter makes appellee's school a sectarian school, and its property taxable. When, however, the entire section is read, it appears that the language above referred to is merely a provision that, if there be any income left after paying the cost of caring for the trust fund, and after paying the salaries of teachers and the general cost of administration, the board is given the right to give something, in its discretion, in the aid of worthy youths of either sex struggling to acquire an education, preference being given in the case of said aid-afforded students to such licentiates or candidates for the ministry as may be properly recommended by the quarterly conference of the circuit or station where they hold membership. But it is obvious that aid thus afforded is given strictly in the cause of education; and the fact that in this one particular preference is given by appellee to candidates for ministry in the Methodist Church does not make it any the less an institution of education or take it out of the exemption afforded by section 170 of the Constitution.

But this question is not an open one in this jurisdiction. In the *Southern Baptist Theological Seminary Case*, supra, the Seminary property was held exempt from taxation, although it was used as a Baptist school wherein the doctrines of that denomination alone were taught. On that subject this court said:

"The work of the institution is confessedly a pure charity, and we think it is no less a public one. It is free to all, and, while under denominational control, so are nearly all successful seats of learning, and this fact has never been

held to affect the nature of the charity. The peculiar tenets of this denomination are doubtless taught, but a belief of them is not required, and it is not made the test of admission."

The case at bar is stronger for the exemption than the Baptist Theological Seminary Case, *supra*; since here Union College does not teach the doctrines of the Methodist Church, as distinguished from other Christian doctrines, although it might do so and still be exempt under the rule laid down in the Baptist Theological Seminary Case. See, also, *Burd Orphan Asylum v. School District of Upper Darby*, 90 Pa. 21, quoted with approval in the *Midway Orphan School Case*, *supra*. This view of the case was made plain in *Widows' and Orphans' Home of Odd Fellows v. Commonwealth*, 126 Ky. 386, 103 S. W. 354, 31 Ky. Law Rep. 775, 16 L. R. A. (N. S.) 829, where the exemption was claimed upon the ground that the orphanage was a purely public charity, rather than an institution of education. In that case we said:

"The convention meant by the word 'purely' to describe the quality of the charity, rather than the means by which it is administered, that it should be wholly altruistic in the end to be attained, and that no profit or selfish interest should be fostered under the guise of charity; but it was never meant that, because a charity was limited by its terms to objects belonging to a certain sect or fraternal order, or color or class, it was a private, and not a public, charity. The members of the convention were wise and practical, and knew that men, as a rule, administer their charity through the organization or organizations to which they belong. Thus Catholics will naturally distribute their charity through the organization of the Catholic Church; Presbyterians through those of the Presbyterian Church; Masons through the organization of the Masonic order," etc.

And, as was said in *Commonwealth v. Young Men's Christian Association*, 116 Ky. 711, 76 S. W. 522, 25 Ky. Law Rep. 940, 105 Am. St. Rep. 234, the fact that some part of the expense in maintaining an institution is required to be paid by those who enjoy all its privileges does not change its character, since that regulation merely made it partly self-sustaining.

It follows that the judgment of the chancellor dismissing the petition was right, and it is affirmed.

YELLOW CHIEF COAL CO.'S TRUSTEE v. JOHNSON et al.

(Court of Appeals of Kentucky. Nov. 11, 1915.)

1. CORPORATIONS — 566 — INSOLVENCY — PRIORITY OF CLAIMS — FRAUD.

Plaintiffs gave options to purchase land owned by them for \$25 an acre, one-third to be paid in cash when the conveyance was made, and the remaining two-thirds in mortgage bonds of a corporation to be organized by the optionees at 80 per cent. of their par value. The option further provided that plaintiffs should have the option at any time after the expiration of 18 months, and within 24 months to sell the bonds to the company at 90 per cent. of their par value. The options were assigned to the

company so organized, which executed a mortgage securing bonds aggregating \$100,000, and plaintiffs executed their deeds to the company in consideration of "the sum of \$10 and other considerations in hand paid," and received bonds at 80 cents on the dollar which showed on their face that the whole number of bonds aggregated \$100,000. In the transactions plaintiffs, who were neither ignorant nor unlettered, had the advice of an attorney. They retained the bonds for 2 years, drawing the interest thereon, but after the company became in failing circumstances they brought a suit to cancel their deeds, or have it adjudged that they had a prior lien on the lands for the balance of the purchase money, alleging that it was represented to them that the mortgage, which covered lands in addition to their own, would secure only enough bonds to cover the purchase price of the mortgaged lands. There was no allegation, however, that any such provision was omitted from the option contract, and no such stipulation was therein contained. *Held*, that plaintiffs had no right to a priority of lien over innocent creditors and other bondholders, but had only the same rights and remedies as the holders of other bonds, no fraud having been shown, and there having been no relation of trust or confidence imposing on the optionees the duty to protect the interests of plaintiffs.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2283-2286; Dec. Dig. ¶ 566.]

2. DEEDS — 70 — RESCISSION AND CANCELLATION — FRAUD.

The company's inability to make good its promise to repurchase the bonds at 90 cents on the dollar was neither a badge of fraud nor a ground for canceling the deed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 165-182; Dec. Dig. ¶ 70.]

3. CORPORATIONS — 437 — CONVEYANCE TO CORPORATIONS BEFORE COMPLETION OF ORGANIZATION.

Where, pursuant to an option for the purchase of land stating that the conveyances were to be made to a company to be organized by the optionees, a deed was made on the day the charter was filed for record in the county clerk's office, and 12 days thereafter a certified copy of the articles of incorporation were filed for record with the secretary of state, the conveyance was valid as between the parties, though made before the organization of the corporation was complete.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1773; Dec. Dig. ¶ 437.]

4. CORPORATIONS — 34, 388 — ESTOPPEL TO DENY CORPORATE EXISTENCE.

A person executing an obligation to a corporation cannot, in an action thereon by the corporation, deny that such a corporation had an existence, nor deny its power to contract, unless the contract be expressly forbidden by law.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 81-86, 1556-1567; Dec. Dig. ¶ 34, 388.]

5. MORTGAGES — 13 — PROPERTY SUBJECT TO MORTGAGE — AFTER-ACQUIRED PROPERTY.

As a general rule, a mortgage of property to be acquired in futuro is void as against mortgagors, creditors, or purchasers for value.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 15; Dec. Dig. ¶ 13.]

6. MORTGAGES — 12 — PROPERTY SUBJECT TO MORTGAGE — OPTIONS TO PURCHASE.

Under Ky. St. § 2341, providing that any interest in or claim to real estate may be disposed of by deed or will in writing, an assignee of an option for the purchase of land had such an estate in the land as could be conveyed by mortgage, and, when it acquired the legal title

tle, such title inured to the benefit of the holders of the bonds secured by the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 13, 14; Dec. Dig. § 12.]

Appeal from Circuit Court, Johnson County.

Consolidated actions by Leonard Johnson and another against the Yellow Chief Coal Company. Judgments for plaintiffs, and defendant's trustee in bankruptcy appeals. Reversed.

H. R. Dysard, of Ashland, for appellant. C. B. Wheeler, of Ashland, and J. K. Wells, of Paintsville, for appellees.

NUNN, J. The appellees, Leonard and Charles Johnson, were plaintiffs below in separate actions. By an agreed order the actions were consolidated and tried together. Separate judgments were rendered against the Yellow Chief Coal Company, whereby Charles Johnson recovered \$5,625, and Leonard Johnson recovered \$3,375. The court also adjudged a lien upon certain lands for the payment of each judgment, and ordered a sale of the lands for that purpose. Pending the action the coal company was adjudged a bankrupt in the United States District Court for the Eastern District of Kentucky, and the trustee, who intervened, brings this appeal. Except in the amounts claimed, the actions of Leonard and Charles Johnson are identical.

In the year 1909 James M. Lively, of New York, came to Johnson county and started negotiations with the appellees and others for the purchase of coal lands on Bobbs branch, in that county. Upon his return to New York the owners made a proposition in the form of a letter agreeing to sell their lands at \$25 per acre, one-third to be paid in cash, and the balance in one and two years. In November, 1909, Lively returned to Johnson county, in company with Henry Taylor, and, after further negotiations, procured, on the 30th day of that month, separate writings or options from Charles and Leonard Johnson whereby Charles agreed to convey 300 acres, and Leonard agreed to convey 180 acres. The consideration was \$25 per acre. The options recited that Taylor and Lively were to organize a company, and the conveyances were to be made to that company within 60 days. One-third of the consideration was to be paid in cash when the conveyances were made, and the remaining two-thirds "to be paid for in the first mortgage, 20-year, 5 per cent. sinking fund bonds of said company, at the rate of 80 per cent. on their par value." During the interval the appellees agreed to furnish an abstract of title. The options also contained this clause:

"It is further provided that the vendor shall have the option, at any time after the expiration of eighteen (18) months from the delivery of such bonds, and before the expiration of twenty-four (24) months, to sell such bonds to the company so organized at the price of ninety (90)

per cent. of their par or face value; and the said company shall within sixty (60) days after such notice take up said bonds and pay therefor such price."

In the meantime the Johnsons were having abstracts made, and Taylor and Lively proceeded with the organization of the Yellow Chief Coal Company, which was tentatively formed by the subscribing stockholders on the 1st of January, 1910. While so organized the company took an assignment of the options executed to Taylor and Lively. On that date the company executed and acknowledged a mortgage or deed of trust to secure an issue of first mortgage bonds of \$500 each, aggregating \$100,000. The mortgage covered all the lands upon which Taylor and Lively had secured options, including the lands of appellees. January 29, 1910, was the last of the 60 days on which the option to purchase might be exercised, and on that day the articles of incorporation of the Yellow Chief Coal Company were filed for record in the Johnson county court clerk's office, as well as the mortgage or deed of trust referred to. On the same day, the Johnsons executed and delivered their deeds to the company, which were then recorded, conveying the lands which they had theretofore optioned, and the consideration was paid therefor as stipulated in the option, viz., one-third cash, and the balance by delivery of first mortgage, 20-year, 5 per cent. bonds; that is, a sufficient number of them at 80 cents on the dollar to equal in amount the balance of the purchase price. The deeds, however, did not recite the whole consideration or the manner of payment. The consideration named was "the sum of \$10 and other considerations in hand paid." It was the ordinary form of general warranty deed, without reservations or limitations of any kind, except an exclusion of two small surveys. No question about the exclusions is involved in this controversy.

On the 11th of February, 1910, a certified copy of the articles of incorporation were filed for record with the secretary of state. On April 18, 1911, at a stockholder's meeting, a resolution was adopted ratifying the mortgage and again declaring it to be the act and deed of the corporation.

By the sale of bonds secured by the mortgage executed and recorded in the way already explained the company procured funds with which to develop the property, and which it commenced to do as soon as titles were acquired. The appellees held their bonds and drew interest thereon semiannually for two years. At that time it became apparent that the company was in failing circumstances. It was unable to pay about \$5,000 which it owed for merchandise supplied by wholesalers to its mine commissary. In February, 1912, appellees filed their suits against the Yellow Chief Coal Company, and averred that it was a corporation "duly organized and existing under and by virtue of

the laws of Kentucky * * * and was organized for the purpose of taking over said property [referring to the land in question].” After setting up the terms of the option, they alleged that, when they made the contract and agreed to accept the bonds as therein stipulated, “the defendants [Lively and Taylor] represented to plaintiff that the mortgage securing the same included only enough bonds to cover the purchase money on this and other tracts adjoining it, bought by defendants as aforesaid, and upon this representation, and believing it to be true, plaintiff agreed to accept same under the terms aforesaid.” They alleged that said representation was falsely made for the fraudulent purpose of cheating plaintiffs, for at that time Taylor et al. intended to, and the company did, issue bonds aggregating \$100,000, “which was more than four times the amount of purchase money for land, as aforesaid.” It is further alleged that before the expiration of 24 months they gave to the company notice of their desire to sell the bonds so held by them at the price of 90 cents on the \$1, and the company failed and refused to purchase or pay for the bonds or any part thereof, “and therefore the full amount thereof is now due, just, and owing to plaintiff * * * and plaintiff has a purchase-money lien upon said land to secure the payment of said sum, which should be enforced by a sale thereof.” By an amended petition they say that the corporation was not, in fact, organized with power to do business until February 11, 1910, but that Lively and Taylor, when the deed was demanded on January 29th, falsely and fraudulently represented that the corporation had been organized, and that the “plaintiff, believing said representations to be true, and believing he was legally bound to execute said deed, signed and acknowledged the deed mentioned and set out in the petition, but with the express understanding that the company, which he thought was then organized and existing, would pay the purchase money on said land as mentioned and set out in said [option] contract.” It is further alleged that at the time the company executed the mortgage or trust deed to secure the \$100,000 bond issue the plaintiffs and other landholders had not executed their deeds for any of the land, covered by the mortgage, and the company “had no title, except the contract aforesaid, which was executed by the plaintiff and other vendors to the defendants, James M. Lively and Henry A. Taylor,” and for this reason, and because the company had no corporate existence, it is argued that the mortgage and bonds are void, and that the bondholders have no lien of any sort. They pray for a cancellation of their deeds or else that they be adjudged to have a prior lien upon the lands they conveyed to secure the balance of their purchase money.

The trustee, in behalf of the creditors, and the bondholders intervene. They al-

lege, in substance, that the bonds were issued and purchased in good faith, and that the bondholders, including the Johnsons, have a lien by virtue of the mortgage, but assert that the Johnsons, have no purchase-money or other prior lien, and plead that the Johnsons are estopped from asserting or claiming any lien for purchase money after having recited in the deed of conveyance that the consideration had been fully paid, and after having accepted the bonds of the company as payment. For the creditors it is said they extended credit in good faith, and, in substance, the plea of the bondholders is relied upon. We are of the opinion that the court erred in rejecting the plea of the creditors and bondholders, and erred also in adjudging appellees a prior lien for purchase money.

[1, 2] The court properly held that the Johnsons failed to show such fraud as would entitle them to a rescission of the option contract or cancellation of the deed. There is no more justification for adjudging them a priority of lien over innocent creditors and bondholders. No relation of trust or confidence is shown as would impose upon Lively or Taylor, or the other promoters or organizers of the company, a duty to protect the interests of the appellees. They were trading at arm's length, and the contracts entered into were carried out to the letter, except the final redemption of the stock. The obligation of the company in that regard is not disputed. The mortgage was recorded in Johnson county on the day the deeds were delivered, and it showed the entire bond issue and the acreage covered. The company did pay for the land “as mentioned in said [option] contract.” The Johnsons made no complaint until the company got in failing circumstances, two years later.

The fraud relied upon to vitiate the option contract and deed is that the first mortgage bonds were to be issued only in an amount sufficient to pay for the land. The option contract which they signed contained no such stipulation, and it is nowhere alleged that anything was left out of the contract. The bonds showed on their face that they were part of a series, the whole number of which aggregated \$100,000. These bonds were accepted when their deeds were written and delivered. The transaction took place in the office of their attorney, and their attorney, a relative, was there for the purpose of advising them and protecting their interests. There is no pretense that they were ignorant or unlettered men. They retained these bonds for two years and drew the interest thereon, and all the time they knew or must have known that they were part of an issue far in excess of the amount which they now insist was the limit agreed upon. The facts alleged merely show an obligation on the part of the company to redeem their bonds at 90 cents on the \$1. It may be that the company is not now able to make its promise

good, but that is not ground for canceling the deed, nor is it a badge of fraud. The deeds which were made to the company recited that the consideration was fully paid, and it was. The bonds accepted as part consideration were a vendable commodity, and the option contract obligated the vendors to accept them as part consideration, and they did accept them when they executed the deed. Clearly, whatever cause of action they have is upon the bonds, and their rights and remedies are the same as the other bondholders.

[3] There is no merit in appellees' claim for rescission upon the plea that at the time they made the deeds the corporation was not duly or completely organized. The petition expressly alleged that it was duly organized for the purpose of taking over this land, and the option contract stated that the company was to be organized, and during the next 60 days one was organized, and on the day the deed was made its charter was filed for record in the county court clerk's office, as required by law, and in 12 days thereafter record had been made of it in the office of the secretary of state. While it is true it accepted the conveyance before the organization was complete, yet, as between the parties to the conveyance, it was valid. *Miller v. Flemingsburg & Fox Springs Turnpike Co.*, 109 Ky. 475, 59 S. W. 512, 22 Ky. Law Rep. 1039; *Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188.

"The conveyance of land to an intended corporation before its organization will take effect when its organization is completed. * * * The fact that a corporation has been irregularly organized will not be sufficient to render invalid the title to land conveyed by it in good faith." 3 *Thompson on Corporations*, § 2372.

Section 566 of the Kentucky Statutes provides:

"No corporation organized under this chapter shall be permitted to set up or rely upon the want of legal organization as a defense to any action against it; nor shall any person transacting business with such corporation, or sued for injury done to its property, be permitted to rely upon such want of legal organization as a defense."

[4] It has been repeatedly held by this court that, where a person executes an obligation to a corporation, he cannot, in an action on it by the corporation, deny that such a corporation had an existence. *Lall v. Mt. Sterling Coal Co.*, 13 Bush, 32; *Jones v. Bank*, 8 B. Mon. 122, 46 Am. Dec. 540. Nor can he set up as defense that it had no power to contract, unless the contract be expressly forbidden by law. *Johnson v. Mason Lodge*, 106 Ky. 838, 51 S. W. 620, 21 Ky. Law Rep. 493; *Blitz v. Bank*, 55 S. W. 697, 21 Ky. Law Rep. 1554; *Oliver v. Louisville Realty Co.*, 156 Ky. 628, 161 S. W. 570, 51 L. R. A. (N. S.) 293, Ann. Cas. 1915C, 565.

[5, 6] It is a general rule that a mortgage of property to be acquired in futuro is void against mortgagors, creditors, or purchasers for value. *Bank of Louisville v. Baumliester*,

87 Ky. 6, 7 S. W. 170; 9 Ky. Law Rep. 845; *Manly v. Bitzer*, 91 Ky. 596, 16 S. W. 464, 13 Ky. Law Rep. 166, 84 Am. St. Rep. 242; *Hutchison, McChesney & Co. v. Ford*, 9 Bush, 318, 15 Am. Rep. 711. But the rule has no application here; for the corporation did have such an estate in the land as could be conveyed by mortgage. It was the owner by assignment of the option contracts, and, as expressly held in the case of *Bank of Louisville v. Baumliester*, supra, a contract for an option to purchase real estate at an agreed price within a specified time may be sold, assigned, or mortgaged. Section 2341, Kentucky Statutes. When the contract was completed, and the legal title taken, it inured to the benefit of the mortgagees, who are the bondholders in this case.

The judgment is reversed for proceedings consistent with this opinion.

YELLOW CHIEF COAL CO.'S TRUSTEE v. PRESTON et al.

(Court of Appeals of Kentucky. Nov. 11, 1915.)

Appeal from Circuit Court, Johnson County. Action by McClelland Preston and others against the Yellow Chief Coal Company's trustee. Judgment for plaintiffs, and defendant appeals. Reversed, with directions.

H. R. Dysard, of Ashland, for appellant. J. K. Wells, of Paintsville, for appellees.

NUNN, J. Except the amount of money involved, the issues and the principles of law applicable thereto, as well as the judgment appealed from, are identical with those in the case of *Yellow Chief Coal Company's Trustee v. Johnson*, 179 S. W. 599, this day decided.

On the authority of that case, the judgment is reversed, with direction for proceedings in the lower court consistent with the opinion rendered in that case.

DOHERTY v. FIRST NAT. BANK.

(Court of Appeals of Kentucky. Nov. 10, 1915.)

APPEAL AND ERROR \S 773—REQUISITES FOR TRANSFER—DOCKET.

Although appellant on the last day took his appeal from a judgment of the district court, but did not file his brief 20 days before the date set for hearing on the appeal, as required by rule 3 of the Court of Appeals (154 S. W. vii), and the appeal was dismissed, the dismissal was erroneous, where the appellant had not summoned the appellee and the case was therefore never properly docketed.

[Ed. Note.—For other cases, see Appeal and Error. Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. \S 773.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Charles J. Doherty against the First National Bank. On motion to set aside order dismissing appeal and to reinstate case upon the docket. Motion granted.

O'Doherty & Yonts, of Louisville, for appellant. Helm Bruce and Bruce & Bullitt, all of Louisville, for appellee.

HURT, J. The judgment appealed from was rendered April 14, 1913. On the 13th day of April, 1915, which was the last day upon which an appeal from the judgment could be granted by the clerk of this court, he filed in the clerk's office of this court a copy of the judgment and what purported to be a transcript of the record in the case, and a statement, as required by section 739 of the Civil Code, and moved the clerk of this court to grant him an appeal. The appeal was granted, as appears from the memorandum made by the clerk upon the transcript, and a summons and copy issued to Jefferson county, for the appellee. The case was set upon the present September docket of this court for the 28th day of September, 1915. On the last-named day the appellee filed a motion to dismiss the appeal, because the appellant had failed to file his brief 20 days prior to that date, as required by rule 3 of this court (154 S. W. vii). The motion was sustained, and the appeal ordered to be dismissed without prejudice. On the 8th day of October following the appellant, having given to the appellee notice of his intention, entered a motion before this court to set aside the order dismissing the appeal and to reinstate the case upon the docket, and the case was submitted upon the motion.

An examination of the record develops the fact that the appellee has never been summoned upon the appeal, and the case was not properly on the docket for hearing at its calling on the 28th day of September, and that on the 21st day of September, preceding its dismissal, an alias summons had been issued for services upon the appellee. Rule 3 of the court, so far as it is pertinent to the matter in hand, is as follows:

"That in all cases of appeals hereafter filed * * * it shall be the duty of the appellant to file his brief twenty days prior to the date the case is set for hearing, * * * and a failure to do so by the appellant shall cause a dismissal of the appeal without prejudice," etc.

At the time the motion to dismiss the appeal was sustained, the attention of the court was not called to the fact that the appellee had never been summoned, nor had ever entered its appearance, and that the case was not properly on the docket for hearing, within the meaning of rule 3 of this court.

The order dismissing the appeal is therefore set aside, and the case is ordered to be reinstated upon the docket.

COTTON SEED PRODUCTS CO. v. BONDURANT.

(Court of Appeals of Kentucky. Nov. 12, 1915.)

1. APPEAL AND ERROR § 616—RECORD—BILL OF EXCEPTIONS—INSTRUCTIONS.

Where a transcript of the evidence and the rulings thereon, not embracing the instructions, was filed as a bill of exceptions, and what purported to be the instructions were copied in the record, with the clerk's note, at the top of the

page where they commenced, "Order made May 7, 1914," and where the only order on that day was one made, prior to the trial, reciting the filing of plaintiff's reply, it could not be said that any order referred to or identified the instructions so copied into the record, so that they could not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2174-2178; Dec. Dig. § 616.]

2. SALES § 52—ACTION FOR PRICE—SUFFICIENCY OF EVIDENCE.

In an action for the price of a car load of cotton seed, defended on the ground that defendant had never bought or agreed to pay for it, but had received it, with others, found it worthless, and refused to pay for it, evidence held to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-144, 1045; Dec. Dig. § 52.]

Appeal from Circuit Court, Fulton County. Action by C. T. Bondurant against the Cotton Seed Products Company, in which defendant counterclaimed. Judgment for plaintiff, and defendant appeals. Affirmed.

Hendrick & Nichols, of Paducah, and Burnett & Burnett, of Louisville, for appellant. W. J. Webb, of Mayfield, for appellee.

TURNER, J. Appellee instituted this action against appellant for the price of a car load of cotton seed. It is the contention of the appellee that appellant's agent, on or about the 23d of January, 1913, entered into a contract with him by which it bought from him five car loads of cotton seed at an agreed price, after an inspection of the seed; the appellant's agent at the time knowing that a part of the seed, about one car load, was not of as good quality as the balance of the seed.

Appellant claims that it did not buy the seed at that time, but received the five car loads of seed, and paid for the four car loads of good merchantable seed, but that the car load for which it refused to pay was practically worthless, and that it never bought or agreed to pay for the same. Its answer was made a counterclaim, wherein it set up certain other and older transactions between the parties, and alleged that it had overpaid appellee in such transactions about \$205, for which it prayed judgment. The allegations of the counterclaim were denied, and upon a trial the jury found for the plaintiff for the car load of seed at the contract price, and against appellant on the counterclaim.

On this appeal only two reasons are given for reversal: (1) Because the court erred in giving instruction No. 2 to the jury, based upon the allegations of the counterclaim; and (2) because the verdict of the jury is flagrantly against the weight of the evidence.

[1] A transcript of the evidence, together with the rulings of the court upon the admission and rejection of testimony, transcribed by the official stenographer and approved

by the court, is filed in the record as a bill of exceptions; but in this bill of exceptions the instructions are not embraced.

What purport to be the instructions given by the court are copied in the record, and at the top of the page where they begin is an annotation in brackets, evidently made by the clerk, which says, "Order made May 7, 1914, continued;" there being no styling of the case, and nothing further to indicate that they were embraced or referred to in any order of the court. The only order of the court made on May 7, 1914, which we have found, is one made prior to the trial, which was held on that day, reciting the fact that the plaintiff had filed his reply, and that is copied in the record several pages in advance of the place where the supposed instructions are copied.

With the record in this condition we are unable to see that there was any order of the court referring to or identifying the instructions which the clerk has copied in the record; and there being no identification of them, either by bill of exceptions or order, they cannot be considered. *Weddington v. White*, 148 Ky. 671, 147 S. W. 17; *Madden v. Meehan*, 151 Ky. 220, 151 S. W. 681; Civil Code, § 335, and notes.

[2] The contention that the verdict is flagrantly against the weight of the evidence, even if it can be considered upon an appeal where the instructions are not in the record, cannot be sustained. The plaintiff explicitly testified that the defendant's agent inspected the seed, knew that one car load of it was not of the best quality, and called attention to that at the time, and bought the whole five car loads at the contract price with this knowledge. This evidence is corroborated, in a measure, by the fact that the five car loads of seed were received by appellant, and that the car load of defective seed was actually paid for by it.

The jury were the judges of the weight to be given to the evidence, and this court will not set aside its verdict, where there is evidence to base it upon, even though the preponderance of the evidence may have been on the other side.

Judgment affirmed.

FRY et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 11, 1915.)

1. STATUTES §118 — VALIDITY — TITLE OF ACT.

Act March 17, 1904 (Laws 1904, c. 29; Ky. St. § 1201c) entitled "An act to regulate crime and fix the punishment thereof," which provides that if any person shall steal poultry he shall be confined in the penitentiary, etc., is not in violation of Const. § 61, declaring that no laws shall relate to more than one subject, which shall be expressed in their titles; the provisions of the statute being germane to the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158-160; Dec. Dig. §118.]

2. CRIMINAL LAW §1213—CRUEL AND UNUSUAL PUNISHMENTS—STATUTES.

Ky. St. § 1201c, prescribing for theft of poultry of the value of \$2 or more imprisonment in the penitentiary for not less than one or more than five years, is not in violation of Const. art. 17, prohibiting the infliction of cruel punishments, for the necessity of the punishment rests in legislative discretion, and as the purpose is to discourage the act, it cannot be held cruel because graver crimes are no more severely punished.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3304-3309; Dec. Dig. §1213.]

Appeal from Circuit Court, Bullitt County.

Ed Fry and others were convicted of larceny, and they appeal. Affirmed.

Chas. Carroll, of Louisville, T. C. Carroll, of Shepherdsville, Ben Chapeze, of Louisville, and J. R. Zimmerman, of Shepherdsville, for appellants. James Garnett, Atty. Gen., and Overton S. Hogan, Asst. Atty. Gen., for the Commonwealth.

HANNAH, J. The appellants were tried under an indictment returned against them in the Bullitt circuit court, and found guilty of the offense of stealing ducks of the value of \$2 or more. Their punishment was fixed by the jury at not less than one nor more than two years in the penitentiary. They appeal.

[1] 1. The prosecution is under the Act of March 17, 1904, section 1201c, Kentucky Statutes, which provides that if any person shall steal chickens, turkeys, ducks or other fowls of the value of \$2 or more, he shall be confined in the penitentiary not less than one nor more than five years. The title of this act is "An act to regulate crime and fix the punishment therefor." It is contended by appellants that this title contravenes section 51 of the Constitution, which provides that no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title. In *Bowman v. Hamlett*, 159 Ky. 184, 166 S. W. 1008, the court said:

"This section of the Constitution has always been liberally construed, all doubts being resolved in favor of the validity of the legislative action. The purpose of this constitutional provision is the prevention of surreptitious legislation; as said in *Cooley* on Constitutional Limitations, 'To prevent surprise or fraud upon the Legislature by means of provisions in bills, of which the titles gave no intimation, and which might, therefore, be overlooked and carelessly or unintentionally adopted.' So, having in mind the purpose of this provision, and the evil against which it is aimed, before any act of the General Assembly should be nullified by this court upon the ground that the subject of the act is not expressed in the title by reason of a variance between the title and the body of the act, it should be made to appear, and the court should be satisfied, that the variance complained of is such as to bring it within the range of the evils sought to be guarded against, and such as to justify its condemnation upon that ground alone."

It has many times been held by this court that there is a sufficient compliance with

the requirements of section 51 of the Constitution when the provisions of the act all relate to the same subject and are naturally connected and are not foreign to the subject expressed in the title. *Williams v. Wedding*, 185 Ky. 381, 178 S. W. 1176, and authorities therein cited. And, while it may be conceded that the title of the act in question does not mention the stealing of fowls, still it cannot be said that such legislation is foreign to the subject expressed in the title. Moreover, the contention now presented by appellants was settled in favor of the constitutionality of the act by this court in the case of *Diamond v. Commonwealth*, 124 Ky. 418, 99 S. W. 232, 30 Ky. Law Rep. 655. In that case, this same act was attacked because of the alleged defect in its title; and the court held that there was a sufficient compliance with the requirements of section 51 of the Constitution. We are not disposed to recede from the position then taken.

[2] 2. But appellants further contend that the act in question is violative of section 17 of the Constitution, which prohibits the infliction of cruel punishments, it being argued that a punishment of not less than one year in the penitentiary for stealing fowls of the value of \$2 or more is such as to contravene this constitutional provision. In *Harper v. Commonwealth*, 93 Ky. 290, 19 S. W. 737, 14 Ky. Law Rep. 163, it was contended that a statute imposed a cruel punishment within the purview of the Constitution. This court said:

"And if it requires confinement in the penitentiary and disfranchisement to prevent or check the practice, the Legislature has the constitutional right and it is its duty, to enact such a law. That body is necessarily the judge of the adequacy of the penalties necessary to prevent crime. The court has no right to say that the punishment is cruel and unconstitutional, unless it clearly and manifestly so appears."

Appellants devote a considerable portion of their brief to a comparison of the punishments prescribed by statute for other offenses with that prescribed for the offense of stealing fowls of the value of \$2 or more; but, as we view it, but little profit is derived from a consideration of the matter of punishments upon that basis. Penal statutes are enacted in an effort to discourage the perpetration of the offenses denounced therein. The punishment that will tend to deter, in respect of one crime, must necessarily differ from that which will deter in respect of another. The offenses of perjury, false swearing, subornation of perjury, grand larceny, and feloniously breaking into a warehouse, and others denounced by statute may be considered of higher grade than that of the stealing of fowls of the value of \$2 or more, but that does not constitute good reason why the penalty for the latter should not be equal to the penalty for the other offenses mentioned, if such a penalty is found to be necessary to deter persons from the commission of the offense of stealing fowls.

The punishment may have the appearance of being severe, but we are not inclined to say that it is clearly or manifestly cruel or in contravention of the constitutional guaranty relied upon and asserted by appellants. Judgment affirmed.

ROBERTS v. BENNETT et al.

(Court of Appeals of Kentucky. Nov. 9, 1915.)

FRAUDS, STATUTE OF § 110—CONTRACTS RELATING TO LANDS—SUFFICIENCY.

Plaintiff entered into a contract for the sale of his farm of 210 acres lying on a named turnpike. Plaintiff owned a farm in that vicinity of over 300 acres, and there was no distinct parcel of 210 acres. *Held*, that while parol evidence is admissible to show what tract of land covers the description contained in the writing, it is inadmissible to show the intention of the parties as to what part of a larger portion is to be conveyed, hence the contract is unenforceable under the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 225-236; Dec. Dig. § 110.]

Appeal from Circuit Court; Henderson County.

Suit by R. R. Roberts against H. T. Bennett and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Montgomery Merritt and Yeaman & Yeaman, all of Henderson, for appellant. Clay & Clay, of Henderson, for appellees.

HANNAH, J. This is a suit to enforce the specific performance of a contract for the sale of land. The contract reads as follows:

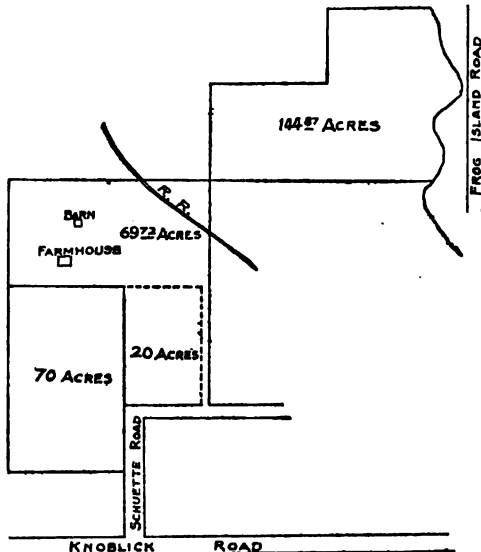
"Henderson, Kentucky, March 12, 1913. This agreement entered into between R. R. Roberts, party of the first part, and Henry and Thos. Bennett, parties of the second part, witnesseth: We, Henry and Thos. Bennett, parties of the second part, agree to pay to Roberts, party of the first part, seven thousand and five hundred dollars cash, and give him seven notes of \$2,228.57, due January 1st of each year, beginning January 1, 1914, bearing interest at 6% payable semiannually, for his farm of 210 acres, more or less, on the Knoblick Pike. Said Roberts agrees to deed a driveway of twenty feet on north line of his farm; said second party to fence same. And Roberts further agrees to keep and care for farm, and to pay \$1,000 rent for said farm, and to give possession January 1, 1914. Said Roberts is to remove what cut posts he now has on said farm. It is further agreed and understood that if parties of the second part fail to raise the cash payment of \$7,500, then this agreement is to be null and void. Said party of second part has hereby paid to said first party five dollars to bind this contract agreement."

This was signed by all the parties mentioned.

The Bennetts paid Roberts \$1,000 on said contract, and, failing to make further payments, or to further carry out their part of said contract, Roberts sued them for specific performance thereof. From a judgment in favor of the defendants, rescinding the contract and adjudging a return of the \$1,000 so paid to him, the plaintiff appeals.

Only one of the defenses interposed by the

defendants is here necessary to be considered—that the contract, for want of a sufficient description of the lands intended to be sold, is within the statute of frauds and therefore unenforceable. At the time of the making of this contract, Roberts was the owner of the lands shown upon the accompanying diagram, comprising 304.59 acres. This land was originally in three tracts. The tract of 70 acres he purchased from a man named Schuette. The remainder he derived by the following conveyances: (1) A deed from Wynne G. Dixon and wife to Edward Roberts, Eula Roberts, and R. R. Roberts, conveying two tracts, one of 89.72 acres, and the other of 144.87 acres; (2) a deed from Eula Roberts to R. R. Roberts, conveying her undivided interest in the lands mentioned, Edward Roberts, uncle of Eula Roberts, and R. R. Roberts, having died intestate leaving them his sole heirs at law.



As has been seen, the language of the contract was "his farm of 210 acres, more or less, on the Knoblick Road." Plaintiff offered to convey to defendants 214.59 acres of said 304.59 acres of land owned by him, and undertakes to explain by parol evidence that the land intended to be sold was the 144.87-acre tract, and that parcel of land marked on the map as 69.72 acres, it being a portion of the tract of 89.72 acres acquired by him as above set forth; that it was understood by the parties that there should be retained by him, out of the 89.72-acre tract, that parcel shown on the map as 20 acres, although it was estimated at the time to contain 25 acres; and that the two tracts sold would contain 210 acres, although upon a survey it was found that their combined acreage was 214.59 acres.

It will be observed that none of Roberts' land abuts directly on the Knoblick Road, and especially none of the portions which he

claims were agreed to be sold to appellees, and appellees argue that this is fatal to the contract. It appears, however, that that road is the principal outlet from the 70 acres, the 20 acres, and the 69.72 acres on which the farmhouse and other buildings are located, being reached, as shown on the map, by passing over a tributary road, known as the Schuette Road, and so marked on the map.

A railroad crosses that corner of the 69.72 acres next to the 144.87 acres. These two tracts touch only at a single point, and Roberts has no writing granting him a passway from the one to the other of these two tracts, though he claims that one of his remote vendors had such a grant.

The question is whether, under the circumstances here shown, the description, "his farm of 210 acres more or less on the Knoblick Road," is sufficiently definite to take the memorandum out of the statute. Waiving the fact that Roberts' land does not abut on the Knoblick Road, we still have the language "his farm of 210 acres," and are confronted with the question whether this is sufficient, when the vendor has in fact 304.59 acres at the place he claims is designated in the writing and offers to convey only 214.59 acres thereof. In *Jones v. Tye*, 93 Ky. 390, 20 S. W. 388, 14 Ky. Law Rep. 448, the writing involved was as follows:

"Received of John S. Tye eighteen dollars, remainder of the payment of the purchase money on the land bought of Madison Jones adjoining the McKibby land. July 2, 1884. [Signed] Madison Jones."

The court in that case said:

"It is clear that the receipt in this case is not a sufficient memorandum of the sale to comply with the statute of frauds, because it fails to identify with reasonable certainty the land sold; and to allow the controversy as to the identity of the land to be settled by the mere weight of verbal testimony would, as it seems to us, defeat the very object of the statute of frauds."

In *Wortham v. Stith*, 66 S. W. 390, 23 Ky. Law Rep. 1882, the writing was:

"Received of C. M. Wortham three hundred dollars in part payment of 115 acres of land, which I have this day sold him for \$3,100," etc.

The court held that the writing was insufficient to constitute a compliance with the requirements of the statute of frauds.

In *Hyden v. Perkins*, 119 Ky. 188, 83 S. W. 128, 26 Ky. Law Rep. 1099, the writing involved was:

"Received of Henry Hyden \$20 first cash payment on farm of about twenty acres known as the 'Vaught Farm,'" etc.

The court held that parol testimony could be resorted to for the purpose of showing what farm was known as the "Vaught Farm," if there was but one so known and it contained about 20 acres. The court further said:

"But if there were two farms to which this description would equally apply, then parol proof would be incompetent to show which of the two parties intended to designate. In other words, when the description given in the

writing is so uncertain that parol proof must be admitted to show what the parties meant, as between two or more things to which the description given in the writing would equally apply, then the contract is within the statute."

So in *Winn v. Henry*, 84 Ky. 43, 7 Ky. Law Rep. 693, the court held sufficient a writing, describing the property as, "Silver Lake Place, near Washington, Kentucky, containing 52 acres, more or less"; parol proof being admissible to show to what land this description applied. And in *Henderson v. Perkins*, 94 Ky. 207, 21 S. W. 1035, 14 Ky. Law Rep. 782, a writing was held sufficient which described the property as "my home place and storehouse," and gave the seller's name and residence.

In *Bates v. Harris*, 144 Ky. 399, 138 S. W. 276, 36 L. R. A. (N. S.) 154, a writing was held sufficient which described the land sold, as the vendor's "Muddy Creek Farm" stating that "it embraces 113 acres," where the vendor had such a farm on Muddy creek, although the vendor had in fact two farms on that creek, but the other did not contain 113 acres.

In *Brice v. Hays*, 144 Ky. 535, 139 S. W. 810, the writing described the land as, "about 150 acres of land near Otter Creek Station about one mile north of Rineyville, Hardin county, Kentucky, on I. C. R. R.," and the court held this description insufficient.

In *Nippolt v. Kammon*, 39 Minn. 372, 40 N. W. 266, the writing contained the description "five acres of lot 3, sec. 23, town 28, range 23." The court said:

"No means are given by which to determine what five acres in lot 3 is intended. When such an agreement contains sufficient elements of description, of course parol evidence may, and indeed must, be resorted to, to apply the description to the specific piece of land supposed to be intended; in other words, to show that a specific piece answers to the description in the writing. But the writing must be a guide to find the land—must contain sufficient particulars to point out and distinguish the piece from any other—so that when the description in the writing is laid beside the description of a particular piece, it may be seen with certainty that the latter was intended by the former."

Other authorities to the same effect are *Miller v. Campbell*, 52 Ind. 125; *Blankenship v. Spencer*, 31 W. Va. 510, 7 S. E. 433; *Omaha Loan & Trust Co. v. Goodman*, 62 Neb. 197, 86 N. W. 1082; *Grier v. Rhyne*, 69 N. C. 346.

The rule deducible from these cases is that, while parol evidence is admissible to show what tract of land answers to the description contained in the writing, if there be such tract, it is not admissible to show what the parties intended or meant by the language of the writing. In other words, had Roberts been the owner of a farm containing about 210 acres, parol evidence would be admissible to show that fact, and thus to show that that tract answers to the description contained in the writing; but parol evidence is not admissible to show

which particular 210 acres out of the 304.59 acres owned by appellant the parties meant by the language of the description contained in the writing here involved. The writing alone must be looked at to show this, and, it failing to do so, the contract was within the statute, and invalid for want of a sufficient description of the land, and the chancellor was right in adjudging the rescission. Wherefore the judgment is affirmed.

COLE et al. v. COLLINS.

(Court of Appeals of Kentucky. Nov. 10, 1915.)

1. EVIDENCE \Rightarrow 260—CONSPIRATORS—DECLARATIONS.

In a civil proceeding founded on conspiracy, the conspiracy must be proved otherwise than by the testimony of a conspirator before his acts and declarations are admissible against a coconspirator.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1010-1012; Dec. Dig. \Rightarrow 260.]

2. EVIDENCE \Rightarrow 253—DECLARATIONS BY CONSPIRATORS.

Declarations of a conspirator made after the purposes of the conspiracy are terminated cannot be proved against a coconspirator.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 994-1002; Dec. Dig. \Rightarrow 253.]

3. DEEDS \Rightarrow 211—VALIDITY—FRAUDULENT CONSPIRACY.

In a proceeding to set aside a deed, etc., based on a conspiracy between a real estate agent and the vendee, held, that there was sufficient evidence, outside of the acts and declarations of the vendee, to sustain a judgment in favor of the vendor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. \Rightarrow 211.]

4. APPEAL AND ERROR \Rightarrow 1009—CHANCELLOR'S FINDINGS—WEIGHT.

Where the evidence is conflicting, and the mind left in doubt, and it is not reasonably certain that the chancellor has erred, the appellate court will affirm his decision.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. \Rightarrow 1009.]

Appeal from Circuit Court, Marshall County.

Suit by D. T. Collins against Charles Cole and others. Judgment for plaintiff, and defendants appeal. Affirmed.

R. L. Shemwell, W. M. Reeder, and E. L. Cooper, all of Benton, for appellants. J. G. Lovett, J. E. Fisher, and Joe L. Price, all of Benton, for appellee.

CLAY, C. D. T. Collins owned a farm consisting of about 166 acres in Marshall county. He placed the farm in the hands of Charles Cole a real estate dealer, and authorized him to sell it. He agreed to pay Cole all over \$5,810 that he realized from the sale of the farm. Cole sold the farm to Roy Houser, and on July 12, 1913, Collins executed a deed to the property. The purchase price was fixed at \$6,500, to be paid as follows: \$1,000 on March 1, 1914; one note of \$475, due and payable to the Bank of

Benton; and five notes for \$1,005 each, due and payable on March 1, 1915, March 1, 1916, March 1, 1917, March 1, 1918, and March 1, 1919, respectively, and bearing interest at the rate of 6 per cent. per annum, payable annually until paid. To secure the payment of the purchase money, a lien was retained on the land. At the same time Collins executed to Cole a note for \$690 in payment of Cole's commission.

On September 1, 1913, Collins brought two separate actions, one against Roy Houser to set aside the deed in question on the ground of fraud and misrepresentation, and the other against Cole for the cancellation of the note on the ground that it was obtained from him by fraud. Afterwards the two cases were consolidated, and on final hearing plaintiff was granted the relief asked. The defendants appeal.

The particular fraud relied upon is the failure of the deed to specify that the \$475 due the bank was to be paid before possession was given, and to provide that upon default in the payment of any one of the notes all the notes should become due and collectible. It is further charged that Cole represented that Houser was a well-to-do man and could pay for the farm. Collins says that the agreement was that the \$475 was to be paid when Houser returned to Benton, and if any one of the notes was not paid at maturity, all the other notes were to become due and collectible. He further says that Cole, who prepared the deed, read the deed as if it contained the provision that all the notes were to become due if any one was not paid at maturity. He further says that Cole recommended Houser as being in good fix and able to pay for the place. A few days after the trade was made he learned that the deed did not contain any provision in regard to all the notes becoming due if any one of them was not paid. It further appears that Cole took Mr. Houser off once or twice, and also Collins once or twice, and talked with them privately. It is also shown that Houser owned a tract of land worth about \$1,000 and \$400 or \$500 worth of personal property. N. R. Estes, who was present when the trade took place, says that Collins wanted \$1,500 down when the land was sold. He also stated that he wanted twelve months between the notes, and, as he understood it, if one note fell due and was not paid, all the notes became due. J. S. Rickman met Houser in Paducah, and says that Houser told him that Charlie got him to go over there and buy the place so Charlie could get his commission; that, if Charlie did not come clean with him, he was going on and keep the place himself; that he had six years in which to pay for the place; and that, if he didn't want to pay for it, he could give it up. Houser also said that he would buy all of Marshall county if he could buy it at that rate. A man by the name of Faust testified that Houser wanted to sell him the timber in

order to get the money to pay something on the place. D. M. Karnes testified that he had a conversation with Houser, in which he asked Houser if Charlie Cole and he had not acted shaky with the old man. Houser said, "No; I played fair and square." Houser further said, "Well, it was through ignorance by God we got them into it," and also remarked that, "The law don't excuse ignorance." L. Gordon testified that Houser said he did not know where the tobacco patch was; that Mr. Cole told him to just buy the farm and not return a word. He further states that Houser told him that the old man was not capable of attending to his business, and ought to have a guardian; that he could not read, and they ran it over him. O. T. Davis testified that shortly after the sale from Collins to Houser he began negotiations with Cole for the purchase of the same tract of land. Cole stated that Houser had six years in which to pay for the farm, and would not have to pay a dollar on it unless he wanted to, and he would draw up the notes the same way for Davis.

According to the evidence for the defendant, Collins was anxious to sell his farm. He did not need the money, but wanted the interest to live on. It further appears that two days after the sale in question was made to Houser Collins sold another tract of land, through Cole as his agent, to one L. G. Harmon. Collins says that this deed was to be written so that when one note became due they were all to become due. He further stated that Mr. Harmon was willing for the deed to be changed at any time. On introducing Mr. Harmon, the latter stated that Cole asked Collins if he wanted the deed written so that all the notes would become due if one became due and was unpaid, and Collins answered that he would not make the deed any other way. The Harmon deed referred to contains a provision to the effect that, if any one of the notes became due and was not paid, all the notes would become due. Cole denies that anything was said about a provision in the deed with respect to the maturity of all the notes in case one became due and was not paid, and denies that he read the deed as if it contained such provision. He further says that he made no representation as to Houser's ability to pay for the place, with the exception of the statement that Houser owned a small farm. Mr. Collins stated that he wanted the notes written so that he could collect the interest; that he did not need the money, but wanted the interest paid annually. Cole further says that he acted merely as an agent to sell the land, and that there was no fraud or conspiracy whatever between him and Houser. Houser also testified that Collins said that just so he got the interest was all he wanted. He did not tell Sam Rickman that he was buying the place for Charlie Cole, nor did he tell him that he would buy all of Marshall county if he could get it on those terms.

He did meet Sam Rickman, but the latter had been drinking. A number of witnesses testified that, while plaintiff's health was bad, he had sufficient mental capacity to attend to business.

[1-4] While it may be true, as a general rule, that the acts and declarations of a co-conspirator are not admissible as evidence against his coconspirators until the conspiracy has first been established by evidence other than the statements of a coconspirator, and that the declarations of a coconspirator after the purpose of the conspiracy has terminated cannot be proven against other conspirators (*Metcalfe v. Conner*, Litt. Sel. Cas. [16 Ky.] 497, 12 Am. Dec. 340; *Sodusky v. McGee*, 7 J. J. Marsh. 266; *Shelby v. Commonwealth*, 91 Ky. 571, 16 S. W. 461, 13 Ky. Law Rep. 178; 8 Cyc. 680-682), yet there are many other circumstances in the case tending to sustain the finding of the chancellor. Cole, being the agent of plaintiff, sustained a confidential relation to him. In making the sale and drawing the deed, it was his duty to act in good faith. The evidence shows that Houser, before making the purchase, made but a slight examination of the farm. It is also shown that Houser owned but little property, and this was probably exempt. Plaintiff and N. R. Estes both say that the agreement was that, if one of the notes was not paid at maturity, all the notes were to become due. Plaintiff further says that the deed was read as if it contained such a provision. As written, the deed places plaintiff in the position where he would either have to wait until all the purchase money became due, or, in case the farm could be divided without materially impairing its value, enforce the payment of the different notes by separate sales of small portions of the farm. While it may be true that in the hurry of closing a transaction the parties might omit to put in a deed a provision to the effect that, if one of the notes should not be paid on maturity, all the notes should become due, yet neither Houser nor Cole now claims that such provision was not put in the deed because the parties overlooked it. They are both insisting that the deed as written expresses the agreement between the parties. That Cole was cognizant of the effect of the deed as written is clearly shown by his attempt to induce O. T. Davis to purchase the same property by telling him how the notes were drawn to Collins, and that, if Davis would buy the farm, his notes would be executed in the same way. Considering the fact that Houser made no careful examination of the farm, that his means were entirely insufficient to pay for it, that Cole had a large commission at stake, that the deed was drawn in such favorable terms, and it is not now claimed that this was the result of any mistake on the part of Cole in drawing the deed, and that Collins claims that the deed was read as if all the deferred

payments would be precipitated if one of the notes was not paid at maturity, it is apparent that there is some evidence tending to support the conclusion of the chancellor. Where, as in this case, the evidence is conflicting, and upon a consideration of the whole case the mind is left in doubt, and it cannot be said with any reasonable degree of certainty that the chancellor has erred, it is our rule not to disturb his finding. *Rawlings v. Fish*, 151 Ky. 764, 152 S. W. 941; *City of West Covington v. Dods*, 152 Ky. 617, 153 S. W. 964.

Judgment affirmed.

CARRICK et al. v. GARTH et al.*

(Court of Appeals of Kentucky. Nov. 10, 1915.)

1. RAILROADS ⚡97 — CROSSING HIGHWAY — CHANGE OF LOCATION — NECESSARY PARTIES.

In an action to change the location of a highway so as to abolish a grade crossing over a railway right of way and relocate the crossing at a point where it would cross the right of way by an overhead crossing, the railroad company is a necessary party.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 297-304; Dec. Dig. ⚡97.]

2. APPEAL AND ERROR ⚡882—INVITED ERROR—PARTIES.

Where one party demurs to the petition on the ground that a necessary party is not made a party to the action by it, he is estopped from afterwards alleging error in joining such party, as the error, if any, is invited.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. ⚡882.]

3. HIGHWAYS ⚡72 — ALTERATION — APPEAL TO CIRCUIT COURT—TRIAL DE NOVO.

Under Ky. St. 1909, § 4303, providing that in proceedings to change a highway any person aggrieved may appeal from the county court to the circuit court, where the trial shall be de novo, where on remonstrants' appeal to the circuit court, the trial was held de novo, and every material issue of fact was submitted to the jury under proper instructions covering all questions of law, the objection that the court erroneously ignored the commissioners' report and remonstrants' exceptions thereto, and tried the case as if it were an ordinary action in the circuit court, is untenable.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 239-252; Dec. Dig. ⚡72.]

4. HIGHWAYS ⚡72 — ALTERATION PROCEEDINGS—APPEAL—RECORD—CORRECTION OF ERRORS.

It is not error for the court on appeal to correct a patent clerical error in the record of the proceedings before the board of commissioners, from whom the case is appealed.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 239-252; Dec. Dig. ⚡72.]

5. TRIAL ⚡260 — REQUESTED INSTRUCTIONS.

Where the instructions in a cause fully and fairly present to the jury every material issue of fact necessary to a correct decision of the case, no error is presented by the court's refusal to give requested instructions.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. ⚡260.]

6. TRIAL \S 139—PEREMPTORY INSTRUCTION—EVIDENCE.

The refusal of a peremptory instruction, where the evidence preponderates upon the other side, is not error, and will not be disturbed on appeal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. \S 139.]

7. HIGHWAYS \S 72—CHANGE OF LOCATION—INCIDENTAL MATTERS.

Where a judgment changing the location of a highway requires the erection of an obstruction across the old highway, the inclusion of such matter, though not essential to the decision, is not error.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 239-252; Dec. Dig. \S 72.]

Appeal from Circuit Court, Scott County.

Action by W. A. Carrick and others against C. H. Garth and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Jas. F. Askew and B. M. Lee, both of Georgetown, for appellants. T. L. Edelen, of Frankfort, and Jas. Bradley and Bradley & Bradley, all of Georgetown, for appellees.

SETTLE, J. This is the second appeal in this case. We quote from the opinion on the first appeal (Carrick, etc., v. Garth, etc., 159 Ky. 505, 167 S. W. 687) such of the facts as give the history of the case down to its return to the circuit court after the reversal of the judgment by this court, which resulted solely from the erroneous ruling of the circuit court in dismissing the appeal taken to that court by the appellants from the judgment of the county court:

"Appellees, Garth and others, instituted in the Scott county court a proceeding seeking the alteration of a portion of the county road known as the Lemon's Mill pike, the change sought to be made being the closing of a portion of the road so as to abolish a grade crossing over the track of the Cincinnati, New Orleans & Texas Pacific Railroad, and the opening of a new road in lieu of the portion discontinued, at a point where the crossing over the railroad track could be made by an overhead bridge. Appellant Carrick owns land along the Lemon's Mill pike abutting that portion of the pike sought to be vacated; and he and other remonstrants appeared in the county court and filed exceptions to the report of the commissioners, which report was in favor of the proposed alteration. The county court overruled the exceptions, and ordered the alteration made. The remonstrants appealed to the circuit court. There a motion was made by the petitioners to dismiss the appeal upon the ground that the remonstrants had no right to prosecute an appeal from the order of the county court. The circuit court sustained this motion and dismissed the appeal; and of that ruling Carrick and the other remonstrants complain upon this appeal. * * *

"We are therefore of the opinion that any person may appear and upon motion be made a party to the proceeding, and may resist the application for the alteration of a public road, and that such person may appeal to the circuit court from the order entered by the county court."

Upon the trial in the circuit court, following the filing therein of the mandate of this court, to the jury was submitted the identical issues presented by the exceptions filed by

appellants to the report of the commissioners in the county court, which report seems to have conformed to the requirements of the statute in its showing as to the necessity for and practicability of the making of the proposed alteration in the road. The verdict of the jury was as follows:

"We, the jury, recommend that the crossing, as it now is, be discontinued, and further recommend the change proposed and described in the petition filed in this case by the petitioners, calling for the overhead bridge."

The findings expressed in the verdict, though not in the same form or as elaborate in detail, accord with those of the commissioners. No objection seems to be urged to the form of the verdict, and it was made the basis for the judgment of the circuit court, which approved and established the alteration in the road and the construction of the overhead bridge over the railroad, as recommended by it. The present appeal is from that judgment.

[1, 2] The grounds urged by appellants for a new trial are numerous, but we will consider only such of them as we regard material. The first ground is that the circuit court erred in overruling appellants' special demurrer to the petition. The demurrer was for alleged defect of parties, in that the Cincinnati, New Orleans & Texas Pacific Railroad Company was not made a party to the proceeding. Notwithstanding their special demurrer, when the railroad company was later made a party to the proceeding on its own motion, the order was objected to by the appellants. The railroad company was a necessary party to the proceeding, and its being made a party caused no change in the issues involved, nor in the status of the other parties in interest. If, however, it could properly be said it was error to make it a party, appellants, after objecting by special demurrer because it was not a party, are estopped to complain that it was made so.

[3] It is also insisted for appellants that the circuit court ignored the report of the commissioners and their exceptions thereto, and tried the case as if it were an action ordinarily originating in that court; and this is assigned as error. The contention is without merit. It is true the exceptions to the commissioners' report were not taken up and disposed of seriatim, but this was not necessary, as every material issue of fact they raised was submitted to and determined by the jury under the court's instructions, and such questions of law as they raised were properly determined by the court. Section 4303, Kentucky Statutes 1909, provides that upon an appeal of such a case from the county court to the circuit court, it shall be tried in the latter court de novo, and such method of trial seems to have been required by the opinion on the former appeal. If there had not been a trial de novo, it would have been only necessary for the circuit court to determine whether the order made by the county

court, establishing the alteration in the road, was warranted by the commissioners' report. Manifestly the hearing *de novo* did not prejudice the rights of the appellants. They insisted upon a *de novo* hearing, which the court accorded, permitting them to introduce all the evidence bearing upon the question whether the proposed alteration in the road was feasible and desirable. It is patent, therefore, that the issues raised by appellants' exceptions to the commissioners' report were not ignored, but tried and determined. If the act of 1912 (Laws 1912, c. 110) was applicable, there was no right of appeal to the circuit court. On the other hand, if the present statute were in force, the appeal was triable in the circuit court *de novo*. The opinion on the first appeal by necessary implication held that the present statute was applicable, and directed that the appeal stood for trial *de novo* in the circuit court.

[4-6] Appellants' complaint of the amendment of a clerical error in the report of the commissioners after the case reached the circuit court is without merit. The error was patent, and the amendment should have been made; indeed, was proper, in view of the right of the parties to a trial *de novo* in the circuit court. Appellants' complaint of the refusal of the peremptory instruction asked by them is untenable, as the weight of the evidence upon every issue was in favor of the petitioners. The objections to the instructions are likewise untenable. They fairly and properly submitted to the jury every material issue of fact necessary to a correct decision of the case.

[7] So much of the judgment complained of as required the erection of fencing across the turnpike at the side of the railroad is not open to the objection urged to it by appellants. The matter to be determined was whether the alteration in the road was necessary and proper. The fencing was an incidental matter, which prevented the use of the railroad crossing, forced travel to the road as altered, and protected the abandoned portion of the highway from being used by the public. Besides, such fencing was specifically asked in the application for the closing of the road.

It is apparent from the record before us that appellants asked for a hearing in the circuit court before a jury, and it was given them. They were permitted to plead and deny the material averments of the petition for the alteration. Proof was heard as to all issues presented by the pleadings, whereby the questions of convenience and inconvenience, and of safety or danger from the closing of the old road and the establishment of the alteration were fully elucidated, from all of which it appears that the alteration made is for the best interests of the citizens of Scott county; in view of which we are unable to see that any injustice was done the appellants. The jury found against them,

and their verdict is supported by the weight of the evidence; and, as the trial court committed no error in its rulings that can be said to be prejudicial to any of appellants' rights, the judgment is affirmed.

KENTUCKY DISTILLERIES & WAREHOUSE CO. v. WARWICK CO.*

(Court of Appeals of Kentucky. Nov. 11, 1915.)

1. EASEMENTS \Leftrightarrow 61—WAYS—ACTIONS—EVIDENCE.

In a suit to enjoin obstruction of a way, evidence held to show that the prior use of the way had only been permissive and that it was not open to the public or a way of necessity.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. \Leftrightarrow 61.]

2. EASEMENTS \Leftrightarrow 18—WAYS—WAYS OF NECESSITY.

A warehouse abutting on a railroad track and surrounded on three sides by defendant's land was conveyed to plaintiff. At that time the way used over the tracks furnished access to all of the warehouses, there being a passway on the property conveyed which led to the rear of the building. Thereafter plaintiff remodeled its property including in the warehouse the passway. Held that, though the change in the building prevented access to the rear portion from the railroad track, plaintiff could not claim a way of necessity over defendant's land, notwithstanding the rule that, where land conveyed is entirely surrounded by lands of a grantor, a way of necessity is implied.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50-55; Dec. Dig. \Leftrightarrow 18.]

3. EASEMENTS \Leftrightarrow 18—WAYS OF NECESSITY—RIGHT TO.

In such case, way of necessity over defendant's land cannot be had on the ground that the way across the railroad tracks might be revoked; there being no prospect of a revocation.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50-55; Dec. Dig. \Leftrightarrow 18.]

4. EASEMENTS \Leftrightarrow 17—CONVEYANCES—"APPURTENANCE."

The word "appurtenances" is generally understood to mean the right to use those things which are essential to the full enjoyment of the premises conveyed, therefore a conveyance of a warehouse with appurtenances will not carry with it the right to use a private way over the grantor's land which at that time was not needed for plaintiff's full enjoyment of the premises.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 45-49; Dec. Dig. \Leftrightarrow 17.]

For other definitions, see Words and Phrases, First and Second Series, Appurtenance.]

5. LICENSES \Leftrightarrow 58—WAYS—REVOCATION.

Where defendant granted plaintiff license to use a way over its land with the express condition that it might be revoked at pleasure, plaintiff's construction of a permanent way will not estop defendant from revoking the license.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 116-121; Dec. Dig. \Leftrightarrow 58.]

Appeal from Circuit Court, Madison County.

Suit by the Warwick Company against the Kentucky Distilleries & Warehouse Company. From the judgment for plaintiff, defendant appeals and plaintiff cross-appeals. Reversed on the original appeal, and affirmed on the cross-appeal.

Wm. Marshall Bullitt, of Louisville, for appellant. J. A. Sullivan, of Richmond, and Barclay, Orthwein & Wallace, of St. Louis, Mo., for appellee.

CARROLL, J. The dispute in this case grows out of a controversy over the right claimed by the appellee Warwick Company to an easement over the land of the appellant, which will be called for convenience the Kentucky Company. It appears that in 1871, or perhaps a few years before, the distillery now owned by the Kentucky Company was operated by W. S. Hume & Co. In 1882 the distillery now owned by the Warwick Company was built near to the distillery established by Hume & Co., and for a couple of years these two distilleries were owned and operated by the same people. In 1884 the distillery properties were separated, the Warwick Company distillery passing into the hands of the Bennetts and Burnams, and what is now the Kentucky Company distillery into the hands of the Humes. In 1899 the Kentucky Company purchased the Hume distillery, and in 1906 the Bernheim Distillery Company became the owners of the Warwick Company. All of this property is situated immediately on the Louisville & Nashville Railroad Company. One warehouse of the Warwick Company and the distillery plant proper of the Kentucky Company are situated on what may be called the east side of the railroad, and the distillery proper of the Warwick Company and some of its warehouses, as well as warehouses of the Kentucky Company, are situated on the west side of the railroad; but, as this controversy centers about the warehouse of the Warwick Company which is situated on the east side of the railroad, it will not be necessary to notice further the location of the other buildings of either company. This warehouse was originally erected in 1882. It fronted immediately on the property line of the railroad company and was surrounded on the other three sides by the land of the Humes now owned by the Kentucky Company. The building was in the shape of an ell and occupied the whole of the lot that was conveyed to the Warwick Company in 1884, when the distillery properties were divided, except that between the wall on the north side and the property line on the north side there was a vacant space several feet wide that extended back about 80 feet to the ell. And in the end of this ell that fronted on the vacant space there was a door. The only other doors in the building were in the end that opened on the right of way of the railroad, and access to the interior of this warehouse was generally had through these end doors; but occasionally the door in the ell was used. In 1907 the Warwick Company remodeled this old warehouse building by making it several stories higher and taking in the vacant strip of ground, so that the exterior walls of the

building covered the entire lot which was the only land owned by the Warwick Company on the east side of the railroad. When this improvement was made, the rear end of the building—that is, the end farthest from the railroad—was converted into a bottling house and separated from the warehouse proper by a solid partition wall, and in the north wall of this bottling room a door was made that furnished an entrance to the room. After the building had been thus divided into a warehouse and a bottling house, access could not be had to the bottling house through the warehouse; and so it was necessary, in taking barrels of whisky from the warehouse to the bottling house to be placed in bottles, to take the barrels out of the front door of the warehouse and carry them around the outside wall to the door of the bottling house, and this, of course, made it necessary to have a passway over the land of the Kentucky Company. Under the impression that it did not have the passway as a matter of right over the land of the Kentucky Company along the north wall of the warehouse from the railroad to the door of the bottling house, in April, 1908, the Warwick Company wrote to the Kentucky Company a letter in which it said:

"The extreme end of the warehouse is to be used by us in the future for a bottling and bond plant. We are forced, however, to have an opening fronting on your property, and also obtain from your corporation sufficient room, say five to seven feet, on your property, so as to permit our constructing a gangway giving us access from the front to the rear end of our warehouse. We are willing, if it meets with your approval, either to buy the necessary land at a reasonable price or to lease it."

In May, 1908, the Kentucky Company answered this letter and said:

"We are quite willing to give you ingress and egress to and from your bottling warehouse in the southeast corner of your warehouse adjoining our premises over a strip of land seven feet wide immediately northeast and alongside of said warehouse, upon conditions that said strip is not to be made a part of your distillery premises and that this consent to enable you to use same may be canceled at our pleasure."

Acting under the authority of this consent, the Warwick Company constructed a platform about seven feet wide along the north side of the warehouse extending from the railroad to the door of the bottling department, and used this platform for the purpose of taking whisky to and from the bottling house to the warehouse until 1911, when the Kentucky Company revoked the consent it had given to use this passway; and soon after that time this suit was brought by the Warwick Company to enjoin the Kentucky Company from interfering with its right to use this passway and to recover damages for its obstruction which began when the license was revoked. After the case was prepared for trial, the court adjudged that the Warwick Company was entitled to a passway leading from the right of way of the railroad along the north side of

its warehouse to its bottling house in the end of the warehouse, and the Kentucky Company was enjoined from its obstruction. It was further adjudged that the Warwick Company should remove the plank platform placed on this passway after it obtained the consent before mentioned; and also adjudged that the Warwick Company was not entitled to any damages for the deprivation of the use of this passway during the time it was obstructed. From this judgment the Kentucky Company appeals, and the Warwick Company prosecutes a cross-appeal, insisting that the court erred in not awarding it damages on account of the obstruction of its right to use the passway between the time of the obstruction and the filing of the suit, when the use of the passway was secured by a temporary injunction.

In the view we have of this case the only question that needs to be disposed of is the right of the Warwick Company to this passway. The Kentucky Company contends on this appeal that the use of this passway was merely permissive, and that it had the right to revoke, as it did, the privilege granted in the letter of May, 1908; while the Warwick Company insists that, independent of this permission, it had the right to the use of this passway, as the land over which it ran (1) had been dedicated to public use; (2) was granted to it by an implication of law; (3) was a way of necessity; (4) was conveyed to it under the term "appurtenances" used in the deed.

From the time these two distilleries were erected until the sale of what may be called the Hume property to the Kentucky Company in 1899, and the sale of what may be called the Bennett and Burnam Company to the Bernheims in 1906, they were owned by the Bennetts, Burnams and Humes, all of whom, aside from being related to each other, were on terms of intimacy; and during the time the property was owned by these people there appears to have been no objection by any of them to the use of the land of the other for passway purposes. It is further shown that probably as far back as 1880 the Humes had made for their convenience a passway or road extending from Silver creek along the north side of this warehouse building to the railroad, and thence to the Richmond and Lancaster turnpike. After 1884, when the distillery property was divided and the warehouse in question passed into the hands of the Bennetts and Burnams, they had little occasion to use this road, which was on the land of the Humes and several feet from the north wall of the warehouse. The Bennetts and Burnams did not own any land on the east side of the railroad besides the lot on which this warehouse was situated, and access to the warehouse, except on rare occasions, was had through the doors in the end fronting on the railroad. Occasionally, however, use was made of the door in the end of the ell front-

ing on that part of the lot not occupied by the warehouse building; but the use of this door was merely desultory and occasional, and there seems to have been no necessity for its use, as ample ingress and egress to and from the warehouse building could be had through the main entrance at the front. But when this entrance at the ell was used, there was no objection by the Humes to the use of this road that passed close by this entrance.

[1] It is very clear, we think, from the evidence, that the use of this road by the Bennetts and Burnams was entirely permissive. It was merely an occasional use by them, not a way of necessity, and this occasional use was never objected to by the Humes, who, as stated, were on terms of intimacy with the Burnams and Bennetts. The public generally did not use this road, as it passed entirely over the land of the Humes and was intended as a passway for the benefit of the farm and distillery properties owned by them. The only one of the public appearing to have claimed the right to use this road is a man named Baldwin, who, in 1905, purchased a part of the Hume farm and used this road, as he claimed, as a matter of right in going to and from his farm. Our conclusion is that the assertion of the Warwick Company that this road was dedicated to the public, and therefore it had the right to use it as a means of ingress and egress to and from its bottling house, is not sustained by the evidence. In reaching this conclusion we do not treat the letter of the Warwick Company, requesting permission to use this passway, as an acknowledgment that the right did not previously exist, or as a confession that the privilege of using it was obtained only by virtue of and under this written consent. It is, however, a circumstance tending to confirm our opinion that the Warwick Company recognized the fact that it was not entitled as a matter of right to the use of this passway, although not conclusive of this question; for, if a person has the right to the use of a passway, the mere fact that he does not understand or appreciate the extent of his right, and consequently seeks and obtains a permissive use, his effort to obtain permission will not deprive him of the use to which he was entitled without the permission.

[2, 3] As we have stated, this entire lot is now occupied by the new warehouse consisting of the warehouse proper and the bottling house and is surrounded on three sides by the land of the Kentucky Company, and the argument is made that, where land conveyed is entirely surrounded by the lands of the grantor, the grant of a right of way as a necessity over the land of the grantor to and from the land conveyed will be implied as a matter of law. *Estep v. Hammons*, 104 Ky. 144, 46 S. W. 715, 20 Ky. Law Rep. 448; *Brown v. Burkenmeyer*, 9 Dana, 159, 33 Am.

Dec. 541; *Beall v. Clore*, 6 Bush, 676; *Hall v. McLeod*, 2 Metc. 98, 74 Am. Dec. 400.

We are not disposed to question the correctness of this principle, but do not find it applicable to the case we have. At the time the vendors of the Kentucky Company conveyed to the Warwick Company the land on which this warehouse was situated, it was not necessary to the use of the warehouse that there should be an entrance on the north side, or, indeed, on any side of the building except the end fronting on the railroad where the principal doors that opened into the warehouse were located. At this time the entire building was used for warehouse purposes, and full and free ingress and egress to and from all parts of the building could be had through the doors in the end fronting on the right of way of the railroad, and these doors, with rare exceptions, were used as a means of ingress and egress. But if it should be said that the door in the ell on the north side of the building was occasionally used, and that access to this door was necessary in the proper use of the building, the Warwick Company had access to this door over its own land. It could pass from the railroad over that part of its lot not occupied by the building and go into the door in the ell. It is true there was a coal shed, and perhaps another little building, on the end of this vacant space next to the railroad; but these buildings could easily have been taken away, and then there would have been ample room over its own land for access from the right of way of the railroad to this door in the ell.

There is, too, some claim that the use of the railroad right of way was merely permissive, and that, if the railroad should prevent the use of its right of way, ingress and egress to and from the building would be entirely closed unless it could be had along this passway. But we find no merit whatever in the claim that there is any probability that the right of ingress and egress over the right of way of the railroad will ever be interfered with. So that when the ground occupied by this warehouse building was conveyed by the grantors of the Kentucky Company to the Warwick Company in 1884, and continually from that time until 1907, after the property had been acquired by the Bernheims, there was at all times an uninterrupted way of ingress and egress to and from this warehouse building, and all parts of it, without going upon the land of the grantor. But after the Bernheims acquired this property in 1906 they proceeded to rebuild and extend the walls of the warehouse until they covered the entire lot, leaving the doors in the end of the building fronting on the railroad as the only way of entrance to it unless a way was had over the land of the Kentucky Company. In addition to this, they converted the rear end of the warehouse building into a bottling house and built a solid wall be-

tween the warehouse proper and the bottling house so that there was no way of getting to the bottling house except over the land of the Kentucky Company. It is therefore obvious that, if the use of the passway over the land of the Kentucky Company is now necessary to give the Warwick Company access to its bottling house, this necessity was voluntarily created by the Warwick Company. A right of way over the land of the Kentucky Company was not necessary to the use of the warehouse or any part of it when the conveyance was made or until many years afterwards when the improvements were made.

Now we think that when a grantor conveys land to which the grantee has a way that furnishes him full and free access to the property conveyed, and the grantee thereafter voluntarily closes up this way or deprives himself of its use, he cannot claim by implication of law another right of way over the land of the grantor. 14 Cyc. 1175; *Mitchell v. Seipel*, 53 Md. 251, 36 Am. Rep. 404.

[4] It is further said that, as the deed to the Warwick Company conveyed the land and "all the appurtenances thereto belonging," the right to the use of this road passed as one of the appurtenances. The word "appurtenances" is generally understood to mean the right to the use of those things that are essential to the full enjoyment of the premises conveyed and which were used as necessary incidents thereto at the time of the conveyance. *Bouvier's Law Dictionary*; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149. But as we have endeavored to point out, this passway was not necessary to the full enjoyment of the property conveyed at the time of the conveyance. It was not an incident or an appurtenance to it. It was not mentioned in any manner in the deed, and we may assume was not in the contemplation of the parties when the conveyance was made.

[5] It is further suggested that the Kentucky Company is estopped to deny the Warwick Company the use of this passway upon the ground that the Kentucky Company saw the improvements being made by the Warwick Company and knew that these improvements would make indispensable this passway in the use of the bottling house, but did not intimate that it would attempt to deprive it of the use of the passway. A sufficient answer to the assertion of estoppel is that the Warwick Company obtained permission to use this passway with the express understanding that the permission might be revoked at any time. In view of this fact, it cannot be said that the Warwick Company made the improvements ignorant of the fact that it might be deprived of the use of the passway at the will of the Kentucky Company.

Upon the whole case, our conclusion is that the judgment should be reversed on the orig-

inal appeal and affirmed on the cross-appeal, with directions to enter a judgment dismissing the petition.

CINCINNATI, N. O. & T. P. RY. CO. et al. v. CUNDIFF.

(Court of Appeals of Kentucky. Nov. 9, 1915.)

1. OFFICERS — 35 — SPECIAL RAILROAD POLICE OFFICER—APPOINTMENT—BOND.

Const. § 236, provides that the General Assembly shall prescribe a time when the officers authorized by the Constitution to be appointed shall enter upon their duties. Ky. St. § 3755, provides that, if the official bond is not given and the oath of office taken within 30 days after notice of appointment, the office shall be considered vacant. Section 779a provides that railroads, on application to the Governor, may have certain persons appointed to act as policemen on trains, who shall qualify by executing bond and taking the oath of office, and be paid by the railroad, which, when it no longer requires their services, may file notice to that effect. Held that, where a special railroad policeman appointed and commissioned in June, 1906, did not take the oath and execute bond until July, 1907, the date of his notice of his appointment should have been avowed to render evidence of his powers to act himself or by deputy admissible, and that there was a presumption that he did not execute the bond and take the oath within the prescribed 30 days after notice of his appointment, so that the office was vacant.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 49, 51, 52; Dec. Dig. —35.]

2. OFFICERS — 49 — SPECIAL RAILROAD POLICE—TERM—CONSTITUTIONALITY OF STATUTE.

Under Const. § 93, providing that inferior and state officers may be appointed for a term not exceeding four years and until their successors are qualified, and Ky. St. § 779a, providing for the appointment of railway police officers, to be paid by the railway and to hold office during its pleasure, it was intended to create the office for the four-year term permitted by the Constitution, and the failure to fix the term as one not longer than four years did not make the statute unconstitutional.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 70; Dec. Dig. —49.]

3. OFFICERS — 55 — SPECIAL RAILWAY POLICE—TERM.

Under Const. § 93, providing that inferior and state officers may be appointed as prescribed by law for a term not more than four years and until their successors are appointed and qualified, the appointment of a special railway police officer under Ky. St. § 779a, on application to the Governor to serve during the railroad's pleasure, did not provide for a succession in such office, so that, when the term expired either by operation of law or by the will of the railroad, the office ceased, and another appointee did not take it as successor.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 76-84; Dec. Dig. —55.]

4. OFFICERS — 43 — SPECIAL RAILWAY OFFICER—"DE FACTO OFFICER."

A special railway police officer whose office had become vacant for failure to take the oath and execute his bond within the time prescribed by the Constitution was not a "de facto officer."

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 65; Dec. Dig. —43.]

For other definitions, see Words and Phrases, First and Second Series, De Facto Officer.]

5. CARRIERS — 352 — FALSE IMPRISONMENT — 15 — RAILROADS — 281 — SPECIAL POLICE OFFICER—DE FACTO OFFICER.

The railroad, which had obtained the officer's appointment, had no right to regard him as a de facto officer, since it was incumbent upon it to see or know that he had qualified to act as an officer de jure before he was given employment on its trains.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1412-1414; Dec. Dig. —352; False Imprisonment, Cent. Dig. §§ 5-67; Dec. Dig. —15; Railroads, Cent. Dig. §§ 902-909; Dec. Dig. —281.]

6. CARRIERS — 374 — FALSE IMPRISONMENT — 15 — SPECIAL RAILWAY POLICE—AUTHORITY.

While every citizen is bound to assist a known public officer in making an arrest when called upon to do so, without information as to the offense charged or inquiry into the regularity of the process, and is protected in making such arrest, yet, where a special railway police officer, not a known public officer, but, assuming to act as an officer, summons a railroad employé to aid in ejecting and arresting a passenger the employé was liable as such if the alleged officer was a trespasser.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1462; Dec. Dig. —374; False Imprisonment, Cent. Dig. §§ 5-67; Dec. Dig. —15.]

7. CARRIERS — 352 — FALSE IMPRISONMENT — 15 — RAILROADS — 281 — SPECIAL RAILWAY POLICE OFFICER—LIABILITY.

In view of Ky. St. § 3755, providing that, if an official bond is not given and the oath of office taken within 30 days after notice of appointment to a public office, it shall be considered vacant, a railroad employing a special police officer was not in the position of a third person who might claim that the acts of a de facto officer were valid as to him, but was responsible for his claim of right, so that for his acts thereunder it was liable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1412-1414; Dec. Dig. —352; False Imprisonment, Cent. Dig. §§ 5-67; Dec. Dig. —15; Railroads, Cent. Dig. §§ 902-906; Dec. Dig. —281.]

8. CARRIERS — 381 — FALSE IMPRISONMENT — 24 — MOTIVE—EJECTION OF PASSENGER.

In an action against a railroad, its special police, officer and another for wrongful ejection and arrest, where the evidence justified compensatory damages only, evidence as to the special officer's motive in making the arrest was inadmissible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1473-1476, 1479-1482; Dec. Dig. —381; False Imprisonment, Cent. Dig. § 101; Dec. Dig. —24.]

9. CARRIERS — 382 — FALSE IMPRISONMENT — 35 — DAMAGES—PUNITIVE DAMAGES.

Where there was nothing in the conduct of defendant railroad's special police officer and its employé, acting under his direction, in ejecting and arresting plaintiff that might be considered as wanton or reckless disregard of plaintiff's rights as a passenger, and where neither their language nor manner was insulting, punitive damages were not recoverable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1478, 1483-1491; Dec. Dig. —382; False Imprisonment, Cent. Dig. § 112; Dec. Dig. —35.]

10. CARRIERS — 382 — FALSE IMPRISONMENT — 36 — EJECTION—EXCESSIVE DAMAGES.

A verdict of \$4,000 for alleged wrongful ejection of plaintiff from defendant's train, and his arrest and detention for an hour, without a showing of any excessive force or brutal treatment or physical injury, even if plaintiff was not drunk or disorderly, as alleged, was in ex-

cess of what would justly compensate him for the suffering endured.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1478, 1488-1491; Dec. Dig. 382; False Imprisonment, Cent. Dig. §§ 110, 113-115; Dec. Dig. 36.]

Appeal from Circuit Court, Boyle County.

Action by W. C. Cundiff against the Cincinnati, New Orleans & Texas Pacific Railway Company and others. Judgment for plaintiff, and defendant Railway appeals. Reversed.

Nelson D. Rodes and Charles H. Rodes, both of Danville, and John Galvin, of Cincinnati, Ohio, for appellant. Robert Harding, of Danville, Charles Montgomery, of Liberty, and Emmet Puryear and John W. Rawlings, both of Danville, for appellee.

NUNN, J. This is an appeal from a judgment rendered against the appellant railway company, Samuel Morrow, and C. N. Mitchell in favor of appellee for the sum of \$4,000. The petition charges that the railway company and its servants, the codefendants, wrongfully, maliciously, and forcibly ejected him from its train, and caused him to be taken by other railroad servants to a police station at Ludlow and there locked up. The defendants filed separate answers, in which they alleged that Mitchell and Morrow were officers of the commonwealth, and not servants or employes of the railroad. Mitchell and Morrow admitted that they took the appellee, Cundiff, off of the train and delivered him to other police officers at Ludlow, Ky., but they say that, acting as police officers of the commonwealth, they arrested him because he was drunk, using profane language, and behaving in a disorderly manner on the train. They claim to have acted in good faith and upon probable cause, and without malice toward appellee. In brief, the facts are as follows:

Appellee was the county court clerk of Casey county, and a candidate for re-election. In the latter part of August, 1913, a considerable number of men from Casey and surrounding counties went to Cincinnati on a Sunday excursion. Appellee lived at Liberty, the county seat, which was 17 miles from Moreland, the nearest station on appellant's road. In company with many others, they left Liberty on Saturday night about 11 o'clock, and drove overland in order to reach Moreland at 5 o'clock Sunday morning, when the excursion train was due. There was Jamaica ginger in the party before they left Liberty, and it is inferable from the record that on the road to Moreland, and on the train to Cincinnati, members of the party were drinking intoxicants of some kind, although there is no evidence that Cundiff partook until he reached Cincinnati. Just why he went to Cincinnati on a Sunday excursion is not a necessary, if a fair, inquiry. He attempts to excuse the trip, however, by

stating that his brother-in-law lived there, and also calls attention to the fact that a good many voters from his county were going, and he wanted to "electioneer" with them. He admits taking several drinks of beer in Cincinnati, but does not fix the number. His friends count at least six that he drank. How many of these are in addition to those admitted by Cundiff the record leaves in doubt. He maintains, however, that he was not drunk, and his friends, certainly not less drunk, corroborate him. According to his story, he was worn out by the time the train was ready to leave Cincinnati that evening at 6 o'clock, and quite naturally his party were at the station a long while—perhaps an hour—before starting time. Before the train gates were opened they made one or more trips to a nearby saloon, where appellee admits taking a final glass of beer, and Waldon, his closest companion, bought a flask of brandy. When the gates were opened they got aboard the train. It consisted of 14 cars. Appellee and his companions got on the second car from the rear end. It was August, the shed was close, the crowd was large, and the train was next to a stone wall where the sun had been shining all day. Of course, it was oppressive in the car, and from these circumstances it is easy to understand how, in connection with being up all night and going all day in a pair of new shoes, appellee felt the need of rest. He says as much, and immediately they were seated he put up his hat, pulled off his coat, removed his collar, unbuttoned his shirt, and took off his shoes. In order that he might not be disturbed, he gave his ticket to Waldon, his companion, with request that he hand it to the conductor. Thus relieved and so clad, he went to sleep. He never knew when the train started. In fact, the first thing he says that he did know was when, in the fifth car from the engine, Morrow caught him by the collar and jerked him out of the seat, and, with the help of Mitchell, marched him to the baggage car, where there were four other drunken passengers. Cundiff says he asked Morrow: "What is the matter? What have I done? What are you doing?" Morrow replied: "I am an officer." Cundiff says: "I am clerk of the county court." To which Morrow replied: "Go on there; I will take care of you." When the train reached Ludlow, Cundiff and the other men in the baggage car were taken off. Cundiff says he then appealed to Morrow for release on the ground of politics and former association with some of Morrow's relatives, but Morrow was obdurate. Cundiff then discovered that he was without coat, collar, hat, or shoes, and asked for time to go aboard to get them. The train was held while Morrow went back for them, but he was only able to find the coat and hat. Cundiff and the baggage car outfit

were delivered into the hands of an alleged police officer at Ludlow, while the other men from Casey continued their journey homeward. With Cundiff in his stocking feet, they were marched some 800 yards to the police station. Cundiff says the other men were put in a cell, but they left him out in the corridor and locked him up. As to being locked up anywhere, no witness supports him, and appellant's witnesses deny it. The mayor came down in a short time and looked him over, and said: "I find no fault in this man." According to precedent, ancient, if not honorable, he desired to wash his hands of the affair by directing his release. To this Cundiff demurred, and insisted that a charge be preferred, and a day fixed for trial, and that he be admitted to bail. After some argument a day was set, and Cundiff prepared an appearance bond in his own hand, which a sympathizing bystander signed. On the day fixed for trial Cundiff appeared, the case was heard, attorney for the railroad took a part, and Cundiff was acquitted.

Three of Cundiff's companions claim to know when Morrow arrested him, but none of them followed to see what became of him. With Cundiff, they occupied seats near the end of the car, facing each other. These men testified that Cundiff went to sleep and never moved from his place until he was pulled out of it by Morrow. They insist that he was not drunk or offensive or creating any sort of disturbance. Waldon, his closest associate, was removed to the baggage car soon after Cundiff was taken off, and he is frank enough to say:

"You see the fact of the business is when they taken Mr. Cundiff, you know, you see I had lost sleep all night, had been up, and was wore out and sleepy, and I just simply laid down and went to sleep. Some of the gentlemen just taken me over in the baggage car, and I slept in there, and then I went back to my car."

He explains that all his brandy was gone when he returned.

Morrow testified that he first saw Cundiff and Waldon together that evening as they came through the station gate "walking and staggering along down the train." They got aboard the twelfth car; that is, the second from the rear. Morrow was acting as a police officer (whether rightfully so is another question). The whole length of the train was his beat. He next saw Cundiff out in the aisle near the middle of the car. A man was trying to get by him. Cundiff was making secret order signs, and, not receiving a proper response, remarked that any man that did not belong to his secret order "is a ——— fool." Morrow caught him by the shoulder and told him he was an officer, and cautioned him of the presence of ladies, and asked him to take his seat and get out of the way. Cundiff wanted to talk to him about his secret order, and, upon receiving information that Morrow did not belong, expressed the opin-

ion: "Well, ———, you have lost the best years of your life." Morrow shoved him down in the seat and went on to the rear of the train. Coming back in three or four minutes, he found him two cars ahead, where he was falling over, and making signs to, an old gentleman. He was advising the old man, with some profanity, to "join as soon as possible." Morrow warned him that if he did not sit down and keep quiet he would have to arrest him. Morrow went on to the front of the train, and then made another round trip without encountering Cundiff. On his next trip he found Cundiff in the fifth car from the engine, seated, and cursing because he could not find a member of his secret order on the train. Morrow then arrested him, and deputized Mitchell, a railroad employé, to take him to the baggage car. Morrow thus described his appearance:

"He didn't have any coat, and his shirt was open. His person was exposed. He did not look like he had combed his head for some time. His hair was stringing around his face. The smell of beer was strong on his breath, * * * and his shirt tail was out."

Mitchell, the old man, and other passengers corroborate Morrow in many of these details, and it is established beyond controversy that the arrest occurred in the fifth car from the engine.

Reversal is asked on several grounds: (1) Morrow acted as a police officer of the commonwealth, and Mitchell was his deputy, and the court erred in rejecting evidence tending to show Morrow's power so to act and deputize Mitchell; (2) the court erred in giving an instruction authorizing the recovery of punitive damages; (3) the verdict is excessive.

[1] Appellant offered to prove that Morrow was a railroad policeman, appointed and commissioned by the Governor of Kentucky in June, 1906, and that on July 3, 1907, he qualified to act as such by taking the oath of office and executing bond to the commonwealth under the provisions of section 779a, Kentucky Statutes. The court ruled that the evidence offered was incompetent. The point was saved by avowal to the above effect. The statute referred to provides that railroad corporations may apply to the Governor and have certain designated persons appointed and commissioned to act as policemen, with powers of sheriffs or constables upon trains and about depots. Any person so appointed shall qualify in the county of his residence by executing bond with good security and taking and subscribing to the oath of office required by the Constitution. These facts must be indorsed upon his commission. Certified copy of the commission, together with the indorsements thereon, shall be recorded in the county court clerk's office of every county in which it is intended the policeman shall act. The policeman is subject to all the liabilities of sheriffs and constables and for which the surety on the bond is

responsible. The compensation of such policeman is paid by the railroad at whose instance he was appointed, and is fixed by agreement between them. When the railroad deems that his services are no longer required, it may file notice to that effect in the several counties where his commission is recorded, and thereupon his right to act as policeman shall cease.

There is nothing in the case to show that the conductor or other employes of the railroad caused Morrow to arrest or eject Cundiff from the train. He acted upon his own initiative. Whether he was a servant of the railroad to the extent that the railroad would be answerable for his conduct if, in fact, he had been lawfully commissioned and qualified to act as railroad policeman is a question not presented by this record. We have reached the conclusion that he was not authorized to make the arrest by virtue of the commission issued to him by the Governor: (1) He failed to qualify within the time required by law; (2) his term of office had expired when he made the arrest. His commission was issued on June 22, 1906. Pulaski was the county of his residence, and he there took the oath of office and executed bond on July 3, 1907. Certified copies of the commission and qualification were subsequently recorded in Kenton county, where the arrest was made. Section 236 of the Constitution provides that the General Assembly shall by law—

"prescribe the time when the several officers authorized or directed by this Constitution to be elected or appointed shall enter upon the duties of their respective offices, except where the time is fixed by this Constitution."

In compliance with this constitutional requirement, section 3755 of the Kentucky Statutes was enacted, and is as follows:

"If the official bond is not given, and the oath of office taken on or before the day on which the term of office to which a person has been elected begins, or in cases of persons appointed to office within 30 days after such person has received notice of his appointment, the office shall be considered vacant, and he shall not be re-eligible thereto for two years."

The avowal does not show when Morrow received notice of his appointment. In view of the lapse of more than a year between the date of his commission and the time of his qualification, we think the date of notice should have been avowed in order to render the evidence competent. This lapse of time, unexplained, amounted to such an unreasonable delay as to raise the presumption that he did not execute the bond and take the oath of office within thirty days after he received notice of his appointment. Therefore we must hold that the office was made vacant and he rendered himself ineligible therefor for two years.

[2] The arrest was made in August, 1913, more than seven years after his appointment and more than six years after his attempted qualification. Under the Constitution, his term of office was four years. It

follows, therefore, that it had expired when the arrest was made, assuming that he ever was legally qualified to make the arrest. Legislative authority to create this office comes from sections 93 and 107 of the Constitution, which are as follows:

"Sec. 93. Inferior and state officers, not specifically provided for in this Constitution, may be appointed or elected, in such a manner as may be prescribed by law, for a term not exceeding four years, and until their successors are appointed or elected and qualified."

"Sec. 107. The General Assembly may provide for the election or appointment, for a term not exceeding 4 years, of such other county or district ministerial and executive officers, as may, from time to time, be necessary."

It will be noticed that section 779a is silent as to the length of time that a railroad policeman shall hold his office, except the fact that it may be terminated at the pleasure of the railroad at whose instance the appointment was made. But the failure of the Legislature to fix a term not longer than four years does not of itself render the act unconstitutional.

"In construing statutes, the courts will never adopt a construction that makes them violate the Constitution, if any other is susceptible from their words." *Standard Oil Co. v. Commonwealth*, 119 Ky. 75, 82 S. W. 1020, 28 Ky. Law Rep. 965; *Render v. City of Louisville*, 142 Ky. 409, 134 S. W. 458, 32 L. R. A. (N. S.) 530; *Commonwealth v. Hodges*, 137 Ky. 233, 125 S. W. 689; *Commonwealth v. International Harvester Co.*, 181 Ky. 551, 115 S. W. 703, 133 Am. St. Rep. 256.

Agreeable to this rule of construction, and as applied in the case of *Sinking Fund Commissioners v. George*, 104 Ky. 260, 47 S. W. 779, 84 Am. St. Rep. 454, we hold that the Legislature intended to create an office for the term permitted by the Constitution—that is, four years—and no more. In that case the court had under consideration an act of the Legislature creating a board of penitentiary commissioners. The board consisted of three members holding office, one for a term of two years, one for four, and the other for six years. George was elected for the six-year term. The constitutionality of the act was attacked on the ground that an office had been created for a term longer than four years. The court held the act constitutional, but limited George's term of office to four years. We quote from the opinion:

"As the General Assembly expressed a willingness that one of the commissioners should hold for two years longer than the Constitution permits, it is certainly reasonable to conclude that it was the will of that body that the commissioners should hold for four years, as this term is necessarily included in the longer one which it fixed. To hold the act void in so far as it makes the term six years, instead of four, still the balance of the act is complete and enforceable. * * * The General Assembly has not only shown a willingness that the terms shall be as much as four years, but that they shall be six. If the unconstitutional portion of an act can be stricken out, and that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained. When that part of the

act which adds two years to the constitutional term of four years is rejected, there will be three commissioners, one of whom shall hold for a term of two years, and two for a term of four years each, and, in the language of the act, hold 'until their successors are elected and qualified.' "

[3] Arguing that Morrow was lawfully qualified in the first place, appellant contends that, under section 93 of the Constitution, he was lawfully acting as policeman, although the four-year term had expired, because, as it says, no successor had been appointed or qualified to take his place. We do not consider this reasoning sound for two reasons: First, the avowal is lacking in that regard; and in the next place, the statute shows that no such thing as succession in this office was contemplated. When the term of office of a railroad policeman expires, whether by operation of law or at the will of the railroad, the office he held ceases with the officer. When another is appointed, he does not take it as successor to any one.

[4, 5] Neither can it be said that Morrow was a de facto officer. Nor did the railroad, responsible for his appointment, have the right to so regard him. It was incumbent upon the railroad to see or know that he had qualified to act as an officer de jure before he be given employment on its trains.

"When an officer is called upon to justify an illeral arrest, and he relies upon his official capacity, it is usually considered necessary that he should prove not only that he was an acting officer, but that he was an officer in truth and right, duly commissioned and qualified to act as such." 2 R. C. L. 490.

[6] Morrow not being a public officer, his summons to Mitchell to aid in keeping Cundiff in custody does not relieve Mitchell of responsibility.

"Every citizen is bound to assist a known public officer in making an arrest, when called upon to do so. * * * According to the better considered authorities, private persons may respond to the call of a known officer without waiting for information as to the offense which the criminal has committed and without pausing to inquire into the regularity of the process; and whoever in good faith renders assistance and obeys the orders and directions of a known public officer in response to a call for assistance is protected in making arrest, although the officer may be acting wrongfully and may be personally liable for the false arrest." 2 R. C. L. 491.

But where the party making the arrest is not a known officer, but only assumes to act in that particular case by special appointment, persons aiding the supposed officer are bound to know whether he has authority to make the arrest or not, and in case he is a trespasser for want of authority, those aiding him are also liable. *Dietrichs v. Schaw*, 43 Ind. 177. See, also, note *Tyron v. Pingree* (Mich.) 67 Am. St. Rep. 421.

[7] Section 3755, Kentucky Statutes, supra, prescribing the time in which an officer shall qualify, in express terms vacates the office for failure to comply therewith. The railroad is not in the position of a third party who may claim that the acts of a de facto officer are valid as to them. The railroad is

responsible for his claim of such right, and whatever steps he takes under such claim of right are taken at their peril.

The instructions authorized the jury to find for Cundiff such damages as would reasonably and fairly compensate him for the mortification and humiliation he experienced in being arrested and evicted from the train, if it was done wrongfully and without probable cause. In their discretion, they were also authorized to award punitive damages, if they believed the defendants acted maliciously and with a reckless and wanton indifference to Cundiff's rights as a passenger on the train.

[8] Appellant's counsel at the trial asked Morrow if at the time he arrested Cundiff he believed in good faith that he had a right to make the arrest. The court sustained an objection to this question, and appellant excepted and avowed:

"That the witness, if permitted to answer, would state that he believed in good faith and honestly that he was entitled to do that for the protection of the women and children and other passengers on board the train against drunken and disorderly persons."

We think this evidence would have been competent had Cundiff made out a case warranting an instruction on punitive damages. Where, at best, the evidence justifies recovery of compensatory damages only, this evidence as to motive is not proper.

[9] However, we feel that it was error to give an instruction on punitive damages. The elements of unnecessary force and oppression are wanting. There was nothing in the conduct of Morrow and Mitchell that can be considered as a wanton or reckless disregard of Cundiff's rights as a passenger. Neither was their manner or language insulting. On another trial the court will omit the instruction on punitive damages. *L. & N. R. Co. v. Scott*, 141 Ky. 538, 133 S. W. 800, 34 L. R. A. (N. S.) 206, Ann. Cas. 1912C, 547; *L. & N. R. Co. v. Ballard*, 88 Ky. 159, 10 S. W. 429, 10 Ky. Law Rep. 735, 2 L. R. A. 694; *Memphis v. Nagel*, 97 Ky. 9, 29 S. W. 743, 16 Ky. Law Rep. 748; *Southern Ry. v. Hawkins*, 121 Ky. 415, 89 S. W. 258, 28 Ky. Law Rep. 364; 13 Cyc. 109. See cases cited *Hobson* on Instructions, § 176.

[10] We are also of opinion that the damages allowed are excessive, even if it be conceded that Cundiff was not drunk or disorderly, and that his arrest and eviction were wrongful. Proof of these facts would only entitle him to compensatory damages for the humiliation. Nothing is shown in the way of excessive force or brutal treatment. He was detained at the police station for only an hour. No physical injury was inflicted. We are of opinion that the damages awarded are in excess of what would justly compensate him for the suffering endured.

In the case of *Schneider v. McGill*, 64 S. W. 835, 23 Ky. Law Rep. 587, one McGill, the clerk at a primary election, was arrested by a police officer for breach of the peace

that had not been committed. McGill was imprisoned for about three hours. In a civil action against the policeman for false arrest and imprisonment the jury awarded McGill \$4,000. In holding that such a verdict was clearly excessive this court said:

"We are also of opinion that the amount of the verdict is excessive, so much so as of itself to authorize a reversal. The proof shows that appellee was charged with an ordinary misdemeanor when arrested, and was kept in custody only about three hours, and suffered no unusual indignity and no violence. We have found no case where a judgment for \$4,000 for false imprisonment for only a few hours has ever been sustained; on the contrary, we find many cases where verdicts for less amounts have been held excessive."

The cases referred to below involve questions somewhat similar to this, and verdicts in smaller sums than in the case at bar were held to be excessive: In *C. N. O. & T. P. Ry. Co. v. Carson*, 145 Ky. 81, 140 S. W. 71, \$400; in *Southern Ry. v. Hawkins*, 121 Ky. 415, 89 S. W. 258, 28 Ky. Law Rep. 364, \$1,000; in *L. & N. v. Breckinridge*, 99 Ky. 1, 34 S. W. 702, \$500; in *L. & E. Ry. v. Lyons*, 104 Ky. 23, 46 S. W. 209, 20 Ky. Law Rep. 516, \$260; in *L. & N. v. Fish*, 127 S. W. 519, 43 L. R. A. (N. S.) 584, \$500; and in *Camden Interstate, etc., v. Frazier*, 97 S. W. 776, 30 Ky. Law Rep. 186, \$500.

Judgment reversed.

PROCTER v. TUBB et al.

(Court of Appeals of Kentucky. Nov. 11, 1915.)

1. JURY \hookrightarrow 13—TRIAL \hookrightarrow 374 — RIGHT TO TRIAL BY JURY—LEGAL ISSUES IN EQUITABLE ACTION.

Where a distinct legal issue is made in an equitable action, either party has the right to have such issue decided by a jury, the verdict of which cannot be set aside, unless flagrantly against the evidence.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35-83; Dec. Dig. \hookrightarrow 13; Trial, Cent. Dig. § 884; Dec. Dig. \hookrightarrow 374.]

2. JURY \hookrightarrow 25—DEMAND—TIME FOR.

The right to a jury trial as to legal issues in an equitable action depends upon whether the application is seasonably made.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 154-173; Dec. Dig. \hookrightarrow 25.]

3. JURY \hookrightarrow 25—DEMAND—TIME FOR.

The application for the submission of legal issues to a jury in an equitable action must be made when the answer is filed, or within a reasonable time thereafter.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 154-173; Dec. Dig. \hookrightarrow 25.]

4. JURY \hookrightarrow 25—DEMAND—SEASONABLE MAKING—DISCRETION.

What is a reasonable time for a party to an equitable action to apply for a jury trial as to legal issues is a matter within the sound discretion of the trial court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 154-173; Dec. Dig. \hookrightarrow 25.]

5. JURY \hookrightarrow 25—TRIAL \hookrightarrow 374 — SUBMISSION OF ISSUES TO JURY—DISREGARD OF FINDINGS.

Where, in an equitable action involving legal issues, the defendant waited several months,

after the filing of answer and until after the case had been referred on his motion to a commissioner to hear evidence and settle accounts, before applying for a jury trial as to the legal issues, such application was too late, and it was an abuse of discretion on the part of the trial court to order a jury trial, since a litigant may not speculate on the chances of securing a favorable report from a commissioner, and the findings of the jury erroneously impaneled on the application could be disregarded by the chancellor in determining the disputed questions of fact.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 154-173; Dec. Dig. \hookrightarrow 25; Trial, Cent. Dig. § 884; Dec. Dig. \hookrightarrow 374.]

Appeal from Circuit Court, Warren County.

Action by R. W. Stanton against B. F. Procter, who filed an answer and cross-petition, making J. M. Tubb a party. Judgment for Stanton against Procter and for the latter against Tubb. Procter appeals. Affirmed.

B. F. Procter, of Bowling Green, for appellant. Rodes & Wallace, of Bowling Green, for appellees.

CLAY, C. Plaintiff, R. W. Stanton, sued defendant, B. F. Procter, to recover the sum of \$84.50 for 84½ days' work at \$1 per day and the sum of \$96.66 for 161 bushels of corn at 60 cents per bushel furnished to the defendant, and for the further sum of 55 cents advanced to the defendant to pay freight. Plaintiff admitted an indebtedness on his part of \$58.38 for supplies furnished him by defendant, and asked judgment for \$123.27. Defendant Procter filed an answer, cross-petition, and counterclaim, making one J. M. Tubb a party. He denied the allegations of Stanton's petition and set up a contract, dated December 26, 1911, by the terms of which both Stanton and Tubb rented defendant's Forrest farm and agreed to cultivate not less than 10 acres in tobacco and not less than 2 acres in strawberries, and to build a barn on the farm. Defendant alleged that all the work done by Stanton was done under this contract, and he had no agreement with Stanton by which he was to pay him for work done on the Woods farm, another farm owned by defendant. Defendant further set up a note for \$100, executed by Stanton and Tubb to him and indorsed to the American National Bank and secured by mortgage on two mules and a wagon owned by Tubb, and asked that the bank interplead and assert its claim. Defendant also pleaded a partnership between him and Tubb, by which Tubb was to operate defendant's dairy, and asked a settlement of the partnership account. It appeared that the \$100 note owned by the bank was subject to a credit of \$22.36. The commissioner reported in favor of Stanton, but allowed Procter a credit for \$58.38 for supplies furnished Stanton, and of one-half of the balance of the \$100 note, amounting to \$38.82. The commis-

sloner reported that he was unable, from the evidence before him, to settle the dairy partnership, but that after charging Tubb with one-half of the balance due on the American National Bank note and the other items, and allowing him certain credits, Tubb was still indebted to Procter. On final hearing the chancellor gave judgment in favor of Stanton for \$83.90. He further adjudged that Procter should recover of Tubb the sum of \$112.61. Procter appeals.

The principal issues between Stanton and Procter are: (1) The value of the corn which Stanton furnished Procter; (2) was the rent contract of December 26, 1911, abrogated by the parties? (3) did Procter employ Stanton to work on the Woods farm at \$1 per day, and, if so, how many days did Stanton work?

It appears that Tubb bought some oats and rented a meadow from R. E. Procter for the price of \$150. The contract made by Tubb with Procter recites that the consideration was to be deducted from the rent note executed by R. E. Procter to B. F. Procter. The principal issue between Tubb and Procter is whether or not Tubb was to pay one-half of the \$150.

This case was originally brought at common law. The equitable issues were introduced into the case by defendant Procter. By agreement of the parties, the case was transferred to the equitable docket. On May 5, 1913, on motion of defendant and by agreement of the parties, the cause was referred to the master commissioner to settle the accounts and claims between Procter, Stanton, and Tubb. The evidence was heard during the summer of 1913, and on October 20, 1913, the commissioner filed his report, deciding the issues of fact in favor of Stanton, and the issue whether or not Tubb was liable for one-half of the oats purchased and meadow leased from R. E. Procter in favor of Tubb. Thereupon Procter filed exceptions to the commissioner's report. On November 1, 1913, Procter moved the court to transfer the cause to the common-law docket for a jury trial on the above issues of fact. This motion was sustained on November 8, 1913. The trial before the jury resulted in a finding in favor of Procter on the issues of fact.

[1-4] In rendering judgment in the case, the chancellor disregarded the findings of the jury. Defendant, Procter, insists that the chancellor had no right to disregard the findings of the jury, unless flagrantly against the evidence. It may be conceded to be the rule, where a distinct legal issue is made in an equitable action, either party has the right to have such issue decided by a jury, and the verdict cannot be set aside unless flagrantly against the evidence. *Hill v. Phillips' Adm'r*, 87 Ky. 169, 7 S. W. 917, 10 Ky. Law Rep. 81. However, the right to a jury trial depends on whether or not application therefor is seasonably made. It is generally held

that the application must be made when the answer is filed, or within a reasonable time thereafter, and what is a reasonable time is a matter within the sound discretion of the trial court. *Fritts v. Kirchdorfer*, 136 Ky. 643, 124 S. W. 882; *Blackburn v. Simpson*, 144 Ky. 503, 139 S. W. 758; *Lewis v. Helton*, 144 Ky. 595, 139 S. W. 772; *Harmon v. Thompson*, 119 Ky. 528, 84 S. W. 569, 27 Ky. Law Rep. 181.

[5] In the present case the issues were completed in the spring. The case was then referred to the master commissioner to hear evidence and adjust the accounts of the parties. The evidence was heard, and he filed his report on October 20, 1913, deciding the disputed issues in favor of Stanton and Tubb. The Code does not contemplate that a party shall have the right to have questions of fact decided by both the commissioner and the jury. Certainly, he cannot take his chances on the action of the commissioner and, in case of an adverse decision, claim the right to have a jury trial. As defendant's application for a jury trial was not made until several months after his answer was filed and until after, on his motion, the case had been referred to the commissioner to hear evidence and to settle the accounts between him and his adversaries, and an unfavorable report had been filed by the commissioner, we conclude that it was an abuse of discretion on the part of the trial court to order a jury trial. As the jury trial was ordered when defendant had manifestly waived his right thereto, and was therefore erroneously ordered, we conclude that the chancellor did not err in ignoring the findings of the jury and in determining himself the disputed questions of fact. That being true, the only question for us to determine is whether or not his findings are correct. Of this there can be no doubt, since they accord with the weight of the evidence.

Judgment affirmed.

TALBOTT v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 11, 1915.)

INFANTS \Rightarrow 18—JUVENILE DELINQUENTS—JURISDICTION OF COURTS—“DELINQUENT CHILD.”

Under Ky. St. § 331e, defining a “delinquent child,” and giving the county courts exclusive jurisdiction in all cases thereunder, by subsection 5 providing that, when any delinquent child is arrested, he shall be taken directly before a county court, and, if taken before a justice or magistrate, it shall be the duty of such justice or magistrate to transfer the case to the county court, the circuit court had no jurisdiction to try and convict a boy of 16 arrested on a police justice's warrant for malicious cutting, who had never been brought before a county court, and its want of jurisdiction might be relied upon as a ground for reversal, though not questioned in the circuit court, though, where the circuit court takes jurisdiction, defendant, on dismissal, is not exempt

from apprehension before the county court, nor will proceedings in the circuit court bar like proceedings in that court on transfer from the county court.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 18; Dec. Dig. § 18.

For other definitions, see *Words and Phrases*, First and Second Series, *Delinquent Child*.]

Appeal from Circuit Court, Daviess County.
Sam Talbott was convicted of malicious cutting, and he appeals. Reversed, with directions.

Louis I. Igleheart and T. W. Jett, both of Owensboro, for appellant. James Garnett, Atty. Gen., and Chas. H. Morris, Asst. Atty. Gen., for the Commonwealth.

CARROLL, J. The appellant, a boy 16 years of age, was indicted by the grand jury of Daviess county, charged with the offense of malicious cutting. On his trial before a jury he was found guilty, and his punishment fixed at confinement in the Eddyville Penitentiary for an indeterminate period of not less than 2 years and 9 months and not more than 3 years.

It appears that Talbott was arrested on a warrant issued by the police judge of Owensboro, the city in Daviess county in which the offense was committed, and after his arrest and examining trial was committed to jail, and there remained until his indictment and trial in the circuit court. He was never brought before the county judge of Daviess county, nor did the county judge, so far as this record shows, know anything of or have any connection with his arrest, imprisonment, or trial.

On this appeal it is urged that the circuit court, under the circumstances, had no jurisdiction to indict and try Talbott. For the commonwealth the argument is made that this ground relied on for reversal should not be considered by this court, because no objection was made to the jurisdiction of the circuit court, and therefore its want of jurisdiction cannot be raised for the first time on this appeal.

The record does not show that counsel for Talbott interposed any objection to the jurisdiction of the Daviess circuit court. There was, however, evidence introduced on the trial sufficient to establish the fact that Talbott was only 16 years old, and when his age was thus brought to the attention of the trial court, we think the court should, under the law, have suspended the trial, discharged the jury, set aside the indictment, and dismissed Talbott, so that he might at once have been taken in charge by an officer and brought before the county judge of the county, to be disposed of as provided in section 331e of the Kentucky Statutes. This section which contains an act of 1908 (Acts 1908, c. 67), relating to children who are now or may hereafter become dependent, neglected, or delinquent, as amended by acts of 1910 and 1912 (Acts 1910, c. 77; Acts 1912, c. 125), declares

that its provisions shall apply to male children 17 years of age or under and to female children 18 years or under. It further provides, in part:

"The words 'delinquent child' shall include any male child seventeen years of age or under and any female child eighteen years of age or under, who violates any law of this state. * * * Any child committing any of the acts hereinabove mentioned shall be deemed a delinquent child, and shall be proceeded against and cared for as such in the manner hereinafter provided. * * * The county courts of the several counties of this state shall have exclusive jurisdiction in all cases coming within the terms and provisions of this act."

It is further provided in subsection 5 of this section that:

"When any child within the provisions of this act is arrested with or without a warrant it shall, instead of being taken before a justice of the peace or police magistrate, be taken directly before the county court, or if it shall be taken before a justice of the peace or police magistrate upon warrant sworn out in such court, or for any other reason, it shall be the duty of such justice of the peace or police magistrate to transfer the case to such county court, and it shall be the duty of the officer having the child in charge to take the child before said county court; and in any case the court may proceed to hear and dispose of such case in the same manner as if the child had been brought before the court upon petition as herein provided. In any case the court shall require notice to be given and investigation to be made as in other cases under this act, and may adjourn the hearing from time to time for that purpose."

"The court may in its discretion in any case of a delinquent child brought before it as herein provided, permit such child to be proceeded against in accordance with the laws that may be in force in this state governing the commission of crimes, and in such case the petition, if any, filed under this act shall be dismissed and the child shall be transferred to the court having jurisdiction of the offense."

It will thus be seen that the statute gives to the county courts of the several counties of this state exclusive jurisdiction of the disposition to be made of a male child 17 years of age or under who has violated any law of this state, and makes express provision that a child coming within this age who has been apprehended for a violation of law shall be brought before the county court. This court may, in its discretion, as provided in the statute, permit such child to be proceeded against in accordance with the laws of the state, and, to accomplish this end, may transfer the child to the custody of the court having jurisdiction of the offense.

In *Com. v. Franks*, 164 Ky. 239, 175 S. W. 349, we said:

"As the law now stands, it lies exclusively with the county court to determine whether a juvenile offender shall be treated as a delinquent child, or prosecuted as a felon. The circuit court has no voice in the determination of that question."

In *Com. v. Yungblut*, 159 Ky. 87, 166 S. W. 808, the purpose of the act to give county courts exclusive, initial jurisdiction over juvenile offenders was also pointed out.

We therefore conclude that the circuit court had no jurisdiction to hear or deter-

mine this case, and, having no jurisdiction, it was not necessary that the defendant should have made the ordinary objections to the jurisdiction of the court to save his right to raise the question here. The statute deprived the court of jurisdiction, and this want of statutory jurisdiction may be relied on in cases like this as a ground for reversal, although not raised in the circuit court. The circuit court has jurisdiction only to indict and try juvenile offenders when they have been transferred to that court by the county court in the manner authorized by the statute. This does not, of course, mean that, when the circuit court takes jurisdiction to hear and determine a case against a juvenile offender, and it develops for the first time during the trial that the defendant is within the statutory age, he cannot, upon his dismissal in the circuit court, be immediately apprehended and taken before the county court; nor does it mean that on the return of this case the defendant should not be, upon his discharge by the circuit court, at once arrested, and taken before the county court; nor will the proceedings had in this case in the circuit court be a bar to other like proceedings in that court in the event the defendant is transferred by the county court to the circuit court.

For the reasons indicated, the judgment is reversed, with directions to proceed in conformity with this opinion.

BAYES et al. v. TOWN OF PAINTSVILLE. (Court of Appeals of Kentucky. Nov. 12, 1915.)

1. MUNICIPAL CORPORATIONS — 430 — STREET IMPROVEMENTS — ASSESSMENTS — ABUTTING LOTS.

The owner of a lot, on which is his residence, by conveying, in anticipation of a street improvement, the front eight feet, reserving the use of it as a means of ingress and egress, with provision that no fence or sidewalk shall be constructed thereon, cannot exempt from assessment the part retained as nonabutting on the street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1040; Dec. Dig. 430.]

2. MUNICIPAL CORPORATIONS — 406 — STREET IMPROVEMENTS — SEWERS — ASSESSMENTS.

By express provision of Ky. St. § 3706, the trustees of a town of the sixth class are empowered to construct sewers as well as streets, and assess the expense on abutting property, not exceeding 50 per cent. of the value of the land.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1001, 1002; Dec. Dig. 406.]

3. MUNICIPAL CORPORATIONS — 446 — STREET IMPROVEMENTS — ASSESSMENTS — PLANS OF IMPROVEMENT.

That by the plan of paving streets and constructing sewers the sewer pipes are smaller in some streets than others does not invalidate the assessments in streets having the larger pipes, absent a showing of fraud in adopting the plan.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1066, 1067; Dec. Dig. 446.]

4. MUNICIPAL CORPORATIONS — 366 — EXPENDITURES — COMPETITIVE BIDDING.

The provision of a town's charter that contracts involving expenditure of more than \$100 shall not be made by it except through competitive bidding does not prevent it, itself, completing a street improvement, on failure of a contractor, without advertising for further bids.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 899; Dec. Dig. 366.]

5. MUNICIPAL CORPORATIONS — 567 — STREET IMPROVEMENTS — ASSESSMENT — APPORTIONMENT OF COST — BURDEN OF PROOF.

That one may have relief against a street improvement assessment, on the ground that a wrong basis of apportionment of the cost was followed, he must allege and prove facts showing that this was done, and that under the proper method he would be required to pay less.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1276-1281; Dec. Dig. 567.]

6. MUNICIPAL CORPORATIONS — 562 — STREET IMPROVEMENTS — CHANGE OF ORDINANCE — ASSESSMENT.

That after completion of the work, under a contract for certain work of a street improvement according to a certain ordinance, the ordinance is repealed and another adopted, requiring a larger work to be done according to the changed plans, and work is done under a new contract, does not invalidate the assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1269-1271; Dec. Dig. 562.]

7. MUNICIPAL CORPORATIONS — 562 — STREET IMPROVEMENTS — ASSESSMENTS — ACTION — SET-OFF AND COUNTERCLAIM.

The property owner cannot, in an action by a municipality to enforce a lien for payment of an apportionment warrant for a street improvement, assert a counterclaim or set-off against it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1269-1271; Dec. Dig. 562.]

Appeal from Circuit Court, Johnson County.
Action by the Town of Paintsville against F. M. Bayes and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. F. Bailey, of Paintsville, for appellants.
G. B. Martin, of Catlettsburg, for appellee.

SETTLE, J. The town of Paintsville, through its board of trustees and under certain ordinances duly passed, inaugurated and executed a plan of street paving and sewerage, extending practically over the whole town. The work was done under what is generally known as the "10-year bond plan" authorized by the charter of towns of the sixth class, to which Paintsville belongs; such authority being found in section 3706, Kentucky Statutes. The cost of the street paving and sewerage construction done by the town of Paintsville aggregated, approximately, \$80,000, and was all completed and paid for except what was assessed against the property of F. M. Bayes, his wife, Mary Bayes, and their daughter, Malta Bailey. In making the improvements under the 10-year bond plan mentioned, the town of

Paintsville let the contracts for the work and issued and sold bonds for the purpose of raising the money to pay for it. By the terms of the bonds the duty of collecting the assessments from the property owners is imposed upon the city, which pledges its faith and credit to exercise all legal means to enforce their collection. Its relation to the matter is therefore analogous to that of a trustee, the bondholders being the cestui que trust. It appears that the appellant F. M. Bayes owns three parcels of real estate, in the town of Paintsville, abutting streets paved and in which sewers were constructed, the first parcel lying on Court street, the second on Second street and the third on Second and Court streets; and that each parcel was liable to an assessment tax for the paving of the street it abuts and constructions of the sewer therein, and was assessed its proportionate part of such cost according to value, the amount assessed against the first parcel of real estate being \$152.42, the amount assessed against the second parcel, \$118.03 and the amount against the third parcel, \$26.66. Appellants having refused to pay these assessments, or any part thereof, this action was instituted by the appellees, town of Paintsville and its board of trustees, for the recovery thereof and to enforce against the lots, respectively, liable therefor the liens allowed by statute as security for such assessments. Prior to the institution of this action there had been instituted in the same court by the appellants an action in which it was sought to enjoin the town of Paintsville and its board of trustees from selling the bonds, which had been issued for the purpose of obtaining the money with which to pay the cost of the improvements in question. The two actions were consolidated and heard together, the questions at issue between the parties being practically the same in each case.

By the petition in the action brought by appellants and their answer to the petition in the instant case, the validity of the assessments in question was attacked and the right of the appellee to subject the property, or any part of it, to the payment thereof denied. The attack upon the validity of the assessments also put in issue the validity of the several ordinances under which the work of improvement was done, the manner of their passage, the letting of the contracts for the work, and the manner in which the work was performed; but by the production of copies of all the ordinances, contracts, and writings showing the proceedings thereunder, and other evidence found in the record, the performance of the work and the manner in which it was done, we are convinced that the whole proceedings, both as regards the validity of the ordinances, contracts, improvements, and the character of the work done in making the same, were planned and executed with unusual care. This conclusion enables us to waive consideration of the im-

material matters appearing in the voluminous record, and brings us to the consideration of the questions necessary to be determined.

[1] First, it is insisted for appellants that the second parcel of real estate, mentioned as lying on Second street, is not subject to assessment for the improvement of that street because it does not abut the street. The basis for this contention is that Mary Bayes, wife of the appellant F. M. Bayes, owns a strip of ground eight feet in width extending along Second street, which abuts the street and lies between it and the remainder of the lot, yet owned by F. M. Bayes. The facts shown by the evidence are that when the purpose of the appellee city to make the improvements in question became known, but before the work on the improvements began, the appellant F. M. Bayes by deed conveyed to his wife the eight-foot strip of ground in question, reserving in the deed the use of it as a means of ingress and egress to the remainder of the lot, upon which he then had and now has his residence, and providing that no fencing or sidewalk should be constructed thereon. In other words, under the provisions of the deed, the wife took nothing but the naked title to the ground, the full possession and right to the use thereof remain in the husband, and may be passed to his vendees, immediate and remote, in all respects as if the deed had not been executed. The circumstances attending the conveyance together with the admissions contained in the testimony of the appellant F. M. Bayes, convince us that the conveyance was made with the intent on the part of the grantor to avoid the assessment that was subsequently made upon the property for the improvement of the street in front of it. The assessment cannot be defeated by such a scheme. If allowed, it would, in effect, nullify the act of the Legislature giving municipalities authority to make such improvements at the cost of abutting property owners, and place an undue burden upon those who had not resorted to such a scheme for a like purpose. The question, in the aspect here presented, has never been passed on in this jurisdiction, but in 28 Cyc. 1133, we find a statement of the law which we think applicable:

"Conveyances to Evade Assessments.—Liability of land for an assessment attaches from the passage of an ordinance ordering an improvement, and will not be affected by a subsequent conveyance; and a colorable sale of the portion of a lot abutting an improvement, with intent to avoid an assessment, will not operate to exempt the part retained."

We therefore concur in the conclusion reached by the circuit court that the lot in question, exclusive of the strip conveyed the wife, is, notwithstanding such conveyance, subject to the assessment.

[2, 3] Another ground of defense relied on by appellants is that the assessment of abutting property for the construction of a sew-

er is unauthorized, and that the sewer on Second street, where abutted by their lot, is larger than that connecting with it. As to the first contention it is only necessary to say that section 3706, Kentucky Statutes, confers upon the board of trustees of a town of the sixth class power to construct sewers as well as streets and also provides that the expense incurred in doing so may be paid by a local assessment upon abutting property, not exceeding 50 per cent. of the value of the ground, after such improvement is made, excluding the value of the buildings and other improvements upon the property so improved. It is not claimed by appellants that the assessment, both for the cost of constructing the street and sewer, exceeds 50 per cent. of the value of the ground assessed, after the exclusion of the buildings and other improvements upon the property. The plan of paving the streets included the construction of sewers for carrying off the surface water. It appears that in some of the streets the dimensions of the sewer pipe are smaller than in others, but where this is so it was, according to the testimony of competent engineers and others, appearing in the record, indispensably necessary to the work of paving the street; and, while the sewer in the particular street complained of by appellants may be somewhat larger than that connecting with it, this fact affords no evidence that the work was defectively performed, or that it could otherwise have been done, consistent with the work of paving.

It is well settled in this jurisdiction that the plan or method of improvement, as well as the necessity therefor, is a matter solely within the discretion of the legislative body, whose discretion in respect thereto is beyond review by the courts, in the absence of a showing of fraud or corruption upon the part of that body in the adoption or execution of the plan. In the recent case of *Town of Russell v. Whitt*, 161 Ky. 187, 170 S. W. 609, one of the complaints made by the property owner was that the construction of the street abutting his property failed, in certain particulars therein alleged, to conform to the contract under which the work of construction was to be performed. In overruling that complaint we said:

"The complaint made in the petition that the construction of the street abutting appellee's property failed, in the particulars therein alleged, to conform to the contract, may be eliminated from the case, because the work as completed was admittedly accepted by appellant's board of trustees; and their judgment is conclusive in the absence of a showing that they were guilty of fraud or mistake. This rule is stated in the case of *Creekmore v. Central Construction Co.*, 157 Ky. 336 [163 S. W. 194] as follows: 'The defendants pleaded in their answers that the work [street construction] was not done in accordance with the contract, and was in several respects defective. But the council had regularly accepted the work, and their action is conclusive upon the property owner in the absence of fraud and collusion.' *Henderson v. Lambert* (14 Bush.) 77 Ky.) 25; *Renter v. Meacham Contracting Co.*, 143 Ky. 557 [136

S. W. 1028, Ann. Cas. 1912D, 265]; *Newport v. Silva*, 143 Ky. 704 [137 S. W. 546]."

[4, 5] It is also insisted for appellants that a number of the items which enter into the apportionment for the work of improvement done were originally embraced in a contract for the same construction, let to J. H. Francisco, and which the appellee town, upon his insolvency, completed, and that such items are not proper charges in the assessment against their property. It appears that the work of construction, or a part of it, was originally let to Francisco, that he became insolvent, and by reason thereof the town, acting under advice of its counsel, made a settlement with Francisco's sureties, accepting a specified sum by way of damages for his breach of the contract, which sum was applied to the further cost of the work; that the town took charge of the work and completed it without advertising for further bids. The work in question to the extent indicated having been done by the town itself, the provision of its charter, requiring that contracts involving expenditures of more than \$100 should not be made by municipalities except through competitive bidding, it seems to us, has no application. Under the embarrassing circumstances attending the failure of Francisco and his violation of the contract, the town could have relieved itself from the dilemma in no other way than that employed, and in so doing they minimized the loss to the greatest degree possible. We think it fairly apparent that this action of the town did not increase to an appreciable extent the cost to appellants or other property owners, of the entire work of construction, and it is also a well-recognized rule of law in this jurisdiction that the burden is on the property owner to show that a wrong basis of apportionment was followed, and he must allege and prove facts showing such to be the case, and that under the proper method of apportionment he would be required to pay less. *Barret v. Stone*, 52 S. W. 947, 21 Ky. Law Rep. 669; *Chawk v. Beville*, 56 S. W. 414, 21 Ky. Law Rep. 1769.

[6] The complaint of appellants that the work performed by the Dunn Construction Company under its contract with the city had been originally let to Francisco at a lower price is, we think, equally unavailing. It is true that the Dunn Construction Company, under its contract, did some paving work upon certain streets where paving work had previously been let to Francisco, but the work performed by the Dunn Construction Company was a different work, under a different plan and involving larger territory, than that covered by the Francisco contract. The board of trustees, following the passing of an ordinance directing the paving of certain of the streets upon a plan contained in the contract let to Francisco, concluded, after the failure of the latter, to do the work according to a different plan and different system of drainage, and covering other streets

than those included in the contract of Francisco. In view of this change of plan and the default of Francisco in his contract, which the town completed as before stated, the board of trustees, by proper ordinance, repealed the former ordinance under which the contract was let to Francisco, and adopted another, requiring that the larger work of construction be done according to the changed plans, the contract for which was let to the Dunn Construction Company as the lowest and best bidder.

In *Horne, etc., v. Mehler*, 64 S. W. 918, 23 Ky. Law Rep. 1176, which was an action to recover an assessment for street construction as in this case, the property owners pleaded that one J. M. McNaughton entered into a contract with the city to do the work in question and gave bond, but that without reason or right this contract was canceled by the city and a new one made with one Gleason, by which the cost of the work was increased 50 per cent. They prayed that the amount of the work assessed against them in favor of Gleason be abated to that extent, but this complaint, upon being considered by the court, was held insufficient to constitute a defense.

In *Gibson, etc., v. O'Brien, etc.*, 6 S. W. 28, 9 Ky. Law Rep. 639, it was held:

"That a prior ordinance had been passed * * * to do the work for less money constitutes no defense. That ordinance had been repealed, and, if not, the failure of the city to abide its contract under it is with the party to the contract who has sustained damages by its breach; and, besides, reasons deemed sufficient by the city council existed why that contract should not be carried out."

It appears from the record that the work of street and sewer construction here involved was done under three ordinances and as many contracts. That under an ordinance of June 18, 1906, was commenced by Francisco and completed by the appellee town. The sewers were constructed by C. P. Sanburn under an ordinance of the same date and a contract made by him with the town. The paving of the streets was done by the Dunn Construction Company, by contract with appellee authorized by an ordinance of April 1, 1907.

In our opinion, none of the matters set up by the appellants' answer in resistance of the assessments sought to be enforced against their property constitute a valid defense; hence they were properly rejected by the circuit court.

[7] Having thus disposed of the matters of defense relied on by the appellants, as their answer was made a counterclaim, it now becomes necessary to determine whether a counterclaim can be pleaded or relied on by the appellants in this case. The three items of damages included in the counterclaim are: (1) That by the construction of the street and sewer in front of their residence property a stream that ran through it, and from which they had been accustomed

to supply their stock with drinking water, was diverted elsewhere, which resulted in the deprivation to appellants of the use of the water; (2) that there was such a defective construction of the sewer in the street in front of their property as prevented a connection with it by a private sewer from their residence; (3) that by reason of appellee's abandonment of the contract with Francisco and the letting by it of the contract to the Dunn Construction Company, the cost of the entire work of construction was so increased as to unduly enlarge the apportionment of the cost imposed upon the property of appellants.

It may here be remarked that if appellants' counterclaim could be relied on, the above items of damage would not be recoverable upon the record presented. In the first place, the exclusive control given to the authorities of a municipality over its streets empowers them to fix the grades of the streets without liability for any damages occasioned thereby. The only instances in which the municipality can be made liable in damages to the abutting property owner from the establishing of the original grade of a street are such as result from such a negligent doing of the work as will interfere with the owner's use of his property. City of Owensboro v. Hope, 128 Ky. 524, 108 S. W. 873, 33 Ky. Law Rep. 375, 15 L. R. A. (N. S.) 996; *Ewing et al. v. City of Louisville*, 140 Ky. 728, 131 S. W. 1016, 31 L. R. A. (N. S.) 612.

This action was instituted by appellee for the benefit of the bondholders, against whom the claim to damages asserted by appellants cannot be maintained. The assessment is in the nature of a tax imposed and apportioned against appellants' property by appellee in its governmental capacity for a public improvement. In enforcing its collection appellee is acting as the trustee of the bondholders, and, as said in 28 Cyc. 1161:

"The fact that an abutter has a remedy against the city for damages from change of grade does not affect his liability for a paving assessment."

In the same volume, on page 1229, it is further said:

"In an action to enforce a special assessment, defendant may not set up a counterclaim against the city or the contractor."

And again on the same page:

"Damages for injury to property against which an assessment is levied may not be set up as a counterclaim in an action to enforce the assessment."

The opinion in *Bodley v. Finley*, 111 Ky. 618, 64 S. W. 439, 23 Ky. Law Rep. 851, is decisive of the question under consideration. In that case the city of Louisville had ordered a street improved, and issued apportionment warrants which were delivered to the contractor. Suit was brought by the contractor to enforce the lien existing by virtue of the warrant. The property holder sued by the contractor held a note against the

latter, which he asked to be permitted to set off against the assessment against his property, due upon the apportionment warrant. This court held that the note, under the circumstances of that case, was a proper matter of set-off, but it is declared by the opinion that a set-off, or counterclaim such as is relied on in this case, cannot be maintained in a similar action brought by a municipality. It is therein said:

"This brings us to a consideration of the question whether a set-off or counterclaim can be pleaded against a suit upon an assessment for local improvement. In *Purdy v. Drake*, 32 S. W. 939, 17 Ky. Law Rep. 819, the question was presented, but not decided, as the set-off there attempted to be pleaded was not sustained by the proof. In *Dill. Mun. Corp. § 810*, it is said: 'As to agreements between the corporation and a contractor to do the work the abutters or property owners on whom the expense falls are not parties, but are brought into direct relation with the proceeding for the local improvement for the first time when the assessment is made. An assessment is a tax levied by the corporation upon property to defray the expenses of the improvement, and the suit to collect it (though brought by the contractor under authority given for that purpose) is not the subject of set-off or counterclaim.' The cases cited in support of the text above quoted are California cases, to the effect, in general, that such an assessment is a tax levied by the corporation upon certain property to defray the expenses of the improvement of a street adjacent to the property.' Said the court, in *Himmelman v. Spanagel*, 39 Cal. 393: 'The origin, obligatory force, and whole nature of a tax is such that it is impossible to conceive of a demand that might be set off against it, unless expressly so authorized by statute. No case has been cited, and probably none can be found, which authorizes a defendant, when sued for a municipal assessment or tax, to set up a counterclaim.' Undoubtedly, this reasoning applies with full force, not only to cases of general taxation, but also to cases where the municipality is asserting against a citizen a claim for a special assessment for local improvement, for which it has paid, or become bound to the contractor. On grounds of public policy, the sovereign, in the exercise of the power of taxation for governmental purposes, must not be compelled to stay its proceedings in order to adjust its indebtedness to a citizen. And in this state, while we hold that these special assessments are not included under the designation of taxation in certain constitutional provisions, we nevertheless recognize that their imposition is an exercise of the sovereign power of taxation. *Richardson v. Mehler* [111 Ky. 408] 63 S. W. 957 [23 Ky. Law Rep. 917]. But is any public policy violated in permitting a set-off against the claim of a contractor in whose favor this governmental power has been exercised? In such case a contract is entered into by the municipality, on behalf of the abutting property holders, with a contractor, for the making of the improvement. Under the statute this is held to give the contractor a lien upon such property for the contract price of the work. If, when he seeks to enforce his lien, the property holder is permitted to set off a demand against him, this does not in any wise interfere with the exercise of the governmental power, nor with the progress of the improvement. This claim is not one by the government, or by the municipality in the exercise of delegated governmental power. It is a private claim, for the enforcement of which a statutory lien is given. The only ground of public policy against the allowance of such a set-off would be the possibility that a

prospective contractor indebted to one or more abutting property holders might either refrain from bidding or make a higher bid than he would make if such set-off were not allowed. This objection does not seem to us very forcible, for we must assume that each contractor knows of the existence of all legal demands against him, and we cannot assume that he intends to avoid their payment. We reach the conclusion, therefore, that on proper showing a set-off may be allowed against a claim for street improvement in such cases as it would be allowed against the assertion of other liens upon property not having their origin in the exercise of governmental power."

In *Board of Council City of Frankfort v. Brislan*, 126 Ky. 477, 104 S. W. 1199, 32 Ky. Law Rep. 377, it was held that an abutting property holder could set up a counterclaim for damages against the city in an action brought by the latter to enforce an apportionment warrant lien against his property, but in the response to a petition for rehearing, following the opinion, it is said:

"In a petition for rehearing the point is made, on behalf of appellant, that appellee should not have the right to assert, as against the city's claim for street improvements, the counterclaim for damages. The improvement was not made by the city, but by a contractor, and the injury and resulting damage to appellee's property, if any, was committed by the contractor. After completing the contract, the contractor assigned his claim to appellant, and the rule that would deny a property owner the right to assert a counterclaim or set-off against the city, if the work had been done by it, and it was seeking to assert its lien, does not apply. As assignee of the contractor's claim, the city occupies no better position than the contractor, and appellee can set up against it any claim for damages that he could have asserted against the contractor. Kentucky Statutes, § 474; Civil Code, § 19. The doctrine that the property owner may rely upon a set-off or counterclaim in a suit by a contractor is expressly decided in *Bodley v. Finley*, 111 Ky. 618, 64 S. W. 439, 23 Ky. Law Rep. 351. The petition for rehearing is overruled."

It is manifest from the foregoing authorities that this court has fully recognized the doctrine that the property holder cannot, in a state of case such as is here presented, assert a counterclaim or set-off against the municipality, in an action brought by the latter to enforce a lien for the payment of an apportionment warrant for a street improvement.

The judgment appealed from dismissed appellants' counterclaim, enforced the appellee's apportionment liens, each as to the property against which it was asserted, and directed the sale of a sufficiency of each parcel to satisfy the lien against it. There is nothing in the record conducing to show any inequality in the assessments as made by the appellee's board of trustees for the cost of the street and sewerage construction; and, as the cost of the improvements apportioned to appellants' property seems no greater than the benefits conferred, and the record discloses no error that we regard prejudicial to their substantial rights, the judgment is affirmed.

LILLIENKAMP v. RIPPETOE.

(Supreme Court of Tennessee. Oct. 26, 1915.)

HUSBAND AND WIFE — §205 — ACTIONS FOR TORTS—STATUTORY PROVISIONS.

Neither Shannon's Code, § 6470, making one committing an assault and battery upon his wife for any cause whatsoever guilty of a misdemeanor, nor Pub. Acts 1913, c. 26, providing that married women are thereby fully emancipated from all disability on account of coverture, that marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property, or as to her capacity to make contracts, and do all acts in reference to property which she could lawfully do if she were not married, but that every married woman shall have the same capacity to acquire, hold, control, and dispose of property and to make any contract in reference thereto and to bind herself personally, and to sue and be sued as if she were not married, abrogates the common-law rule that one spouse cannot sue the other for a tort committed during the marriage, as it must be assumed that, if it had been the purpose of the Legislature to change this rule, such purpose would have been clearly expressed, or would have appeared by necessary implication.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 744, 748-755, 970; Dec. Dig. §205.]

Certiorari to Court of Civil Appeals.

Action by Sara A. Lillienkamp against W. T. Rippetoe. A judgment of dismissal was affirmed by the Court of Civil Appeals, and plaintiff brings certiorari. Affirmed.

Green, Webb & Tate, of Knoxville, and McCanness, Coleman & Taylor, of Morristown, for plaintiff. W. N. Hickey, of Morristown, for defendant.

BUCHANAN, J. The only question necessary to be decided is whether a divorced woman can maintain against her former husband an action for damages resulting from an assault and battery committed by him upon her person after the passage of chapter 26 of the Acts of 1913, and while they sustained toward each other the relation of husband and wife; the action having been instituted after the divorce, and within one year after the date of the battery.

The case is before us on plaintiff's petition for certiorari, seeking to reverse the judgment of the Court of Civil Appeals, which affirmed the judgment of the circuit court by which plaintiff's suit was dismissed at the point of a demurrer interposed by defendant.

Beyond all question, under the common law as it was in force in this state prior to the passage of the act of 1913, supra, such an action as this could not have been maintained. It was a fundamental principle of the common law that by marriage husband and wife became one. Her existence as a legal unit became merged into that of the husband, and during the continuance of the coverture she was capable of suing or defending an action only with his concurrence, and in his name as well as her own. It has been

held in this state that neither spouse could maintain an action against the other for torts committed by one against the other during coverture. The holding was said to rest in part upon their unity by virtue of the marriage, which was said to preclude one from suing the other at law, and in part it was said to rest upon the respective rights and duties involved in the marriage relation. *McKelvey v. McKelvey*, 111 Tenn. (3 Cates) 388, 77 S. W. 664, 64 L. R. A. 991, 102 Am. St. Rep. 787, 1 Ann. Cas. 180. This holding is supported by a practically unanimous current of authority. *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; *Schouler's Domestic Relations*, § 52 (4th Ed.); *Cooley on Torts* (2d. Ed.) §§ 223-233; 21 Cyc. 1519, 1520; *Thompson v. Thompson*, 218 U. S. 611, 31 Sup. Ct. 111, 54 L. Ed. 1180, 30 L. R. A. (N. S.) 1153, 21 Ann. Cas. 921; *Strom v. Strom*, 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N. S.) 191, 116 Am. St. Rep. 387, and note; *Freethy v. Freethy*, 42 Barb. (N. Y.) 641; *Schultz v. Christopher*, 65 Wash. 496, 118 Pac. 629, 38 L. R. A. (N. S.) 780; *Schultz v. Schultz*, 89 N. Y. 644; *Peters v. Peters*, 156 Cal. 32, 103 Pac. 219, 23 L. R. A. (N. S.) 690; *Bandfield v. Bandfield*, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757, 72 Am. St. Rep. 550; *Libby v. Berry*, 74 Me. 286, 43 Am. Rep. 589; *Phillips v. Barnett*, 1 Q. B. D. 436 (English).

In some of the cases cited above the insistence was made that, the marriage relation having been terminated by the divorce, the right of action revived, having been merely suspended during coverture; but in reply it was said:

"That the error in this insistence was in supposing that a right of action ever existed; that there was no civil remedy either during or after coverture, because there was no civil right to be redressed." *Phillips v. Barnett and Abbott v. Abbott*, supra.

See, also, *McKelvey v. McKelvey*, supra.

We do not understand plaintiff's brief to question the rule of the common law, as above set out. Her insistence is that the rule of the common law was abrogated by the following statutes of this state:

"If any person commits an assault and battery upon his wife, for any cause whatsoever, he is guilty of a misdemeanor, and punishable accordingly." Shan. Code 1896, § 6470.

Chapter 26 of the Public Acts of the year 1913:

"A bill for an act to be entitled 'An act to remove disabilities of coverture from married women, and to repeal all acts and parts of acts in conflict with the provisions of this act.'

"Section 1. Be it enacted by the General Assembly of the state of Tennessee, that married women be, and are, hereby fully emancipated from all disability on account of coverture, and the common law as to the disabilities of married women and its effects on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in

reference to property which she could lawfully do if she were not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of, all property, real and personal, in possession, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued with all the rights and incidents thereof, as if she were not married.

"Sec. 2. Be it further enacted, that all acts and parts of acts in conflict with the provisions of this act be, and the same are, hereby repealed.

"Sec. 3. Be it further enacted, that this act take effect from and after January 1, 1914, the public welfare requiring it.

"Passed February 20th, 1913."

The constitutionality of the act of 1913 was assailed in *Parlow v. Turner*, 178 S. W. 766, and on that point this court, speaking through its Chief Justice, said:

"It is said the act is unconstitutional because it violates so much of article 2, § 17, of the Constitution as provides that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title. There is but a single subject, and that appears fully in the title, viz., the relief of married women from the disabilities of coverture. That subject fully covers every element that is written into the body of the act. The first clause, standing alone, 'that married women be, and are, hereby fully emancipated from all disability on account of coverture,' would have made thoroughly effective the purpose expressed in the title. All that followed merely amplified the thought, but each term of particularization lay implicit within the clause quoted."

It is clear that section 6470, Shan. Code 1896, quoted *supra*, does not accomplish any abrogation of the common-law rule in respect of actions for tort by either spouse against the other. That section merely denounces any person who commits an assault and battery upon his wife, for any cause whatsoever, as guilty of a misdemeanor, and punishable accordingly. In connection with the statute last referred to, and chapter 26 of the Acts of 1913, plaintiff's brief relies upon the following of our cases: *Queen v. Dayton Coal & Iron Co.*, 95 Tenn. (11 Pick.) 458, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. Rep. 935; *Adams v. Insurance Co.*, 117 Tenn. (9 Cates) 470, 101 S. W. 428; *Weeks v. McNulty*, 101 Tenn. (17 Pick.) 495, 48 S. W. 809, 43 L. R. A. 185, 70 Am. St. Rep. 693; *Railway v. Haynes*, 112 Tenn. (4 Cates) 712, 81 S. W. 374. But we do not understand the brief to insist that section 6470, Shan. Code, and the principles on which he relies as established by the cases last cited, would avail to change the common-law doctrine that one spouse cannot maintain suit against the other for a tort committed during the existence of the marriage relation. At all events, in our opinion, there would be no merit in such an insistence, if made.

Examination of the cases cited to sustain the existence of the common-law rule first laid down herein will disclose a practically unanimous concurrence of judicial opinion to the effect that an abrogation of the common-law rule will only be held to have been ac-

complished by a statute when such purpose is clearly expressed therein.

It has been held in this state:

"That a statute will not be construed to alter the common law, further than the act expressly declares or than is necessarily implied from the fact that it covers the whole subject-matter." *State v. Cooper*, 120 Tenn. (12 Cates) 549, 113 S. W. 1048, 15 Ann. Cas. 1116.

We must assume that the Legislature had in mind in the passage of the act the fundamental doctrine of the unity of husband and wife under the common law, and the correlative duties of husband and wife to each other, and to the well-being of the social order growing out of the marriage relation, and that, if it had been the purpose of the Legislature to alter these further than as indicated in the act, that purpose would have been clearly expressed, or would have appeared by necessary implication.

We are not warranted in ascribing to the Legislature by anything appearing in this act a purpose to empower a wife to bring an action against her husband for injuries to her person occurring during the coverture, thereby making public scandal of family discord, to the hurt of the reputation of husband and wife, their families and connections, unless such purpose clearly appears by the express terms of the act.

It results that, in our opinion, there is no error in the judgment of the Court of Civil Appeals, and the same is therefore affirmed.

BENNETT et al. v. HUTCHENS et al.

(Supreme Court of Tennessee. Nov. 3, 1915.)

1. HUSBAND AND WIFE ⇐14—AFTER-ACQUIRED PROPERTY—ESTATES BY THE ENTIRETIES.

Where a deed of land is to a husband and wife, an estate therein is by the entireties, and not in common, so that, on the death of one, the other takes the land absolutely.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 71-86, 88, 89; Dec. Dig. ⇐14.]

2. HUSBAND AND WIFE ⇐14 — ESTATES BY THE ENTIRETIES—DEED—CONSTRUCTION.

Where a deed of land is to a husband and wife, it is immaterial that it does not show upon its face that they are husband and wife, or that it was the intention of the grantor to create an estate by the entireties, but the common law requires that the estate be by the entireties.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 71-86, 88, 89; Dec. Dig. ⇐14.]

3. HUSBAND AND WIFE ⇐14—ESTATES BY THE ENTIRETIES—STATUTORY PROVISIONS.

Shannon's Code, § 8677, providing that in all estates held in joint tenancy the share of the joint tenant dying shall descend to his heirs, instead of the other joint tenant, does not abolish estates by the entireties, but is limited to estates held in technical joint tenancy.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 71-86, 88, 89; Dec. Dig. ⇐14.]

4. HUSBAND AND WIFE ⇐113—ESTATES BY THE ENTIRETIES—STATUTE—CONSTRUCTION.

Laws 1913, c. 26, providing that married women shall be released from all disability on

account of coverture, and that the common law limiting their estates is abrogated, giving them all the rights of feme sole, does not affect the estates of married women held at the time of its passage, since it does not purport on its face so to do, and a statute will not be construed to alter the common law further than it expressly declares or necessarily implies a change.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 394; Dec. Dig. ¶113.]

Appeal from Chancery Court, Knox County; Will D. Wright, Chancellor.

Action by J. C. Bennett and others against Jefferson Hutchens and another. From an order dismissing the bill, plaintiffs appeal. Affirmed.

Noble Smithson, of Knoxville, for appellants. A. C. Grimm and W. F. Black, both of Knoxville, for appellees.

BUCHANAN, J. The action is ejectment, brought by the collateral kindred and heirs at law of Darcus Hutchens. The land in suit was conveyed to her and her husband, Jefferson Hutchens, by deed dated September 22, 1897, filed for registration and registered June 24, 1899. The land conveyed by the deed was held by the husband and wife until her death intestate and without issue in September, 1914. It was thereafter held by Jefferson Hutchens until June 22, 1915, when he, by deed, conveyed it to R. L. Peters, his codefendant herein. Hutchens, we assume, was made a defendant in this suit upon the idea that, as the holder of a purchase-money lien, he was a necessary party. The defendants interposed a demurrer to the bill. The chancellor sustained the demurrer, dismissed the bill, and complainants appealed. The theory of the bill is that, upon the death of Mrs. Hutchens, complainants, as her heirs at law, became the owners of an undivided one-half interest in the land; or, in other words, the theory is that, at the time of the death of Mrs. Hutchens, she and her husband were tenants in common, each owning an undivided one-half interest in the property.

The defendants insist that, under the deed to Hutchens and wife, they were seised of an estate by the entirety, and therefore that no estate in the land passed to her heirs at law upon the death of Mrs. Hutchens.

To support complainants' theory, the first insistence advanced is that the deed on its face did not purport, and did not convey, an estate by the entirety to the grantees. So far as the provisions of the deed need be noticed, they were as follows:

"This indenture, made this 22d day of September, A. D. 1897, between Rufus M. Bennett, of Knox county, in the state of Tennessee, of the first part, and Darcus Hutchens and Jefferson Hutchens, of the same county and state, of the second part, witnesseth."

Then follows a recital that the parties of the first part, for and in consideration of the sum of \$1 in hand paid by the parties of

the second part, the receipt of which is acknowledged, have granted, bargained, sold, and conveyed,

"and doth hereby grant, bargain, sell and convey unto the said parties of the second part the following described premises, to wit."

Here is recited a description of the land, and then:

"With the hereditaments and appurtenances thereunto appertaining, except the said Darcus Hutchens and Jefferson Hutchens of the second part are to pay an annual rent of the sum of \$25 to the said Rufus M. Bennett as long as he may live."

Then follow the usual habendum clause and general covenants of warranty, the testimonium clause, the signature of the grantor, signature of a witness, certificates of acknowledgment, etc., all in proper form.

The stipulation for an annual rental was part of the consideration for the deed. The bill avers that the grantees in the deed were husband and wife when it was made.

[1] We think it is clear that this deed vested in Jefferson and Darcus Hutchens an estate by the entirety. Such a deed to persons not husband and wife, considered under the common law, would have created in the grantees an estate in joint tenancy. Each of the grantees under such a deed would have taken as individuals, one and the same interest at one and the same time by one and the same deed, and they would have held the estate conveyed by one and the same undivided possession. By the authorities it is held that a deed to husband and wife, which would at common law have created in them an estate in joint tenancy, had they not been married, does, by the fact of the marriage, create in the husband and wife an estate by the entirety. This upon the reasoning that in the eye of the law husband and wife are not separate individuals, but one person, and the estate vests in them as an entirety. In legal contemplation, each of them is seised of the whole estate, and the death of one of them does not put an end to the seisin of the survivor, because his or her original seisin was of the whole, and not of part, of the estate.

[2] It is immaterial that the deed in the present case did not on its face name the grantees as husband and wife; nor is it material that we find in the deed no words used to indicate a purpose in the grantor to create an estate by the entirety; nor a purpose in the grantees that such an estate should be conferred upon them. The estate, by the entirety, upon the execution of the deed, depended on the unity of the husband and wife, under the common law.

"If an estate be given to a man and his wife they are neither properly joint tenants nor tenants in common; for husband and wife being considered as one person in law, they cannot take the estate by moieties but both are seised of the entirety, per tout, et non per my; the consequence of which is that neither the husband nor the wife can dispose of any part without the as-

sent of the other, but the whole must remain to the survivor." 2 Bla. Com. 182.

"The authorities agree that 'the same words of conveyance which would make two other persons joint tenants will make a husband and wife tenants of the entirety, so that neither can sever the jointure, but the whole must accrue to the survivor.'" *Cole Manufacturing Co. v. Collier*, 95 Tenn. (11 Pick.) 116, 117, 31 S. W. 1000, 30 L. R. A. 315, 49 Am. St. Rep. 921.

"The properties of a joint estate are derived from its unity, which is fourfold—the unity of interest, the unity of title, the unity of time, and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession." 2 Bla. Com. 180.

Generally, on the same subject, see the following of our cases: *Taul v. Campbell*, 15 Tenn. (7 Yerg.) 319, 27 Am. Dec. 508; *Ames v. Norman*, 36 Tenn. (4 Sneed) 683, 70 Am. Dec. 269; *Johnson v. Lusk*, 46 Tenn. (6 Cold.) 114, 98 Am. Dec. 445; *Berrigan v. Fleming*, 70 Tenn. (2 Lea) 271; *Shields v. Netherland*, 73 Tenn. (5 Lea) 193; *McRoberts v. Copeland*, 85 Tenn. (1 Pick.) 211, 2 S. W. 33; *Jackson, Orr & Co. v. Shelton*, 89 Tenn. (5 Pick.) 82, 16 S. W. 142, 12 L. R. A. 514; *Hopson v. Fowlkes*, 92 Tenn. (8 Pick.) 697, 23 S. W. 55, 23 L. R. A. 805, 36 Am. St. Rep. 120; *Chambers v. Chambers*, 92 Tenn. (8 Pick.) 707, 23 S. W. 67; *Walker v. Bobbitt*, 114 Tenn. (6 Cates) 700, 88 S. W. 327; *Beddingfield v. Estill & Newman*, 118 Tenn. (10 Cates) 39, 100 S. W. 108, 9 L. R. A. (N. S.) 640, 11 Ann. Cas. 904. For general authority to the same effect, see *Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, and note, 43 Am. St. Rep. 762; *Jordan v. Reynolds*, 105 Md. 288, 66 Atl. 37, 9 L. R. A. (N. S.) 1026, and note, 121 Am. St. Rep. 578, 12 Ann. Cas. 51; *Pegg v. Pegg*, 165 Mich. 228, 130 N. W. 617, 33 L. R. A. (N. S.) 166, and note, Ann. Cas. 1912C, 925; *In re Meyer*, 232 Pa. 89, 81 Atl. 145, 36 L. R. A. (N. S.) 205, and note, Ann. Cas. 1912C, 1240; *Wilson v. Frost*, 186 Mo. 311, 85 S. W. 375, 105 Am. St. Rep. 619, 2 Ann. Cas. 557, and note.

[3] Complainants' second insistence is that estates by the entirety were abolished by our Acts 1784, c. 22, § 6. See section 2010, Code 1858, and section 3677, Shannon's Code, which legislation is as follows:

"In all estates, real and personal, held in joint tenancy, the part or share of any joint tenant dying shall not descend or go to the surviving tenant or tenants, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common."

The view now insisted on by complainants as the effect of the above legislation was put forward, but rejected, by our court in *Taul v. Campbell*, supra, and other of our cases heretofore cited. We are urged to overrule those cases, but we decline to do so, both upon the ground that upon them now depend well-settled rules of property, and because in our opinion their reasoning is sound.

[4] The final insistence offered by complainants is that the effect of chapter 26 of the published Acts of 1913 was to abrogate the fundamental principles of the common law under which, by virtue of the marriage, husband and wife became a legal unity, and their argument is that, such being the effect of the act, the result was to destroy all existing estates by entireties, including that held by Hutchens and wife in the land sued for herein. The bill avers that the wife, Mrs. Hutchens, died after the act took effect.

We have had occasion, during the present term, to consider this act in the case of *Sarah Lillienkamp v. W. T. Rippetoe*, 179 S. W. 628, Knox Law, and an opinion for publication was handed down. The conclusion we reached in that case was not in accord with the present insistence of the complainants.

The act does not, by its terms, purport to abrogate estates held by entireties at the time of its passage, and created by contract antedating its passage. If the Legislature had intended the act to have such effect, we must assume that it would either in plain terms have so declared, or that it would have employed terms from the use of which such effect would necessarily result. In the absence of such declaration or clear implication that the act should have such effect, we are not called upon to express any opinion based on the hypothesis of the presence of such a legislative purpose; nor do we express any opinion as to what the effect of the act would be on the estate conveyed to husband and wife by deed executed after the act became effective. The rule in this state is:

"That a statute will not be construed to alter the common law further than the act expressly declares, or than is necessarily implied from the fact that it covers the whole subject-matter." *State v. Cooper*, 120 Tenn. (12 Cates) 549, 113 S. W. 1048, 15 Ann. Cas. 1116 and authorities cited; *Sarah Lillienkamp v. W. T. Rippetoe*, supra, and cases cited; *Wilson v. Frost*, 186 Mo. 311, 85 S. W. 375, 105 Am. St. Rep. 619, 2 Ann. Cas. 557, and note.

Examination of the cases cited in the note last above will disclose the weight of authority to be in support of our view of the effect of the act of 1913.

The three questions we have discussed dispose of all of the assignments of error made by complainants, and it results that the decree of the chancellor will be affirmed, at the complainants' cost.

CITY OF MEMPHIS et al. v. STATE ex rel. RYALS.

(Supreme Court of Tennessee. Oct. 23, 1915.)

1. CONSTITUTIONAL LAW §211—CONSTRUCTION.

Under Const. U. S., Amend. 14, prohibiting the denial to any person of the equal protection of the law, and Const. Tenn. art. 1, § 8, prohibiting the imprisonment or execution of any person, or depriving him of life, liberty, or property, except by judgment of his peers or the law of the

land, and article 11, § 8, forbidding class legislation, the same rules will be applied to classifications therein as to the classifications made in legislative enactments, so that the basis for a classification must be natural, and not arbitrary or capricious, and must rest on some substantial difference; but the classification is not invalid merely because it does not depend on scientific or marked differences.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 678; Dec. Dig. ¶211.]

2. CARRIERS ¶2—CONSTITUTIONAL LAW ¶208, 241—CLASS LEGISLATION—REGULATION OF JITNEYS—PRIVATE CONVEYANCES.

Acts 1915, c. 60, regulating jitneys as common carriers, and prohibiting their operation, except upon prescribed conditions, does not make an arbitrary classification between jitneys and privately owned automobiles, since the uses and character of operation of the two classes are distinct.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. ¶2; Constitutional Law, Cent. Dig. §§ 649-677, 700, 701; Dec. Dig. ¶208, 241.]

3. CONSTITUTIONAL LAW ¶208, 241—CLASS LEGISLATION — REGULATING JITNEYS — STREET CARS.

Acts 1915, c. 60, regulating jitneys as common carriers, and prohibiting their operation, except upon prescribed conditions, does not make an arbitrary classification between jitney busses and street railway cars, since the jitney runs upon no track, and is less substantial and more dangerous than the street car, thus presenting essential differences, properly the subject of classification.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677, 700, 701; Dec. Dig. ¶208, 241.]

4. CONSTITUTIONAL LAW ¶208, 241—CLASS LEGISLATION — REGULATION OF JITNEYS — TAXICABS.

Acts 1915, c. 60, regulating jitneys as common carriers, and prohibiting their operation, except upon described conditions, does not make an arbitrary classification between jitneys and taxicabs, since taxicabs are for hire at a fare proportioned to the length of the trips of the several passengers, without regard to route, while the jitney carries passengers upon a designated route, and the investments in the two classes of machines are widely different.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677, 700, 701; Dec. Dig. ¶208, 241.]

5. CARRIERS ¶4 — CARRIERS OF PERSONS — "JITNEYS."

A "jitney" is a self-propelled vehicle, other than a street car, traversing the public streets between certain definite points or termini, and, as a common carrier, conveying passengers at a five-cent or some small fare, between such termini and intermediate points, and so held out, advertised, or announced.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1, 462-478; Dec. Dig. ¶4.]

6. CONSTITUTIONAL LAW ¶208—CLASS LEGISLATION—ARBITRARY CLASSIFICATION.

Under the provisions of the Constitution prohibiting class legislation, it is not sufficient to invalidate a statute merely to show points of similarity in the thing classified, and the thing excluded from the classification; but it must be shown that the classification is unreasonable and impracticable.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. ¶208.]

7. MUNICIPAL CORPORATIONS ¶703—STREETS —LEGISLATIVE CONTROL—JITNEYS.

The Legislature, being endowed with police power to regulate the use of streets in public

places, may prescribe the conditions with which jitneys, being common carriers, must comply in order to operate.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. ¶703.]

Appeal from Circuit Court, Shelby County; A. B. Pittman, Judge.

Habeas corpus by the State of Tennessee, on the relation of S. B. Ryals, against the City of Memphis and others. From an order releasing the relator, defendants appeal. Reversed and remanded.

O. M. Bryan and Leo Goodman, both of Memphis, and Chas. T. Cates, of Maryville, for appellants. Caruthers Ewing, of Memphis, for appellee.

WILLIAMS, J. Ryals, as relator, sued out a writ of habeas corpus to effect his release from the custody of the chief of police of the city of Memphis; he having been arrested for a violation of Acts 1915, c. 60. The circuit judge released the relator, holding that act void, because violative of the constitutional provisions that inhibit arbitrary class legislation. Const. Tenn. art. 1, § 8, and article 11, § 8; fourteenth amendment of the Constitution of the United States.

The act thus attacked was evidently passed for the regulation of a class of motor vehicles recently brought into service in the principal cities of the state, commonly known as "jitneys."

By section 1 of the act it is provided that any person, firm, or corporation operating for hire any public conveyance propelled by steam, gasoline, or other power, "for the purpose of affording a means of street transportation similar to that ordinarily afforded by street railways (but not operated upon fixed tracks) by indiscriminately accepting and discharging such persons as may offer themselves for transportation," is declared a common carrier, and the business of all such carriers is declared to be a privilege.

Section 2 of the act makes unlawful the use and occupation of any street or alley or other public place in any incorporated city or town without first obtaining from such city or town a permit or license by ordinance giving the right to so use or occupy such street, alley or other public place—the permit or license to embody "such routes, terms and conditions as such city or town may elect to impose: Provided, however, that no such permit or license shall be granted which does not require the execution and filing of a bond," as provided by section 3.

Section 3 provides that before such common carrier may conduct his business he must execute a bond, with good and sufficient surety or sureties, in no case to exceed \$5,000 for each car operated, conditioned that such common carrier will pay any damage that may be adjudged finally

against such carrier as compensation for loss of life or injury to person or property inflicted by such carrier or caused by his negligence.

Section 4 makes it unlawful for such common carrier to use or occupy any street or alley or other public place without the permit or license aforesaid or without first executing and filing the bond as required by section 3.

The subsequent sections need not be outlined, since the provision requiring the execution of a bond is the only one inveighed against by relator, charged as he was with the operation of a jitney automobile without having executed such bond.

The circuit judge, after calling attention in his opinion to the fact that the act does not limit the condition of the bond to a protection of the passengers of such a common carrier, but includes the payment of damages by reason of negligence resulting in injury to pedestrians or to property generally, expressed the view that the provision of the statute might be upheld if the bond required had to do only with the protection of passengers, and further said:

"This act imposes upon the carrier burdens not only in his character of common carrier, but also burdens in his capacity of an ordinary user of the streets. Using the same kind of vehicle, with the same motor power, in identically the same manner as private operators of automobiles, he is required to give a bond to protect other users of the streets against his negligence. No such requirement is made of any other person using similar vehicles."

The act was therefore held invalid, with result that the city has appealed to this court.

[1] Under the provisions of the state and national Constitutions, above referred to, the same rules are applied as to the validity of classifications made in legislative enactments. When an effort is thus made to distinguish and classify as between citizens, the basis therefor must be natural, and not arbitrary or capricious. The classification must rest on some substantial difference between the situation of the class created and other persons to whom it does not apply. *State ex rel. v. Schlitz Brewing Co.*, 104 Tenn. 730, 59 S. W. 1033, 78 Am. St. Rep. 941, and cases cited.

However, classification for such purposes is not invalid because not depending on scientific or marked differences in things and persons, or in their relations. It suffices if it is practical, and it is not reviewable unless palpably arbitrary. *Orient Ins. Co. v. Daggs*, 172 U. S. 562, 19 Sup. Ct. 281, 43 L. Ed. 552, cited with approval in *State ex rel. v. Schlitz Brewing Co.*, supra.

"When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitra-

ry." *Motlow v. State*, 125 Tenn. 547, 145 S. W. 177, following *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160.

Having these principles in mind for guidance, we may conceive that, from the experience developed by the operation of jitney automobiles at the time of the enactment of the regulatory statute, the Legislature deemed the provision for a bond to be necessary because it realized that by reason of the small fare charged by such operators the tendency would be for them to invest in cheap or secondhand machines, oftentimes fragile in character; that frequently the vehicle would not be owned outright, but only subject to a lien or by way of lease; that, by reason of the limited size and carrying capacity of the conveyances, an increased congestion of the streets and public places would follow, as well as an overtaxing of the capacity of the given conveyance; that they would have no fixed track upon which to run, moving at will over the entire street surface, and in their crossing over and stopping along the curb between crossings, or at street crossings, danger to persons and property would be augmented; that, by reason of the competition of the many engaged in the business, frequent contests between the operators for points of vantage in the streets would follow; that there was a tendency fraught with danger in the many so engaged seeking the streets of heaviest travel for passengers, thus leading to congestion, as well as in hasty efforts made to head off and divert those waiting on the curb as offerers for passage on street railways; that the desire and necessity to collect many small fares would tempt operators to indulge in swift and careless running; that by reason of receiving and discharging passengers at short, unscheduled intervals, there would be an interruption of traffic and an endangering of other vehicles in the streets; that by reason of the small investment required many who are financially irresponsible would embark in the business; that the collection of damages from the operators would be difficult, and in many instances impossible.

[2] We come now to the test of the law made by the circuit judge, and which led him to denounce the classification—the inclusion of jitney automobiles and the exclusion of automobiles privately owned and used. We think that such a classification is easily sustainable by reason of the applicability of many of the considerations above enumerated. The privately owned vehicle ordinarily has but a single destination, at which it comes to rest. Its use is not urged to or towards the limit in order to the reaping of profits. We are unable to see merit in the distinction taken by the circuit judge, when he intimated the opinion that a classification of the jitney from privately used automobiles might be sustained only so far as indemnity for damages done to passengers

was concerned. Most of the dangers that surround such passengers in a substantial sense beset also the users of the street.

[3] Contrasting the jitney with street railway cars, to ascertain whether there be arbitrary classification: The street railway, by reason of its having tracks at definite places assigned it by municipal authority, on which tracks its traffic must move, is less liable to cause injury; and the substantial nature of it cars, and particularly the fixity, permanency, and great cost of its roadbed, afford an anchored indemnity in respect of its liability for negligence. Other marks for differentiation, appearing in the above outline of considerations imputable to the legislative mind, need not be reiterated.

[4] Assuming for test purposes (without meaning to decide or to intimate a decision) that taxicabs are common carriers, and that they are not included within the terms of the statute, does their exclusion operate to make the classification unreasonable and arbitrary?

The word "taxicab" is one of recent coinage, to describe a motor-driven conveyance that performs a service similar to the cab or hackney carriage, held for hire at designated places at a fare proportioned to the length of the trips of the several passengers, who are taken to be carried to destinations without regard to any route adopted or uniformly conformed to by the operator. The jitney holds itself out to accommodate persons who purpose traveling along a distinct route chosen by the operator. Operators of taxicabs have not the temptation or necessity, we may assume, of choosing the most traveled streets, since those less traveled afford them better opportunities to serve the object their owners have in view. It may be that a larger investment is ordinarily required to enter the taxicab business than the other, and that the conveyances would be less in number on this account, as well as because of the greater fare charged, not to mention other differences to be drawn from the above summary. In New York an ordinance regulating the conduct of the business of public hackmen has been held not to be discriminatory, because it applied only to those engaged in transporting passengers for hire who solicit business on the streets, or because taximeters are required to be attached to motor-driven vehicles only. *The Taxicab Cases*, 82 Misc. Rep. 94, 143 N. Y. Supp. 279, affirmed under style *Yellow Taxicab Co. v. Gaynor*, 159 App. Div. 893, 144 N. Y. Supp. 290.

The Supreme Court of the United States has held that the inclusion of producing, and the exclusion of nonproducing, venders of milk in legislation was valid, the court saying:

"A picture is exhibited of producing and non-producing venders [of milk] selling milk side by side; the latter, it may be, a purchaser from the former; the act of one permitted, the act of the other prohibited or penalized. If we could look no farther than the mere act of selling, the in-

justice of the law might be demonstrated; but something more must be considered. Not only the final purpose of the law must be considered, but the means of its administration—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose." *St. John v. New York*, 201 U. S. 633, 26 Sup. Ct. 554, 50 L. Ed. 896, 5 Ann. Cas. 909, affirming 178 N. Y. 617, 70 N. E. 1104.

The same court upheld a classification of vehicles (in respect of their respective owners' rights to use the streets) by which advertising wagons or busses were excluded, while ordinary business wagons, when engaged in the usual business of the owner, and not used merely or mainly for advertising, were permitted to use the streets while exhibiting business notices. *Fifth Ave. Coach Co. v. New York*, 221 U. S. 467, 31 Sup. Ct. 709, 55 L. Ed. 816, affirming 194 N. Y. 19, 86 N. E. 824, 21 L. R. A. (N. S.) 744, 16 Ann. Cas. 605. See, also, *Provident Institution v. Malone*, 221 U. S. 660, 31 Sup. Ct. 661, 55 L. Ed. 899, 34 L. R. A. (N. S.) 1129.

[5] The word "jitney" we think may be defined to be a self-propelled vehicle, other than a street car, traversing the public streets between certain definite points or termini, and as a common carrier conveying passengers at a five-cent or some small fare, between such termini and intermediate points, and so held out, advertised, or announced.

In the case of *Ex parte Cardinal* (Cal) 150 Pac. 348, where was involved an ordinance substantially so defining a jitney, and requiring the owner, before operating such machine, to obtain a permit, and to give a bond or provide a policy of insurance to protect those injured, the court upheld the ordinance as not creating an arbitrary class, and said:

"It is manifest that as to automobiles there may be circumstances existing, by reason of the manner and character of their use on the streets, that will warrant, in the interest of the safety of the public, special regulations as to those used for a particular purpose and in a particular way. * * * We entertain no doubt whatever as to the power of the board of supervisors of the city and county of San Francisco to make special regulations relating to the use on the streets of such vehicles as are described in section 1 of the ordinance, and therein termed jitney busses. It is argued that the charge of ten cents or less for passage is no proper criterion by which to classify for such a purpose as that of this ordinance. It may well be, however, that the special danger to the public sought to be guarded against is confined to just the class of vehicles described, viz., automobiles used on the public streets for the carriage of passengers at a very small charge. * * *

It is the 'low fare' automobile for the carriage of passengers on the streets of San Francisco that the ordinance is designed to regulate. The real question in this connection is whether there is sufficient distinction between the operation on the public streets of these 'low charge' automobiles for the carriage of passengers and the operation of self-propelled motor cars on which a much higher charge is made, to warrant the imposition of the special regulations made by this ordinance. It is a matter of common knowledge on the part of those familiar

with conditions in our large cities that the comparatively recent introduction of this class of vehicle, commonly known as the 'jitney,' for the carriage of passengers on the public streets, for a charge closely approximating that made on street cars, in view of the almost phenomenal growth of the institution, has made clearly apparent the necessity of some special regulations in order to reasonably provide for the comfort and safety of the public. It may well be that the board of supervisors concluded that, in view of the number of this class of public conveyances that were operated upon the public streets, especially upon the principal streets already occupied almost to overflowing during the hours of heaviest traffic by street cars and other vehicles, as well as by pedestrians at street crossings, the speed at which they would naturally be operated in order to make them pay on such a low rate of fare, and the probable lack of substantial financial responsibility on the part of very many undertaking to operate such vehicles, special regulations as to condition of car, * * * as well as security to protect against improper or negligent operation, were essential to the public safety. We certainly cannot say that the legislative body was not justified in so determining."

[6] Counsel for the appellee relator treats his case against the act as made out if he be able to present some points of similarity in the jitney and the taxicab or privately operated automobile. But mathematical or logical exactness, in every aspect, in a division for classification is not always possible, and it is not required in order to validity. "The best that can be done is to keep within the clearly reasonable and practicable. That is accomplished where there are such general characteristics of the members of the class as to reasonably call for special legislative treatment. That may be true, generally, and yet some such characteristics sometimes may be found to exist outside the boundaries of the class." *Mehlos v. Milwaukee*, 156 Wis. 591, 146 N. W. 882, 51 L. R. A. (N. S.) 1009, Ann. Cas. 1915C, 1102; *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 33 Sup. Ct. 66, 57 L. Ed. 164; *Motlow v. State*, supra; 6 R. C. L. p. 360, § 373.

We therefore hold that the segregation of the jitney automobile for regulation in the matter of the execution of an indemnity bond by its owner is not vicious or unreasonable class legislation.

Counsel for appellee commends to our consideration *People v. Coolidge*, 124 Mich. 664, 83 N. W. 594, 50 L. R. A. 493, 83 Am. St. Rep. 352, and *Gibbs v. Tally*, 133 Cal. 373, 65 Pac. 970, 60 L. R. A. 815. In the first of these cases it was held that an act, requiring all merchants who sell farm produce on a commission to execute a bond of \$5,000 to faithfully perform their contracts, was unwarranted class legislation, and that the act could find no support in the police power, since there was nothing in the business hostile to the comfort, health, morals, or even convenience of a community. The second case involved an effort on the part of the Legislature to require the owner of property, who contracts for the placing of a building thereon, to furnish a bond for

the benefit of laborers and materialmen on terms that would make him liable for 25 per cent. above the contract price. The court held that the act there in question was not justifiable by the police power, and was violative of constitutional provisions pointed out.

We fail to see the pertinency of these cases to the one at bar, which involves the right to regulate a common or public carrier in respect of the use of public streets.

[7] It is too clear for extended discussion that it was competent for the Legislature under the police power to regulate the use of the streets and public places by jitney operators, who, as common carriers, have no vested right to use the same without complying with a requirement as to obtaining a permit or license. The right to make such use is a franchise, to be withheld or granted as the Legislature may see fit. *Dill. Mun. Corp.* §§ 1210, 1229; *Fifth Ave. Coach Co. v. New York*, 194 N. Y. 19, 86 N. E. 824, 21 L. R. A. (N. S.) 744, 16 Ann. Cas. 695. Further, the use or license may be conditioned on the execution of a bond for the indemnification of those injured. So held in respect of motor-propelled vehicles in the recent cases of *State v. Howell* (Wash.) 147 Pac. 1159, *Greene v. City of San Antonio* (Tex. Civ. App.) 178 S. W. 6, *Ex parte Dickey* (W. Va.) 85 S. M. 781, and *Ex parte Cardinal*, supra.

We are of opinion that the statute is not subject to the objections urged by the appellee, and that therefore the lower court erred in its disposition of the case. Reversed and remanded; all costs to be paid by the relator.

MEMPHIS ST. RY. CO. v. RAPID TRANSIT CO. et al.

(Supreme Court of Tennessee. Oct. 23, 1915.)

1. CONSTITUTIONAL LAW — 46 — CONSTITUTIONAL QUESTIONS—NECESSITY OF DECISION.

The Supreme Court on appeal has jurisdiction and will determine the constitutionality of a law, although the cause can be decided upon other grounds, where the constitutional question is made in good faith and relied on in the case, since by Acts of 1907, c. 82, establishing and defining the powers of the Court of Civil Appeals, jurisdiction of that court is defeated by the presence of a constitutional question.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 43-45; Dec. Dig. —46.]

2. MUNICIPAL CORPORATIONS — 703—REGULATION OF JITNEYS.

Under Acts 1915, c. 60, making jitneys common carriers, and requiring them, under ordinances of the cities or towns, to file bonds and perform the conditions of the statute and ordinances, a jitney company is altogether without right to do business on the streets of a city, where the city has passed no ordinance pursuant to the act, and the company has failed to procure any license or execute any bond under the act.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1509-1513; Dec. Dig. —703.]

3. INJUNCTION ~~64~~—RIGHT TO INVOKE—EXCLUSIVE FRANCHISE.

Where the plaintiff street railway company has a franchise from the city, its franchise is a property right, under which it can restrain any person from becoming a common carrier of passengers in competition with it without legislative or municipal authority, and for that purpose its franchise is exclusive against all persons upon whom similar rights have not been conferred.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 131-133; Dec. Dig. ~~64~~.]

4. INJUNCTION ~~9~~ — RIGHT TO REMEDY — DOUBTFUL CASE.

An injunction will not be awarded to protect an alleged right, except upon a clear case.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 8; Dec. Dig. ~~9~~.]

5. INJUNCTION ~~65~~ — RIGHT TO REMEDY — GROUNDS.

Where, under an act of the Legislature, municipalities are authorized to regulate by ordinance, subject to the statute, the operation of jitney busses as common carriers, and the city council fails to regulate, a street railway company can have the operation of jitneys enjoined, since the city council might fail to act at all under the statute, and thus the rights of the company be unlawfully invaded.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 134; Dec. Dig. ~~65~~.]

6. MUNICIPAL CORPORATIONS ~~697~~—UNAUTHORIZED OPERATION OF JITNEYS—NUISANCE—INJUNCTION.

Where statute authorizes the regulation of jitneys, and prohibits their operation, except upon conditions named, and those conditions are not fulfilled, but many jitneys are operated with consequent danger to persons and property, they constitute a nuisance, and may be enjoined on the bill of a private individual who can show special damage to himself.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1502-1505; Dec. Dig. ~~697~~.]

7. MUNICIPAL CORPORATIONS ~~697~~ — OBSTRUCTION OF STREETS—RIGHT TO REMEDY.

Relief by an injunction against a nuisance by which the highway is obstructed need not be sought by an abutting owner, but may be had by any individual who can show special damage to himself.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1502-1505; Dec. Dig. ~~697~~.]

Appeal from Chancery Court, Shelby County; F. H. Helskell, Chancellor.

Action by the Memphis Street Railway Company against the Rapid Transit Company and others. From an order dismissing the bill on defendants' demurrer, complainant appeals. Reversed.

Charles T. Cates, Jr., of Knoxville, and Wright, Miles, Waring & Walker, of Memphis, for appellants. Caruthers Ewing, of Memphis, for appellees.

GREEN, J. This bill was filed by the Memphis Street Railway Company to enjoin the Rapid Transit Company and other defendants from operating jitneys on the streets of Memphis in competition with the complainant's street cars. A demurrer was interposed by defendants, and sustained by

the chancellor, and the complainant has appealed to this court.

Complainant alleged that it was organized under the laws of Tennessee, and had a franchise from the city of Memphis to operate a street railway system in that city; that it had expended in excess of \$10,000,000 in constructing and equipping its street railway lines; that it operated about 129 miles of track, extending over all parts of the city; and that it had complied with all the laws of Tennessee and all the terms of its franchise from the city of Memphis.

The bill further averred that the defendants were engaged in operating jitneys or jitney busses upon the streets of Memphis in competition with the complainant, and that defendants were conducting this business without having made any attempt to comply with the statute of Tennessee regulating said business; that said defendants were operating their automobiles on the same streets upon which complainant ran its cars; that the jitneys were running at high rates of speed, cutting in front of complainant's cars, and racing by the cars in their efforts to reach the stopping places first, in order to pick up passengers; that they frequently ran in front of complainant's cars, thus forcing the cars to be stopped in order to prevent accident; that they often ran dangerously close to and by complainant's cars while the cars were standing for the purpose of taking off and discharging passengers, thereby causing many very serious accidents and even deaths. It was said that such operation of the said jitneys was hindering and impeding complainant from giving first-class service; that such illegal and unauthorized competition was depriving complainant of a large amount of revenue, by unlawfully diverting from it intended passengers upon its cars. The bill contains other charges upon which it is not necessary to dwell.

The General Assembly of Tennessee, in 1915, by chapter 60, Acts of that year, undertook to regulate the jitney business in the cities and towns of this state. This act declared those operating such vehicles to be common carriers, and provided that the operation of these conveyances should be unlawful in the incorporated cities or towns of this state without first obtaining a permit or license under ordinance from said city or town, and it was further provided that no such license should be issued unless the owner or operator filed with the clerk of the county court in the county in which the business was proposed to be done, a bond of not less than \$5,000 to cover loss of life or injury to person or property inflicted by such carrier or caused by his negligence. It was further enacted that said license should embody such routes, terms, and conditions as the city or town might elect to impose, pro-

vided that no such permit or license should be granted which did not require the execution and filing of the bond mentioned above. Said act is set out in the margin of this opinion.¹

[1] The demurrer of defendants challenges the constitutionality of the act referred to and relied on by complainant. It does not distinctly appear whether the chancellor passed on the constitutionality of the statute or based his decision on other grounds of the demurrer. It is said by counsel for defendants that the result below was reached without consideration of the validity of the act in question, and it is urged that the case can be determined in this court without reference to the said act. Defendants therefore insist that this court is without jurisdiction, and the case is properly one for the Court of Civil Appeals; that no constitutional question is involved.

We are referred to cases in which it is said that the constitutionality of a statute

¹An act to define as common carriers within this state, persons, firms and corporations operating certain self-propelling public conveyances and affording means of street transportation similar to that ordinarily afforded by street railways but not operated upon fixed tracks; to declare the business of all such common carriers a privilege and to forbid and declare a misdemeanor their operation upon streets, alleys, public places of incorporated cities or towns without obtaining permits or licenses from such cities or towns and giving bond to indemnify against loss of life and damage to person and property; and to authorize incorporated cities and towns of this state to grant permits and licenses to such carriers to operate over streets, alleys and public places and to fix routes, terms and conditions of such operation, and to limit such operation in the interest of public convenience and safety, and to impose a tax for the exercise of the privilege herein granted.

Section 1. Be it enacted by the General Assembly of the state of Tennessee, that any person, firm or corporation operating for hire any public conveyance propelled by steam, compressed air, gasoline, naphtha, electricity or other motive power for the purpose of affording a means of street transportation similar to that ordinarily afforded by street railways (but not operated upon fixed tracks) by indiscriminately accepting and discharging such persons as may offer themselves for transportation along the way and course of operation, be and the same is hereby declared and defined to be a common carrier, and the business of all such common carriers is hereby declared to be a privilege.

Section 2. Be it further enacted, that it shall be unlawful for any common carrier as defined in section 1 of this act, to use or occupy any street, alley or other public place in any incorporated city or town of this state without first obtaining from such city or town a permit or license by ordinance giving the right to so use or occupy such street, alley or other public place, such permit or license to embody such routes, terms and conditions as such city or town may elect to impose: Provided however, that no such permit or license shall be granted which does not require the execution and filing of a bond as provided for in section 3 of this act.

Section 3. Be it further enacted, that any such common carrier, before operating any public conveyance as aforesaid, in addition to obtaining a permit or license as aforesaid, shall execute to the state of Tennessee and file with the clerk of the county court of the county in which the business

will not be considered or adjudged if the case can be otherwise decided. We do not think, however, such a rule should control here. We have formerly said that, when any question involving the constitutionality of an act of the Legislature is bona fide made and relied on in a case, this court should take appellate jurisdiction of such a case under chapter 82, of the Acts of 1907. *Campbell County v. Wright*, 127 Tenn. 1, 151 S. W. 411.

The chief contention of complainant in this case is that defendants are outlaws on the streets of Memphis, with no right to pursue their business, by reason of the fact that the city has passed no ordinance giving them permission to operate, and because they have made no bonds, according to the provisions of chapter 60, Acts of 1915. Defendants, as we have said, challenge the constitutionality of this act. We think, therefore, the constitutional question in this case is bona fide, and that constitutional rights are relied on.

is to be carried on, and renew or increase from time to time as may be required by such city or town, a bond with good and sufficient surety or sureties, to be approved by the mayor of such incorporated city or town, in such sum as such city or town may reasonably demand (in no case, however, in a sum less than five thousand dollars for each car operated), conditioned that such common carrier will pay any damage that may be adjudged finally against such carrier as compensation for loss of life or injury to person or property inflicted by such carrier or caused by his negligence.

Section 4. Be it further enacted, that any common carrier as defined in section 1, of this act which shall use or occupy any street, alley or other public place in any incorporated city or town of this state without first obtaining a permit or license to so use and occupy such street, alley or other public place, or shall operate any such conveyance without first executing and filing bond as required by section 3 of this act shall be guilty of a misdemeanor and shall upon conviction be fined not less than fifty dollars nor more than one hundred dollars for each offense, and each day upon which such common carrier shall so unlawfully use or occupy any street, alley or other public place in any incorporated city or town of this state, shall constitute a separate offense.

Section 5. Be it further enacted, that all incorporated cities and towns of this state be and they are hereby authorized and empowered to grant permits or licenses to such common carriers to operate over the streets, alleys and public places of such cities and towns, and to fix in such licenses and permits the routes, terms and conditions upon which such common carriers may operate, subject to the limitations contained in section 2 of this act: Provided that no license or permit shall be granted to any such common carrier without the execution and filing of bond as required by section 3 of this act being required.

And all such incorporated cities and towns are hereby authorized and empowered to impose upon all such common carriers a tax for the exercise of the privilege herein granted.

Section 6. Be it further enacted, that if any section or part of this act be for any reason held unconstitutional or invalid, such holding shall not affect the validity or the remaining portions of this act, but such remaining portions shall be and remain valid.

Section 7. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it.

Although we appreciate the delicacy of passing on the validity of an act of the Legislature, such a duty is often imposed upon us, and we must not dodge our jurisdiction. Where an act of the Legislature undertakes to regulate a particular subject, and the application of such an act is invoked by one party in a suit involving that subject, and the validity of the act is questioned by the other party, we think it proper that the statute should be tested. Statutes are enacted to make the law plain and rights distinct. They are intended to be administered, and it is not incumbent upon the courts to enter upon a difficult and doubtful investigation of the rights of the parties under the common law—such rights being defined by a statute—merely to avoid passing on the constitutionality of such a statute.

So we think that there is a constitutional question in this case properly made, and that this court has appellate jurisdiction.

[2] Chapter 60, Acts of 1915, has been considered, and the act adjudged valid and constitutional, in the case of *City of Memphis et al. v. State of Tennessee ex rel. S. B. Ryals*, 179 S. W. 631, opinion in which has just been filed by Mr. Justice Williams. It is not, therefore, necessary to further discuss this question in this opinion.

The act being valid, there is little trouble as to its proper construction. We have heretofore intimated our conception of its meaning. Under it, no jitney may be operated in any city or town of the state of Tennessee, except under a license or permit from said city or town, issuing under an ordinance passed in conformity with the said statute, nor shall such permit or license be issued until the statutory bond has been executed and filed with the county court clerk. In other words, jitneys have no right to operate on the streets of any incorporated city or town in Tennessee until an ordinance has been passed providing for licenses or permits, and such permits or licenses have been secured, and they have no right then to operate until they have made bond as required by the statute.

In the case before us the city of Memphis has passed no ordinance authorizing the issuance of licenses or permits to engage in this business, nor have the defendants undertaken to procure any such licenses, nor have they executed any bonds.

It is very clear, then, that defendants have no right whatever to do business on the streets of Memphis. They are lawbreakers, subject to criminal prosecution, operating in direct violation of the statute of this state.

[3] These conclusions upon the statute being reached, many of the questions presented by the demurrer of defendants as to their common-law rights are eliminated from further consideration. The status of defendants is fixed by the act. There remains, however, the question as to the right of the complain-

ant to an injunction against defendants under the circumstances above detailed.

The complainant does not seek an injunction here on the theory that it is possessed of an exclusive franchise to conduct the business of common carrier of passengers on the streets of Memphis. The contention of complainant is that, having been granted a franchise as such common carrier, it has a property right that will entitle it to restrain any person or corporation from attempting to engage in the business of common carrier of passengers on the streets of Memphis, in competition with complainant, without legislative or municipal authority. Complainant concedes that its franchise is not exclusive, in the sense that a similar franchise might not be granted to another to be exercised and enjoyed in the city of Memphis; but it maintains that its franchise is exclusive against all persons upon whom similar rights have not been conferred by legislative sanction.

We think this contention is well founded and supported by the great body of authority. In *Pomeroy's Equity Jurisprudence* it is said:

"An injunction is the appropriate remedy to protect a party in the enjoyment of an exclusive franchise against continuous encroachments. Such continuous encroachments constitute a private nuisance, which courts of equity will abate by injunction. The jurisdiction rests on the firm and satisfactory ground of its necessity to avoid a ruinous multiplicity of suits, and to give adequate protection to the plaintiff's property in his franchise. To be entitled to relief, a plaintiff need only show that he is entitled to a franchise, and that there is continuous interference therewith by the defendant. It is not necessary that the plaintiff first establish his right at law." *Pomeroy's Eq. Jur.* § 583.

Further it is said:

"It is not necessary, 'to entitle the owner to relief in equity, that the franchise should be an exclusive franchise in the sense that the granting of another franchise to be exercised and enjoyed at the same place would be void.' The theory is 'that the defendant who has no franchise, is acting in violation of law in operating * * * without authority from the sovereign power, and that the owner of the franchise may complain of and restrain such illegal acts when they result in injury to his franchise, which, in the eye of the law, is property. As to the one who is invading his rights without legal sanction, the franchise is an exclusive franchise, although the owner of it might not be entitled to any protection as against the granting of a similar franchise to another.'" *Pomeroy's Eq. Jur.* § 584.

In dealing with a controversy between two electric light companies, one without a franchise, the Supreme Court of Oklahoma observed:

"When plaintiff accepted its franchise, it did so subject to the power of the municipality to grant other persons or corporations similar franchises, and with the knowledge that it might be compelled to exercise its rights under its franchise with others exercising similar rights. If, by the competition of rival companies to whom the use of the streets and public grounds has been granted by the municipality, plaintiff is rendered unable to discharge the obligations of its contract to furnish the city and its inhabitants with light and power at stipulated prices,

except at a financial loss to it, plaintiff cannot complain, for it must be held to have contemplated such condition might arise, and to have agreed thereto when it accepted the franchise; but such cannot be said of the defendant, who unlawfully occupies the streets and public grounds of the city in competition with plaintiff. By its unlawful acts defendant can and will take from plaintiff a portion of its business. At the same time, defendant is under no obligation to the city or its inhabitants, and is all the while maintaining upon the streets and public grounds of the city a public nuisance, and the loss plaintiff sustains is to defendant its fruits from its violation of the law. By these unlawful acts of defendant, plaintiff may be rendered financially unable to comply with the obligations of its contract, and may be subjected to suits for damages, mandamus proceedings to enforce the performance of its contract, or an action to forfeit its franchise. Defendant does not undertake to compete with plaintiff for the business of the city and its inhabitants by furnishing to them light and power other than by the use of the streets and alleys. Its right to sell light and power is not dependent upon any franchise, but its right to use the streets and public grounds of the city for that purpose does depend upon the consent of the city; and, when it uses the streets without that consent, it is not only guilty of maintaining a public nuisance, but also inflicts upon plaintiff a special injury by its unlawful act, which may be restrained." *Bartlesville E. L. & P. Co. v. Bartlesville I. R. Company*, 26 Okl. 457, 109 Pac. 229, 29 L. R. A. (N. S.) 81.

In a similar case the New Jersey court said:

"Legislative grants of franchises of the nature claimed by complainant, whether granted by special * * * privileges which are necessarily exclusive in their nature as against all persons upon whom similar rights have not been conferred, for any attempted exercise of such rights, without legislative sanction, is not only an unwarranted usurpation of power, but operates as a direct invasion of the private property rights of those upon whom the franchises have been so conferred. *Raritan & Delaware Bay R. R. Co. v. Delaware & Raritan Canal Co.*, 18 N. J. Eq. (3 C. E. Gr.) 546, 569; *Penn. R. R. Co. v. Nat. R. R. Co.*, 23 N. J. Eq. (8 C. E. Gr.) 441, 447; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. (2 Stew.) 242, 250; *Elizabethtown Gas Co. v. Green*, 46 N. J. Eq. (1 Dick.) 118, 124 [18 Atl. 844]. It follows that, if complainant is at this time entitled to exercise in the disputed territory the privileges set forth in the legislative act referred to, and defendant, as claimed, enjoys no legislative sanction for the conduct sought to be enjoined, complainant will be entitled to the relief prayed for." *Millville Gas L. Co. v. Vineland L. & P. Co.*, 72 N. J. Eq. 305, 65 Atl. 504.

The same question has often arisen with reference to ferries, and the courts have awarded injunction against the operation of unlicensed ferries at the suit of the ferryman legally authorized to conduct his business.

In one of these cases the Supreme Court of Mississippi said:

"A public ferry cannot be erected and operated in this state without a special license therefore, and such license bestows upon the licensee the exclusive right of such ferry—exclusive as to all persons, except that the board of supervisors may establish as many ferries as the public convenience may require at the same or adjacent places of crossing. Every such licensee, however, is required to give bond with security for the performance of the obligations assumed by

him, which impose upon him the duties of keeping a proper and safe boat and equipments, and of his constant attendance at the ferry, and of the due and speedy transportation over it of all persons and property desired to be transported, and to secure these and other stringent duties required of him he is placed under heavy liabilities, civil and criminal, for their performance, all of which is necessary for the public convenience, and as a remuneration for his services and liabilities he is allowed a fixed rate of ferrage. The right secured to the licensee is a legal right, created by public law, and not to be infringed except by the authority of the state itself; and such right would be of no avail, unless the party holding it is protected by law in its enjoyment. Indeed, it is a maxim of law that there is no right without a remedy, for 'whosoever the law giveth any right,' says Coke, 'it also giveth a remedy.' Coke on Litt. 56. The ferry right of appellant should have secured to him the tolls lost to him by the infringement of his right by the defendants, and they should make him whole for the damages that he has sustained, to be measured by the amount of tolls diverted." *McInnis v. Pace*, 78 Miss. 550, 29 South. 835.

Other ferry cases are *Patterson v. Wollmann*, 5 N. D. 608, 69 N. W. 1040, 33 L. R. A. 537; *Green v. Ivey*, 45 Fla. 338, 33 South. 711; *Tugwell v. Ferry Co.*, 74 Tex. 480, 9 S. W. 120, 13 S. W. 654. All these cases sustain the views expressed in the foregoing quotations, and many other cases in which the same doctrine is recognized are collected in a note to *Bartlesville Elec. L. & Power Co. v. Bartlesville I. R. Co.*, reported in 29 L. R. A. (N. S.) 77.

We are unable to follow the effort of learned counsel for the defendants to distinguish the cases from which we have quoted from the case here presented. We think the foregoing authorities are sound and should control this controversy.

When a business may not be conducted as a matter of common right, but legislative authority is necessary, such authority, when conferred, is exclusive against all persons not endowed with like authority. Such rights, so bestowed by law, may not be infringed, except by authority of the state, and will be protected by injunction against unlawful invasion.

[4] As a matter of course, the observation just made is only applicable to clear cases, as the case before us. If the franchise or license of a complainant was doubtful, an injunction would not be awarded to protect it, nor could the validity of a license or franchise possessed by a competing defendant be questioned, and its exercise restrained, in proceedings of this character. *Geneva-Seneca Electric Co. v. Economic Power & Const. Co.*, 136 App. Div. 219, 120 N. Y. Supp. 926; *Coffeyville Min. & Gas Co. v. Citizens' Natural Gas & Min. Co.*, 55 Kan. 173, 40 Pac. 326; *Market St. Ry. Co. v. Pen. Ry. Co.*, 51 Cal. 583. We are in full accord with the views expressed in these and like cases. Questions upon the regularity of a charter, the validity of a franchise, and the like, are to be determined upon suit of the Attorney General or other constituted authority, and not on suit of a competing corporation.

In the case at bar, however, defendants make no claim to any license or franchise, although such license is a statutory prerequisite to the pursuit of defendants' business. The validity of complainant's franchise, on the other hand, is not impeached.

[5] We are referred to the case of *Levisay v. Delp*, 9 Baxt. (68 Tenn.) 415, as laying down a contrary rule. In that case a licensed ferryman, the owner of one bank of the river, sought an injunction against the unlicensed operation of a ferry in competition by the owner of the other bank of the river. Under Shannon's Code, §§ 1697, 1703, the owner of either bank of a river is entitled to keep a ferry, but "all ferry keepers are required to procure a license and execute a bond." The court refused an injunction, saying with reference to the defendant:

"It would be an idle exercise of the injunctive power by the court to restrain him in this case, when, as owner of one bank of the river, he may apply to the county court and obtain a license or order establishing his ferry, thus legalizing it, at the next term of that court."

Levisay v. Delp, supra, was no doubt correctly decided on the facts appearing in that case, inasmuch as the defendant there could have procured his license as a matter of right almost by the time the injunction sought would have become effective. The injunction would have accomplished little or nothing.

The injunction cannot be refused in this case on such a ground. An injunction may accomplish much here. The city of Memphis may decline to authorize the operation on its streets of jitney cars at all. At any rate, an injunction restraining the operation of such cars until the statutory bond is executed will eliminate all irresponsible owners.

In so far as *Levisay v. Delp* intimates that an injunction may not issue to protect a franchise, unless that franchise be exclusive of the right of the state to confer on others a like franchise, we are unwilling to adhere to it. We think these remarks of the learned judge delivering the opinion were obiter, and not fully considered, and they are in conflict with the great weight of authority, as we have heretofore shown. We therefore must confine the authority of the case of *Levisay v. Delp*, supra, to its own facts.

[6] We are of opinion, moreover, that complainant is entitled to the injunction sought on another ground. As we have stated, the operation of jitneys on the streets of any incorporated city or town in Tennessee without municipal permission, when the owners have executed no bond, is absolutely unlawful. Such operation is in defiance of the statute of this state and amounts to a public nuisance.

"Any unauthorized obstruction of a public highway is a nuisance." 37 Cyc. 247.

"Any unauthorized obstruction which necessarily impedes or incommodates the lawful use of a highway is a public nuisance at common law." Elliott on Roads and Streets, § 644.

"All unauthorized and illegal obstructions which prevent or interfere with the free use of a

street or highway as such are within the legal notion of a nuisance." McQuillan on Municipal Corporations, § 925.

"An obstruction may be a nuisance, although it is not of a permanent character." Elliott on Roads and Streets, § 648 (giving many illustrations).

Under the authorities quoted there can be no doubt but that the illegal operation of the swarm of jitneys described in the bill, run by irresponsible owners, racing with the street cars for patronage, and otherwise imperiling the safety of the public, in violation of law, constitutes a nuisance. The law is well settled that a public nuisance may be enjoined by a private individual, provided the latter shows special damage to himself resulting therefrom. *Weakley v. Page*, 102 Tenn. 179, 53 S. W. 551, 46 L. R. A. 552; *Richt v. Chattanooga Brewing Co.*, 105 Tenn. 651, 58 S. W. 646; *Weidner v. Friedman*, 126 Tenn. 677, 151 S. W. 56, 42 L. R. A. (N. S.) 1041; 37 Cyc. 253; High on Injunctions, § 816 et seq.

A frequent application of this rule is in favor of persons specially injured by nuisances on a public highway.

In *Richt v. Chattanooga Brewing Co.*, 105 Tenn. 651, 58 S. W. 646, it was held that an abutting owner was entitled to enjoin an unauthorized construction and operation by a private corporation for its own use of a private railroad along the street, which destroyed the ingress and egress of such owner to and from his premises.

Such a right of injunction is conceded to abutting owners in almost every jurisdiction, when they show special damages by reason of the obstruction of the highway. High on Injunctions, § 816. See cases collected in a note to *Sloss-Sheffield Steel Co. v. Johnson*, 147 Ala. 384, 41 South. 907, 8 L. R. A. (N. S.) 226, 119 Am. St. Rep. 89, as reported in 11 Ann. Cas. 285.

[7] It is not necessary that the relief should be sought by an abutting owner, for it has been said that the character of the injury is not determined by the location of the property. The mere fact that an individual's property is at some distance from the obstruction does not determine whether or not his damage is special. *Eldert v. Long Island Elec. R. Co.*, 28 App. Div. 451, 51 N. Y. Supp. 186.

A neighboring landowner has been held to be entitled to enjoin the accumulation of an unlawful quantity of nitroglycerin on defendant's premises, where the complainant's property was so located as that he might be specially damaged by an explosion. *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 N. E. 59, 16 L. R. A. 443, 31 Am. St. Rep. 433.

The owner of a licensed ferry has been granted an injunction against the obstruction of a public road leading to his ferry. The court said:

"The obstruction of the public road leading to plaintiff's ferry was a public nuisance and an injury to him specially; and his right to injunction against the continuance of such a nuisance is well settled."

sance is unquestionable." *Draper v. Mackay*, 35 Ark. 497.

An injunction has also been awarded against the obstruction of a road leading to a toll bridge, at the suit of the owner of the bridge. The court was of opinion that such an obstruction, which would divert travel from the road and cause a loss of tolls to plaintiff, went to the substance and value of plaintiff's estate as the owner of a franchise to operate the bridge. *Keystone Bridge Co. v. Summers*, 13 W. Va. 476.

So, without multiplying authorities, we conclude that on the ground last stated, as well as the former, the complainant in this case is entitled to an injunction. There can be no question but that the operation of the jitneys in the manner described in the bill, in contempt and disregard of the law of Tennessee, constitutes a public nuisance on the streets of Memphis. There is not the slightest doubt but that the complainant suffers special damage by reason of such nuisance. Complainant's loss of revenue by reason of the illegal competition amounts, it is alleged, to several hundred dollars each day. This damage is distinct and peculiar to complainant, and is an injury, to borrow the phrase of the West Virginia court, in the very substance and value of its estate.

The decree of the chancellor will be reversed. Within 30 days from this date an injunction will issue as prayed by the complainant. In the interest of the people of Memphis, who may be discommoded otherwise by the sudden removal of this means of transportation, we have thought it best to suspend the awarding of the injunction for a brief time, to permit the city of Memphis, should it so desire, to pass an enabling ordinance for the jitney owners, and to give to the latter an opportunity to comply with the terms of said ordinance and the statute of Tennessee.

CINCINNATI, N. O. & T. P. RY. CO. v. WRIGHT.

(Supreme Court of Tennessee. Nov. 8, 1915.)

1. RAILROADS §401—ACTIONS FOR INJURY OR DEATH—CONFUSING INSTRUCTIONS.

In an action for the death of a person struck by a railroad train while standing at a point on a sharp curve, it was the theory of the company sustained by proof that a south-bound train was so interposed between deceased and the engine which struck him that deceased and his companion could not be seen from the engine. Plaintiff requested a charge that, if deceased could have been seen on the track by one on the lookout ahead before the view was cut off by the south-bound train, the law required that he be seen, and, though the south-bound train subsequently cut off the view, it was the duty of those operating the train to reduce the speed and bring the train under such control as to make certain that it could be stopped after he could again be seen and before striking him. The court so charged, with the modification that, if deceased again appeared upon the track, it was the duty of those on the engine not to so control the train as to be certain that it could

be stopped before striking deceased, but to sound the alarm, put down the brakes, and use every possible means to stop the train and prevent the accident. *Held*, that this instruction, with the modification, was at least confusing to the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1382-1390; Dec. Dig. §401.]

2. RAILROADS §367—INJURIES TO PERSONS ON TRACK—KEEPING "LOOKOUT AHEAD."

Under Shannon's Code, § 1574, providing that every railroad company shall keep the engineer, fireman, or some other person upon the locomotive always upon the "lookout ahead," enginemen are not required, when on a curve, to look across the intervening space to the further end of the curve, thereby withdrawing the lookout from the track immediately ahead of the engine.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1257, 1258; Dec. Dig. §367.]

3. RAILROADS §372—INJURIES TO PERSONS ON TRACK—RATE OF SPEED ON CURVES.

As a precaution against injury to persons walking on the track, but not seen or known so to be, there is no duty to slacken the ordinary speed of a train approaching a curve in the open country, though the curve be in whole or in part in a cut or hidden from view by a train going in the opposite direction on the concave side of the curve.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1267-1269, 1271-1274; Dec. Dig. §372.]

Error to Criminal and Law Court, Scott County; Xen Hicks, Judge.

Action by Eva Wright against the Cincinnati, New Orleans & Texas Pacific Railway Company. A judgment for plaintiff was affirmed by the Court of Civil Appeals, and defendant brings error. Reversed and remanded.

H. M. Carr, of Harriman, for plaintiff in error. J. A. Fowler, of Knoxville, and R. Hurt, of Huntsville, for defendant in error.

WILLIAMS, J. In the capacity of widow, and seeking to recover under the statute for the benefit of herself and her minor children, Eva Wright brought this suit against the appellant railway company to recover damages for the alleged negligent killing of her husband. She recovered a judgment for \$1,000, which was sustained by the Court of Civil Appeals.

On August 31, 1913, deceased, Wright, along with one James Thompson, went from their home to a point on the Tennessee-Kentucky state line to lay in a supply of "Labor Day" whisky. On their return, with their whisky in a basket and a bag, they made use of the tracks of appellant railway company as a walkway. The line of railway is double-tracked in that section, and the two men were walking south on the west or south-bound track, when they heard a freight train approaching from the north. They left the west track and went upon the east or north-bound track, and, when the south-bound train was passing them, they turned and faced the passing train and waved at the fireman on the engine of the south-

bound train. While standing thus engaged on the north-bound track, a freight train running north ran upon them, instantly killing Wright. Thompson, who was standing within a few feet of Wright, further from the approaching engine, and within striking distance of the same, was struck and injured. He had so far recovered as to be the chief witness in behalf of the widow of Wright in the trial of this case in the court below.

Thompson testified that when his attention was first attracted by the north-bound engine it was about to hit Wright, or was within 3 or 4 feet of him. It does not appear whether deceased Wright ever saw this engine; he having been instantly killed by it. It is the claim of appellee that the statutory alarm signal was not sounded from the north-bound engine.

The record shows that these men were struck while standing at a point on a sharp curve of about $3\frac{1}{2}$ to 4 degrees curvature, and that in this curve was a cut about 12 feet deep.

The lower end of this curve was a considerable distance from the place where these men stood looking at the train passing on the west track, which track is on the concave side of the curve.

It was the theory of the railway company (sustained by proof) that the south-bound train was so interposed between the engine of the north-bound train and these men as that they could not be seen as an obstruction on the track ahead of the engine; that the intervening train on the inside of the curve interfered with the line of vision from the engine to the point where the deceased stood; and, further, that it was not the duty of the engineer or fireman to look to or directly in the direction of a point towards the upper end of the curve, if thereby attention was withdrawn from the track more immediately in front of the engine; in other words, that it was no part of their duty to look across the intervening space, when their line of vision would be directed away from the points on the track more immediately ahead of the advancing engine.

[1] The counsel for the plaintiff widow, in an effort to meet this contention, submitted a request for a charge to the jury as follows:

"If the deceased, Eck Wright, could have been seen as an obstruction upon the north-bound track by one on the lookout ahead, on either the engineer's or fireman's side of the engine, before the view was cut off by the south-bound train, then the law required that he be seen by such person on the lookout, and, though the south-bound train subsequently cut off the view of said Wright, yet it was the duty of those operating the north-bound train to reduce speed and bring the train under such control as to make certain that it could be stopped after said Wright could again be seen and before striking him."

The trial judge responded to this request in the following language:

"I instruct you that this is the law, with this modification, however, that if the deceased again

appeared upon the track, it was the duty of the agents and servants of the defendant on the engine not to so control the train as to be certain that it could be stopped before striking Wright, but to sound the alarm, put down the brakes, and use every possible means to stop the train and to prevent the accident."

The railway company assigned this action of the trial judge as error in the Court of Civil Appeals, but that court failed to see error in the request as modified by the trial judge.

The request, with the grafted modification, must at the least have been confusing to the jury. We ourselves think it subject to the construction that it gave the jury to understand that, while it was not the duty of the enginemen on the north-bound train to so control the train as to be certain that it could be stopped before striking Wright, yet that it was their duty to so control the train as that the statutory precautions could be observed if and when deceased, Wright, again appeared in the view of the enginemen as an obstruction upon the track as they looked immediately ahead. Otherwise it seems that the trial judge would have refused the request outright.

[2] Giving the charge this construction, it could only be held to be correct if the proposition of law advanced by appellee's counsel is sound, to wit: That the enginemen should, as by way of legal requirement, have maintained such a lookout ahead as that they could have discovered Wright as an obstruction on their track at or near the head of the curve, in order to preparation for the observance of the precaution, even if, to do so, they would be called to direct the line of vision away from the track, and striking distance thereof, across the "bowstring" of the curve.

May the statute, stringent as it is, be given any such construction? The language of the statute (Code, Shannon, § 1574) in respect to the duty imposed is "always upon the lookout ahead; and when any person, animal or other obstruction appears upon the road," the precautions shall be observed. The phrase "lookout ahead" in an early case was treated as equivalent to "ahead on the track" (*East Tennessee, etc., R. Co. v. St. John*, 5 Sneed [37 Tenn.] 525, 73 Am. Dec. 149), and to mean "the direction in which the engine is moving" (*Patton v. Railway*, 39 Tenn. 370, 15 S. W. 919, 12 L. R. A. 184). The burden of showing compliance with the prescribed precautions arises only when the object appears on the track or within striking distance. *Cincinnati, etc., C. Co. v. Brock*, 132 Tenn. —, 178 S. W. 1115.

A defense interposed by a railway company, in a case involving an injury to one on a curve, that its operatives on the engine were looking out across the intervening space at an object on the further end of the curve, would not be yielded to by the court as an excuse for their failure to observe an ob-

struction on the track appearing ahead of and near to engine.

Only one case has been called to our attention that bears on the point, *Central, etc., Co. v. Vaughan*, 93 Ala. 209, 9 South. 468, 30 Am. St. Rep. 50, where it was held that the engineer on a moving train approaching a distant trestle on a curve in a cut is under no common-law duty (there being no statute governing the matter in Alabama) to withdraw his attention from the track in front of him and look across the country to see whether any one was on the trestle as an obstruction, and it was further held that evidence as to the fact that he might have seen such person on the trestle before entering the curve at a distance of 400 yards was not relevant or admissible on the question of negligence in failing to keep a proper lookout.

The principle may be sharply exemplified by an assumed case, that of a railroad, such as that of the plaintiff in error, running through a mountainous section, making necessary sharp curves through deep cuts or tunnels. It cannot be maintained that the enginemen are required to look to the further end of such a curve, thereby withdrawing the lookout or line of vision from the track more immediately ahead of the engine thus assumed to be in or approaching the cut or tunnel.

The above charge of the trial judge imposed an undue burden on the railway company, and constitutes reversible error.

[3] There is, furthermore, no duty to slacken the ordinary speed of a train approaching a curve in the open country, although the curve be in whole or in part in a cut, as a precaution against injury to persons walking on the track, but not seen or known so to be. *Hoffard v. Illinois Cent. R. Co.*, 138 Iowa. 543, 110 N. W. 446, 16 L. R. A. (N. S.) 797, in which case the court said:

"No court has ever gone so far as to hold that it is incumbent on a railroad company to slacken the ordinary speed of its trains upon the approach to every curve in the track, which involves also a cut, as a precaution against injury to persons walking or working on the track. The reasons why such should not be the rule are obvious. Present-day conditions demand the maximum of speed consistent with train safety, this not only as in the interest of the operating company, but as related to the interests of the general public. Under a rule as contended for, such would not be possible of attainment in this country, where cuts and curves are of great frequency."

The same principle is applicable to the situation presented on a double-track railway where a train is approaching and passing the one on which is the lookout, and which, being on the track on the concave side of the curve, tends to obstruct the forward vision of the lookout from the engine on the track on the convex side of the curve. There is no duty imposed by the law

on the operatives of the company to slow down the speed of the train to prevent possible injury to some one who may be walking on the track obscured from vision by the intervening train. Such a rule would seriously retard the business of transportation, and the only reason for it would be the anticipation that some person was without license making use of the track not designed for his use.

The facts of this case demonstrate that a double-tracked railway line is a far more perilous place for pedestrians than a single-track line. These tracks are constructed at great expense in order to make transportation safer and speedier, but such increase of peril is an incident not avoidable by the railway company.

Owing to the disposition we make of the case, we do not think it necessary to pass on another assignment of error to the effect that the verdict is excessive; but we do think it proper to say that on a retrial of the cause it should be borne in mind that the increase of peril above noted should be deemed to augment the negligence of deceased if he stepped from one of such tracks to another without taking care for his own safety.

Other questions are disposed of orally.

Reversed, and the cause remanded for a new trial.

CHILDRESS v. STATE.

(Supreme Court of Tennessee. Nov. 6, 1915.)
INFANTS ~~§~~12—DELINQUENT CHILDREN—
STATUTES—VALIDITY.

Const. art. 1, § 14, declares that no person shall be put to answer any criminal charge, but by presentment, indictment, or impeachment. Laws 1911, c. 58, establishing juvenile courts, declares that any child under 16 who violates any law shall be deemed a delinquent child, and may be committed to the state reformatory, and that in case the child is incorrigible and incapable of reformation he shall be remanded to the proper courts for the trial of criminal offenses. *Held*, that the statute is not in violation of the Constitution; the proceeding not being one penal in its nature, but merely for the protection of the delinquent child.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 13; Dec. Dig. ~~§~~12.]

Appeal from Juvenile Court, Anderson County; J. H. Wallace, Judge.

John Childress was committed to the reformatory as a delinquent child, and he appeals. Affirmed.

J. B. Burnett, of Clinton, for appellant.
W. H. Swiggart, Jr., Asst. Atty. Gen., for the State.

GREEN, J. In this case John Childress, a minor under 16 years of age, was committed as a delinquent child to the state reformatory for a period of 12 months, after due proceedings under chapter 58, Public Acts of 1911. It appeared that he was guilty of the crime of larceny, and was properly found to

be a delinquent child on a hearing before the county judge of Anderson county sitting as a juvenile court under the said statute.

The case has been brought to this court, and Childress seeks to escape the judgment below by attacking the validity of chapter 58, Public Acts of 1911. It is insisted that said act violates section 14, of art. 1 of the Constitution, to the effect:

"That no person shall be put to answer any criminal charge but by presentment, indictment or impeachment."

The statute mentioned outlines certain proceedings to be had before the juvenile courts thereby established with reference to dependent, neglected, and delinquent children, and provides for the disposition, care, education, protection, etc., of such children. Any child under the age of 16 years who violates any law of the state is declared to be a delinquent child, and the juvenile courts are authorized to commit such a child to the state reformatory or otherwise dispose of the child as set forth in said act.

Such proceedings before a juvenile court do not amount to a trial of the child for any criminal offense. If it be found that the child has violated a law of the state, then he may be adjudged a delinquent child within the meaning of the act. The court, however, does not undertake to punish the child for the crime committed, but undertakes to remove him from bad influences and to make such disposition of the child as to eradicate evil propensities by education, wholesome training, and moral instruction.

As pointed out by the court in *Ex parte Januszewski* (C. C.) 196 Fed. 123, the commission of a crime by a child may set the juvenile court in motion, but the court does not try the delinquent minor for the crime. The crime being evidence of delinquency, the court undertakes to remedy the delinquency.

Our statute provides that a child who shall have committed a misdemeanor or felony and has been adjudged to be a delinquent child,

if thereafter found by the court to be incorrigible and incapable of reformation, or dangerous to the community, is then to be remanded to the proper courts for the trial of criminal offenses. So the proceedings in a juvenile court are entirely distinct from proceedings in the courts ordained to try persons for crime.

Statutes like chapter 58 of the Public Acts of 1911 have been enacted in many of the states, and have been uniformly upheld.

This court, speaking of the commitment of children to the state reformatory under a previous statute, has said:

"Such statutes are not penal, and commitment is not in the nature of punishment. Such an institution is a house of refuge, a school—not a prison. The object is the upbuilding of the inmate by industrial training, by education and instilling principles of morality and religion, and, above all, by separating them from the corrupting influences of improper associates." *State ex rel. v. Kilvington*, 100 Tenn. 227, 45 S. W. 433, 41 L. R. A. 284.

"The commitment of infants to industrial schools, reformatories, or houses of refuge by a judge or justice without a trial is not in violation of the constitutional provisions relating to trial by jury. Such institutions are not prisons, and the proceeding is not a criminal prosecution. The object of the commitment is not punishment, but reformation and education of the infant. * * *" 24 Cyc. 147.

To the effect that these statutes do not interfere with constitutional rights to trial by jury, or immunity from trial except upon presentment or indictment, or with other constitutional rights, see *Rooks v. Tindall*, 138 Ga. 863, 76 S. E. 878; *Ex parte Januszewski* (C. C.) 196 Fed. 123; *Marlowe v. Commonwealth*, 142 Ky. 106, 133 S. W. 1137; *Mill v. Brown*, 31 Utah, 473, 88 Pac. 609, 120 Am. St. Rep. 935; *Lindsay v. Lindsay*, 257 Ill. 328, 100 N. E. 892, 45 L. R. A. (N. S.) 908, Ann. Cas. 1914A, 1222. See, also, cases collected in notes to 45 L. R. A. (N. S.) 908, and 18 L. R. A. (N. S.) 886.

The judgment of the juvenile court is affirmed.

BAKER v. DEW et al.

(Supreme Court of Tennessee. Nov. 9, 1915.)

1. DESCENT AND DISTRIBUTION ~~§~~52—WIFE'S PERSONALTY—HUSBAND'S RIGHTS—STATUTES.

Laws 1913, c. 26, entitled "To Remove Disabilities of Coverture from Married Women," and providing that they are fully emancipated from all such disabilities, and that the common law with respect thereto and its effect on the rights of the wife is totally abrogated, that marriage shall not impose any disability on a woman as to the ownership, acquisition, or disposition of property, and that she shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of property as if unmarried, failing expressly, or by necessary implication, to make any disposition of her property after her death, in the event of her failure to dispose of it, her personal property on her death, without such disposition, passes, *jure mariti*, to her husband, as it would had they, prior to passage of the act, made an antenuptial contract in the terms of the statute, under the law then existing.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 83, 135-140, 144, 147-149, 151-158, 161-167, 169-171, 296-308; Dec. Dig. ~~§~~52.]

2. STATUTES ~~§~~239—CONSTRUCTION—ALTERING COMMON LAW.

A statute intended to alter the common law will not be construed to alter it further than it expressly declares or is necessarily implied from the fact of it covering the whole subject-matter.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 320; Dec. Dig. ~~§~~239.]

Appeal from Chancery Court, Knox County; Will D. Wright, Chancellor.

Suit by J. T. Baker against Mrs. R. E. Dew and others. Demurrer to bill was overruled, and defendants appeal. Affirmed and remanded.

O. L. White, S. R. Maples, Cornick, Frantz & McConnell, Jourdolmon & Welcker, and Green, Webb & Tate, all of Knoxville, for appellants. Jesse L. Rogers, of Knoxville, for appellee.

BUCHANAN, J. Baker married Miss Clara Dew, a daughter of Mrs. R. E. Dew. The marriage occurred on November 1, 1914, and was dissolved by the death of Clara, on March 30, 1915. The bill in this case was filed by Baker on June 16, 1915, seeking a decree against Mrs. Dew and other defendants for the sum of \$1,515.40, averred to be in the hands of Mrs. Dew, as guardian of her daughter Clara. The suit is based upon the ground that the above sum of money in the hands of Mrs. Dew was, at the time of the marriage, the property of Clara, and, upon the death of Clara, became the property of Baker *jure mariti*. Defendants interposed a demurrer, which the chancellor overruled but allowed an appeal which defendants perfected.

[1] The question made by appellants is that the bill shows the marriage and death of Clara Baker to have occurred after chapter 26 of the Acts of 1913 went into effect,

and therefore it is said the chancellor should have sustained the demurrer and dismissed the bill upon the ground that the act abrogated the marital rights of the husband in the personal property of the wife, and upon her death the above sum passed to her next of kin and heirs at law.

The substance of the title of the act of 1913 is "To Remove Disabilities of Coverture from Married Women," and the substance of the body of the act is:

That married women are fully emancipated from all disability on account of coverture, and the common law as to the disabilities of married women and its effect on the rights of property of the wife, is totally abrogated. Marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married. Every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of, all property, real and personal, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued with all the rights and incidents thereof, as if she were not married.

This act has been considered by us heretofore in three cases. *Parlow v. Turner*, 178 S. W. 766; *Sarah Lillienkamp v. W. T. Rippetoe*, and *J. G. Bennett et al. v. Jefferson Hutchens et al.* The opinions in the two cases last named were delivered at the present term. In *Parlow v. Turner*, supra, the wife was the owner of two tracts of land at the time of her marriage, which occurred prior to the passage of the act of 1913. She rented the land to a tenant by the month, the tenant paid the rent to her which accrued after the passage of the act, and upon the suit of the husband, seeking to compel the tenant to pay the same rent again, we held the tenant to be acquitted by the payment to the wife, and the result reached was based on the act of 1913. In *Lillienkamp v. Rippetoe*, supra, we held that the act did not enable a divorced woman to maintain against her former husband an action for assault and battery committed by him upon her person after the act was passed, and while they sustained towards each other the relationship of husband and wife, and in *Bennett v. Hutchens*, supra, we held that the act did not abrogate an estate held by the entireties created by deed to husband and wife antedating the passage of the statute.

Prior to the passage of the act of 1913 the law in this state upon the question of the husband's rights in the personal property of the wife was well settled. In *Prewitt v. Bunch*, 101 Tenn. (17 Pick.) 723, 50 S. W. 748, it was said:

"Personal property in possession, and the possession of the wife in such cases is the possession of the husband, is, in law, the property of the husband; nothing else appearing to show a separate property of the wife. *Wade v. Cantrell*, 1 Head, 346; *Hollingsworth v. Mith (Miller)*, 5 Sneed, 472; *Cox v. Scott*, 9 Baxt. 305.

The general principle of the common law is that marriage amounts to an absolute gift to the husband of all personal goods of which the wife is actually or beneficially possessed at the time, or which comes to her during coverture. *Wade v. Cantrell*, 1 Head, 346; *Allen v. Walt*, 9 Heisk. 242; *Joiner v. Franklin*, 12 Lea, 422; *Handwerker v. Diermeyer*, 96 Tenn. 619, 627 [36 S. W. 869]. The common-law rule that the husband is entitled to receive and reduce to possession, during coverture, all choses in action, whether in the form of notes, debts, or legacies, belonging to the wife at the time of their marriage, or accruing afterwards, prevails in Tennessee. *Rice v. McReynolds*, 8 Lea, 36, 37. Where money of the wife is in the hands of her guardian, the latter may settle with the husband and pay him the money due. *Sanders v. Forgasson*, 3 Baxt. 249; *Lane v. Farmer*, 11 Lea, 568-572. The fact that the wife is a minor at the time of marriage makes no difference, for, upon marriage of a female ward, guardianship ceases. *Jones v. Ward*, 10 Yerg. 168. From that time the husband becomes clothed with the right to demand, receive, and sue for the distributive share of his wife in her father's estate, or for any funds in the hands of the guardian. The guardian might settle with him and pay him the money due the wife. *Lane v. Farmer*, 11 Lea, 568-572. It is also well settled that if, for any reason short of abandonment of these fixed and vested rights by the husband, the wife dies before reduction to possession, the choses in action go to the husband, and whether this be as next of kin or jure mariti is immaterial. *Williams on Exec.* 242; 2 Kent Com. 137; *Hamrico v. Laird*, 10 Yerg. 222; *Tune v. Cooper*, 4 Sneed, 296."

See, also, on the same subject, *D'Arcy v. Mutual Life Ins. Co.*, 108 Tenn. (24 Pick.) 567, 69 S. W. 768; *Shugart v. Shugart*, 111 Tenn. (3 Cates) 179-183, 76 S. W. 821, 102 Am. St. Rep. 777; *Williford v. Phelan*, 120 Tenn. (12 Cates) 589-596, and authorities cited; *Mitchell v. Bank*, 126 Tenn. (18 Cates) 669, 150 S. W. 1141.

In *Prewitt v. Bunch*, supra, the equity of the wife to a settlement, who died without issue (as did the wife in the present case), was held to be no bar to the suit of the husband brought after the death of the wife, and the holding in that case was mainly put on the ground that if the husband had sued during the life of the wife, and a settlement had been decreed to her, it would only have been for the life of the wife, with remainder to the husband, she leaving no issue.

In one of our cases, speaking of the marital right of the husband, it was said:

"If there be a marriage contract whereby this right is abridged, it is taken away only to the extent stipulated in the settlement. When the settlement makes no disposition of the property, in the event of the wife's death, and provides only for her dominion over it during coverture, the right of the husband as survivor is a fixed and stable right over which the court has no control, and of which he cannot be divested."

The language of the contract in that case was:

"That the negroes and their future increase are to be and remain the property of the said Elizabeth, and subject to her control and disposal forever."

The court admitted that the words of the contract—especially in connection with the word "forever"—were appropriate to the creation of an absolute estate in the prop-

erty, but held, nevertheless, that they were used to express the quantity of the estate and the character of the dominion, which the wife was empowered to exercise over the property; the word "forever" was held to be limited by the context to a control and disposal of the property during the coverture of the wife. She did not exercise the right of disposal during her life, and it was held that the husband's marital right which had been abridged by the contract during coverture attached to the property at her death. *Brown's Adm'r v. Brown's Adm'r*, 25 Tenn. (8 Humph.) 126, 127. On the other hand, in another case, the contracting husband had bound himself, his heirs, etc., "to relinquish, and does relinquish, all claims he has, or ever could have, to the property or money so purchased, either in law or equity, that he might acquire by marrying or becoming the husband of the said Sarah." In commenting on the effect of this part of the contract, the court said:

"Language more strongly appropriate to exclude him from all title whatever to the property by virtue of his marital right to the property not only during coverture, but absolutely and forever, could not, we think, have been adopted, and we are unable to perceive anything in the balance of the instrument to limit the language to the period of coverture."

So here the marital right of the husband was held to be extinguished by his contract. *Hamrico v. Laird*, 18 Tenn. (10 Yerg.) 222. The principle established by these cases and others was recognized and applied in *Mitchell v. Bank*, 126 Tenn. (18 Cates) 669, 672, 150 S. W. 1141, and it was there pointed out that the creation of a separate estate in personalty, unless words were used indicating clearly an intention to cut off after coverture the husband's rights jure mariti, would merely have the effect to suspend them during the period of coverture, and they would attach again, at the death of the wife, to the property in which her separate estate had been created.

[2] In the light of the law, as we have reviewed it above, we must determine what change was made by the act of 1913, so far as the rights of the parties to this suit are concerned. It is significant that neither expressly nor by necessary implication does that statute undertake to make any disposition of the property of the wife after her death in the event of her failure to exercise any of the powers conferred on her by the statute. What is the necessary result? We think there can be but one, and it is the devolution of such of her property as she had not disposed of during life, according to the rule of the common law left unchanged by the act. In other words, the property passes jure mariti to her husband, exactly as it would have done had the husband made an antenuptial contract in the terms of the statute prior to the passage of the act under the law as it then existed. We have seen that the effect of such a contract would have

been to abridge the marital rights of the husband in the personal property of the wife during coverture, and that at her death his marital rights would again attach, and the property would pass to him thereunder; so in the present case we think it must be under the statute. It cannot be material that the wife in this case was under the age of 21 years, at the time of marriage and during the period thereof. The law makes no exception in such a case. In opposition to the views we have expressed, the brief for appellants insists that the act totally abrogates the common law in respect of the marital rights of the husband. But there are no words of the statute which expressly so declare, and considering it as a whole we do not think such result follows by necessary implication. We think that the words "totally abrogated," in section 1 of the act, are limited by the context in which they are used, and their effect is to manifest a legislative purpose so as to free the wife from the disabilities which the common law imposes on her as the result of marriage that she may enjoy during coverture all rights "as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married." Construed as we have held this act should be, its provisions clearly fall short of the effect of the marriage contract in *Hamrico v. Laird*, supra, and in *Loftus v. Penn*, 31 Tenn. (1 Swan) 445. Each of those contracts was held to look to a period of time beyond the coverture, and death of the wife, and to bind the husband and his representatives to refrain from setting up claim to the property of the wife *jure mariti*, when that period of time

should arrive. Manifestly, the Legislature knew of the existence of the marital rights of the husband in the property of the wife when it passed the act of 1913, and, if its purpose had been not only to abridge but to totally abrogate those rights, we think that purpose would have been made to appear either by the express terms of the act, or by necessary implication, considering it as an entire piece of legislation; and, as no such purpose appears, we may well assume that the body which passed the act intended to confer on the wife the power to determine by her own acts during life and coverture whether her property should, on her death, pass to her husband *jure mariti*, or to her next of kin and heirs at law, or to some other beneficiary on whom she might see fit to bestow it. Our rule for the construction of statutes intended to alter the common law is that a statute will not be construed to alter the common law further than the act expressly declares, or than is necessarily implied from the fact that the act covers the whole subject-matter. *State v. Cooper*, 120 Tenn. (12 Cates) 549, 113 S. W. 1048, 15 Ann. Cas. 1116. This rule is well supported by the weight of authority, as may be seen by reference to the cases cited in *Sarah Lillienkamp v. W. T. Rippetoe* and *J. C. Bennett et al. v. Jefferson Hutchens et al.* We think the act of 1913 does not cover the subject of the marital rights of the husband in the personal property of the wife, after her death, where she has failed to make provision as to how it shall go on the happening of that event.

We find no error in the decree of the chancellor, and the same is therefore affirmed, at appellants' cost, and the cause is remanded for further proceedings.

ST. LOUIS, I. M. & S. R. CO. v. FREEMAN.
KIRTLEY & GULLEY v. ST. LOUIS, I. M.
& S. R. CO.
(No. 173.)

(Supreme Court of Arkansas. Oct. 18, 1915.)

1. ATTORNEY AND CLIENT \Leftrightarrow 172—COMPROMISE
OF ACTION BY LITIGANTS—RIGHT OF ATTOR-
NEY—STATUTE—REPEAL.

Where, by contract with their client, a law firm was to receive 50 per cent. of any amount derived from recovery or compromise of an action against a railroad company, a settlement for \$25 between the railroad and the client without the consent of the firm entitled the firm to a judgment against the railroad of \$12.50 under the act of May 31, 1909 (Laws 1909, p. 892), creating a lien in favor of the attorney upon his client's cause of action for the amount of his fee, and did not entitle them to a reasonable fee, since Kirby's Dig. § 4457, giving a cause of action to the attorney representing the party who receives a consideration in a compromise between the litigants, a right of action against both litigants for a reasonable fee, was repealed by the act of May 31, 1909, creating a lien in favor of an attorney upon his client's cause of action which attaches to a judgment in his client's favor and the proceeds thereof.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 384; Dec. Dig. \Leftrightarrow 172.]

2. STATUTES \Leftrightarrow 226—CONSTRUCTION—STAT-
UTES ADOPTED FROM ANOTHER STATE.

Where a statute is adopted from another state after being construed by the courts thereof, such construction will be adopted, if not in conflict with the settled policy of the state adopting the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. \Leftrightarrow 226.]

3. ATTORNEY AND CLIENT \Leftrightarrow 150—COMPROMISE
BY CLIENT—CONTINGENT FEE—
AMOUNT RECOVERABLE.

An attorney, after compromise by his client in good faith of a claim upon which suit has been brought, is bound by the terms of his contract for the amount of his contingent fee, and is entitled only to such per cent. of the amount realized from the settlement as is fixed by his contract.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 354-357; Dec. Dig. \Leftrightarrow 150.]

4. ATTORNEY AND CLIENT \Leftrightarrow 189—ACTION
PENDING—RIGHT OF CLIENT TO COMPROMISE.

Litigants have the right to settle controversies between them without the consent and over the objection of the attorneys representing them therein.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 407-411; Dec. Dig. \Leftrightarrow 189.]

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by Frank Freeman against the St. Louis, Iron Mountain & Southern Railway Company in the Pulaski circuit court for personal injuries, wherein Kirtley & Gulley filed a petition for a reasonable fee as attorneys for plaintiff, as against the Railroad Company for a wrongful settlement. With this was consolidated a suit by Kirtley & Gulley against the Railroad Company in a justice of the peace court, and appealed to the Pulaski Circuit Court by the Railroad. There was a trial by the court, and judgment

for Kirtley & Gulley in the sum of \$50, from which judgment the Railroad Company appeals. Judgment modified to reduce recovery to \$12.50, and affirmed.

E. B. Kinsworthy and W. G. Riddick, both of Little Rock, for appellant. Hal. L. Norwood, of Little Rock, for appellee.

KIRBY, J. [1] This appeal involves the construction of our statute relating to attorney's fees of April 4, 1899 (section 4457, Kirby's Digest), and of Act 298 of the Acts of General Assembly of 1909; it being insisted by appellee that the act of 1899 is repealed by the later one. Said section 4457 provides for the sale of a judgment, or any part thereof, of a court of record, or the sale of any cause of action or interest therein after suit has been filed thereon, which shall be evidenced by a written transfer, which, when acknowledged and filed and noted as provided, shall be full notice and valid, and binding upon all persons subsequently dealing with reference to said cause of action or judgment, and also:

"In case the plaintiff and defendant compromise any suit for liquidated or unliquidated damages or any other cause of action after same is filed, where the fees or any part thereof to be paid to the attorney for plaintiff or defendant are contingent, the attorney for the party plaintiff or defendant receiving a consideration for said compromise, shall have a right of action against both plaintiff and defendant for a reasonable fee, to be fixed by the court or jury trying the case."

Said act of May 31, 1909, provides:

"The compensation of an attorney or counselor at law for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor and the proceeds thereof in whosoever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment or final order."

No question has heretofore been raised of the repeal of the first statute which has been construed and applied in *Fordyce v. McPhetridge*, 71 Ark. 327, 73 S. W. 1096; *K. C. Ft. Scott & Memphis Ry. Co. v. Joslin*, 74 Ark. 552, 86 S. W. 435; *Rachels v. Doniphan Lumber Co.*, 98 Ark. 529, 136 S. W. 658; *Adamson v. Kay*, 100 Ark. 248, 140 S. W. 13, and *Hall v. Huff*, 169 S. W. 792.

[2] The latter statute is a borrowed one, coming from New York, after it had been construed by the courts of that state, and the rule is that the construction of a borrowed statute is adopted with it, unless contrary to the settled policy of the state adopting the statute. *McNutt v. McNutt*, 78 Ark. 346, 95 S. W. 778; *Nebraska Nat. Bank v. Walsh*, 68 Ark. 433, 59 S. W. 952, 82 Am. St. Rep. 301.

In *Fischer-Hansen v. Brooklyn Heights*

Ry., 173 N. Y. 492, 66 N. E. 395, the court held that the statute gave an attorney a lien upon his client's claim and cause of action upon the commencement of the action, which extended to the proceeds realized, whether upon settlement or judgment, but that it gave the attorney no right to control the litigation and prevent a settlement thereof. It was there said:

"A cause of action is not the property of the attorney, but of the client. The attorney owns no part of it, for a lien does not give a right to property, but a charge upon it. As it is merely incidental and for the purpose of security only, it would not be reasonable to hold that the Legislature intended that it should be the means of blocking an honest and genuine adjustment of controversies. We think the lien is subject to the right of the client to settle in good faith, without regard to the wish of the attorney. * * * The right of the parties to thus settle is absolute, and the settlement determines the cause of action and liquidates the claim. This necessarily involves the reciprocal right of the attorney to follow the proceeds of the settlement, and, if they have been paid over to the client, to insist that his share be ascertained and paid to him; for the defendant is estopped from saying that with notice of the lien he parted with the entire fund."

In *St. Louis, I. M. & S. R. Co. v. Blaylock*, 175 S. W. 1170, this court held likewise that the lien given by the statute did not give the attorney an interest in the cause of action itself or control over it, saying:

"The parties to the litigation must necessarily control the proceedings affecting their respective interests until the lawsuit is ended. The attorney, under the statutes, has a lien for his fee which cannot be defeated by any settlement of the parties litigant before or after judgment or final order. The attorney has no right to compel his client to continue litigation. A client may dismiss his cause of action or may settle with the opposite party without consulting his attorney, but, where there are any proceeds resulting from the litigation, either through settlement or compromise, or as the final result of the prosecution of the lawsuit to the end, the attorney has a lien on such proceeds of which he cannot be deprived by the parties to the lawsuit by any settlement they may make."

This statute provides that the compensation of an attorney for his services is governed by agreement, express or implied, which is not restrained by law, and gives him a lien from the commencement of an action or special proceeding or the filing of an answer and counterclaim upon the cause of action, which attaches to any proceeds realized out of such claim or cause of action resulting from the litigation, either through a settlement, compromise, or judgment, and of which he cannot be deprived by the parties to the action by any settlement they may make.

Under the former statute, the attorney was remitted to his claim for a reasonable fee against both parties to the litigation in case of a settlement thereof without his consent; the amount of the fee to be determined upon proof of the services performed. *Rachels v. Doniphan Lumber Co.*, supra.

The later statute is in conflict with the other, and provides a remedy for the protec-

tion of an attorney, in the collection of his fee or compensation for services, from the beginning of the suit, in accordance with his contract therefor, according to the construction placed upon the statute in the state from which it came. *Witmark v. Perley*, 43 Misc. Rep. 14, 86 N. Y. Supp. 756; *Olshel v. Metropolitan St. R. Co.*, 110 App. Div. 709, 97 N. Y. Supp. 447; *Goldstein v. Nassau Ry. Co.*, 157 App. Div. 228, 141 N. Y. Supp. 805.

[3,4] The attorney, after the compromise or settlement in good faith by his client of a claim upon which suit has been brought, is bound by the terms of his contract for the amount of his fee, and only entitled to that per cent. of the amount realized from the settlement or judgment fixed by his contract. *Fischer-Hansen v. Brooklyn Heights Ry. Co.*, supra; *Stephens v. Railway Co.*, 157 Mo. App. 656, 904. In this case the attorneys agreed to perform the services in bringing the suit in the collection of the claim for 50 per cent. of whatever might be realized therefrom, by settlement or otherwise, and, their client having settled the claim, as he had the right to do, without their consent, or over their objection for that matter, the railway company effecting such settlement was only bound to them for the discharge of their claim in the sum of 50 per cent. of whatever amount they paid in settlement of the claim.

It is undisputed that the claim was settled for \$25, and therefore the attorneys were only entitled to judgment against the railroad for 50 per cent. of that sum, or \$12.50.

The judgment is reduced to that amount, and, as modified, will be affirmed.

It is so ordered.

WESTERN UNION TELEGRAPH CO. v. BROOKS. (No. 189.)

(Supreme Court of Arkansas. Oct. 25, 1915.)

1. TRIAL \S 260—REQUESTED INSTRUCTIONS—CHARGES ALREADY GIVEN.

There is no error, where the court refuses instructions requested, if the matters contained in the refused instructions were embraced in other instructions given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. \S 260.]

2. TELEGRAPHS AND TELEPHONES \S 54 — NEGLIGENCE—LIMITATION OF LIABILITY.

Where the contract between a telegraph company and the sender of a message limits the liability of the company to \$50, the sender suing for negligent failure to deliver the telegram can recover nothing in excess of the \$50.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 39-47; Dec. Dig. \S 54.]

Appeal from Circuit Court, Lonoke County; Eugene Lankford, Judge.

Action by A. B. Brooks against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed in part.

Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, Trimble & Williams, of Lonoke, and George H. Fearons, of New York City, for appellant. Geo. M. Chapline, of Lonoke, for appellee.

HART, J. A. B. Brooks sued the Western Union Telegraph Company to recover damages for mental anguish on account of the alleged negligence of the telegraph company in failing to deliver a message to him, notifying him of his brother's death. The plaintiff resided at Kerr, in Lonoke county, Ark., and the message was addressed to him there and was sent from Kansas City, Mo. The jury returned a verdict in favor of the plaintiff, and the telegraph company has appealed.

There was sufficient evidence to show negligence on the part of the telegraph company.

[1] The telegraph company assigns as error the action of the court in refusing certain instructions asked by it, but we think the matters contained in these refused instructions were embraced in other instructions given by the court. It is well settled that the court is not required to repeat instructions.

[2] In the case before us the defendant claimed in the pleadings only the right to enforce the limitation of its liability down to the sum of \$50. The facts bring the case squarely within the rule announced in *Western Union Telegraph Co. v. Compton*, 169 S. W. 946.

The judgment of the circuit court will therefore be reduced from \$250 to \$50 and the judgment for that sum will be affirmed.

TISDALE v. STATE. (No. 192.)

(Supreme Court of Arkansas. Oct. 25, 1915.)

JURY \Leftrightarrow 103—COMPETENCY—KNOWLEDGE AND OPINION.

A juror is not disqualified merely because he had talked with persons who had heard the witnesses testify in the justice court, and supposed that he had, from the facts they detailed, formed an opinion as to the guilt or innocence of defendant; he stating that he could and would go into the jury box and give defendant a fair and impartial trial according to the law and evidence, disregarding what he had heard and any opinion he had formed.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 444, 456, 460, 461-479, 497; Dec. Dig. \Leftrightarrow 103.]

Appeal from Circuit Court, Cleveland County; Turner Butler, Judge.

N. R. Tisdale was convicted, and appeals. Affirmed.

Bratton & Bratton, of Little Rock, for appellant. Wallace Davis, Atty. Gen., and John P. Streepey, Asst. Atty. Gen., for the State.

KIRBY, J. This appeal is from a conviction for the unlawful sale of intoxicating liquors, and it is insisted for reversal that the court erred in not excusing the juror Sid Mays for cause. The record discloses

that 18 jurors were examined and declared qualified, Mays among the number, and from this list the names of three jurors each were struck by the state and the defendant. On his voir dire the juror stated:

"Q. You say you have heard of the case? A. I heard of the case here in the justice of the peace court. Q. Did you hear any of the witnesses? A. No, sir; those to whom I talked had heard the witnesses, and they detailed the facts in the case to me as they heard it. Q. They detailed the facts to you? A. Yes, sir. Q. From that did you form an opinion as to the guilt or innocence of the defendant? A. Yes, sir; I suppose I did. The Court: If you were selected as a juror in this case, could you and would you go into the jury box and lay aside those things you might have heard, this hearsay, and efface from your mind any opinion you might have formed from what you have heard, and try this defendant according to the evidence as detailed to you by the witness here from the stand, and the law as given you by the court, disregarding all you might have heard or opinions you may have formed? A. Yes, sir; I would try him according to the law and the evidence. The Court. The juror is qualified."

The examination of the juror clearly shows that he had no fixed opinion of the guilt or innocence of the defendant, notwithstanding he said he had talked with some persons who had heard the witnesses testify in the trial. He was not certain that he had an opinion even, answering the question whether he had formed an opinion from hearing the facts detailed by those who had heard the other witnesses: "Yes; I suppose I did." He stated he could go into the jury box and give the defendant a fair and impartial trial according to the law and the evidence as detailed by the witnesses upon the stand, disregarding what he had heard about the case and any opinion he might have formed, and that he would do so. Thereupon the court declared him competent and not subject to challenge for cause, and committed no error in doing so.

The juror only supposed that he had an opinion, did not say that it was definite and fixed, or would require evidence to remove it, nor was he asked any further questions that might have disclosed a state of mind that would have rendered him incompetent as a juror, if such was the fact. *McElvain v. State*, 101 Ark. 450, 142 S. W. 840; *Collins v. State*, 102 Ark. 182, 143 S. W. 1075; *Jackson v. State*, 103 Ark. 21, 145 S. W. 559; *Hamer v. State*, 104 Ark. 606, 150 S. W. 142.

The judgment is affirmed.

SHUFFIELD v. STATE. (No. 187.)

(Supreme Court of Arkansas. Oct. 25, 1915.)

1. ARSON \Leftrightarrow 37—EVIDENCE—SUFFICIENCY.

Evidence in a prosecution for arson held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. §§ 71-73; Dec. Dig. \Leftrightarrow 37.]

2. CRIMINAL LAW \Leftrightarrow 371—EVIDENCE—OTHER OFFENSES—INTENT AND MOTIVE.

Where a sheriff and his deputy had searched two persons, and were both threatened by them,

on a charge of burning the barn of the sheriff the following night evidence was admissible that the deputy's fence and corn tops were burned the same night, as tending to show motive and intent and the incendiary origin of the fire.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. ¶371.]

3. CRIMINAL LAW ¶374—EVIDENCE—HEARSAY.

On a criminal prosecution, other offenses, tending to show the intent or motive, cannot be established by hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 835; Dec. Dig. ¶374.]

4. CRIMINAL LAW ¶376 — EVIDENCE — BAD REPUTATION.

The prosecution cannot introduce evidence of the bad character of accused as a circumstance from which the jury may infer guilt, until the accused has introduced evidence of his good character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836-839, 841, 843; Dec. Dig. ¶376.]

5. CRIMINAL LAW ¶378—EVIDENCE—CHARACTERS—SPECIFIC ACTS.

Proof of pleading guilty to stealing chickens is not admissible to rebut evidence of the good character of one accused of arson; for neither good nor bad character can be proved by specific deeds or acts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 842; Dec. Dig. ¶378.]

Appeal from Circuit Court, Hot Spring County; W. H. Evans, Judge.

Walter Shuffield was convicted of arson, and he appeals. Reversed.

H. B. Means, of Malvern, for appellant. Wallace Davis, Atty. Gen., Jno. P. Streepey, Asst. Atty. Gen., and D. D. Glover, of Malvern, for the State.

HART, J. Walter Shuffield and Walter Counts were jointly indicted for the crime of arson, charged to have been committed by burning the barn of W. T. Shuffield on the 22d day of November, 1914, in Hot Spring county, Ark. They severed, and the defendant Shuffield was convicted, and from the judgment of conviction has duly prosecuted this appeal. On the trial of Shuffield the state proved a state of facts substantially as follows: W. T. Shuffield was constable of Bismarck township in Hot Spring county, Ark., and on the night of November 22, 1914, was called to a church in the township to quell a disturbance. Some one had been shooting at the church with pistols, and he deputized Joe Sanders to go with him to the church. They searched all the people found at the church, including Walter Counts and the defendant Walter Shuffield. Counts and the defendant both cursed the constable and both, in effect, threatened him. Shuffield then went home, and his barn was burned about 12 o'clock that night. The barn had a scuttle hole which had been covered with corn tops, and it appeared that it was set on fire at that place. An examination of the ground around the barn showed tracks made by shoes about the size of those worn

by the defendant. The tracks led back to a point where two horses had been hitched, and it appeared that one of these horses had run away. The track of the other was followed, and led to the residence of the mother of Walter Counts, where he resided. This track was of the same size and shape as that made by the horse of Walter Counts which he had ridden the night before. Joe Sanders, the man who was deputized by the constable to assist in quelling the disturbance and who helped to search the defendant and Walter Counts, had a bottom field about four miles distant from the burned barn. The tracks of the horses which led up to the place where they had been hitched near the barn the night of the fire came from the direction of Sanders' bottom field. The evidence showed that some of the corn tops which were in Sanders' bottom field were set on fire earlier in the night on the same night that the constable's barn was burned. Other evidence tended to show that the defendant and Counts rode in the direction of this bottom field when they left the church. W. T. Shuffield aroused some of his neighbors when he discovered that his barn was on fire, and one of them, on his way there, found Walter Shuffield's horse loose in the road. The next day the defendant said to this witness, "Walter Counts played hell when he turned my horse loose."

[1] Evidence was adduced in behalf of the defendant tending to show that he was not guilty, and it is contended by his counsel that the evidence on the part of the state is not sufficient to show his guilt. Without commenting upon it, we are of the opinion that the evidence on the part of the state, if believed by the jury, was sufficient to establish the guilt of the defendant.

[2] It is next contended that the court erred in permitting Joe Sanders to testify that the defendant burned his fence and corn tops on the night that W. T. Shuffield's barn was burned. It is urged that this testimony was inadmissible, for the reason that one crime cannot be proved as a circumstance from which to infer guilt of the commission of another. Though this is true, we think evidence that the corn tops of Joe Sanders were burned on the same night was admissible under the circumstances, not only to show the motive or intent of the defendant, but also because it tended to show the incendiary origin of the fire. It will be remembered that Joe Sanders was deputized by the constable to help search the defendant and Walter Counts at the church house. They were both threatened by the defendant and Counts, and later, on the same night, both the barn of the constable and fence and corn tops of the person who was deputized to assist the constable were burned. *Nash v. State*, 179 S. W. 150.

[3] The testimony complained of, however,

was incompetent for another reason. An examination of the record shows that it was hearsay. Joe Sanders was told the next day after the fire that his corn tops were burned the night before, and that the defendant had burned them. His testimony in regard to the matter was hearsay, and should not have been admitted on that account.

[4] The father of the defendant was a witness in his behalf, and on cross-examination, over the objection of the defendant, was asked whether it was true that his son, naming the defendant, had pleaded guilty before a justice of the peace to a charge of stealing chickens, and answered that it was true. The admission of this testimony was erroneous, and its admission was prejudicial to the rights of the defendant. It is the settled rule of this state that the prosecution cannot resort to the bad character of the accused as a circumstance from which to infer guilt, and this doctrine is founded upon the wise policy of avoiding unfair prejudice or unjust condemnation which such evidence might induce in the minds of the jury. In the case before us the defendant did not put his character in evidence, and the state had no right to show his bad character. *Ware v. State*, 91 Ark. 555, 121 S. W. 927; *Younger v. State*, 100 Ark. 321, 140 S. W. 139.

[5] Moreover, it is well settled that neither good nor bad character can be proved by specific acts or deeds. *Hardgraves v. State*, 88 Ark. 261, 114 S. W. 216.

For the error in the admission of the testimony just referred to, the judgment must be reversed, and the cause remanded for a new trial.

PEERY v. MAULDIN. (No. 188.)

(Supreme Court of Arkansas. Oct. 25, 1915.)

1. JUSTICES OF THE PEACE ⇨135 — EXECUTION—RETURN.

Where a justice of the peace issued execution on a judgment April 14, 1914, and placed it in the hands of a constable, such execution being found later among the official papers of the justice indorsed: "This writ came to hand on the 17th day of April, 1914, and I have duly served the same by showing and reading to R. E. M. and now return this execution with stay bond filed April 29, 1914. S. D. M., Constable"—it sufficiently appeared from the constable's return that the execution was returned on April 29, 1914, within 30 days from the date of issuance, as required by law, by the constable's delivering it to the justice by whom it was issued.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 426-447, 749; Dec. Dig. ⇨135.]

2. SHERIFFS AND CONSTABLES ⇨106—FAILURE TO LEVY EXECUTION.

To recover in his action against a constable for negligent failure to levy an execution, plaintiff must prove that during the life of the writ the judgment debtor was possessed of property liable to seizure thereunder, and that the constable neglected to seize it.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 175-178, 204; Dec. Dig. ⇨106.]

Appeal from Circuit Court, Mississippi County; J. F. Gautney, Judge.

Action by R. E. Peery against S. D. Mauldin for negligent failure to levy an execution and to return the same within the time prescribed by law. Judgment for defendant, and plaintiff appeals. Affirmed.

R. E. Peery, pro se. W. D. Gravette, of Blytheville, for appellee.

HART, J. R. E. Peery instituted this action against S. D. Mauldin under section 3286 of Kirby's Digest to recover \$141.11 for the alleged negligent failure to levy an execution and for the alleged failure to return the same within the time prescribed by law. The facts are as follows:

[1] R. E. Peery sued R. E. Mangrum before H. C. Hall, justice of the peace, and recovered judgment for the amount sued for. Hall issued an execution on the judgment and placed it in the hands of the defendant S. D. Mauldin as constable of Chickasawba township, Mississippi county, Ark. The execution was issued on April 14, 1914, and the following return is indorsed on it:

"This writ came to hand on the 17th day of April, 1914, and I have duly served the same by showing and reading to R. E. Mangrum, and now return this execution with stay bond filed April 29, 1914. S. D. Mauldin, Constable."

Hall, the justice of the peace before whom the case was tried, testified that he had no recollection of the execution being returned, but knew that it must have been returned because he found it in the pigeon hole of his desk five or six days before the trial; that he remembered filling out a blank stay bond at the request of S. D. Mauldin, the constable, and either at that time, or some time afterwards, copied the indorsement of costs as they appear on the back of the stay bond. The indorsement referred to shows a fee of 75 cents for approving the stay bond. The constable had approved it and had charged and was allowed a fee of 75 cents for doing so. The justice further stated that he never issued any certificate that a stay bond had been taken to anybody, and that he had no recollection of seeing the bond after the constable asked him to draw it up for him, and that the bond was never filed with him. The stay bond was executed by R. E. Mangrum and Mack Rogers, and there appears upon it the following indorsement: "Approved this April 29, 1914. S. D. Mauldin, constable." There also appears, among other things, the following item of cost: "Taking stay bond, seventy-five cents." The court found in favor of the defendant Mauldin, and the plaintiff Peery has appealed.

The judgment of the circuit court was right. It sufficiently appears from the return made by the constable that the execution was returned within the time prescribed by law. The return of the officer shows that the execution with the stay bond attached

thereto was returned to the justice of the peace who issued the execution on April 29, 1914. The execution was delivered to the constable on the 17th day of April, 1914, and was found among the official papers of the justice of the peace. We are of the opinion that this is sufficient to show that the constable returned the execution within 30 days from the date of its issuance by delivering it to the justice of the peace by whom it was issued. See *Loveless v. State*, 64 Ark. 205, 41 S. W. 418.

[2] The complaint alleges that the constable failed to levy the execution upon the property of the defendant in execution, but does not allege that the defendant in execution had property at the time upon which to make the levy. There is nothing in the record which tends to show that the defendant in execution was possessed of any kind of property which the constable could have seized under execution. In order to enable the plaintiff to recover, it was incumbent upon him to prove that during the life of the writ of execution his debtor was possessed of property liable to be seized under the writ and that the constable neglected to seize said property. *State v. Kirby*, 6 Ark. 454; *Conway v. Magill*, 53 Neb. 370, 73 N. W. 702; *Stevenson v. Judy*, 49 Mo. 227; *Smith v. Heineman*, 118 Ala. 195, 24 South. 364, 72 Am. St. Rep. 150; *Phelps v. Cutler*, 4 Gray (Mass.) 137.

It follows that the judgment must be affirmed.

WATKINS et al. v. FINGER et al. (No. 196.)
(Supreme Court of Arkansas. Oct. 25, 1915.)

1. COUNTIES \S 165 — COUNTY WARRANTS — VALIDITY.

Where the county court has made an appropriation, though not a sufficiently large one to discharge all expenditures for bridge purposes, warrants issued for bridge purposes are not void.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. \S 246-248; Dec. Dig. \S 165.]

2. COUNTIES \S 196 — COUNTY WARRANTS — PAYMENT—OBJECTIONS.

Where county warrants issued for bridge purposes were not void, but only voidable pro tanto in so far as they exceeded the appropriation, taxpayers cannot, after the warrants have been accepted by the treasurer, who, under *Kirby's Dig. § 1165*, is liable for fourfold the amount of any warrant which he shall refuse to pay if he have sufficient funds, secure cancellation of the warrants, for they had been satisfied, and nothing was left save for the presiding judge of the county court to write "Redeemed" across the face of each warrant, and sign his name thereto as final evidence of the redemption, in accordance with section 1169.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. \S 308; Dec. Dig. \S 196.]

Appeal from Polk Chancery Court; James D. Shaver, Chancellor.

Action by D. M. Watkins and others against H. W. Finger and others. From a

judgment for defendants, plaintiffs appeal. Affirmed.

Winchester & Martin, of Ft. Smith, for appellants. W. M. Pipkin and J. I. Alley, both of Mena, for appellees.

SMITH, J. Appellants are citizens and taxpayers of Polk county, Ark., and alleged in their complaint that the county court of that county had, at its October term, 1913, appropriated the sum of \$3,000 for building county bridges, but that during the year 1914 the county judge of said county made three separate contracts for bridges and bridge materials, amounting in the aggregate to \$20,119. It is alleged that some of the bridges so contracted for were bridges of the first class, and others bridges of the second class, but that said bridges were built without specifications or the appointment of commissioners, or without bids of any kind having been received, or without contracts therefor having been made. And it was further alleged that in the construction of said bridges the county judge paid twice the value of the material used; yet, when claims for these materials were filed for allowance before the county court, the county judge allowed them in the full amount claimed, although he well knew that the affidavits attached to the respective claims that the same had not been enlarged or enhanced because of the depreciated price in scrip were false. It was alleged that no appeal was taken from the allowance of said demands against the county, for the reason that the time for appeal had expired before appellants knew of the allowances. It is further alleged that:

"All of said warrants were illegally and wrongfully issued, and they do not constitute just and legal evidence of the indebtedness of Polk county, but before the filing of the original complaint in this action all of said warrants had been, for one purpose or another, turned into the hands of defendant H. W. Finger, sheriff of Polk county, and by him turned over to the defendant W. E. Anderson, treasurer of said county."

It was further alleged that of said warrants so turned over to the treasurer by the sheriff four of them were for the sum of \$500 each, and that these warrants had been received by the collector in exchange for other warrants, that is, he had changed larger warrants by giving warrants of smaller denominations. And it was further alleged that:

"On the 10th day of March, 1915, said sheriff had received the sum of \$7,916 of this same lot of warrants, issued as aforesaid to Boardman & Co., from a taxpayer who did not pay his taxes, but only deposited these warrants with the sheriff, and these the said sheriff delivered to the county clerk of Polk county, who receipted the sheriff for the same in the name of said treasurer, but not as county clerk, nor as deputy of said treasurer, that this taxpayer has not paid his taxes and holds no receipt from said sheriff save for said warrants, but that the said

county clerk has entered said warrants upon the register of redeemed warrants."

There was a prayer that said warrants be declared illegal, and not binding, obligations against the county of Polk, and that they be ordered canceled.

Appellees filed a demurrer to this complaint, which was sustained by the court below, and this appeal has been duly prosecuted from that decree.

We understand the effect of the allegations above set out to be that the sheriff received \$2,000 worth of the warrants in question which were not tendered in payment of taxes, or any other demand due the county, but that he gave smaller warrants for these larger ones; in other words, he changed them.

We do not fully understand the effect of the allegation in regard to the warrants deposited with the treasurer aggregating \$7,916, but the complaint does allege that the treasurer holds them as redeemed warrants, and has so listed them with the county clerk. Even if the court below should have treated this demurrer as a motion to make specific, the fact remains that the complaint was not made specific, but that appellants stood on their complaint, and the same was dismissed without any offer to amend or make specific.

[1, 2] The allegations of the complaint in regard to the circumstances under which these warrants were issued raised very serious questions concerning their validity while they were outstanding, but, under the allegations of the complaint, we think those questions have not been raised in apt time. There is no allegation of fraud or collusion on the part of either the collector or the treasurer to defraud Polk county, or to aid any one in disposing of invalid warrants. Upon the contrary, the effect of the recitals of fact contained in the complaint is to allege that the treasurer now has in his hands a large amount of redeemed warrants the validity of which was questionable before their redemption.

We need not discuss here the effect of the action of the county court in making allowances for excessive amounts to compensate the depreciation in the value of county warrants. The law on this subject is fully discussed in the recent case of *Monroe County v. Brown*, 177 S. W. 40.

Nor need we consider here the effect of the action of the county court in building the bridges without having advertised the contracts and without letting them to the lowest bidder. The complaint contains an allegation that an appropriation had been made for the purpose of building bridges, and the existence of this appropriation was the jurisdictional fact essential to the validity of the warrants, although a sufficiently large appropriation had not been made to cover the expenditures for that purpose. *Watkins v. Stough*, 103 Ark. 468, 147 S. W. 443;

Weigel v. Pulaski County, 61 Ark. 74, 32 S. W. 116.

These warrants were issued pursuant to an order of allowance made by the county court, and they were not void, although they may have been voidable pro tanto, and these were such warrants, therefore, as the county treasurer would have been protected in paying in good faith under the requirements of section 1165 of Kirby's Digest, which makes the treasurer liable for fourfold the amount of any warrant which he shall refuse to pay if he have sufficient funds in his hands therefor.

It is true that in the case of *Vale v. Duchanan*, 98 Ark. 304, 135 S. W. 850, it was held that:

"The orders or warrants of a county are not negotiable instruments in the sense of the law merchant, and no one can become an innocent purchaser thereof, although he obtains same for value and before maturity. Every one receiving such a warrant takes the same with full notice of the purpose for which it was issued and of the order of the county court authorizing its issuance."

These warrants were like past-due commercial paper, subject to any defense against the holder which could have been made against the person to whom the allowance was made. But this rule does not apply to appellees, who are sued in their official capacities. The treasurer was not a purchaser of these warrants, and does not claim protection as such. He acts for the county and received the warrants for the county, and when they reached his hands they were redeemed. The allegations of the complaint are that they had been filed and listed as redeemed warrants, and they could not thereafter be reissued or further used for any purpose, and nothing further remained to be done with them, except for the presiding judge of the county court, at the annual settlement with the treasurer, to write the word "Redeemed" across the face of each of these warrants, and sign his name thereto as the final and conclusive evidence of the redemption. Section 1169, Kirby's Digest.

The judgment of the court below will therefore be affirmed.

BURKE et al. v. BOARD OF IMPROVEMENT PAVING DIST. NO. 5
et al. (No. 194.)

(Supreme Court of Arkansas. Oct. 25, 1915.)

1. MUNICIPAL CORPORATIONS—§352—PAVING STREETS—CONTRACTS—QUANTITY OF WORK.

A contract for paving streets described the work to be done as the construction and completion of the paving of the roadways of the streets and avenues in a paving district as indicated by the board of improvement, and provided that if in the judgment of the engineer the work was not being pushed with the necessary degree of activity, it should be at his option to employ such additional forces as might be required, and purchase material in the open market and deduct the cost from the money due the

contractor, that the engineer should have the right to make alterations in the line, grade, plan, form, and quantity of the work, and that if such alterations diminished the quantity of work, this should not constitute a claim for damages on anticipated profits. A proposal for bids, which stated the approximate quantities upon which bids would be received, was not included nor referred to in the contract. *Held*, that the contract being unambiguous and such proposal not having become a part thereof, the district was not bound to give the contractors the quantity of work specified in the proposal, but was bound to permit them to do all of the work required to be done so long as the contract continued in force, and the district could not, under the guise of making alterations in the contract, take from the contractors certain designated streets and do the work itself or through other contractors.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 883; Dec. Dig. ¶ 352.]

2. MUNICIPAL CORPORATIONS ¶366—PAVING STREETS—CONTRACTS—COMPLETION OF WORK BY CITY.

Where the district paved certain of the streets after giving the contractors notice that this would be done in the exercise of the option reserved to employ additional forces of men and purchase materials in the open market, it did not attempt to deprive the contractors of the work, but only to pave such streets at the expense of the contractors, and the contractors were entitled to the difference between the cost to the district of doing the work and the agreed price.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 809; Dec. Dig. ¶ 366.]

3. MUNICIPAL CORPORATIONS ¶362—PAVING STREETS—CONTRACTS—DAMAGES FOR DELAY.

Where a paving district and parties contracting to pave the streets of the district recognized that the paving could not possibly be completed within the time provided in the contract because of the time required for the construction by the contractors of a plant for the manufacture of bricks and the time lost on account of the failure of abutting property owners to construct the curb and guttering against which the pavement must rest, for which failure neither the paving district nor the contractors were to blame, a finding that the district was not entitled to any damages for the failure to complete the work within the specified time was warranted.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 894, 895; Dec. Dig. ¶ 362.]

Appeal from Sebastian Chancery Court; Jas. D. Shaver, Special Chancellor.

Action by M. C. Burke and J. A. Burke, copartners as Burke Bros. against the Board of Improvement Paving District No. 5 and others. From a judgment for plaintiffs for an insufficient amount, they appeal, and defendants also appeal. Modified and affirmed.

Pryor & Miles, John H. Vaughan, and J. V. Bourland, all of Ft. Smith, for appellants. Kimpel & Dally, of Ft. Smith, for appellees.

KIRBY, J. This suit was brought by Burke Bros. for an accounting and to recover the balance claimed to be due under a contract with improvement district No. 5 of the city of Ft. Smith, for paving the streets of said city. The contract provided

for paving roadways of all the streets of said city and the work was carried on by them during a period of 5 or 6 years, after they had erected a brick manufacturing plant, at an expense of near \$150,000, in the city of Ft. Smith, to comply with the terms of the contract in furnishing brick manufactured in Ft. Smith for the work. A great mass of testimony was introduced, and the record is voluminous. A master was appointed by the chancellor, and reported his findings on the different claims made, and upon exceptions to the master's report the chancellor found in favor of appellants on their claim for retained percentage \$38,297.86, of the amount due for paving, and for pine headers \$197.88, and for iron gutter plates, \$377, and rendered a decree for the whole sum, \$42,260.88, found to be due, from which Burke Bros. appealed, contending that the chancellor erred in finding against them on their other claims and in reducing their claims on the items for pine headers and iron gutters. The court held against appellees on all claims made by way of counterclaim and set-off, and they also appealed.

In the notice and proposal for bids sent out by the district it was stated:

"The approximate quantities upon which bids will be received and compared are as follows:

"Square yards of completed brick pavement laid on said foundation, 20,000 sq. yd.

"Square yards of completed brick pavement laid on concrete foundation, 20,000 sq. yd.

"Cubic yards of concrete in place for gutterways 4,000 cu. yd.

"Pounds of cast iron cover plates for gutterways, 300,000 pounds."

The bidders were also advised—

"to make such examinations as may be necessary to inform themselves in respect to present conditions of the streets and local surroundings before submitting proposals."

Appellants' bid of 81½ cents per square yard for the pavement on sand foundation, \$1.46 per square yard for pavement on concrete foundation, \$12 for each yard of concrete in place for guttering, and 3 cents per pound for iron covers for gutterways, all materials to be furnished and work done by the bidders, was the lowest bid and accepted by the board and a contract made with them. The contract as entered into for the construction of the paving contains no provision relative to the particular kind and amount of paving to be done, and makes no reference to the proposals for bids, nor bids received, except it recites that Burke Bros., party of the first part—

"in competition submitted the lowest and best tender for constructing the paving improvement in paving district No. 5, of the city of Ft. Smith, Arkansas, said improvement being as follows, viz.: The construction and completion of the paving of the roadways of the streets and avenues in said paving district No. 5, as indicated by said board of improvement, and furnishing the necessary labor, materials, tools and plant therefor."

The other provisions necessary to be set out are sections 9, 14, and 15 of the contract

and the specifications relating to concrete and gutterways as follows:

"9. If, in the judgment of the engineer, the work is not being pushed with the degree of activity necessary to its completion within the specified time, then it shall be at his option upon written notice and approval of the board, to employ such additional force of men as may be required, and to purchase material in open market and deduct the cost thereof from money due the contractor."

"14. The engineer, in concurrence with the board, shall have the right to make alterations in the line, grade, plan, form and quantity of the work herein contemplated, either before or after the commencement of the work.

"If such alterations diminish the quantity of the work to be done, they shall not constitute a claim for damages on anticipated profits on the work dispensed with; if they increase the amount of work, such increase shall be paid for according to the quantity actually done, and the price or prices stipulated for such work in this contract."

"15. In consideration of the completion by the said first party of all work embraced in this contract in conformity with the specification and stipulations herein contained, the board of improvement of paving district No. 5 of the city of Ft. Smith, Arkansas, party of the second part hereby agrees to pay said first party the following prices: For each square yard of completed brick pavement laid on sand foundation the sum of eighty-one and three quarter cents (81- $\frac{3}{4}$ cents) dollars; for each square of completed brick pavement laid on concrete foundation the sum of one and forty-six one hundredths (\$1.46) dollars; for each cubic yard of concrete in gutterways, the sum of twelve (\$12.00) dollars; for each pound of cast-iron cover for gutterways, the sum of three (3) cents."

"Concrete. If upon any street to be paved the board of improvement should decide to use a concrete base due to the presence of street or steam railway tracks, or for any other cause, the engineer may order that the surface of the subgrade be brought eleven (11) inches below and parallel with the finished cross-section of the street, and that upon this subgrade, when properly prepared, there shall be laid a layer of Portland cement concrete, not less than five (5) inches in thickness when tamped. * * *

"Gutterways. At such street and alley intersections as may be designated by the engineer there shall be constructed by the contractor, as a part of the street pavement, covered gutters or waterways, the same to conform to the details therefor on file. * * *

Appellees, after constructing a plant for the manufacture of paving brick out of shale, at Ft. Smith, which required almost two years, proceeded with the work of paving the streets as they were designated for that purpose by the engineer of the district. They were delayed greatly in the prosecution of the work of paving by the failure of the property owners to construct the sidewalks and curbs on the abutting property, and were compelled often to move their working companies and appliances to different streets, or to different sections of the same street, in order to continue the work without too great break or delay. Neither the paving district nor the contractors were at fault for the failure of the property owners to sooner construct their sidewalks and curbs. The city attempted to compel the construction by an ordinance which was declared void by this court, and finally by another or-

dinance passed after a grant of power by the Legislature succeeded in having it done.

There was much friction between the board and the contractors, each insisting that the other was at fault in the performance of the contract; the contractors insisting that they were being arbitrarily required to move to different and distant places at great expense and loss of time; that they were harassed by numerous inspections and rejection of brick captiously made, and the board claiming that the brick used and attempted to be put down in paving was not of the kind and quality contracted to be used, and did not meet the test prescribed; also that the contractors were furnishing brick from their plant to be used and using them on other contracts and improvements at different places, outside of Ft. Smith. Certain paving on sand foundation was done in some of the gutters, which should have been done by the property owners, and likewise in the alleys, but which was done by the contractors at the regular price to the district, and for which the property owners paid the commissioners \$1 per yard. Payments for the work were made in accordance with the schedule of prices fixed in section 15 of the contract upon monthly estimates of the engineer, less 10 per cent. of the amount of the estimates retained by the board, in accordance with the contract, until the completion and acceptance of the work.

Certain designated streets and portions of streets were paved by the district with concrete after the board of improvement and engineer notified the contractors that it would be done in exercise of the option, reserved in section 9 of the contract, to employ additional forces of men and purchase materials in the open market for the construction of the work; such notices assumed for the purpose of it only, that the contract was still existing, and expressed that the engineer, with the concurrence of the board, had the power (which was denied by the contractors), under section 15, providing for the alterations, to diminish the quantity of work contemplated under the contract, by eliminating therefrom the streets designated for concrete pavement by the board.

As already said, the volume of testimony is great and in many instances it is in direct conflict. Especially is this true relative to the conduct of the engineers and the improvement district in the designation and failure to designate streets to be paved and in the inspection and rejection of the brick to be used and in the action of the district and failure to have the curb and guttering completed that the paving could be continued, as well as in the kind and quality of brick furnished and used in the paving, none of which it was claimed came up to the test required by the specifications. No useful purpose can be served by setting out the testimony in detail, and it will suffice to

say that it supports the findings of the chancellor upon all claims, upon which judgment was rendered in appellants' favor, and that his findings upon any and all other matters, except as indicated herein, are not clearly against the weight or the preponderance of the testimony.

[1] The proposals for bids sent out by the board of improvement, with instructions to bidders stating the approximate amount and kinds of paving to be done, did not become a part of the contract, not being included nor referred to therein and the contract having afterwards been prepared and executed without any agreement for or designation of a certain amount and kind of paving to be done, the price alone for the certain kinds or units of a class being stipulated in said section 15 thereof. The contract provides for—

"the construction and completion of the paving of the roadways and streets and avenues in said paving district No. 5, as indicated by said board of improvement and furnishing the necessary labor, materials, tools and plant therefor," "and to complete the work in strict conformity with the details and plans for said work on file in the office of the said board of improvement, and according to the specifications hereinafter contained and made part of this contract, and in compliance with the directions of the said board of improvement, or their duly authorized agents, and to the satisfaction and acceptance of said board."

The contract being unambiguous, the notice and proposal for bids, containing the approximate amounts of the different kinds of paving, cannot be construed to be a part of it, having been omitted therefrom, and must be considered only as belonging to the preliminary and antecedent negotiations. *Soudan Planting Co. v. Stevenson*, 83 Ark. 163, 102 S. W. 1114; *Tedford Auto Co. v. Thomas*, 108 Ark. 503, 158 S. W. 500.

The district was not bound to give the contractors the number of square yards of completed brick pavement on concrete foundation and the number of cubic yards of concrete in place for gutterways mentioned in the proposal for bids, the contract not providing therefor, but it was bound to permit them to put down in concrete all the gutterways that were designated by the engineer and all the kinds of pavement that were required to be made in paving the streets, so long as the contract continued in force. In other words the district could not, under the guise of making alterations under the provisions of section 14 of the contract, take from the contractors certain designated streets, a substantial portion of the work contracted to be done, and deprive them of the benefit thereof by giving it to the other contractors, or having the work done itself. *Kieburts v. Seattle* (Wash.) 146 Pac. 400 (March 15, 1915).

[2] Such would not be the case of a loss suffered because of the performance of the work required by the contract on account of a change in the plans, increasing the number of units of work in the one class and de-

creasing the number of units in another. The court is of opinion, however, that the district did not attempt to deprive the contractors of the work, but only to pave said designated streets at the expense of the contractors under the provisions of said section 9 of the contract, because the work was not being dispatched by the contractors as rapidly as the board thought it should be done, in order to the completion of the paving within the time given therefor. Appellants were therefore entitled to recover for said paving the difference between the cost thereof per yard to the district and the price agreed to be paid them for pavement, on a concrete foundation, which was 10 cents per square yard on 103,000 square yards of pavement, amounting to \$10,500, as found by the master.

The parties appear to have disregarded and waived the provisions of the contract in many particulars, the district appearing to have endeavored to get all the pavement laid on a sand foundation, out of the best brick that could be manufactured by the contractors at their plant from the material available, while the contractors appeared desirous of making the best paving brick that could be manufactured under the existing conditions and using them in the laying of the pavement on the streets designated, with proper expedition and dispatch. Both parties appear finally to have waived and disregarded all the provisions of the contract, except only those relating to the price and payment for the pavement laid of the best brick that the commissioners could get the contractors to make and use therein, and the rattle test was never insisted upon, the parties appearing to have recognized that the brick that could be manufactured at the contractors' plant would not stand this test, and to have accepted instead the best brick that could be manufactured from the materials available to the plant and that were of a standard of quality equal to those that had theretofore been used in the paving of Garrison avenue.

[3] The parties appear also to have recognized that the paving could not possibly be completed within the time provided in the contract, because of the time required for the construction of the plant for the manufacture of the bricks and of the time necessarily lost from the work of paving on account of the failure of the abutting property owners to construct the curb and guttering against which the pavement must rest, and the chancellor's finding that the district was not entitled to any damages for failure to complete the work within the specified time, is also in accordance with the testimony.

The decree upon the items found in favor of appellants is correct, and appellants are further entitled to recover the difference between the cost of the paving laid in concrete done by the board of improvement at the expense of the contractors and the price to be

paid them therefor—\$10,500, as found by the master—with interest, and to judgment here for that additional sum.

The decree is accordingly modified and, as modified, affirmed.

GREGG et al. v. LITTLE ROCK CHAMBER OF COMMERCE et al. (No. 191.)
(Supreme Court of Arkansas. Oct. 25, 1915.)

1. CORPORATIONS 374 — POWERS — IMPLIED POWERS.

Powers essential to the exercise of the powers necessarily granted are necessarily implied, and are as much granted as if expressed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1517, 1518; Dec. Dig. 374.]

2. CORPORATIONS 447 — POWERS — CONTRACTS.

The power of a corporation to make and take contracts is restricted to the purposes for which it is created, and cannot legally be exercised by it for other purposes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1786, 1788, 1807; Dec. Dig. 447.]

3. CORPORATIONS 447 — CHAMBER OF COMMERCE — POWERS.

The Little Rock Chamber of Commerce, incorporated under Kirby's Dig. §§ 937-943, providing that such corporations shall have, for carrying out their object, such powers as are possessed by other corporations, and which may be necessary to their management and purposes, and whose constitution declared its object to be the upbuilding of the city, the encouraging of its public improvements and educational advantages, and the development of its industries, and whose by-laws provided for an industrial committee to have exclusive control of the industrial fund and the power to grant aid or subsidies for public purposes, did not exceed its powers by granting a subsidy for the construction of boats and the navigation of the river from the city to Memphis, with a view to lowering prevailing freight rates.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1786, 1788, 1807; Dec. Dig. 447.]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit for injunction by Frank B. Gregg and others against the Little Rock Chamber of Commerce and others. Decree for defendants, and complainants appeal. Affirmed.

This appeal challenges the power of the Little Rock Chamber of Commerce and its industrial and development committee, to grant or give the funds and property donated to the Chamber of Commerce for the promotion of the general welfare of the cities of Little Rock and Argenta, the county of Pulaski, and the state, in educational, commercial, and industrial ways, for subsidizing and establishing a boat line for the navigation of the Arkansas river from Little Rock to Memphis, Tenn.

The complaints allege that the Chamber of Commerce is about to make a contract for the purchase of a steamboat, to cost approximately \$30,000, to be operated on the Arkansas river, between Little Rock and Mem-

phis, for carrying freight and passengers for hire, contrary to the articles of incorporation and the constitution and by-laws thereof, and have appropriated \$50,000 to be used in the purchase of the boats and payment of subsidies to the owners and operators thereof, to induce them to engage in the carriage of freight and passengers for hire, for a term of five years; that when the plaintiff subscribed to the fund it was represented to him that it would be collected for the Chamber of Commerce, and—

"would be used for industrial and development purposes in Little Rock and vicinity, and that the principal part of said fund would be used for the purpose of locating factories and developing the resources of the city of Little Rock, and Pulaski county, and incidentally of advertising the resources of the state of Arkansas and the opportunities for the development of manufacturing and other industries in the city and state."

It was alleged, further, that it would be a diversion of the fund from the purpose for which it was raised, and so reduce the fund as to create an irreparable injury, and asked an injunction to prevent it.

The Chamber of Commerce admitted the allegations of the complaint as to its incorporation and powers, and that it was about to execute the contract granting the subsidies for a boat or boats to navigate the Arkansas river, as alleged in the complaint, but denied that it was contrary to its articles of incorporation or beyond its powers; denied any representations to the parties subscribing to or donating lands in aid of the fund, that such fund would be used solely in locating factories and developing the resources of the city of Little Rock and incidentally advertising the resources of the state; alleged that the contracts donating the lands and purchasing them from it were in writing.

The object and purpose of the Little Rock Chamber of Commerce is stated in article 2 of its constitution, as follows:

The object and purpose of this organization shall be the upbuilding of the city of Little Rock, Argenta, Pulaski county and the state of Arkansas, encouraging and assisting in public improvements of all kinds therein, including streets, highways, sewers, public buildings, and any and all things which are for the public good; locating schools and colleges, libraries, and all things which look toward higher and better educational advantages; locating and developing and assisting in the location and development therein of manufactures and other industries; buying, owning, developing and selling property, real and personal, borrowing money and issuing bonds and other evidences of indebtedness, and executing mortgages or deeds of trust to secure same; conducting a merchants' association, which will bring merchants and parties engaged in trade in closer association and work for the mutual advantage and protection of the same, conducting a board of trade with all the necessary adjuncts, conducting a real estate exchange, which shall unite under rules of business and justice the business of buying, selling and exchanging real estate and for the conduct and control of brokers, agents and others engaged in that line of business; for organizing and conducting any other bureau or bureaus,

exchanges, which the board of governors may decide shall be beneficial or necessary in the building up of said cities and state, and for the best interest thereof and of this organization; shall have full power to do any and all things deemed necessary in carrying on any and all of the above objects; to foster and promote the commercial, industrial, physical and moral development of the cities of Little Rock, Argenta and vicinity.

Article 10, § 6, of the by-laws provides:

An industrial and development committee of the Chamber of Commerce is hereby created. Said committee shall have exclusive control of the disposition of the industrial and development fund raised by the Chamber of Commerce, and the fund shall be paid out only upon drafts or warrants of said committee. The committee shall have the right to make investments of said funds, to make donations and grant aids or subsidies and use it in any manner which a majority may determine upon for public purposes. The section further provides that the committee shall consist of six members, and provides for their term of office, and that it may have the right to establish by-laws, rules and regulations for the control of its meetings.

It appears from the testimony what representations were made by the canvassers securing the donation and subscriptions to the "million dollar fund" and Mr. Frank B. Gregg, who was president of the Chamber of Commerce at the time, stated that it was represented to him, as an inducement to sign a contract for the purchase of certain lands from the Chamber of Commerce, that the proceeds would be used for industrial and development purposes by bringing factories to Little Rock. The money was to be used to induce factories to locate in Little Rock. He said:

"At the time the million dollar fund was raised in 1912 by the Chamber of Commerce, it was not contemplated by the officers of the Chamber of Commerce that any part of the fund would be used in inducing navigation on the Arkansas river. It was contemplated that the fund, when it was raised, would be used in giving bonuses to factories and giving sites, part paying for sites, for factories, and advertising Little Rock and vicinity; in fact, in any way that would help the industrial development of the city."

Mr. Carl J. Baer testified that he was industrial commissioner of the Chamber of Commerce and made the campaign for the million dollar fund. He said there were no contracts made with the plaintiffs, except those in writing. He states generally what was necessary to the industrial development of the city, and:

"Freight rate is the real hindrance to the development of Little Rock. Money could not be spent in a more advantageous way than in securing cheaper transportation. The object in subsidizing the boat was to secure cheaper rates, and thereby to improve conditions in Little Rock. Without effort to get cheaper transportation the Chamber of Commerce would be very much hindered in the development of Little Rock, and the money expended would not result in material advantage in anything like it would if it expended the money in securing lower rates. Cheaper transportation is necessary in locating schools and colleges and industrial plants, and all things of that kind and character that go to build up a city. Was familiar with Little Rock and its surroundings, and in his opinion there was no way to secure low rates than by river competition."

He stated the purpose of the contract was for the purchase of the boat, that it was the intention of the committee to navigate the river and, if necessary, to purchase a boat to engage in the freight and passenger traffic between Little Rock and Memphis, and:

"The operation of a boat line between Little Rock and Memphis will enable citizens of Little Rock to demand of the Interstate Commerce Commission a river and rail rate to all points in the United States, the same as other cities on navigable streams."

The terms of the contract for the building of the boat were shown in evidence. No financial benefit was to be derived by the Chamber of Commerce from the operation of the boat, no profit to be paid it, nor loss to be sustained by it.

D. K. Hawthorne, of Little Rock, for appellants. Mehaffy, Reid & Mehaffy and Lawrence B. Burrow, all of Little Rock, for appellees.

KIRBY, J. (after stating the facts as above). The Chamber of Commerce was not organized for pecuniary profit or dividend making or sharing, but under the statute providing for the organization of corporations for benevolent purposes, and as boards of trade or chambers of commerce, which provides they shall have, for carrying out the purposes and objects of their organization, such powers as are possessed by other corporations and which may be necessary to their efficient management and the promotion of their purposes. Sections 937-943, Kirby's Digest.

It is insisted that because the terms of the charter designating the purposes of the organization do not expressly state that the corporation shall have power to grant a subsidy for the operation of boats on the Arkansas river, the contemplated action is beyond its powers. The statement of the object and purposes is broad and inclusive:

"For the upbuilding of the cities of Little Rock and Argenta, Pulaski county and the state of Arkansas, encouraging and assisting in public improvements of all kinds therein, including streets, highways, sewers, public buildings and any and all things which are for the public good; locating schools and colleges, locating, developing, and assisting in location and development therein, manufactures and other industries, * * * conducting a merchant association, board of trade, real estate exchange * * * for organizing and conducting any other bureau or bureaus, exchanges, which the board of governors may decide will be beneficial or necessary in the building up of said cities and state, for the best interest thereof and of the organization, shall have full power to do any and all things deemed necessary in carrying on any and all of the above objects to foster and promote the commercial, industrial, physical and moral development of the cities of Little Rock, Argenta and vicinity."

Thompson says:

"The powers of the corporation are to be measured by its charter, read in connection with the general laws applicable to such corporations, and whatever under the charter and general laws, reasonably construed, may be fairly considered as incidental to the purposes for

which the corporation was created is not to be taken as prohibited, but is as much granted as that which is expressed." *Thompson on Corporations*, § 2771.

Ordinarily only such powers and rights can be exercised by corporations under their charters as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant, and the charter, read in the light of any general laws which are applicable, is the measure of its powers, and such is the case whether the corporation is created by special charter from the Legislature or formed by articles of association under general laws. *Thomas v. West Jersey Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950.

Cyc. says:

"The implied powers of a corporation are not limited to such as are indispensably necessary to carry into effect those expressly granted, but comprise all that are necessary in the sense of being appropriate, convenient, and suitable for such purposes, including the right to a reasonable choice of means to be employed. They must result from the charter by necessary implication, regard being had to the object and purpose of the corporation;" and "if the means employed are reasonably adapted to the ends for which the corporation was created, they come within its implied or incidental powers, although they may not be specifically designated by the act of incorporation." 10 Cyc. 1097.

[1] Our court has said that:

"Powers that are essential to the exercise of the powers expressly granted are necessarily implied from those expressly granted, and are 'as much granted as what is expressed.'" *Rachels v. Stecher Cooperage Works*, 95 Ark. 6, 128 S. W. 348; *Simmons' National Bank v. Dilley Foundry Co.*, 95 Ark. 368, 130 S. W. 162.

[2] It is also true and a well-settled general rule of law that the power of a corporation to make and take contracts is restricted to the purposes for which it is created, and cannot legally be exercised by it for other purposes. *Simmons' National Bank v. Dilley Foundry Co.*, *supra*.

[3] Of course the enumeration of the powers of a corporation in its charter implies the exclusion of all others not fairly incidental to those granted. The only question here, as said, is whether the proposed action of the Chamber of Commerce to grant a subsidy for the construction and operation of boats in the navigation of the Arkansas river in carrying passengers and freight for hire between Little Rock, Ark., and Memphis, Tenn.,

transcends its powers. We do not think it does. The purpose of the organization was to foster and promote the educational, commercial, industrial, physical, and moral development of the cities of Little Rock, Argenta, and vicinity, and if the establishment and operation of the boat line as proposed would reasonably tend to any such development, it would easily come within the implied and incidental powers of the corporation being necessary, appropriate and suitable for effecting the purpose.

If it be questionable whether the Arkansas river can be successfully navigated by the granting of the subsidy and the construction and operation of the proposed boat line, that is a matter left for decision to the industrial and development committee of the Chamber of Commerce and the organization itself, and of its decision appellants cannot complain, unless the success of it is so improbable as to show an arbitrary exercise of the power and waste of the fund. It is a well-recognized fact that accessibility to market and facilities for transportation, at a low and reasonable freight rate, tend greatly to the development and promotion of the local welfare in industrial and commercial ways. This is not disputed by appellants, who object chiefly because they think the proposed project is impracticable and will result in failure and loss, forecasting the future from the experience of the past. That, however, was a matter to be settled by the Chamber of Commerce or its appropriate committee, and has been against appellants' contention. We think the right of the appellee to use the funds donated to it to be expended for the promotion of the public welfare of the cities of Little Rock, Argenta, their vicinity, and the state, in physical, moral, educational, commercial, and industrial ways, includes the power to use it as proposed in the establishment of a boat line for the navigation of the river, under the circumstances.

We do not think it necessary to decide whether a corporation may become a member of a partnership, since this record discloses that there was no attempt or agreement on its part to do so, it being expressly agreed that the corporation does not share in the profit or loss of the enterprise of the navigation of the river.

The decree is affirmed.

RILEY v. STATE. (No. 185.)

(Supreme Court of Arkansas. Oct. 25, 1915.)

1. CRIMINAL LAW — 1092—RECORD—MATTERS REVIEWABLE — RESERVATION OF EXCEPTIONS.

Where, after conviction of a felony, defendant failed to file his bill of exceptions within the time granted therefor, no question upon the admission of evidence or the charge of the court is presented, since these can only be presented by a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2919; Dec. Dig. —1092.]

2. INDICTMENT AND INFORMATION — 110 — FOLLOWING LANGUAGE OF STATUTE.

Under Kirby's Dig. § 1732, providing that "every person who shall exhibit any gaming table [naming certain tables], although not herein named, be the name or denomination what it may, adapted * * * for the purpose of playing any game of chance, or at which any money or property may be won or lost, shall be deemed guilty of a misdemeanor," it is sufficient to describe the offense created by statute in the words of the statute; and an indictment charging that the defendant "did keep and exhibit a certain gambling device adapted, devised, and designed for the purpose of playing a game of chance, in which money may be won and lost, commonly called a pool table," is sufficient to charge a public offense, and it is immaterial under the statute what the name of the device may be.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. —110.]

Appeal from Circuit Court, Boone County; John I. Worthington, Judge.

W. J. Riley was convicted of the crime of exhibiting a gambling device, and he appeals. Affirmed.

Troy Pace and T. D. Crawford, both of Little Rock, for appellant. Wallace Davis, Atty. Gen., and John P. Streepey, Asst. Atty. Gen., for the State.

WOOD, J. Appellant was indicted as follows:

"The grand jury of Boone county, in the name and by the authority of the state of Arkansas, accuse J. Riley of the crime of exhibiting a gambling device, committed as follows, to wit: The said J. Riley, in the county and state aforesaid, on the 10th day of September, A. D. 1914, being then and there the occupant of a certain house, in the city of Harrison, in said county and state, did then and there unlawfully and knowingly set up, keep, and exhibit a certain gambling device adapted, devised, and designed for the purpose of playing a game of chance, and in which money may be won or lost, which said gambling device was commonly called a pool table, against the peace and dignity of the state of Arkansas."

[1] Appellant urges for reversal alleged error of the court in admitting certain evidence and in giving certain instructions. The record shows that on the 5th of August, 1915, appellant filed his motion for a new trial, which was overruled, and that he also

filed a motion in arrest of judgment, which was overruled. Thereupon appellant was granted "15 days within which to prepare and file his bill of exceptions." The bill of exceptions was not filed within the time given by the court. See *Stinson v. Shafer*, 58 Ark. 110, 23 S. W. 651; *Routh v. Tharpe*, 103 Ark. 46, 145 S. W. 888, and cases cited; *Peebles v. Columbia Woodmen*, 111 Ark. 435, 164 S. W. 296. Therefore we cannot consider the alleged errors relating to the admission of testimony and the giving of instructions, as these can only be presented by a bill of exceptions. *McLaughlin v. State*, 174 S. W. 234.

[2] Appellant's motion in arrest of judgment challenges the sufficiency of the indictment. Section 1732 of Kirby's Digest provides:

"Every person who shall set up, keep or exhibit any gaming table or gambling device [naming certain ones], * * * or bank of the like or similar kind, or of any other description, although not herein named, be the name or denomination what it may, adapted, devised or designed for the purpose of playing any game of chance, or at which any money or property may be won or lost, shall be deemed guilty of a misdemeanor," etc.

It is generally sufficient to describe an offense created by statute in the words of the statute. *Portis v. State*, 27 Ark. 360; *State v. Hooker*, 72 Ark. 382, 81 S. W. 231. The indictment charged that the appellant—"did keep and exhibit a certain gambling device, adapted, devised, and designed for the purpose of playing a game of chance, in which money may be won and lost, commonly called a pool table."

This is sufficient, under our statute and the latest decisions of this court on the subject, to charge a public offense. *State v. Sanders*, 86 Ark. 353, 111 S. W. 454, 19 L. R. A. (N. S.) 913; *Tully v. State*, 88 Ark. 411, 114 S. W. 920; *Johnson v. State*, 101 Ark. 159, 141 S. W. 493. It is wholly immaterial, under the statute, as to what the name or denomination of the device may be. The statute was leveled at devices "adapted, devised and designed for the purpose of playing a game of chance at which any money or property may be won or lost," no matter what the name of such device may be. The indictment under review expressly charges that appellant exhibited such a device.

As before stated, we cannot enter upon the question as to whether the evidence was sufficient to sustain the charge. The only question for decision is whether the indictment itself is couched in language setting forth facts which, if proved, would constitute a public offense. According to the cases supra, the indictment charges a public offense.

The judgment is therefore correct, and it is affirmed.

COUNTS v. STATE. (No. 197.)

(Supreme Court of Arkansas. Oct. 25, 1915.)

1. CRIMINAL LAW ⚡424—EVIDENCE—DECLARATION OF CONSPIRATORS AFTER CONSUMMATION OF CONSPIRACY.

On the trial of one jointly indicted with S. for arson, where testimony regarding tracks of defendant and S. and their horses constituted a material part of the evidence, and it appeared that S.'s horse was found running loose, and that its tracks were compared with those found near the burned building, it was error to permit a witness to testify that S. told him, after any conspiracy with defendant had been consummated, that defendant "played hell when he turned my horse loose," since, when a deed is done and the criminal enterprise of the conspirators is ended, the acts or declarations of one conspirator are thereafter inadmissible against his co-conspirator.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002-1010; Dec. Dig. ⚡424.]

2. CRIMINAL LAW ⚡1163—WITNESSES ⚡278—CROSS-EXAMINATION—PREJUDICIAL ERROR.

On a trial for arson, it was error, and presumptively prejudicial, to permit one jointly indicted with defendant to be asked, on cross-examination, whether his brother had not been charged with killing and burning a woman; the brother not being a witness nor charged with the crime on trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. ⚡1163; Witnesses, Cent. Dig. §§ 985, 986; Dec. Dig. ⚡278.]

Appeal from Circuit Court, Hot Spring County; W. H. Evans, Judge.

Walter Counts was convicted of arson, and he appeals. Reversed and remanded.

H. B. Means, of Malvern, for appellant. Wallace Davis, Atty. Gen., Jno. P. Streepey, Asst. Atty. Gen., and D. D. Glover, of Malvern, for the State.

SMITH, J. Appellant was jointly indicted with one Walter Shuffield for the crime of arson, alleged to have been committed by burning a barn, the property of one W. T. Shuffield. The state depended upon circumstantial evidence for a conviction, and appellant questions the sufficiency of this evidence to support the verdict of the jury, finding him guilty of that charge. Among the circumstances offered in proof was evidence concerning certain tracks alleged to have been made by appellant and his companion, and certain horse tracks alleged to have been made by the horses which they rode on the night of the fire. On the following morning, while these tracks were being followed, a witness found Shuffield's horse running loose in the road leading to the barn, and comparisons were made of the tracks of this horse with those of one of the horses found near the barn, where two horses had been recently hitched for a sufficient length of time for them to tramp and beat down the ground where they had been standing. Appellant and Shuffield did not deny that they had

been together that night, nor did they deny that Shuffield had ridden the horse which was found running loose. Their explanation of this fact, however, was that on the night of the fire Walter Shuffield rode to Walter Counts' home with him, and when they reached there they were cold and went in to warm, and ate supper, during which time the horse became untied and strayed away. A witness, Fred Caver, was permitted to testify that after Shuffield's horse had been found Walter Shuffield stated to him that, "Walter Counts played hell when he turned my horse loose." Upon the cross-examination of the witness Walter Shuffield he was asked, over the objection and exception of appellant, if his brother Hardy Shuffield had not been charged with having killed and burned a woman, and the witness answered that his brother had been so accused.

[1] We think it unnecessary to set out the evidence in this case, but announce our conclusion that it was legally sufficient to sustain the verdict, and the testimony in regard to the tracks of appellant and his companion and their horses constituted a very material part of this evidence. In this connection it may be said that the testimony of the witness Caver related to a statement of Walter Shuffield, made after the consummation of the conspiracy between Shuffield and appellant, and its damaging effect is, of course, apparent. It is thoroughly well established that when a deed is done and the criminal enterprise of the conspirators is ended, the acts or declarations of one conspirator are thereafter inadmissible against his co-conspirator. *Willis v. State*, 67 Ark. 234, 54 S. W. 211; *Chapline v. State*, 77 Ark. 444, 95 S. W. 477; *Lawson v. State*, 32 Ark. 220; *Polk v. State*, 45 Ark. 165; *Gill v. State*, 59 Ark. 422, 27 S. W. 598; *Foster v. State*, 45 Ark. 328; *Cummock v. State*, 87 Ark. 34, 112 S. W. 147; *Benton v. State*, 78 Ark. 284, 94 S. W. 688; *Wiley v. State*, 92 Ark. 586, 124 S. W. 249; *Storms v. State*, 81 Ark. 25, 98 S. W. 678; *Harper v. State*, 79 Ark. 594, 96 S. W. 1003; *Easter v. State*, 96 Ark. 629, 132 S. W. 924.

[2] It was, of course, error to permit the state to ask the witness Walter Shuffield if his brother had not been charged with having killed and burned a woman. Hardy Shuffield was not charged with the commission of this crime, nor was he a witness at the trial. But this evidence would not have been competent in either of those cases. We do not know upon what theory this evidence was admitted but we do know it was erroneous, and the presumption is that it was prejudicial; its necessary effect being to show that a brother had been accused of an even more serious crime than the witness Walter Shuffield himself was charged with.

For the errors indicated, the judgment of the court below will be reversed, and the cause remanded for a new trial.

EOFF & SNAPP v. SCULLIN et al.
(No. 186.)

(Supreme Court of Arkansas. Oct. 25, 1915.)

1. CARRIERS ⇐230—CARRIAGE OF LIVE STOCK
—NEGLIGENCE—QUESTION FOR JURY.

In an action against a railroad and receivers of another road for injuries to a jack in transit, whether the receivers' employes were negligent in handling the car containing the jack after it reached their road held for the jury, under the evidence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 961, 962; Dec. Dig. ⇐230.]

2. CARRIERS ⇐218—CARRIAGE OF LIVE STOCK
—STIPULATION AS TO NOTICE OF INJURY—
VALIDITY.

Where a railroad stipulated with the shipper of a jack that he should notify the road of any injury to the animal in transit one day after delivery at destination, and the jack was delivered in an injured condition, but the injury did not become perceptible until more than a day had elapsed, the shipper was excused from giving the stipulated notice, since the parties, in making the stipulation, did not contemplate compliance where such compliance was impossible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. ⇐218.]

3. CARRIERS ⇐218—CARRIAGE OF LIVE STOCK
—STIPULATION REGARDING NOTICE OF IN-
JURY.

Such stipulation between common carrier and shipper of live stock, setting a time within which the shipper must give notice of injury to the stock as a condition to recovery, will not be enforced as unreasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. ⇐218.]

4. CARRIERS ⇐218—CARRIAGE OF LIVE STOCK
—STIPULATION AS TO NOTICE OF INJURY—EFFECT.

Where a railroad carrying a jack stipulated with the shipper that notice of injuries in transit should be given one day after delivery, and such stipulation could not be enforced because the injured condition of the jack did not become perceptible until more than a day had elapsed, the shipper was not required by such stipulation to give notice within a reasonable time after learning of the condition of the animal, since the imposition of such a requirement would be to compel the shipper to perform conditions required neither by his special contract nor the law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. ⇐218.]

Appeal from Circuit Court, Boone County;
John I. Worthington, Judge.

Action by Eoff & Snapp against the Missouri Pacific Railway Company and John Scullin and another, as receivers of the Missouri & North Arkansas Railroad Company. Judgment for the receivers, and plaintiffs appeal. Reversed, and cause remanded for new trial.

The appellants filed their complaint against the Missouri Pacific Railway Company and the appellees herein, as receivers of the Missouri & North Arkansas Railroad Company, setting up that they had shipped a jack over the lines of the Missouri Pacific Railway Company from Smithton, Mo., to Joplin, and

from Joplin over the Missouri & North Arkansas Railroad to Bellefonte, Ark. They charge negligence in delaying the shipment and in moving the cars, by which numerous unnecessary jolts and jars occurred, thereby injuring the jack of appellants, to their damage in the sum of \$3,500, for which they prayed judgment.

The service on the Missouri Pacific Railway Company was quashed, and the suit proceeded against the receivers of the Missouri & North Arkansas Railroad Company. They deny that there was any negligent delay or any negligent handling of the jack on the Missouri & North Arkansas Railroad. The testimony of the plaintiff Eoff on this point is as follows:

"Q. I will ask you to state, Flem, what the handling was so far as the train was concerned with reference to the jars and jerks and jolts or its smooth operation after you left Joplin to come to Bellefonte. A. Well, we did pretty well until we got to Seligman, and then from there to Eureka and up there at the tunnel—Q. Were there any jars and jerks of unusual force and character? A. Yes, sir. Q. What happened at the tunnel? A. Well, they stuck in there; I don't know; jerked around there trying to get out of there, and stayed right there quite a little bit. Q. Anything happen to the train and engine in the tunnel? A. There was something; I don't know; they jerked something out; I believe they called it a drawbar. Q. There was a jerk there? A. Yes; they cut out some cars there. Q. Cut out some cars? A. Yes. Q. The jolts and jerks were unusually heavy? A. Yes, sir. Q. Just state what was done? A. They jerked there a right smart, and then come on a little piece further, over to Freeman, I believe they said it was, and they claimed the 18 hours was up. Q. Now, just go on and tell what was done. A. Well, they stopped there; just stopped there, and went to bed when we got there. Q. That is the hands went to bed? A. The crew went on to bed and just left us standing there on the side track. Q. How long did you stay there? A. I don't know; not very long; they sent after another outfit, and they carried us on a little piece further. Q. Then on the way to Bellefonte what about the jerks and jars and rough handling of it? A. They handled us pretty rough from there on."

On cross-examination the witness, in answer to questions, stated that it was not as rough on the Missouri & North Arkansas as on the Missouri Pacific. He stated that he told the conductor that it was handled pretty rough, but that the other road (the Missouri Pacific), of course, handled it a "heap rougher" than this road (meaning appellees' road).

Appellees further set up that the plaintiffs violated the terms of the contract under which the jack was shipped by failing to give the written notice therein required. The contract specified:

"As a condition precedent to the recovery of damages for injury to live stock, the shipper shall give notice in writing of his claim to some general officer of the company, or the nearest station agent, or the agent at destination, and before the live stock is mingled with other live stock, and within one day after it is delivered at destination."

The plaintiffs admitted that they did not give the notice specified in the contract, and set up as justification for not so doing that:

"They did not know, and it was impossible for them to know, the true condition of the jack within the time that they were required to give the notice."

After the testimony was adduced, the court, at the request of the defendants, instructed the jury to return a verdict in their favor. The plaintiffs duly objected, and excepted to the rulings of the court, and from a judgment dismissing plaintiffs' complaint, and in favor of the defendants for costs, this appeal has been duly prosecuted.

W. B. Smith, J. Merrick Moore, and H. M. Trieber, all of Little Rock, for appellants. E. G. Mitchell, of Harrison, for appellees.

WOOD, J. (after stating the facts as above). [1] 1. The appellees insist that the judgment was correct because there was no evidence to show negligence on the part of the appellees' road. The question of negligence under the evidence was one for the jury, especially as to whether or not appellees' employes were negligent in the handling of the car after the same was received on appellees' road. The testimony of the appellant Eoff set forth in the statement made it an issue of fact for the jury to say whether or not the appellees' employes were negligent in the manner in which they handled the car that contained the appellants' jack.

[2, 3] 2. It is conceded by the appellants that the notice specified in the contract was not given. The undisputed evidence on this point was to the effect that the jack was delivered to the appellants at Bellefonte on Saturday afternoon. When the jack was unloaded at Bellefonte, it appeared to be "in good health and in good condition; looked like he was all right." Eoff, one of the appellants, discovered on Monday "some symptoms that the jack was not right." He did not know at that time what was wrong with him; did not know but what he was founder-ed; "didn't know what was the matter." He was asked "how long afterwards until it seriously began to manifest itself" and before he began to get uneasy, and answered, "Well, I believe it was Thursday." The testimony of the veterinary surgeon showed that the jack had what he designated as "car founder, "laminitis," "caused from standing too long and from being jerked, probably." The witness stated that unusual jerking or jars would cause it.

The appellees contend that appellants had notice of the injury to the jack on Monday, and that, excluding Sunday, the notice could and should have been given on Monday, and therefore that appellants had reasonable opportunity to comply with the notice requirement of the contract. Conceding, without deciding, that Sunday should be excluded, still the undisputed evidence shows that the appellants did not know on Monday that the injury to the jack was caused by the negligence of the employes of the appellees. The proof shows that they did not know until several days

thereafter that the jack was injured as a result of delay and rough handling during his shipment. This court has frequently held that this provision in contracts of common carriers, where reasonable, will be enforced; but necessarily the parties to a contract containing this provision do not contemplate, in the making of it, compliance with it where such compliance is impossible.

This court, speaking of a similar provision in *St. Louis & San Francisco R. Co. v. Keller*, 90 Ark. 308, 119 S. W. 254, said:

"This provision of the contract does not affect the liability itself of the common carrier created or caused by the act itself of injury or of negligence. It is not a limitation of or an exemption from liability done or caused by such act of injury or negligence. * * * It is founded upon the consideration of the original contract, and its validity depends upon its reasonableness. If it is not inhibited by any statutory enactment, and if it is otherwise reasonable, there is no reason of public policy that should declare it invalid."

And further:

"Its effect is to require the one who has the peculiar knowledge to inform the other who has not that knowledge to seek the facts while they exist, so that the facts may be obtained and presented by both sides."

It is manifest that the purpose of this provision is to have shipper notify carrier promptly and to enable the carrier to investigate promptly when it is notified by the shipper of the injury claimed by him to have been sustained by reason of the negligence in shipment. The carrier could not have contemplated in such a provision that the shipper should give notice within one day when the shipper himself did not know that he had sustained any damage by the negligence of the carrier. To require notice under such circumstances would be wholly unreasonable, and be exacting on the part of the shipper compliance with the provision of a contract under circumstances that the parties did not have in mind when the contract was executed. This court will not uphold and enforce the provisions of such a contract where it appears from the undisputed evidence that it would be unreasonable to do so, as it does in this case. See *St. Louis & San Francisco R. Co. v. Keller*, supra, and cases there cited.

[4] But it is contended by the appellees that, if the stipulation for notice within one day is not reasonable, appellants were required to give notice within a reasonable time thereafter. It does not follow that because it is unreasonable under the circumstances to enforce the contract as made by the parties that the shipper should be held to give the notice within a reasonable time after discovering the injury. This provision is purely one of contract, and while the court should refuse to enforce a contract of a public carrier made with its shipper that is unreasonable, it does not follow that the shipper should be compelled to give notice other than that required by the contract. To do this would be compelling the shipper to perform conditions which neither his contract nor the

law requires. The court will not make contracts for the parties.

The court therefore erred in directing a verdict for the appellees, so the judgment is reversed, and the cause remanded for a new trial.

BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DIST. et al. v. WILLIFORD.

(No. 184.)

(Supreme Court of Arkansas. Oct. 25, 1915.
Separate Opinion, Nov. 8, 1915.)

1. LEVEES — BOARD — DISCRETION TO DECLARE EXTRAORDINARY EMERGENCY — STATUTE.

Acts 1909, p. 724, § 5, providing that it shall be unlawful for the board of directors of the St. Francis levee district, or any officer, member, or agent thereof, to pledge or deposit any bond, etc., issued under the act as security for the payment of any borrowed money, etc., or to appropriate any money arising from the sale of any such bond to any use other than as expressly directed by the act, etc., also provided that interest-bearing certificates of indebtedness of the board or district, payable to bearer and negotiable, may be issued in cases of extraordinary emergency for levee work, not to exceed a certain amount. *Held* that, since the act does not define what an extraordinary emergency is, the question is left to the discretion of the board, and their action in the premises, so long as it is not arbitrary, capricious, or fraudulent, cannot be challenged.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 19; Dec. Dig. § 34.]

2. STATUTES — 225½ — CONSTRUCTION OF ACTS RELATING TO SAME SUBJECT.

Where the Legislature passed two acts dealing with the powers of a board of directors of a levee district, and the language of one of the acts was ambiguous, to determine the intention of the Legislature, the court should consider the other act with that under consideration.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 304; Dec. Dig. § 225½.]

3. LEVEES — BOARD — POWER IN EMERGENCY — STATUTE.

Acts 1909, p. 724, § 5, reads: "It shall be unlawful for the * * * board of directors of the St. Francis levee district * * * to pledge or deposit any bond * * * issued under * * * this act, as security of the payment of any borrowed money, * * * or to appropriate * * * any money arising from sale of any such bond * * * to any use * * * other than as herein expressly directed, or to sell or negotiate any such bond * * * for * * * less than par, or to issue any interest-bearing certificate of indebtedness of said board or district: Provided, that interest-bearing certificates of indebtedness * * * may be issued in cases of extraordinary emergency for levee work not to exceed \$21,000 upon a two-thirds vote of the entire membership of said board." Acts 1909, p. 717, passed on the same day, provided for a bond issue of \$750,000 to redeem a previous bond issue, issued to complete the levee begun by the directors and for "building, repairing, rebuilding, raising, and maintaining levees within the district." The first, second, third, and fourth sections and the first part of the fifth section of the last-named act authorized another bond issue of \$325,000 to pay for and carry out the provisions of all contracts for work and labor "in the repairing, constructing, and maintaining of the levee in the district made prior to March 1, 1909." *Held* that, under the statutes, the board of levee directors had power to issue interest-bearing

certificates of indebtedness in cases of extraordinary emergency, not to exceed \$21,000 in any event, and that when such amount had been issued the power of the board was at an end, since, after authorizing bond issues in large amounts to provide for the normal construction and maintenance of the levee of the district, the Legislature undertook to provide for cases of extraordinary emergency arising thereafter, and limited the entire amount to be expended in all emergencies to \$21,000.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 19; Dec. Dig. § 34.]

Hart and Smith, JJ., dissenting in part.

Appeal from Crittenden Chancery Court; Chas. D. Frierson, Chancellor.

Suit by J. E. Williford against the Board of Directors of the St. Francis Levee District and others. Decree for plaintiff, and defendants appeal. Affirmed in part, and reversed and remanded in part, with directions.

This suit was instituted by the plaintiff, a taxpayer owning lands in the St. Francis levee district, to restrain the board of directors from issuing certificates of indebtedness amounting to \$95,670. The board of directors, it appears from the pleadings, passed resolutions providing for the issuance of certificates of indebtedness varying in amounts from \$16,000 to \$21,120 to repair and construct the levee of the district at five different places therein. The board declared that the work of repairing and constructing the levee at each of the places named was an extraordinary emergency, and directed the officers to contract for the work and to sell interest-bearing certificates of indebtedness to pay for the same. These five separate resolutions were passed by the board on September 9, 1915. It appears that during the months of April and May, 1912 and 1913, the board of directors of the St. Francis levee district had already declared extraordinary emergencies and had caused to be issued interest-bearing certificates of indebtedness amounting to the sum of \$21,000.

The chancellor entered a decree perpetually enjoining the board of directors from issuing and selling interest-bearing certificates of indebtedness in an amount exceeding \$21,000 in any one or all of said emergencies mentioned in said resolutions, but entered a decree authorizing them to issue interest-bearing certificates of indebtedness in the sum of \$21,000 to cover one or all of the emergencies mentioned in the resolutions. Both parties have appealed. The facts as set forth in the pleadings were undisputed.

Section 5 of Act No. 287 of the Acts of 1909 provides (Acts 1909, p. 721):

"It shall be unlawful for the said board of directors, St. Francis levee district, or for any officer, member or agent thereof, to pledge or deposit any bond or coupon issued under the provisions of this act, as security of the payment of any borrowed money or any debt or obligation of said board or of any person, firm or corporation whatever, or to appropriate or use any money arising from the sale of any such bond or bonds to any use or purpose whatever other than as herein expressly directed, or to

sell or negotiate any such bond or bonds for and at an amount or price less than par, or to issue any interest-bearing certificate of indebtedness of said board or district: Provided, that interest-bearing certificates of indebtedness of said board or district payable to bearer and negotiable may be issued in cases of extraordinary emergency for levee work not to exceed twenty-one thousand (\$21,000) dollars upon a two-thirds vote of the entire membership of said board. And the St. Francis levee board shall not enter into any contract for levee work of any kind unless the board has or will have from the revenue thereby of that year sufficient money in its treasury to pay for such work. Any member, officer or agent of said board of directors, St. Francis levee district, who shall violate any of the provisions of this section shall be deemed guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary for not less than one nor more than five years."

B. J. Semmes, of Memphis, Tenn., for appellants. L. C. Going, of Harrisburg, for appellee.

WOOD, J. (after stating the facts as above). These appeals involve the construction of the above section. The plaintiff, on his appeal, contends that the board of directors, under the above section, had authority to issue interest-bearing certificates of indebtedness in extraordinary emergencies in an amount not exceeding \$21,000, and that when such certificates were issued in that amount during the years 1912 and 1913 the power of the board was exhausted, and that, therefore, so much of the decree of the chancellor as authorized the issuing of interest-bearing certificates of indebtedness in the amount of \$21,000, pursuant to the resolutions of the 9th of September, 1915, was erroneous.

The defendants, on their appeal, contend that the chancellor erred in not holding that the board had authority to issue interest-bearing certificates of indebtedness in an amount not exceeding \$21,000 to do the work contemplated in each case, where the board declared that an emergency had arisen.

[1] The act does not define what an extraordinary emergency is. That, necessarily, is left to the discretion of the board. So long as the board does not act arbitrarily, capriciously or fraudulently, their conduct in declaring extraordinary emergencies cannot be challenged.

[2, 3] When the whole act is considered, it is manifest that the Legislature did not intend by the section under review to grant the board of directors of the St. Francis levee district any such unlimited power as that contended for by defendants. On the contrary, the purpose of the proviso, as we construe the act, was only to allow the board to declare extraordinary emergencies, when any should arise, and to issue interest-bearing certificates of indebtedness to pay for the work done in an endeavor to meet such emergencies, to the amount of \$21,000 and no more.

To determine the intention of the Legislature, where the language is ambiguous, the court should look not only to the act under

consideration, but may consider other acts in pari materia. The Legislature at the same session, on the same day (Act No. 236), had provided for a bond issue of \$750,000 for the purpose of redeeming a previous bond issue in that sum, which had been issued "for the purpose of completing the line of levee begun by the board of directors of the St. Francis levee district," and for "building, repairing, rebuilding, raising and maintaining levees within the district." See Act No. 55, Acts of 1899. The first, second, third, and fourth sections and the first part of the fifth section of the act now under consideration show that the Legislature had authorized another bond issue of \$325,000, the proceeds of which were "for the purpose of paying for and carrying out the provisions of all contracts for work and labor in the repairing, constructing and maintaining of the levee in said district made prior to March 1, 1909."

It is manifest from these acts, when construed together, that the Legislature was treating the levee or levees provided for in the act creating the St. Francis levee district as a completed project, and the proceeds of these bond issues were intended to pay for all the work that had been done in building, repairing, constructing, and maintaining such levee as a completed whole up to March 1, 1909. The Legislature prohibited the St. Francis levee board from expending the money raised by these bond issues for any other purpose than that declared in these acts. Then, after authorizing the bond issues in these large amounts and the expenditure of the money raised by such issues in building, repairing, constructing, and maintaining the levee of the district, and limiting the amount of money thus raised for the purposes therein named, the Legislature, in the section under review, undertook to provide for cases of extraordinary emergency that might arise thereafter, and limited the entire amount to be expended in these emergencies to the sum of \$21,000. It is the same, in effect, as if the Legislature had said:

"For extraordinary emergencies the board may issue interest-bearing certificates of indebtedness not to exceed the sum of \$21,000."

The language of the whole act shows that the Legislature had in mind to place a definite limit as to the amount that the board might expend in extraordinary emergencies. The Legislature doubtless concluded that after the expenditure of the large sums of money that had been previously authorized for levee purposes, and the completion of the work contemplated by the money raised by these bond issues, it would not be necessary in the immediate future to expend any very large sums, and that the expenditure of any further sums should not be allowed, except in cases of extraordinary emergency, and then only to the extent of \$21,000, for all emergencies that might arise.

The board derived its power in the matter of issuing bonds or interest-bearing certifi-

cates of indebtedness from the Legislature, and, although the board of directors, as an agent of the state, was charged by the Legislature with the performance of certain duties, to wit, the building, repairing, maintaining, etc., of the levee within the district, yet this board, under the act, has no power to issue bonds or interest-bearing certificates of indebtedness and to raise and expend the money derived therefrom, except as therein expressly provided. While the language of the act, to wit, "in cases of extraordinary emergency," indicates that there may be more than one case of extraordinary emergency, yet this language does not denote that in each case the sum of \$21,000 may be expended. On the contrary, the plain language indicates that the sum of \$21,000 is the maximum amount for which interest-bearing certificates of indebtedness can be issued.

The severe penalty which the Legislature imposed for a violation of the provisions of section 5 shows an intention that these provisions, concerning the issuance of interest-bearing certificates of indebtedness, should be restrictions upon the power of the board of directors to expend money in cases of extraordinary emergency, and that they should not go beyond the amount designated in the act.

It follows that so much of the decree as perpetually enjoined the defendants from issuing certificates of indebtedness in an amount exceeding the sum of \$21,000 is correct, and it is affirmed. That part of the decree, however, which permits the issuance of interest-bearing certificates of indebtedness not exceeding \$21,000 in pursuance of the resolutions of the board passed September 9, 1915, is erroneous, because the pleadings show that the board had, on a former occasion, since the passage of the present act, issued interest-bearing certificates of indebtedness in an amount equal to that sum. That part of the decree, therefore, permitting the further issuance of interest-bearing certificates of indebtedness will be reversed and remanded, with directions to perpetually enjoin and restrain defendants from the issuance of further interest-bearing certificates of indebtedness.

HART and SMITH, JJ., concur in part and dissent in part.

Separate Opinion.

SMITH, J. We agree with the chancellor that the act contemplated that more than one emergency might arise, but that not more than one could arise or exist at any given time. However, we do not agree that the enlargement work covered by the resolutions of the board was such an emergency as was contemplated by the Legislature. The purpose of this enlargement work was to bring the levee more nearly to the final standard adopted as being necessary for the protection of the lands of the district. This en-

largement work is not an extraordinary emergency. It is necessary work, of course, but work the necessity for which has existed since the building of the levee was begun; and such necessity will continue until the final standard of perfection and safety has been reached. But we think this necessity does not constitute an extraordinary emergency within the meaning of the act, and for this reason we concur in the conclusion announced by the court.

HART, J., concurs.

WARD v. NUTT et al. (No. 180.)

(Supreme Court of Arkansas. Oct. 25, 1915.)

1. PRINCIPAL AND SURETY ⇐106 — DISCHARGE OF SURETY—EXTENSION OF TIME FOR PAYMENT.

An agreement, upon a valid consideration, by a creditor, without the consent of the surety, not to sue the principal debtor for a stated time, discharges the surety.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 211, 212; Dec. Dig. ⇐106.]

2. PRINCIPAL AND SURETY ⇐108 — DISCHARGE—ALTERATION OF CONTRACT—EXTENSION OF TIME FOR PAYMENT.

Where a note was paid by the maker, who agreed with the payee at the time for an extension of time for payment of the note, such extension did not operate to discharge the maker's surety, since the payment of a debt at the time or after it becomes due is not a sufficient consideration to support the creditor's agreement for forbearance, while an agreement to extend the time for payment which will discharge a surety must be valid and enforceable.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 213-218; Dec. Dig. ⇐108.]

3. PRINCIPAL AND SURETY ⇐104 — DISCHARGE—ALTERATION OF CONTRACT—EXTENSION OF TIME FOR PAYMENT — PRIOR CONSENT.

Where a note contained an express stipulation that the parties consented that the time of payment might be extended without notice, a subsequent extension did not discharge the maker's surety on such note.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 186-190, 193-195, 197-200; Dec. Dig. ⇐104.]

Appeal from Circuit Court, Howard County; Jeff. T. Cowling, Judge.

Action by J. F. Ward against S. L. Nutt and others. Judgment for the named defendant, and plaintiff appeals. Judgment set aside, and judgment entered for plaintiff.

W. C. Rodgers, of Nashville, for appellant.

McCULLOCH, C. J. This is an action instituted before a justice of the peace by appellant to recover the amount of two promissory notes executed by S. L. Nutt, the appellee, and other joint makers. Appellee

Nutt appealed to the circuit court, and a trial in that court resulted in his favor.

On the face of the notes appellee appears to be a joint maker, but the undisputed proof establishes the fact that he was merely a surety. One of the notes is for the sum of \$200, bearing date April 2, 1914, and due and payable 7 months after date, with interest from date until paid. The other note is for \$142.80, with a credit of \$17.50, and is dated June 3, 1914, and due and payable 6 months after date, with interest from date until paid. The last-mentioned note also contains the following stipulation:

"The makers, sureties, indorsers, and guarantors of this note severally waive presentment for payment, notice of nonpayment, protest, notice of protest, and diligence in bringing suit against any party thereto, *and consent that the time of payment may be extended without notice thereof.*"

The only defense interposed is that appellant entered into an agreement with one Kennedy, who was also one of the makers of the notes, for an extension of the times of payment. The testimony of Kennedy, which the verdict shows that the jury accredited, is that a few days before the last note became due he paid the interest on each of the notes to appellant, and that the latter agreed to extend the time for payment on each of the notes for 12 months. It will be seen from the above recitals of facts that the last note became due and payable on December 3, 1914, and the first note on November 2d, so it is evident that at the time Kennedy says that he paid the interest, and that the alleged extension of time was agreed to by appellant, the first note was nearly a month past due.

[1, 2] The law on the subject, as laid down by this court, is as follows:

"An agreement upon a valid consideration by a creditor without the consent of the surety, not to sue the principal debtor for a stated time, discharges the surety. Such an agreement ties up the hands of the creditor, because, if he breaks it, he may be sued for damages. * * * But the payment of part of a debt by the principal, at the time or after it becomes due, is not a sufficient consideration to support an agreement for forbearance; and an agreement for forbear-

ance, founded upon such consideration, even though carried out by the creditor, will not discharge the surety. In such cases, no benefit is received by the creditor but what he was entitled to under the original contract, and the debtor has parted with nothing but what he was already bound to pay." *Thompson v. Robinson*, 34 Ark. 44.

In *Vestal v. Knight*, 54 Ark. 97, 15 S. W. 17, it was held that payment of interest on a note in advance is sufficient consideration to support a contract for the extension of the time of payment, and that an agreement of the creditor with the principal for an extension of time based upon such consideration discharges the surety.

[3] The interest on the first note was past due when it was paid, as claimed by Kennedy. Therefore, according to the well-settled principles already announced, there was no consideration for an extension of the time of payment of that note. The other note contained an express stipulation to the effect that the parties "consent that the time of payment may be extended without notice thereof." That stipulation is not susceptible to any other interpretation than that all of the parties to the note consented to any agreement of extension which might thereafter be made. It means that, if it means anything at all; and since appellee expressly consented in advance to an extension of time, his rights are not affected by the alleged agreement of appellant to extend the time.

The verdict was therefore erroneous, according to the testimony adduced by appellee. According to the undisputed testimony in the case, there being no other defense offered, except that referred to above, appellant is entitled to a judgment for the amount of each of the notes (less the credit of \$17.50 indorsed on the second note), with interest from maturity. Appellant denied that the interest was paid at all, but the verdict of the jury settles that issue against him.

The judgment in appellee's favor will therefore be set aside, and judgment will be entered here in favor of appellant for the amounts due on the notes as above indicated. It is so ordered.

WILKERSON et al. v. STASNEY & HOLUB.
(No. 5578.)

(Court of Civil Appeals of Texas. Austin.
Oct. 13, 1915.)

**APPEAL AND ERROR ⇨282—RESERVATION OF
GROUNDS OF REVIEW — MOTION FOR NEW
TRIAL.**

Under District court rule 71a (145 S. W. vii), providing that a motion for a new trial shall be filed in all cases where parties desire to appeal from a judgment or sue out a writ of error unless the error complained of is fundamental, except in such cases as the statute does not require a motion for a new trial, and Vernon's Sayles' Ann. Civ. St. 1914, art. 1612, providing that appellant or plaintiff in error shall file with the clerk of the court below all assignments of error, provided that, where a motion for a new trial has been filed, the assignments therein shall constitute the assignments of error, and need not be repeated, and article 1991, providing that it shall be sufficient for the party excepting to the conclusions of law or judgment of the court to cause it to be noted on the record in the judgment entered that he excepts thereto, and that such a party may appeal or take a writ of error without a statement of facts or further exceptions in the transcript, a party may appeal and file assignments of error without a motion for a new trial where a case has been tried by the court without a jury and conclusions of fact and law filed, and the judgment has been duly excepted to.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1662-1665; Dec. Dig. ⇨282.]

Appeal from Williamson County Court; Richard Critz, Judge.

Action between A. E. Wilkerson and others and Stasney & Holub. From the judgment, Wilkerson and others appeal. On motion to strike out the assignments of error. Motion overruled.

W. A. Barlow, of Taylor, for the motion.

RICE, J. This case was tried before the court without a jury, and judgment rendered therein against appellants on the 12th day of April, 1915, from which judgment they have perfected this appeal. Appellees have filed their motion to strike out the assignments of error herein filed on behalf of appellants, on the ground that no motion for new trial was made in the court below, predicating their right so to do on district court rule 71a (145 S. W. vii), which reads as follows:

"A motion for new trial shall be filed in all cases where parties desire to appeal from the judgment of the trial court, or sue out a writ of error in the cause, unless the error complained of is fundamental, except in such cases as the statute does not require a motion for a new trial."

If in certain cases the statute does not require a motion for new trial to be filed in the court below as a prerequisite for an appeal, and this case falls within that class, then appellees' insistence is not well taken.

Appellants contend that in all cases tried before the court without a jury, where the judgment rendered is excepted to, and con-

clusions of fact and law are filed, the appellant has the right to appeal without filing a motion for a new trial. We think this position is well taken. By article 1612, Vernon's Sayles' Rev. Civ. St., the appellant is required to file with the clerk of the court below his assignments of error upon which he relies for a reversal, before he takes out the transcript, provided that, where a motion for new trial has been filed, the assignments therein shall constitute the assignments of error, and need not be repeated by the filing of assignments; thus contemplating that in some cases such assignments might be filed in the court below without filing a motion for new trial. Article 1991, Id., reads thus:

"It shall be sufficient for the party, excepting to the conclusions of law or judgment of the court, to cause it to be noted on the record in the judgment entry that he excepts thereto; and such party may thereupon take his appeal or writ of error without a statement of facts or further exceptions in the transcript; but the transcript shall in such cases contain the special verdict or conclusions of law and fact aforesaid, and the judgment rendered thereon."

These two statutes have been construed by several of the Courts of Civil Appeals as allowing the right of appeal on the part of the appellant, in the absence of a motion for a new trial, where, as in the instant case, the trial was before the court without a jury, and conclusions of fact and law had been filed which were duly excepted to, as required by statute. See *American, Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.*, 155 S. W. 286; *Pollard v. Allen & Sims*, 171 S. W. 302; *Cornelius v. Harris*, 163 S. W. 346; *Cooney v. Dandridge*, 158 S. W. 177, 178; *Moore v. Rabb*, 159 S. W. 85; *Dees v. Thompson*, 166 S. W. 56; *Commonwealth Bonding & Casualty Co. v. Cator*, 175 S. W. 1074. In *Dees v. Thompson*, supra, it is held that Acts 83d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612), making assignments of error in motions for new trial the assignments on appeal, did not change the rule that no motion for new trial need be filed in cases tried by the court without a jury, in which findings of fact and conclusions of law were filed and excepted to. The only case cited by appellees sustaining their contention is that of *Head v. Altman*, 159 S. W. 135, which is in conflict with the cases above cited, in which Mr. Justice Connor, in support of his views, cites *Davidson v. Patton*, 149 S. W. 757, *Nunn v. Veal*, 149 S. W. 758, and *Murphy v. Earl*, 150 S. W. 486, the first two of which were decided by the Court of Civil Appeals of the Amarillo District, and the last by the El Paso court. In *Nunn v. Veal* and *Murphy v. Earl* there were jury trials, and in *Davidson v. Patton* the record does not disclose whether tried by the court or with a jury; but said courts have since said time reversed their holdings in this re-

spect. See *Dees v. Thompson*, *supra*, and other cases above cited.

Prior to the promulgation of the rule relied upon and Courts of Civil Appeals rules Nos. 23 and 24 (142 S. W. xii) the Supreme Court of this state and the Courts of Civil Appeals uniformly held that a party appealing from a judgment by the court without a jury had the right to appeal without filing a motion for a new trial. *Bell County v. Alexander*, 22 Tex. 357, 73 Am. Dec. 268, *Luther v. Western Union Tel. Co.*, 25 Tex. Civ. App. 31, 60 S. W. 1029, and *Greer v. Featherston*, 95 Tex. 654, 69 S. W. 69.

Mr. Justice Brown, in the case of *M., K. & T. Ry. Co. v. Beasley*, 155 S. W. 183 et seq., in passing upon a somewhat similar question to the one here involved, held that the Supreme Court could not by rule set aside a statute, and that the rules of court must be so construed as to harmonize with the articles of the Revised Statutes, and with the former decisions of that court. We therefore have no hesitation in holding that the rules relied upon by appellees will not warrant us in sustaining their contention; but, on the contrary, we hold that, where the case has been tried before the court without a jury, and conclusions of fact and law have been filed by the trial court, and the judgment duly excepted to, as in the instant case, that the appellant has the right to appeal and file assignments of error without a motion for a new trial, and therefore we overrule appellees' motion to strike out appellants' assignments of error.

Motion overruled.

MOODY v. BONHAM et al. (No. 5508.)
(Court of Civil Appeals of Texas. Austin.
Oct. 13, 1915.)

Appeal from District Court, Freestone County; H. B. Daviss, Judge.

On motion for additional findings of fact. Findings made.

For opinion, see 178 S. W. 1020.

Anderson & Moses, of Fairfield, for appellant. M. L. Bonham, of Anderson, S. C., W. W. Ballew, of Corsicana, and T. H. Bonner and Boyd, Bell & Fryer, all of Fairfield, for appellees.

Additional Findings of Fact on Motion for Same.

JENKINS, J. The appellant having complained that our findings of fact herein are not sufficiently full, we make the following additional findings of fact:

I. James B. Bonham was killed at the Alamo in 1836.

II. The record in this case indicates that his estate was administered upon and his land was partitioned among his heirs, from which we infer that his headright certificate

was located and patented. When and where this administration was had the record does not disclose.

III. On August 13, 1859, M. M. Bonham, acting for himself and the other heirs of James B. Bonham, through his attorney, James C. Walker, petitioned the Court of Claims to issue to said heirs the donation certificate to which they were entitled as such heirs.

IV. On October 15, 1859, said certificate No. 37 was issued to said heirs.

V. M. M. Bonham filed his petition to the probate court of Freestone county to the September term, 1859, of said court, to be appointed administrator of the estate of James B. Bonham. This petition was signed by "Walker & Bradley, Attys., per L. D. Bradley."

VI. At the October term, 1859, of said court, letters of administration were issued to said M. M. Bonham.

VII. September term, 1860, M. M. Bonham filed a petition for the sale of said certificate, alleging claims against said estate, aggregating \$453.76, of which \$198.56 was alleged to be due said M. M. Bonham. This petition was signed by Walker & Bradley, Attorneys.

VIII. On September 24, 1860, said probate court ordered M. M. Bonham to sell said certificate to the highest bidder for cash.

IX. At the November term, 1860, said administrator reported that he had sold said certificate, as ordered by the court, to L. D. Bradley at 41 cents per acre.

X. On November 6, 1860, M. M. Bonham, administrator, deeded said certificate to L. D. Bradley. This deed was recorded May 5, 1882.

XI. At the December term, 1860, of said court, said sale was approved.

XII. On September 9, 1861, S. C. Simmons, E. Steele, and L. D. Bradley entered into a written agreement with each other, which recited among other things:

"That heretofore, in the year 1860, the said parties entered into a copartnership for the purpose of purchasing and locating land certificates, under which copartnership they have purchased and located the following certificates."

Among others is mentioned:

"453½ acres by virtue of James B. Bonham's donation certificate No. 37 for 640 acres; 180½ acres by virtue of James B. Bonham's donation certificate No. 37."

This agreement further states that said Bonham certificate had been paid for by L. D. Bradley, and that other certificates therein mentioned had been paid for by the other parties, but that they were to pay the same amount and be equal partners in said lands.

XIII. On May 30, 1862, the land in controversy was patented to the heirs of James B. Bonham by virtue of said donation certificate.

XIV. The parties hereto filed a written agreement, as shown by our original findings of fact herein.

NATIONAL LIVE STOCK INS. CO. v. GOMILLION. (No. 5482.)

(Court of Civil Appeals of Texas. Austin. Oct. 13, 1915.)

COURTS ⇐247—APPELLATE JURISDICTION—CERTIFICATION—WRIT OF ERROR GRANTABLE.

The Court of Civil Appeals will not certify a case to the Supreme Court, where that court has jurisdiction to grant a writ of error.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 437, 749, 751-754, 757, 759, 760, 762-764; Dec. Dig. ⇐247.]

Appeal from Caldwell County Court; J. T. Ellis, Judge.

On motion for rehearing. Overruled.

For former opinion, see 178 S. W. 1050.

E. B. Coopwood and Nye H. Clark, both of Lockhart, for appellant. O. Ellis, Jr., S. R. Graves, and T. B. Monroe, all of Lockhart, for appellee.

JENKINS, J. In our original opinion herein we held that article 4951, R. S. (article 3096eee, c. 69, Acts 28th Leg.), was constitutional. A careful examination of the able brief and argument of appellant herein on its motion for a rehearing has not changed our views as to this.

Appellant vigorously assails our opinion herein, wherein we held that appellant was not in a position to attack the constitutionality of the enactments of the Legislature regulating the admission of foreign corporations to do business in this state for the reason that in accepting such permit it agreed to be bound by such enactments. Article 4972 makes the provisions of title 71, R. S., conditions precedent upon which foreign insurance companies shall be permitted to do business in this state, and provides that such companies by doing business in this state "shall be held to have assented thereto." The law is a part of every contract. Under the law of this state when a foreign insurance corporation obtains a permit to do business in this state, every provision of title 71 of the Revised Statutes, in so far as applicable to its line of business, becomes a part of its contract to do business in this state. Having accepted said provisions and agreed to be bound thereby, it will not, after doing business under such permit (and without which it could not have any business in this state), be heard to question the validity of such provisions.

Such we understand to be the effect of the decision of the Supreme Court of the United States in *Waters-Pierce Oil Co. v. State of Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657. In that case it was contended by appellant that the statute of Texas was unconstitutional, in that it took away "the property and liberty assured by the fourteenth amendment of the Constitution of the United States," and made "many discriminations be-

tween persons and classes of persons." To this the court replied:

"The plaintiff in error is a foreign corporation, and what right of contract has it in the state of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the powers of the state over them. What those rights are and what that power is has often been declared by this court."

The court quotes with approval from *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, as follows:

"Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may see proper to impose. They may exclude the foreign corporation entirely. * * * The whole matter rests in their discretion."

As a conclusion of this whole matter the court said:

"The statute of 1889 (which was assailed as being unconstitutional), therefore, was a condition upon the plaintiff in error within the power of the state to impose, and *whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted with it.*" (Italics ours.)

It will be observed that article 4951, R. S., does not discriminate between foreign and domestic insurance companies. This is a suit to recover on an insurance contract, and the appellant seeks to read into that contract questions and answers in the application for the policy, when under the provisions of title 71, R. S., hereinbefore referred to, such questions and answers did not become a part of such policy, for the reason that a copy thereof did not accompany said policy.

For the reasons stated in our original opinion herein, we overrule appellant's contention that appellee was not entitled to a judgment for the penalty and attorney's fees recovered.

For the reasons stated herein, appellant's motion for a rehearing is overruled.

The Supreme Court has jurisdiction to grant a writ of error in this case, for which reason the motion to certify is also overruled. *Jones v. Lopez*, 172 S. W. 992, 993; *Day v. Mercer*, 175 S. W. 766.

Motion overruled.

WICHITA VALLEY RY. CO. v. SOMERVILLE et al. (No. 808.)

(Court of Civil Appeals of Texas. Amarillo. Oct. 16, 1915. On Motion for Rehearing, Nov. 6, 1915.)

1. WILLS ⇐792—ELECTION—QUESTIONS FOR JURY.

A husband at the time of his death owned two lots with a hotel thereon, constituting community property, on which he and his wife had been living. His will gave the property to a son, subject to the payment of rent to the widow for life, and also gave the widow all of

the furniture. The son had been living with his father and mother as one of the family, and continued to live there and manage the hotel without any change being made in the management of the property. He had the will probated, but, though named as executor, never qualified, and never exercised any authority as such, nor attempted to carry out the provisions of the will, further than to pay certain sums to the other children as provided in the will. The hotel was subsequently sold, the widow and son both signing the deed, and part of the furniture being turned over to the purchaser apparently passing with the sale of the hotel, and not being sold for any fixed price or as the property of the widow. The widow claimed that she did not know the contents of her husband's will, and never accepted the provisions thereof, but continued to occupy the premises, claiming her community and homestead rights. *Held*, that the facts did not conclusively show an election by her to accept the provisions of the will, and whether there was such an election was a question for the jury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2049-2052, 2061-2063; Dec. Dig. ¶ 792.]

2. WILLS ¶792—ELECTION—ACTS CONSTITUTING.

An election by a widow to take under her husband's will in lieu of her community and homestead rights must be unequivocal and with the intention to make an election.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2049-2052, 2061-2063; Dec. Dig. ¶ 792.]

3. ADVERSE POSSESSION ¶103—EXTENT OF RIGHTS ACQUIRED.

Where a husband at the time of his death was in possession of two lots constituting community property, but the record title to a small part of one of the lots was in a third party, and he had not acquired title thereto by limitation, if the wife remained in peaceable adverse possession, cultivating, using, and enjoying the land in question under a claim of title for the required period, she acquired title to the whole thereof, and not merely to an undivided one-half interest.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 590-594; Dec. Dig. ¶ 103.]

4. ADVERSE POSSESSION ¶86—PAYMENT OF TAXES—STATUTORY PROVISIONS.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5674, providing that every suit to recover real estate as against any person having peaceable and adverse possession, cultivating, using, or enjoying it, and paying taxes thereon, if any, and claiming under a deed duly registered, shall be instituted within five years, the party in adverse possession must pay all of the taxes, and where defendant claimed title by limitation under such article, she was bound to show the payment of city taxes, as well as a special school tax levied by an independent school district.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 504; Dec. Dig. ¶ 86.]

5. APPEAL AND ERROR ¶1064—HARMLESS ERROR—BURDEN OF NEGATING PREJUDICE.

It must appear that an erroneous charge calculated to mislead the jury did not have that effect, or the judgment will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224, Dec. Dig. ¶ 1064.]

6. APPEAL AND ERROR ¶1064—HARMLESS ERROR—INSTRUCTIONS.

In trespass to try title, where defendant pleaded the five and ten year statutes of limi-

tation, an erroneous instruction allowing her to prevail under the five-year statute, though she had not paid city and school taxes, could not be held immaterial, unless she was entitled to a peremptory instruction under the ten-year statute, as it was probable that the jury did not investigate the question of adverse possession for longer than five years, and it therefore probably caused the rendition of an improper verdict within rule 62a (149 S. W. 2), providing that no judgment shall be reversed for an error of law in the course of the trial, unless the appellate court shall be of opinion that the error amounted to such a denial of appellant's rights as was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. ¶ 1064.]

7. ADVERSE POSSESSION ¶115—EVIDENCE—ISSUES.

A husband at the time of his death was residing with his wife and son on two lots on which was a hotel and which constituted community property. He gave the property to the son, subject to the payment of rent to the widow during her life. The son had been living with his father and mother as one of the family and working for them as during his minority, and after his father's death he continued to manage the hotel; no change being made in the management of the property. The widow also continued to occupy the lots, and, though the son was named as executor of the will, he never qualified or exercised any authority as executor. Title to a portion of one of the lots was in plaintiff. There was evidence tending to show an election by the widow to take under the will, but she denied this and claimed to have been in possession, claiming her community and homestead rights. In plaintiff's suit against the widow and son in trespass to try title there was no testimony that the son was his mother's tenant, and it was shown that after the expiration of five years, but within ten years from the commencement of the adverse possession, he leased the disputed land from plaintiff, and there was testimony, though contradicted, tending to show that the widow knew of this lease and acquiesced therein. *Held*, that the widow was not entitled to a peremptory instruction under the ten-year statute of limitations, and an erroneous instruction allowing her to prevail under the five-year statute, notwithstanding nonpayment of taxes, was not immaterial, as the facts raised an issue as to whether the son was not in possession, and the widow merely living with him, and also raised the issue of a mixed or joint possession or occupancy, and, if this was the case, she was not in peaceable adverse possession during the time the son was also in possession under the lease from plaintiff.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 814, 691-701; Dec. Dig. ¶ 115.]

8. ADVERSE POSSESSION ¶68—MIXED POSSESSION—EFFECT.

When two persons are in mixed possession of the same land, one by title, and the other by wrong, the law considers the one who has title as in possession to the extent of his rights, so as to preclude the other from taking advantage of the statute of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 387-393; Dec. Dig. ¶ 68.]

9. ADVERSE POSSESSION ¶112—EVIDENCE—BURDEN OF PROOF.

In trespass to try title against a mother and son, where it appeared that both had been

living on the property, and that the son, within the period of limitation, had taken a lease from plaintiff, the burden was on the mother to show that she, and not the son, had possession under a claim of exclusive ownership.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 651, 653, 654, 657-659, 661-663, 665, 666; Dec. Dig. § 112.]

10. TRIAL § 255—INSTRUCTIONS—NECESSITY OF REQUESTS.

In trespass to try title against the widow of a former owner of lots, embracing the tract in controversy, if plaintiff desired the submission of the question as to the wife's election to take under her husband's will in lieu of her community and homestead rights, or if it desired its theory of the case presented, it should have requested proper charges.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.]

11. ADVERSE POSSESSION § 116—TRIAL—INSTRUCTIONS.

In trespass to try title against a mother and son, both of whom had been living on the land, and each of whom pleaded title by limitation and claimed to have had possession, where it appeared that the son, after his father's death, continued to live as theretofore as a member of the family and to manage the property, and that within the period of limitation he accepted a lease to the property from plaintiff, the refusal of an instruction that, if he had actual control and management of the property, and was authorized by his mother to control and manage her property, and that in leasing it he was acting within the scope of the authority granted to him, the jury should find for plaintiff as against both defendants, was not error.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 66; Dec. Dig. § 116.]

12. APPEAL AND ERROR § 1068—HARMLESS ERROR—ERRORS RENDERED HARMLESS BY VERDICT.

In trespass to try title against a mother and son, each of whom claimed title, the refusal of an instruction to find against the son under certain facts was immaterial where the jury found for the mother, as it thereby, in effect, found against the son.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.]

Appeal from District Court, Wichita County; E. W. Nicholson, Special Judge.

Trespass to try title by the Wichita Valley Railway Company against C. F. Somerville, in which Mrs. Sarah Somerville intervened. From a judgment in favor of the intervener, plaintiff appeals. Reversed and remanded.

Thompson & Barwise, of Ft. Worth, and Carrigan, Montgomery & Britain, of Wichita Falls, for appellant. A. A. Hughes and T. R. Boone, both of Wichita Falls, for appellees.

HUFF, C. J. This case was reversed and remanded upon a written opinion by the court. In its rendition we overlooked an agreement by the parties, filed in addition to the record, in which it was agreed that the filing of appellee's (Mrs. Somerville's) intervention was on the 16th day of August, 1912. This will necessitate a reconsideration of the entire case. The former opinion by this court will therefore be withdrawn.

In discussing this case we shall refer to Mrs. Sarah Somerville, who was the intervener in this case, as appellee, and her son, C. F. Somerville, either by name or as the son.

On the 4th day of November, 1911, appellant, Wichita Valley Railway Company, brought suit in trespass to try title against appellee C. F. Somerville for a small triangular piece of land out of lot 2, block 211, in the town of Wichita Falls, Tex. Thereafter, on the 16th day of August, 1912, Mrs. Sarah Somerville filed her petition for intervention in this suit, setting up her right to the land in controversy. Both C. F. Somerville and Mrs. Sarah Somerville pleaded that they were each the owners of the land by deed, and also pleaded the five and ten year statutes of limitation, seeking separate recoveries. We will not set out the pleadings of appellant and appellees more at length at this time, as we believe that the statement of the facts will sufficiently present the issue.

The Wichita Valley Railway Company alone is appealing. C. F. Somerville does not appeal, but he is made an appellee in this case. The court submitted the case to the jury on general charges, instructing the jury substantially that appellant had title to the land sued for, unless defeated by the statutes of limitation pleaded by the respective parties, and submitted the case on that theory alone. The jury returned a verdict in favor of the intervener, Mrs. Sarah Somerville, upon which judgment was rendered for her, decreeing her the land as against both appellant and C. F. Somerville. For the purposes of this opinion we do not believe it will be necessary to set out the title of the respective parties, but we find the record title is shown to be in appellant, and it should recover, unless defeated by the statutes of limitations. For convenience, and for the purpose of getting generally the issues in this case, we will adopt the statement made by appellee, but will, as we consider the several assignments, refer to such facts as may be deemed necessary in considering the same:

"On the 14th day of March, 1901, A. D. Anderson, Frank Kell, and J. J. Lory conveyed to A. J. Somerville, by their deed of that date, lots 1 and 2 in block 211 of the town of Wichita Falls, which deed embraces the land in controversy. Said deed was duly recorded in the deed records of Wichita county, Tex., on the 25th day of March, 1901; said deed was duly acknowledged. Immediately after said land was conveyed to A. J. Somerville, he and his wife, Sarah Somerville, moved into the hotel building, which was situated on both the said lots, and had a fence built around the entire lots, inclosing the same by said fence. This fence was built the last of March or about the first of April, 1901. The intervener was at that time the wife of A. J. Somerville, and they lived in the said house and ran a hotel business therein until some time in November, 1903, when A. J. Somerville died. During the lifetime of

A. J. Somerville the appellee C. F. Somerville, who was the son of A. J. Somerville and Sarah Somerville, lived in said hotel with them, and in a large part managed said hotel for them. C. F. Somerville had lived with his father and mother all of his life; had never left them, had never worked for wages, but had lived with them and worked for them just as he did when he was a minor, without making any account against him for the money that he received or making any account for his clothing, and he charged nothing for his services; in other words, he lived with them just as one of the family, as he did before he grew to manhood. He managed the hotel for them during the life of A. J. Somerville and under his direction. A. J. Somerville died in 1908, and left a will, which was duly probated in the county court of Wichita county, Tex. The will provided that C. F. Somerville should be the executor. It further provided that small sums of money should be paid to each of his other children, and that the widow, Sarah Somerville, should receive the rent from said hotel during her life, and should have all of the furniture, but devised the fee to Chas. Somerville, subject to the payment of said rent. C. F. Somerville had the will probated and filed an inventory, but never qualified as executor, and, so far as the records show, never exercised any authority as executor or attempted to carry out the provisions of the will, further than to pay the said sums of money to the other children as provided in the will.

"Lots 1 and 2 in block 211 was the community property of A. J. Somerville and intervener, and they resided on said lots up to the time of his death, and after his death intervener, Sarah Somerville, continued to occupy the same as her homestead just the same as she did before his death, and C. F. Somerville continued to manage the hotel for her just as he did for A. J. Somerville during his lifetime; in other words, the business continued after the death of A. J. Somerville just as it did before his death, no changes being made whatever in the management of the property.

"C. F. Somerville testified on the stand that he considered he had an interest in the property after his father's death, but explained what he meant by stating that it would come to him after his mother's death.

"Sarah Somerville continued to occupy said lots and building inclosed by a fence up to the time she intervened in this suit and for some time thereafter. She testified she did not know the contents of A. J. Somerville's will, and did not accept the provisions thereof, and did not accept the rent and furniture in lieu of her legal rights, but that she continued to occupy the house and premises, claiming her legal rights to the property and claiming her homestead rights therein until after she filed her plea of intervention in this suit."

[1, 2] The first assignment is urged to the action of the court in refusing to instruct peremptorily a verdict to find for appellant. The proposition under this assignment, and the only one, is there was no evidence sufficient to authorize the jury to find either for the defendant or the intervener, under the pleading setting up the statutes of limitation. We take it from the statement that the appellant's main reliance under this assignment is that the evidence is conclusive that Mrs. Sarah Somerville elected to accept under the will made by her husband. In this we do not agree with appellant. She testified that she did not do so, but at all times claimed her community interest in the property and her homestead rights on the lots.

These lots were deeded to her husband in March, 1901, and were fenced in April of that year, and remained so until after the suit was instituted against her son, C. F. Somerville, November 4, 1911. She lived in the hotel on the lots and made it her home during all those years. Under the will, she was to have all the hotel furniture and the rents from the property during her life. She testified she did not accept such property or rents in lieu of the community interest or of her homestead rights. It appears after this suit was brought the hotel was sold to one Perkins, and that she and her son signed the deed. Part of the furniture was turned over to Perkins. The testimony does not show that it was sold as her property or that any fixed price was placed on it, but it rather suggests that the property passed simply with the sale of the hotel. The mere fact that the furniture was used in the hotel, or that it was transferred with the hotel, does not conclusively show she accepted the personal property in lieu of her interest in the land. It is just as conclusive that the son claimed it as that she did, and the deed is just as conclusive that she claimed the land as that she claimed the personal property. Its use by her was not inconsistent with her undivided interest and right to exemption therein, and not conclusive that she accepted it in consideration for the relinquishment of her rights in the lots. Under the will, the son would take the father's interest, even if the wife did not accept, and the sale of the property and the manner of it indicates it was so treated by both mother and son. The husband had no right to dispose of her interest without her consent. There is no express election shown, and we think the evidence must show such election, and that she received property of value under the will to which she was not entitled otherwise. She had the right to retain the personal property until it was divided, since she had an undivided interest therein, all of which was furniture for the hotel and household and kitchen purposes. She was not called upon to divide the same by any of the heirs, and no reason is shown why she should relinquish her right of possession thereto. In the sale the son is shown to have participated therein as much as did the mother. The action of election must be unequivocal and with the intention to make an election. 40 Cyc. 1976, 1977; McClary v. Duckworth, 57 S. W. 317; Mayo v. Tudor Helms, 74 Tex. 471, 12 S. W. 117; Gilroy v. Richards, 26 Tex. Civ. App. 355, 63 S. W. 664; Chace v. Gregg, 88 Tex. 552, 32 S. W. 520; Cobb v. MacFarland, 87 Neb. 408, 127 N. W. 377; Archer v. Barnes, 149 Iowa, 518, 128 N. W. 967.

We think the evidence raised the question of election, which was for the jury to determine under a proper charge by the court. At this time we will not notice the questions raised on the statutes of limitations, upon

which appellant probably sought an instructed verdict.

[3] The second assignment asserts error in refusing special charge No. 2, to find for plaintiff an undivided half interest in the land sued for. It asserted that, if Mrs. Somerville did not accept under the will, her claim was for an undivided half interest, and, as the son was in possession as plaintiff's tenant, appellee could get title to no more than she claimed. If Mrs. Somerville was in possession of the land, claiming it as her own for the period of time required to vest her with title, then she would recover the whole of the land, and not merely an undivided interest. At the time of the husband's death no title by limitation had vested, but was an inchoate right in the wife. If she remained in peaceable, adverse possession, cultivating, using, and enjoying the same under a claim of title, the required period, it would vest in her title to the land in question. *Gafford v. Foster*, 36 Tex. Civ. App. 56, 81 S. W. 63.

[4] By the third assignment appellant complains of the following charge of the court to the jury:

"You are instructed that, in order to claim land by limitation under the five-year statute, it is not necessary that the city or any special school taxes be paid by the party claiming the same."

The fourth assignment of error urges that the court was in error in authorizing the jury to find under the five-year statute of limitation in favor of Mrs. Somerville. The trial court also submitted to the jury the ten-year statute of limitation. The jury returned a general verdict in favor of Mrs. Somerville. The jury were also instructed by the trial court that in considering the five and ten year statutes they would exclude one year following the death of A. J. Somerville, the husband of appellee. The land was conveyed to A. J. Somerville March 14, 1901, and the deed therefor was filed for record on that date. He went into possession of the property April 2, 1901, and died in November, 1903. His will was probated February, 1904, and the suit was instituted against his son November 4, 1911. The executor named in his will never qualified as such, and no inventory of the property was filed. C. F. Somerville testified that he paid the taxes from 1902 to 1908, inclusive, at the courthouse, and that the taxes were paid by him to the city for the same years. On cross-examination, however, he testified he would not swear positively he paid them every year; he had no receipts and was not positive and would not swear he paid the city taxes for 1904 or 1905. The city tax collector testified the city taxes for the years 1904 and 1905 were delinquent and unpaid, and for the years 1904, 1905, 1906, and 1907 the taxes were assessed for the independent school district and were not paid. Wichita Falls is shown to be an incorporated city and to be an independent school district, and the lot in question was in that

district. Bonds had been issued for the district, and taxes levied to pay the interest and sinking fund. Under these assignments the question is raised as to the correctness of the instruction that the payment of city taxes and special taxes was not necessary under the five-year statute. Under article 5674, Vernon's Sayles' Civil Statutes, suit must be brought in five years next after the cause of action accrues against a party claiming under a deed duly recorded, having peaceable and adverse possession, cultivating, using, or enjoying the same, and paying taxes thereon. It has been repeatedly held by the courts of this state that all incidents of the statute must concur and be continued for a period of five years. A failure to pay the taxes for five consecutive years had been held not sufficient to prescribe under the statute. *Converse v. Ringer*, 6 Tex. Civ. App. 51, 24 S. W. 705; *Club Land Co. v. Wall*, 99 Tex. 591, 91 S. W. 778, 122 Am. St. Rep. 666. The statute does not say that all the taxes shall be paid; neither does it say that the payment of part of the taxes will be sufficient; but the language is, "paying taxes thereon." It will be noted the statute does not say that the taxes shall be paid for five consecutive years, or that taxes shall concur with the time of the recording of the deed or with the adverse possession; but it is clearly implied from the wording of the statute. "Paying the taxes thereon" is not met by paying part of the taxes thereon. Taxes thereon include all the taxes. City taxes and school taxes are taxes thereon, recognized by both the Constitution and laws of this state. It is suggested the purpose of paying taxes is to give notice to the owner. We doubt if this is correct. Possession of the land and the recordation of the deed answers that purpose. If, however, that is its purpose, the laws and the Constitution recognize two separate assessors and collectors in county and city. If an owner should go to the city rolls and find that taxes on his property are not paid by any other, would he have the right to rest on the fact that it was not adversely held in possession under a deed duly registered? The statute says such holder shall pay taxes. The city rolls notify the owner such claimant is not doing so. These taxes are a lien on the land in the city. We believe good faith upon the part of the adverse claimant requires that he pay off this debt against the land and relieve it of the lien. In jurisdictions where there is no statute of limitations prescribing the payment of taxes as a prerequisite thereto the payment of taxes by the adverse claimant is admissible to show adverse holding. *Wren v. Parker*, 57 Conn. 520, 18 Atl. 790, 6 L. R. A. 80, 14 Am. St. Rep. 127. However, in *Draper v. Shoot*, 25 Mo. 197, 69 Am. Dec. 462, it is stated payment of taxes by a stranger tends to show knowledge of that fact by the true owner. We think under the statute that the claimant should show that he has paid the city and the special

school tax; otherwise he is holding property which he permits to become incumbered, and it is a circumstance tending to show he does not claim it adversely. Such a failure does not meet the full requirements of the statute, which all the courts hold is a necessary prerequisite to prescribe under the statute. *Dunn v. Taylor*, 102 Tex. 80, 118 S. W. 265. In *Dutton v. Thompson*, 85 Tex. 115, 19 S. W. 1026, Judge Stayton said it was not very clear why the Legislature made the payment of taxes necessary to sustain the defense of five years. It may have been to require evidence of good faith by the occupant to secure the state and its municipal subdivisions in the payment of taxes due thereon, or to give further notice of the adverse claim. It will be noted by the expression of Justice Stayton that, in his mind, at that time the statute required the payment of taxes due municipal subdivisions. If it is required for the purpose of additional notice, each tax roll, whether state, county, city, or independent school district, must each show the payment in order to give such notice; for each are required to be kept and the payment on each is notice of an adverse claim. We have been unable to find any case in this state involving the question here under construction. Counsel for both parties state that they are unable to find any case in this state. They cite us to the cases of *Allen v. Allen*, 159 Cal. 197, 113 Pac. 160; *Railway Co. v. Pyle*, 19 Idaho, 3, 112 Pac. 678; *Green v. Christie*, 4 Idaho, 438, 40 Pac. 56; *Coonradt v. Hill*, 79 Cal. 587, 21 Pac. 1099. These cases, in so far as they discuss the question, hold that all the taxes, state and special, must be paid, but we gather from the opinion of the courts this holding is based on the statute which so prescribes. However, as we interpret our statute, it clearly implies the payment of all taxes. The taxes to be paid are not specified, and the requirement for payment is not limited to any particular tax. State, county, municipal, and school taxes are each a charge on the property—made so by the Constitution and the laws. This must necessarily have been known to the Legislature, and, having failed to limit the tax to be paid, they must have intended all taxes which are a charge upon the land. We believe the court was in error in giving the charge that it was unnecessary to show the payment of city and school taxes.

[5-9] The appellee suggests that, if the trial court was in error in giving the charge, it was not material, and should not reverse the case. It is suggested the facts under the charge of the court would have authorized the verdict of the jury under the ten-year statute. The jury could have properly, under the charge of the court, based their verdict on the five-year statute. If it was apparent to us that the verdict was rendered on the ten-year statute, and not the five-year statute, we might be authorized to hold the charge harmless; but we are unable to de-

termine from the record upon which statute the jury found. *Adkins v. Galbraith*, 10 Tex. Civ. App. 175, 30 S. W. 291; *Thompson v. Chaffee*, 39 Tex. Civ. App. 567, 89 S. W. 285-287. It must appear that an erroneous charge calculated to mislead the jury did not have that effect, or the judgment would be reversed. "In such case the duty does not devolve upon the party complaining to show that he was thereby injured, but upon him in whose favor the verdict was returned to show that the complaining party was not prejudiced by the error." *Railway Co. v. Johnson*, 91 Tex. 569, 44 S. W. 1067. If rule 62a (149 S. W. x) has modified the above, it is, as we conceive it, in placing the duty on the appellate court to determine whether such error amounted to such a denial of the right of appellant as was reasonably calculated to, and probably did, cause the rendition of an improper judgment. Clearly, appellant's rights required that the law applicable to the five-year statute should be correctly given, and to tell the jury that the taxes for five consecutive years was not required in order to prescribe under the five-year statute was a denial of appellant's right to have the jury told these taxes must be paid before a title would vest under the five-year statute. Under this charge it is probable the jury did not investigate the question of adverse possession longer than the period of five years. It was reasonably calculated to induce the jury to rest content with five years, and not to consider the subsequent years of possession or the acts of the parties with relation thereto, and thereby probably caused the rendition of an improper verdict. If we are correct in holding the court erroneously stated the law in his charge, then, as we believe, the only justification we would have in holding the error immaterial would be to find that appellee, under the facts, was entitled to a peremptory instruction for a verdict under the ten-year statute. The facts in this case are peculiar to it, and more so than is usual. The evidence, aside from the appellee's testimony, tends to support an election by appellee under the will, and would support a finding that she was living with her son on the property as his. This, however, appellee contends, is rebutted by the verdict of the jury. This question was not submitted to the jury by the court by a direct charge on the question, but was doubtless included in the general charge on adverse possession. The bearing the election would have on the question of limitation, however, may not have been clearly perceived by the jury; hence not given that consideration it deserved. There is no testimony that the son was the tenant of appellee. His possession, management, and control of the property is consistent with his claim of title asserted in his answer and his declaration while in possession. If he was not so in possession, then he could have been only so as the agent or servant of appellee.

The issue is raised by the evidence whether he was in possession of the property under a claim of title. If he was so in possession, claiming title, it would be adverse to appellee. After the five-year period, and before the expiration of the ten-year, he entered into a written lease contract for the land from appellant. He paid either two or three years' rental to appellant for the land, and after he refused to pay the rent he was notified by the agent of appellant to remove his fence from around the land. This he did, and moved, if not all, at least a part, back on his land. The evidence suggests that he sought advice, and thereafter replaced the fence to its original position; whereupon appellant instituted this suit for the land. Appellee testifies she knew nothing of the lease and did not consent to it. Aside from her testimony, there are circumstances from which a jury might infer she did know of it, and, if she did not consent to it, she nevertheless acquiesced. Again, the facts in this case suggest that C. F. Somerville was in possession of the land, holding or claiming it as his own, and that his mother, appellee, was living with him thereon, and not he with her. If this shall be found to be true, we see no reason why the principle announced in the case of *Hurley v. Lockett*, 72 Tex. 262, 12 S. W. 212, should not apply. In that case the controversy was over a strip of land growing out of the location of the true boundary between two surveys. Hurley owned one of the surveys, and M. S. Lockett owned the other. Lockett sought to establish her right to recover under the ten-year statute. Testimony was offered and rejected to the effect that, while Reuben and Charles Lockett were living on the land of M. S. Lockett, they claimed that they were the owners of the place, and they claimed at that time the boundary was where Hurley contended, and did not during the year hold the strip of land in controversy adversely to Hurley. The court held in that case this testimony should have been admitted; that it was not conclusively shown that Reuben and Charles were tenants of M. S. Lockett. There is no contention in this case that C. F. Somerville, when he gave the lease on this land, was in possession of the land as the tenant of appellee. He was there claiming title or simply living with his mother as a servant, or acting for her as agent. He managed the hotel, rented it, and mortgaged it as his own, collected the rents, and in a measure appropriated the proceeds. He had his father's will probated, and paid the legacies provided for in the will to the heirs. The furniture was retained in the hotel, which was given to appellee by the will, in lieu of her interest in the land. These facts, we think, clearly raise the issue of possession by the son under his claim of title, and, if he was so, then he relinquished it by leasing the land from appellant. Adverse pos-

session for ten years would not, under such circumstances, be established in appellee. The facts also raised the issue of joint possession under a claim of title in the fee by both the mother and son. The son, by leasing the land from appellee, held the possession adverse to his mother for appellant, and she could not be said to be in peaceable adverse possession of the land in question. Neither the mother nor the son had the title to the land in question. There is evidence in the record tending to show that neither held and used exclusively the possession of the land and neither was the tenant of the other. Would not the acknowledgment by one of the joint possessors of title to the land in appellant and taking possession as the tenant of appellant destroy the peaceable adverse possession of the other? If the possession of the land was in the son, under a lease from appellant, this possession, it occurs to us, would be adverse to appellee. *Wiley v. Bargman*, 90 S. W. 1116. Unless there was such fiduciary relation existing between appellee and son, such as would preclude an adverse holding by the son, we think appellant would not be barred by the ten-year statute. Mere possession will be presumed to be in subordination to the title of the true owner. The law presumes the true owner is in possession until adverse possession is proved to begin, and when two persons are in mixed possession of the same land, one by title, and the other by wrong, the law considers the one who has title as in possession to the extent of his rights, so as to preclude the other from taking advantage of the statute of limitation. 2 *Corpus Juris*, Adverse Possession, § 587, p. 264; *Satterwhite v. Rosser*, 61 Tex. 166; *Holland v. Nance*, 102 Tex. 177, 114 S. W. 346. As heretofore suggested, the evidence tends to show that C. F. Somerville was claiming title to the lots and was in possession, asserting such ownership in himself, and was not in possession under his mother. If the mother was claiming ownership, and was in possession, she and her son were holding a mixed or joint possession, under different claims of title. Up to five years it may be the possession was held adverse to appellant by both mother and son, but by a joint possession, under adverse claims of title as to each other. After that period, and before the expiration of ten years, the son acknowledged the title of the true owner and leased the land and paid rent for two or three years. Appellant, then by tenant, entered into possession of the land for that period and was thus holding the possession. Appellee, under such circumstances, it occurs to us, would not during that time be in "peaceable, adverse possession." If the jury should find the mother was in possession, claiming under her community and homestead rights, and the son at the time was in possession with her, claiming title under the will, this would necessarily be a mixed pos-

session. Now, suppose the son had purchased the land from the true owner before limitation was complete, could the mother recover upon a title resting alone upon adverse possession for ten years? Did she have exclusive, peaceable, adverse possession for that period? Wherein is the difference between a purchase and a lease? The acts of the son could not have affected the rights or title which appellee may have had; yet she had none, but must rely upon peaceable, adverse possession to acquire one by limitation. When the son changed his attitude towards the true owner, that possession which they had theretofore held adverse to the owner ceased to be adverse. "This becomes obvious when it is reflected that, had he completed his purchase and obtained plaintiff's title, his possession would have been a rightful one held in his own right, and there could have been no holding adverse to his by other members of the family." *Burrell v. Adams*, 104 Tex. 183, 135 S. W. 1156. In other words, he would be the true owner in possession, and the wrongful possessor could not prevail under limitation. The rightful title would draw to it the seisin. "Adverse possession is an actual and visible appropriation of the land, commenced and continued under a claim of right, inconsistent with and hostile to the claim of another." Article 5681, R. C. S. In this state, as we understand the rule, it is not necessary to show actual notice of such possession to the true owner, but it must be actual, continuous, visible, notorious, distinct, and hostile. It is stated by the courts that such holding is necessary so "that the adverse claimant may be thus notified that his title is disputed." *Gillespie v. Jones*, 26 Tex. 346; *Richards v. Smith*, 67 Tex. 610, 4 S. W. 571; *Cyc.* vol. 1, p. 1032 (b).

In *Richards v. Smith*, *supra*, it is said:

"When the acts done upon a tract of land are such as to give unequivocal notice to all persons of a claim to it adverse to the claim of all others, and this is accompanied by an actual possession, exclusive in its character, then limitation will run in favor of the person so asserting adverse claim, and enjoying an exclusive possession from the time such exclusive occupancy began, whether the land be inclosed or not."

Again, it is said in *Mhoon v. Cain*, 77 Tex. 316, 14 S. W. 24, in order for possession to be adverse to the true owner, it "must be 'of such a character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant.'" Also see *Bender v. Brooks*, 103 Tex. 329, 127 S. W. 168, *Ann. Cas.* 1913A, 559.

Can the evidence in this case be said to conclusively show "unmistakably an assertion of claim of exclusive ownership" in appellee? She was an occupant thereon, and so was the son. If the evidence conclusively showed that the possession was her possession, and not the son's, and that she was exercising such possession under her claim of

title, and which was sufficient to afford appellant notice of that fact, then we might sustain appellee's contention. We think appellant, under the evidence in this case, may well have understood she was not in possession, asserting a claim of exclusive ownership. Of course, if the facts show that appellee was so in possession, and appellant knew that fact, or if the facts show that she was in possession and so occupied the land, and it was of such a character as to unmistakably show she was asserting under such possession an exclusive ownership, then appellee would be entitled to recover. The burden is on the appellee in this case to prove such possession under claim of title.

The trial court therefore could not have instructed a verdict for appellee under the ten-year statute, and, if the charge of the court was error, as held by us, on the five-year the error was material.

[10] The fifth and sixth assignments will be overruled. The question of election under the will was one of fact. If appellee accepted under the will, she had no right to the land, and, in so far as she was concerned, the act of C. F. Somerville in leasing the land did not matter, if she was claiming the land. If appellant desired the submission of the question of her election under the will, it should have requested a charge to that effect. On the hypothesis of appellee's theory urged by her, the charges of the court objected to were correct. If appellant desired its theory presented, a proper charge should have been requested presenting its theory. On the question of election we refer to what has been said in disposing of the first assignment and the authorities cited thereunder, and we also cite the additional cases of *Carroll v. Carroll*, 20 Tex. 731; *Moss v. Helsley*, 60 Tex. 428.

For the reasons above suggested, we overrule the seventh assignment.

[11] The appellant requested the following charge:

"You are charged that, if you believe from the evidence that from 1904 to 1911 C. F. Somerville had actual control and management of the property in controversy and was authorized by his mother to control and manage her property, and that in leasing the property in controversy from plaintiff he was acting within the scope of the authority granted by his mother, you will find for the plaintiff as against the defendant and intervenor."

This court is unanimous in the opinion that the trial court was not in error in refusing the above charge, and we have decided not to express the views of the majority with reference to the principles sought to be presented by the charge, and withdraw our opinion with reference to the same, heretofore filed in this case.

[12] The ninth assignment will be overruled, for the reason particularly that under the facts submitted the jury were instructed to find against C. F. Somerville. The jury,

in refusing to render a verdict for him, and finding for the intervener, practically found against C. F. Somerville, and the refusal of the charge became immaterial, if otherwise correct, which we do not now decide.

The tenth assignment is overruled. We think the charge was correctly refused.

The eleventh assignment is overruled. There was some evidence as to the payment of the taxes for the year 1903, and it would have been improper to charge the jury that there was none. If the charge had requested the issue to be submitted as one of fact to be found by the jury, it should have been given under the testimony in the record.

For the reasons given, the judgment will be reversed and the cause remanded for another trial.

The motion for rehearing will therefore be overruled, but, as we have given a different reason for reversing the case to that given in the former opinion, appellee will be permitted to file a motion for rehearing on this opinion.

On Motion for Rehearing.

In some measure appellee's criticism of our use of joint possession in the original opinion, is correct, as there, of course, can be but one possession. We might more properly have expressed our meaning by saying "occupancy." We are well aware of the class of cases in which the question of mixed possession has found expression. This is an anomalous case. The true owner of this land found two occupants on it. One had or claimed title to it, as would appear from the probate records by will, and before ten years had elapsed he acknowledged the title of appellant and leased the land as its tenant. Thereafter the true owner is in possession by tenant. The appellee was in possession, or rather living in the house on another portion of the lot. Why should not the rule of mixed possession apply in this kind of a case? We believe it should. Again, the appellee, under the law, as we conceive it, must have had actual, open, visible, exclusive, distinct, and hostile possession. It must have been such as would give notice to the owner that its title is disputed. This joint occupancy by the mother and son, especially after the lease by the son, does not by the record, we believe, conclusively show that appellee had such exclusive hostile possession. The fact that the jury may have found such hostile possession was had for five years might be warranted under the facts; for neither mother nor son was occupying the land as the tenant of appellant up to that time. Thereafter the jury may have well concluded appellee did not have actual, exclusive, and hostile possession such as to give notice to appellant of an adverse claim of title to it.

The motion will be overruled.

LEVY et al. v. DUNKEN REALTY CO.* (No. 5488.)

(Court of Civil Appeals of Texas. Austin.
Oct. 20, 1915.)

1. BROKERS — §82—ACTIONS FOR COMMISSIONS —COMPLAINT—ALLEGATIONS AS TO ABILITY AND WILLINGNESS.

In a broker's action for commissions for procuring a contract for the exchange of lands between defendants and C., which provided that if either party failed to perform, such party should forfeit and pay to the other party a specified sum as liquidated damages, an allegation that C. was at all times ready, able, and willing to carry out the contract and take defendants' property upon the terms agreed upon, as evidenced by such contract, was more than an allegation that he was ready, able, and willing to take the property or pay the stipulated penalty, and was a specific and distinct allegation of his ability and willingness to exchange the property upon the terms agreed upon.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 101-103; Dec. Dig. §82.]

2. TRIAL — §343 — VERDICT — CONSTRUCTION AND OPERATION.

In a broker's action for commissions, where the testimony on an issue as to plaintiff's breach of a contract to procure a loan for defendants with which to clear up an incumbrance was conflicting, and such issue was submitted to the jury, a verdict for plaintiff necessarily decided it against defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 800-812; Dec. Dig. §343.]

3. BROKERS — §61—RIGHT TO COMMISSIONS— FAILURE OF NEGOTIATIONS.

Though brokers with whom defendants listed property for sale or exchange, and who had knowledge of the existence of incumbrances on the property, could not themselves have made a contract binding defendants to sell or exchange their property otherwise than subject to the incumbrances, where defendants made a contract to exchange lands with a party procured by the brokers which bound them to remove such incumbrances, the brokers were entitled to their compensation, notwithstanding their knowledge of the incumbrances, and though defendants' failure to comply with the contract resulted from their failure to remove such incumbrances.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 77, 78, 92, 93; Dec. Dig. §61.]

4. BROKERS — §82—ACTIONS FOR COMMISSIONS —COMPLAINT—ALLEGATIONS AS TO ABILITY AND WILLINGNESS.

In a broker's action for commissions for procuring a contract for the exchange of lands between defendants and C., plaintiff's allegation that C. was ready, able, and willing to carry out the contract was equivalent to an allegation that he had title to the property he contracted to exchange, especially where it otherwise appeared that the failure to carry out the contract was due to defendants' failure to remove incumbrances from their property.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 101-103; Dec. Dig. §82.]

5. PLEADING — §129—FAILURE TO DENY—AD- MISSIONS—ACTIONS FOR COMMISSIONS—EVI- DENCE.

Where, in a broker's action for commissions for procuring a contract for the exchange of lands between defendants and C., defendants' answer alleged that the trade was not consummated because of incumbrances on their property, and that by reason of their failure to remove such incumbrances, they became liable to C. for liquidated damages, their brief on appeal

stated that the trade was not consummated because of such incumbrances, and one of the defendants testified that he paid C. \$2,500 on account of their liability under the contract, it sufficiently appeared that C. did not break the contract, especially where the petition alleged that C. was at all times ready, able, and willing to carry out the contract, and the statute then in force required parties to swear to their pleadings, and provided that the failure of the opposite party to deny under oath a fact thus pleaded should operate as an admission of the truth of such fact, and defendants did not deny the allegation in question.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270-275; Dec. Dig. ¶ 129.]

6. PLEADING ¶200 — EVIDENCE ADMISSIBLE UNDER PLEADINGS.

Where defendants did not deny under oath the truth of an allegation in the petition that plaintiffs were partners, as they were required to do by the statute then in force in order to make it an issue, evidence that they were not partners was properly excluded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 859-863, 886½; Dec. Dig. ¶ 290.]

7. TRIAL ¶329 — VERDICT — SUFFICIENCY — FAILURE TO DISPOSE OF ISSUES.

Where, in a broker's action for commissions for procuring a contract for the exchange of lands which defendants failed to perform, defendants pleaded as a defense plaintiffs' breach of a contract to procure a loan to enable them to clear up an incumbrance on the land, and this issue was submitted to the jury by a charge requiring a verdict for defendants if such issue was decided in their favor, a general verdict for plaintiffs for a specified sum, disposed of defendants' cross-action for expenses claimed to have been incurred by reason of plaintiffs' alleged breach of contract, and judgment was properly rendered against defendants on such cross-action.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 774-776, 782; Dec. Dig. ¶ 329.]

8. PLEADING ¶406 — WAIVER OF ERRORS.

Where, in a broker's action for commissions, though the allegation of the petition charging defendants with fault was general, and did not specify in what particular they had breached their contract, it was not excepted to for that reason, it had its standing in court as a plea fixing responsibility upon defendants for their failure to consummate the deal.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1359, 1361-1365, 1367-1374, 1386; Dec. Dig. ¶ 406.]

9. TRIAL ¶251 — INSTRUCTIONS — CONFORMITY TO ISSUES — ACTIONS FOR COMMISSIONS.

Where, in a broker's action for commissions for procuring a contract for the exchange of lands which defendants failed to perform, the supplemental petition alleged that the other party to the contract was at all times ready, able, and willing to carry out the contract, and that if the contract was not carried out by defendants, it was the fault of defendants themselves, an objection to a special charge on the ground that the pleadings raised no issue as to whether it was defendants' fault that the contract was not performed was not well founded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. ¶ 251.]

10. APPEAL AND ERROR ¶835 — OBJECTIONS TO INSTRUCTIONS — WAIVER.

Objections to a paragraph of the court's main charge and to a special charge, contained in a motion for a rehearing, were waived, where in appellants' brief no complaint was made of such paragraph of the charge and a different

objection was made to the special charge in question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3241-3243; Dec. Dig. ¶ 835.]

Appeal from District Court, McLennan County; Tom L. McCullough, Judge.

On motion for rehearing. Motion overruled.

For former opinion, see 178 S. W. 984.

Gross & Street and W. L. Eason, all of Waco, for appellants. J. A. Stanford, of Waco, for appellees.

KEY, O. J. Appellants have presented an elaborate motion for rehearing, which has been duly considered and the conclusion reached that it should be overruled. In that motion, among other things, it is said:

"We earnestly insist that the court give to this case that mature consideration which it deserves, as we feel, as is shown by its opinion in this case, that you have not heretofore given much consideration to it."

Assuming that the statement quoted was made in good faith, and conceding the right to so make it, we have concluded to write this additional opinion, in order that it may be seen that the case has received due consideration at the hands of this court. If the charge that this court had not given sufficient consideration to the case is based upon the fact that we did not, in our original opinion, discuss all the questions presented in appellants' brief, then every appellate court in this state, and perhaps in all others, is subject to the same criticism, as that course is pursued in a majority of cases decided by all other appellate courts; and any other course would be impracticable if the business of such courts is to be disposed of with any reasonable degree of dispatch.

On the last page of the brief upon which appellants submitted the case to this court it is stated that, while some minor questions are presented, yet the real questions involved in the appeal are only three, viz.:

First. "That appellees predicate their right to recover on the theory that they procured the execution of the contract in suit, which contract is not capable of specific performance in a court of equity, and therefore they did not earn a commission when they procured its execution. It was incumbent on them to show that Crowley was ready, able, and willing to exchange properties with the Levys, and this they have failed to do. They allege that Crowley was ready, able, and willing to carry out his contract, that is to say, he had the right to demand the forfeit." Second. "Appellees knew of the incumbrances on appellants' property when the same was listed, and the trade in question was not consummated because of these incumbrances. It is well settled that a real estate broker cannot recover a commission from his customer where a trade is not consummated by reason of defects known to the broker at the time he accepts the listing." Third. "Appellees failed to show that Crowley had a good title to the Tarrant county land, and for that reason the contract in question was not capable of specific enforcement in a court of equity, and therefore

the real estate broker is not entitled to his commission. A party must prove his case before he can recover."

[1] When the record is examined, even conceding that appellants' contention that the contract between them and Crowley was not capable of enforcement by suit for specific performance is correct, still, the three questions enumerated in appellants' brief are not difficult of solution, and therefore do not require any very extended consideration. As to the first of these questions, the answer to appellants' contention is that appellees not only alleged in their original petition that Crowley was ready, able, and willing to carry out his contract, but in their supplemental petition they alleged—

"that the said A. F. Crowley was at all times ready, able, and willing to carry out said contract and to take defendants' property upon the terms agreed upon as evidenced by said written contract as set out in plaintiffs' amended petition, and if said contract was not carried out by the defendants, then it was the fault of the defendants themselves, for which these plaintiffs are in no way responsible."

The allegation that Crowley was at all times ready, able, and willing to carry out the contract and take appellants' property upon the terms agreed upon was more than an allegation that he was ready, able, and willing to take appellants' property or pay the penalty stipulated in the contract. It was a specific and distinct allegation of his ability and willingness to exchange property with appellants upon the terms agreed upon in the written contract.

[2, 3] The answer to appellants' second contention is that appellees brought Crowley and appellants together, and they entered into a written contract, by the terms of which appellants obligated themselves to remove the incumbrances referred to; and, such being the case, appellees were entitled to compensation for their services as brokers, unless they were in fault in procuring appellants to make the contract, or unless they made and breached the contract pleaded by appellants in the eighth and ninth paragraphs of their amended answer, which read as follows:

"(8) These defendants further represent that it was expressly understood and agreed between plaintiff herein and these defendants that said loan should be negotiated against said Wise county land, and that in case same was not negotiated, and for that reason exchange of properties should not be consummated by actual delivery of deeds, then in that event defendants should not be liable to plaintiff for any commission whatsoever, but in case said loan should be negotiated, and said exchange of properties be finally consummated by the passing of deeds, then in that event it was understood and agreed that these defendants should pay plaintiff the sum of \$1,000. These defendants further represent that they entered into the contract with A. F. Crowley upon the faith which they had in the representations and guaranty of plaintiff herein that he would negotiate a loan against said land sufficient to clear the incumbrance which was against these defendants' property in Waco, Tex.

"(9) These defendants further represent that after the execution of said contract with the said

A. F. Crowley plaintiff and these defendants undertook to procure a loan against said land in Wise county, as hereinbefore described, but that in this their efforts were futile; that by reason of their inability to procure such loan the agreement between these defendants and A. F. Crowley was not finally consummated. Wherefore these defendants say that by reason of the foregoing they never became liable or bound to pay plaintiff any sum whatsoever."

Appellees denied under oath that such contract was made. The issues so made and upon which the testimony was conflicting were submitted by the court to the jury and the verdict for appellees necessarily decided these issues against appellants. The result of the verdict is that the agreement pleaded by appellants as a defense was never made; and, in the absence of such an agreement, if appellants listed their property with appellees for sale or exchange (which appellees charged in their petition and appellants admitted in their answer) then, if they brought the parties together, although appellees may not have been authorized to bind appellants to remove the incumbrances upon their property, yet if appellants themselves entered into a contract with Crowley by which they bound themselves to do so, appellees had the right to recover their compensation as brokers, although they knew the existence of the incumbrances when the property was listed with them, and although the failure of appellants to comply with their contract with Crowley resulted from their failure to remove the incumbrances referred to. *Hamburger & Dreyling v. Thomas*, 118 S. W. 770. We quote as follows from the opinion in that case, including the authorities there cited:

"The rule seems to be well settled that where a real estate broker has contracted for a certain compensation for procuring a customer to purchase on certain terms and conditions, and he procures a purchaser who agrees to purchase under modified terms and conditions differing from those the agent was authorized by his principal to make, and such terms, as modified, are agreed to by the owner of the property by his entering into a written contract of sale, embodying the modified terms and conditions, with the purchaser, the broker is entitled to his compensation as stipulated in his contract of agency, if through the failure of his principal to comply with the terms and conditions he has undertaken on his part to perform and comply with the contract of sale is not consummated. *Graves v. Bains*, 78 Tex. 94, 14 S. W. 256; *Conkling v. Krakauer*, 70 Tex. 739, 11 S. W. 117; *Hahl v. Wickes*, 44 Tex. Civ. App. 76, 97 S. W. 838; *McDonald v. Cabiness* (Tex. Civ. App.) 98 S. W. 943; *Id.*, 100 Tex. 615, 102 S. W. 721; *West v. Thompson* [48 Tex. Civ. App. 362], 106 S. W. 1134; *Stewart v. Mather*, 32 Wis. 344; *Gilder v. Davis*, 137 N. Y. 504, 33 N. E. 599, 20 L. R. A. 398; *Lockwood v. Halsey*, 41 Kan. 166, 21 Pac. 98; *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 884, 38 Am. St. Rep. 683; *Smith v. Schiele*, 93 Cal. 144, 28 Pac. 857."

So it seems quite clear that, although appellees, having knowledge of the existence of the incumbrances, could not themselves have made a contract binding appellants to sell or exchange their property otherwise than subject to the incumbrances, yet when ap-

pellants made a contract binding themselves to remove the incumbrances, appellees were entitled to their compensation as brokers, unless their right thereto was defeated by the matters pleaded in appellants' answer.

[4, 5] Appellants' third proposition is answered by citing the fact that at the time this case was tried the statute was in force which required parties to swear to their pleadings, and provided that the failure of the opposite party to deny under oath a fact thus pleaded should operate as an admission of the truth of such fact. As shown by the quotation from appellees' supplemental petition, they alleged that Crowley was at all times ready, able, and willing to carry out the contract by taking appellants' property, and appellants did not, by any pleading, sworn to or otherwise, deny the allegation so made in appellees' supplemental petition. Crowley could not have been able to carry out his contract and convey to appellants a good title to his property unless he had such title, and therefore the averment that he was able to convey such title was equivalent to saying that he had such title. Besides, it is averred in appellants' answer that the trade in question was not consummated because of the incumbrances upon their property, and that by reason of their failure to remove such incumbrances they became liable to Crowley for \$2,500, the damages stipulated in the contract between them; and it is also stated in appellants' brief that the trade was not consummated because of the incumbrances referred to; and it is shown by the testimony of appellant Ike Levy that he paid Crowley \$2,500 on account of such liability under the contract. What has been said in reference to this matter relates to appellants' contention, made elsewhere in their brief and also in the motion for rehearing, that appellees were not entitled to recover because they failed to prove that Crowley had submitted to appellants an abstract, showing that he had title to his property, within the time required by the contract. Appellants' statement in their answer that on account of their failure to remove the incumbrances from their property they thereby breached their contract with Crowley and became liable to him for \$2,500, and the testimony given by one of them that they paid Crowley that sum because of such liability, and the admission in appellants' brief that the trade in question was not consummated because of such incumbrances, is sufficient to satisfy this court that Crowley did not breach the contract, and was ready, able, and willing to carry it out by conveying to appellants the property he contracted to convey.

[6] This covers all the questions presented in appellants' brief except the minor question, hereafter adverted to. It is contended that error was committed in not permitting appellants to prove that appellees were not partners, as alleged in their petition. Ap-

pellants did not deny under oath the truth of that allegation, as they were required to do by statute in order to make it an issue, and therefore we overrule their contention in that regard.

[7] Error is also assigned upon the action of the court in rendering judgment against appellants upon a cross-action which they set up against appellees; the contention being that the cross-action was not disposed of by the verdict. The verdict was a general finding for the plaintiffs for a specified sum of money, no reference being made therein to appellants' cross-action; but the cross-action was founded upon the facts pleaded in defendants' answer as a defense. In other words, it was alleged that by reason of appellees' failure to comply with their agreement to procure a loan for them, appellants were entitled to recover from appellees \$25 which they had paid an attorney to examine the title to the Crowley property, \$100 paid to the same attorney for going to Ft. Worth and endeavoring to induce Crowley to release appellants from their obligation to pay the \$2,500 penalty, and another sum of money which constituted the expense of shipping cattle to Ft. Worth to discharge appellants' indebtedness to Crowley. Thus it appears that appellants sought to predicate appellees' liability upon the fact that they had breached their contract to secure a loan for appellants; and, as that issue was submitted to the jury and decided against appellants under a charge requiring a verdict for them if decided in their favor, it necessarily follows that the verdict of the jury does in fact dispose of the cross-action.

[8] Before closing this opinion we deem it proper to call attention to the fact that, while in their first assignment of error appellants complain of the action of the trial court in overruling a special exception to the plaintiffs' petition, the record does not show that the exception referred to was ruled upon or called to the attention of that court. In so far as the record shows, appellants either concluded to abandon that exception or negligently failed to call it to the attention of the court and have it ruled upon. At any rate, the record does not sustain that assignment. However, the exception in question should not have been sustained. It asserted that inasmuch as appellees' petition showed upon its face that appellants had entered into a contract with Crowley which would not support an action for specific performance, appellees were not entitled to recover compensation for the services rendered by them in regard to the matter. Appellees alleged that the failure to consummate the deal was caused by the fault of appellants; and, if such was the case, and the other necessary facts were shown, then appellees were entitled to recover as brokers, even though the contract may not have been such as would have supported a suit for specific per-

formance—a point upon which we express no opinion. It is true that the plea charging appellants with fault was general, and did not specify in what particular appellants had breached their contract, but it was not excepted to for that reason, and therefore it had its standing in court as a plea fixing responsibility upon appellants for the failure to consummate the deal between them and Crowley.

[8, 10] Also attention is called to the fact that nearly nine pages of appellants' motion for rehearing are devoted to complaints urged against a certain paragraph of the court's charge and a special charge given at the request of appellees, submitting to the jury the issues of fact involved in the case. In appellants' brief no complaint was made of that paragraph of the court's charge, but the special charge referred to was assigned as error, the sole objection being, as shown by the only proposition submitted under that assignment, that the pleadings did not raise any issue as to whether or not it was appellants' fault that the properties were not exchanged, and therefore that issue should not have been submitted to the jury. What we have already said refutes that contention. We have already quoted from appellees' supplemental petition the allegation that if the deal between appellants and Crowley was not consummated, it was on account of appellants' fault, which pleading renders it apparent that that complaint in appellants' brief against the action of the court in giving appellees' special charge No. 2 was not well founded. However, in appellants' motion for rehearing five other objections are urged against the action of the court in giving that charge, and the charge given by the court, upon which no error was assigned. Those objections do not disclose fundamental error; and, if they indicate such error as might have required a reversal of the case if presented in time, they must now be considered as waived on account of the failure of appellants to present them in the time and manner required by law. However, it is proper to say that the controlling questions as to the merits of the case as summarized on the last page of appellants' brief were presented by other assignments complaining of the action of the court in refusing to instruct a verdict for appellants, and in refusing to give certain other requested instructions. At the original hearing those questions, as well as all others presented in appellants' brief, received all the consideration at the hands of this court that was deemed necessary for their proper decision; and a reconsideration of them in the light of appellants' motion for rehearing, in-

stead of producing any doubt upon the subject, has confirmed the belief that our former decision was correct, and therefore the motion for rehearing is overruled.

Motion overruled.

PYE et al. v. CARDWELL. (No. 6864.)
(Court of Civil Appeals of Texas. Galveston.
June 10, 1915.)

APPEAL AND ERROR \Leftrightarrow 833—MOTION FOR REHEARING—FILING.

Where appellee's motion for rehearing contains much abusive and vituperative language referring to appellant, it will be dismissed, with leave to file another.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3214, 3229-3240, 3244-3246; Dec. Dig. \Leftrightarrow 833.]

Appeal from Galveston County Court; Geo. E. Mann, Judge.

Action between B. F. Pye and others against Margaret Cardwell. There was a judgment for the latter, and the former appeal. On appellee's motion for rehearing. Motions stricken, with leave to file a second motion.

Lipscomb & Lipscomb and B. F. Pye, all of Beaumont, and Lewis Fisher, of Galveston, for appellants. Geo. G. Clough and Aubrey Fuller, both of Galveston, for appellee.

PLEASANTS, O. J. Upon reading the motion for rehearing filed by appellee, we find that, along with propositions and arguments of clearness and force which are entitled to a careful consideration, it contains much abusive and vituperative language referring to appellants. This abuse and vilification of appellants is several times repeated in the motion, and we feel constrained to express our condemnation of such language in a paper addressed to and filed in this court.

Whether or not appellants have acted in a way to justify the reflections cast upon them by counsel for appellees is immaterial. We cannot permit the records of this court to be made a channel through which attorneys or parties may cast abuse and vilification upon each other, and our files cannot be used to preserve documents containing violent and abusive language of the kind contained in this motion. It evidences a lack of proper respect for this court for counsel to present to it a motion of this character, and such action might properly be treated and punished as contempt.

We will not do more, however, than to order the motion stricken from the files and returned to its author. Appellee will be granted ten days in which to file a proper motion, and when such motion is filed it will have our careful consideration.

FIRST NAT. BANK OF KNOX CITY et al.
v. LESTER et al. (No. 7124.)

(Court of Civil Appeals of Texas, Galveston.
Oct. 15, 1915. Rehearing Denied
Oct. 28, 1915.)

1. APPEAL AND ERROR ⇐424—WRIT OF ERROR—CITATION—STATUTE.

Under Rev. St. 1911, art. 2095, providing that if a party is a nonresident, or if it appears from the return that he cannot be found in the county of his residence; the citation in error shall direct service on his attorney of record, service upon a party's attorney of record, instead of upon the party who resided in the county where the case was tried, was invalid and did not confer jurisdiction upon the Court of Civil Appeals to pass upon the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2152-2154; Dec. Dig. ⇐424.]

2. APPEAL AND ERROR ⇐627—WRIT OF ERROR—CITATION—SERVICE.

Where judgment was rendered in the county court January 15, 1914, and an original citation in error was attempted to be served January 8, 1915, by delivering a copy to the defendant in error's attorney, and where defendant in error's motion for affirmance of the judgment below, made on June 17, 1915, was refused on the ground that service of the citation in error was invalid, and an alias citation in error was duly served, plaintiff in error's failure to file the record in the Court of Civil Appeals within three months after the original service which he believed to be regular was such laches as to require a dismissal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749, 3126; Dec. Dig. ⇐627.]

Error from Harris County Court at Law; Clark C. Wren, Judge.

Action between the First National Bank of Knox City and others, and J. E. Lester and others. Judgment for Lester and others, and the bank and others bring error. Dismissed.

McMEANS, J. Defendants in error have filed a motion to dismiss the writ of error in this case on account of laches of the plaintiffs in error in filing the record in this court, and we are of the opinion that the motion should be sustained.

[1] The judgment from which the writ of error was prosecuted was rendered in the county court on the 15th day of January, 1914. The petition and bond for writ of error were filed in the trial court by plaintiffs in error on January 7, 1915, and citation in error was issued on the same day; and on the next day it was attempted to be served on the defendants in error, who were residents of Harris county, by delivering a copy of the citation to one of their attorneys of record. The defendants in error being residents of the county in which the case was tried, the service of citation upon their attorneys of record, instead of upon the defendants in error in person, was invalid, and did not confer jurisdiction upon this court to pass upon the appeal. Article 2095, Revised

Statutes 1911; National Cereal Co. v. Earnest, 84 S. W. 1101; Oge v. Froboese, 63 S. W. 654; McCloskey v. McCoy, 89 S. W. 450.

[2] The records of the court show that on June 1, 1915, the defendants in error filed a motion for affirmance of the judgment of the court below, accompanied by a certificate for affirmance; but the motion, on June 17, 1915, was refused for the reason that the service of citation in error was invalid and that therefore this court had not acquired jurisdiction. Afterwards, on June 9, 1915, the plaintiffs in error procured the issuance of an alias citation in error, which was duly served, and thereafter, on the 22d day of June, 1915, filed the record in this court.

The attorney representing the plaintiffs in error, in his affidavit in opposition to the motion to dismiss, says that he did not know of the defective service of citation until June 17th, and that he then procured the issuance of the alias citation on June 19th, and had the same promptly and properly served, and urges his want of knowledge of the defective service as an excuse for the delay in filing the record. It seems to us that his want of knowledge accentuates the laches rather than excuses it.

The original citation was served on January 8, 1915. If it had been properly served, it would have been the duty of the plaintiff in error to file the record on appeal in this court not later than three months thereafter. Plaintiffs in error's counsel believed the citation had been properly served, but notwithstanding this he made no effort to file, and did not file, the record in this court within the time provided by law, but permitted the time to lapse; so that, had the citation been properly served, he would have lost his right of appeal by the delay. On June 1st the motion to affirm on certificate was filed by defendants in error in this court and a copy thereof was promptly served on plaintiffs in error's counsel, but counsel urged no opposition thereto; and it was not until this court refused to affirm on certificate on June 17th that counsel became aware of the defective service and the consequent want of jurisdiction in this court to pass upon the motion.

Had the counsel, believing that the service had been properly made, filed the record on appeal in this court within the time prescribed by law, and the appeal had then been dismissed for want of jurisdiction on account of the defective service, and had he then promptly sued out and caused to be properly served an alias citation, and brought the record to this court within the prescribed time, we think that a sufficient showing of diligence could have been made; but to allow the time to elapse within which the record could be filed in this court, believing, as he did, that the service was regular, and not

knowing that it was not regular until more than two months after the time of filing had elapsed, seems to us to evidence such a want of diligence in prosecuting the writ of error as to require a dismissal of the appeal on motion of the parties adversely interested.

Dismissed.

MOSSOP v. ZAPP. (No. 7159.)

(Court of Civil Appeals of Texas. Galveston. Nov. 4, 1915.)

APPEAL AND ERROR \Leftrightarrow 767 — BRIEFS — STRIKING OUT — ABUSE OF LOWER COURT AND OPPOSING COUNSEL.

A brief of appellant, alleging that the decree took his property and gave it to plaintiff as a matter of charity, unauthorized by any evidence, or by any principle of law or equity, that it amounted to nothing more or less than judicial robbery, that appellant, who was willing to let appellee rescind the contract, was prevented from doing so by the advice of her counsel contrary to her own interest induced by having the trial court give him a verdict for his foolish advice, and a motion by appellee referring to opposing counsel in abusive and vituperative language, would be stricken from the files on the court's own motion, and appellant allowed 20 days to file a brief from which the objectionable language was expunged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3102; Dec. Dig. \Leftrightarrow 767.]

Error to District Court, Fayette County; Frank S. Roberts, Judge.

Action by Mrs. Isolda Zapp against Y. F. Mossop. Judgment for plaintiff, and defendant brings error. Brief of appellant and motion of appellee to strike it from the files both stricken on the court's own motion, and appellant allowed 20 days within which to file another brief.

John T. Duncan, of La Grange, for plaintiff in error. C. D. Krause, of La Grange, for defendant in error.

PLEASANTS, C. J. Appellee has filed a motion asking that the brief of appellant be stricken from the files of this court because of the abuse and vilification therein contained of the trial judge and of counsel for appellee.

The following excerpts from appellant's brief copied in the motion are, upon examination, found to be correct copies:

"Because the decree of the court * * * was an indirect attempt on the part of the court to take the property of the defendant and give it to plaintiff as a matter of charity."

"The plaintiff in error, Mossop, does not feel that the trial court had the right to run his hands into his pockets and take his money and give it to the defendant in error for her to compensate her counsel for giving the advice that she received."

"The judgment of the court in taking the property of plaintiff in error and giving it to the defendant in error was an act of charity to say the least of it, on the part of the court, which was unauthorized by any evidence in the case and by any principle of law or of equity known to our jurisprudence. If the court had wanted to have done an act of kindness for the plaintiff, he would have denied to the plaintiff

in the court below any relief whatever, but would have referred her to her contract which she had made and would have advised her that she was fully protected under that, and that none of her rights had been invaded, and no wrong had been done to her directly or indirectly, either legal or equitable, of which she could complain and she would have been dismissed out of court and adjudged to pay the costs of the proceedings. But inasmuch as the defendant was willing to let her rescind the contract, however beneficial it was to her and however burdensome it was to him, then the court should have stopped there; but for the court to have gone further and put its hands in the plaintiff in error's pocket and take \$150.00 of plaintiff in error's money and give it to the defendant in error, this was a little more than ordinary humanity could stand. We say that this act of taking plaintiff in error's money and giving it to the defendant in error without any just cause or without any legal or equitable ground is nothing more nor less than judicial robbery. * * *

"This he (plaintiff in error) was prevented from doing by advice of counsel (referring to counsel for defendant in error) who, according to the undisputed evidence in this case, had advised his client contrary to her own interest, and it appears that the inducement that he had in doing this is to have the trial court to give him \$300 for the foolish advice which he had given his client."

"Then an able counselor (referring to counsel for defendant in error) appears upon the scene, and by advice not based upon an investigation she is induced to rescind or recede from this agreement."

"We are willing to concede that the advice which Mrs. Zapp's lawyer gave her was far more beneficial to Mr. Mossop than it was to Mrs. Zapp. It certainly saved Mr. Mossop over \$2,000.00. It certainly cost Mrs. Zapp over \$2,000.00."

"The plaintiff in error alleged that Mrs. Zapp's attorney was willing to recommend to Mrs. Zapp the purchase of the bonds if plaintiff in error would pay him a fee of \$250.00, which plaintiff in error alleged that he refused to do. * * *

"On special exceptions of defendant in error this allegation was expunged under the order of the court. The record does not show this order of the court, but the defendant's answer shows that the allegation was erased. For this reason the court refused to hear any evidence on this issue, and hence no evidence was introduced in support of it."

That this language is improper and could serve no useful purpose in fairly presenting to this court the issues raised by this appeal must be fully recognized by the distinguished lawyer who signs appellant's brief. The greatest latitude should be allowed counsel in presenting their arguments in an appellate court; but whenever they allow their personal animosities to control them, and indulge in abuse or vilification of opposing counsel, or speak disrespectfully of the trial court, they exceed their rights and evidence a want of proper respect for the court in which such argument is presented. In a recent case in which we, upon our own motion, struck from the files of this court a motion for rehearing because it contained abusive and vituperative language in regard to opposing counsel, we said:

"We cannot permit the records of this court to be made a channel through which attorneys

or parties may cast abuse and vilification upon each other, and our files cannot be used to preserve documents containing violent and abusive language of the kind contained in this motion. It evidences a lack of proper respect for this court for counsel to present to it a motion of this character, and such action might properly be treated and punished as contempt."

The motion filed by appellee in its abusive and vituperative language in reference to opposing counsel is on a par with the foregoing excerpts from appellant's brief, and we will permit neither of them to remain on file in this court. Attorneys who practice in this court must understand that we will never permit an argument to be made or filed in this court which, by its abuse of the trial court or of opposing counsel, shows a want of proper respect for the dignity of our courts, the agency created and commissioned by the people of the state to interpret and enforce their sovereign will as expressed in their laws, and all the power of this court will be exercised to secure a proper recognition and observance by attorneys of the rules of decorum necessary to an orderly and dignified administration of law by the courts.

The brief of appellant and the motion of appellee will both be stricken from the files of this court and returned to their respective authors, on the court's own motion. Appellant will be allowed 20 days in which to file a brief from which the objectionable language before quoted has been expunged.

INTERNATIONAL & G. N. RY. CO. v. MUDD. (No. 5517.)

(Court of Civil Appeals of Texas. San Antonio. Oct. 27, 1915.)

TRIAL \Leftrightarrow 403—DELAY IN FILING FINDINGS—EFFECT.

Where the trial court, upon timely request, failed to file findings of fact within the 10 days after expiration of the term allowed by Vernon's Sayles' Ann. Civ. St. 1914, art. 2075, his subsequently filed findings of fact and conclusions of law were a nullity, and could not be considered by the Court of Civil Appeals.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 913, 954-956; Dec. Dig. \Leftrightarrow 403.]

Appeal from Frio County Court; S. T. Dowe, Judge.

Action by G. H. Mudd against the International & Great Northern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for trial.

Cobbs, Eskridge & Cobbs, of San Antonio, and Wilson, Dabney & King, of Houston, for appellant. Magus Smith, of Pearsall, for appellee.

CARL, J. Appellee recovered the judgment against appellant for damages to a shipment of stock from Dilley to Ft. Worth.

The first assignment of error complains that the court erred in failing to file findings of fact and conclusions of law, after timely request, within the time prescribed by law.

The judgment was on December 9, 1914, and the transcript shows that the term of court expired on the 12th day of December, 1914. The court filed findings of fact on January 5, 1915, or more than 10 days after the adjournment of said term. Article 2075, Vernon's Sayles' Statutes, provides that such findings of fact and conclusions of law shall be filed within 10 days after the adjournment of court. A bill of exceptions was duly reserved to the failure of the court so to file such findings of fact and conclusions of law as prescribed by statute, and there is no statement of facts in the record. This assignment must be sustained, because it has often been held in this state that such findings of fact and conclusions of law, filed more than 10 days after the expiration of the term of court, are a nullity and cannot be considered by the Court of Appeals. *Wandry v. Williams*, 103 Tex. 91, 124 S. W. 85; *Emery v. Barfield*, 156 S. W. 313; *Bradford v. Knowles*, 11 Tex. Civ. App. 572, 33 S. W. 149; *State ex rel. Sutherland v. Pease*, 147 S. W. 649; *Guadalupe County v. Poth*, 153 S. W. 919; *M., K. & T. Ry. v. Cameron & Co.*, 136 S. W. 74; *Bliss v. San Antonio School Board*, 173 S. W. 1178.

Having sustained this assignment, we would not be justified in attempting to pass upon the other assignments of error; and, for that matter, the things therein complained of will doubtless not arise upon another trial.

The judgment of the trial court is reversed, and the cause remanded for trial.

BONNER OIL CO. v. GAINES. (No. 6962)*

(Court of Civil Appeals of Texas. Galveston. June 16, 1915. On Motion for Rehearing, Oct. 21, 1915.)

1. PRINCIPAL AND SURETY \Leftrightarrow 35—CREATION OF RELATION—CONSIDERATION—EXTENSION OF PAST-DUE INDEBTEDNESS.

A creditor's extension of the payment of a past-due indebtedness from a corporation upon receiving its 60 or 90 day notes would support a contract of suretyship evidenced by the indorsement of its president.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 68; Dec. Dig. \Leftrightarrow 35.]

2. PAYMENT \Leftrightarrow 7—TIME—EXTENSION—PAST-DUE INDEBTEDNESS.

A creditor, extending a past-due indebtedness, by accepting the 60 and 90 day notes of a debtor conclusively bound himself not to collect the debt until the maturity of the notes.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 11; Dec. Dig. \Leftrightarrow 7.]

On Motion for Rehearing.

3. APPEAL AND ERROR \Leftrightarrow 493—RECORD—SHOWING JURISDICTION.

A default judgment against a defendant will be reversed where the record fails to show service of citation, other than by the recital thereof in the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2282-2284; Dec. Dig. \Leftrightarrow 493.]

4. APPEAL AND ERROR \Leftrightarrow 880—PARTIES ENTITLED TO ALLEGE ERROR.

In an action against a corporation on its notes and against its president as surety thereon, where the surety's pleading did not seek any relief against the corporation by reason of his suretyship, and where the corporation did not appeal from a default judgment against it reversible on the ground that the record failed to show service against it, the surety could not raise the question of the want of a valid judgment against the corporation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3584-3590; Dec. Dig. \Leftrightarrow 880.]

5. APPEAL AND ERROR \Leftrightarrow 724—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Under Rev. St. 1911, art. 1612, requiring the plaintiff in error to file in the court below all assignments of error distinctly specifying the grounds on which he relies, and declaring that all other errors shall be waived, assignments sufficient to direct the appellate court's attention to the errors complained of were sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997-3001, 3022; Dec. Dig. \Leftrightarrow 724.]

6. PRINCIPAL AND SURETY \Leftrightarrow 163—JUDGMENT—RELIEF TO SURETY—PLEADING.

In an action against a corporation on its notes and against its president as surety thereon, where the surety sought no relief over against the corporation, a judgment against the surety was not required to be so framed as to subject the property of the principal to its satisfaction before proceeding against the surety for its collection.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 446-454; Dec. Dig. \Leftrightarrow 163.]

Error from District Court, Harris County; Wm. Masterson, Judge.

Action by the Bonner Oil Company against the Lake Austin Canal Company and John W. Gaines. Judgment for plaintiff against the Canal Company and in favor of defendant Gaines, and plaintiff brings error. Reversed, and judgment rendered for plaintiff.

Hunt, Myer & Teagle and Rodman S. Cosby, all of Houston, for plaintiff in error. Gaines & Corbett, of Bay City, and Cole & Cole, of Houston, for defendant in error.

McMEANS, J. The Bonner Oil Company brought this suit against the Lake Austin Canal Company, a corporation, and John W. Gaines, on two promissory notes alleged to have been executed to it by the defendants, each for the sum of \$445.20, dated February 3, 1914, bearing 8 per cent. per annum interest and maturing 60 and 90 days after date, respectively. The defendant Lake Austin Canal Company failed to appear and answer. The defendant Gaines answered, pleading want of consideration on his part for the execution of the notes which he alleged were given for a debt due by the canal company to plaintiff, and that he was not interested in such debt except as a stockholder in the defendant canal company. Plaintiff, in reply, pleaded that the execution of the notes by defendant Gaines was done for the purpose of securing an extension of

time for the payment of the debt due by the canal company, and that therefore there was a valid consideration. To this the defendant Gaines replied that there was no specific agreement for the extension of time for the payment of the debt due by the canal company at the time he signed the notes, and that the plaintiff never requested him to sign the notes, and that the same were signed by him without request and without consideration. He also pleaded that the purpose of executing the notes was to settle all controversy as to the amount and validity of the debt due plaintiff by the canal company, and not for the purpose of securing an extension of time, or to limit the time within which plaintiff could sue on the debt. The case was tried before the court without a jury and resulted in a judgment by default against the defendant Lake Austin Canal Company for \$990.40, together with \$49.38 interest and \$100.93 attorneys' fees, aggregating \$1,143.67, and in favor of defendant John W. Gaines. From the judgment in favor of defendant Gaines, the plaintiff has prosecuted a writ of error to this court.

Appellant by several assignments of error complains, in different ways, of the action of the court in rendering judgment in favor of defendant Gaines; the gravamen of the complaint being that the undisputed evidence shows that the act of said Gaines in signing the notes sued upon was based on a sufficient consideration to render his promise to pay them a binding obligation upon his part.

The following is a statement of the material undisputed facts as shown by the record: The Lake Austin Canal Company was a corporation duly chartered under the laws of Texas, and at the time at which plaintiff's cause of action arose was, and so far as the record shows is now, a going concern. Its capital stock was \$18,000, and was owned in equal amounts by defendant John W. Gaines, his son, C. M. Gaines, and Ed Savage. John W. Gaines was its president, and Ed Savage its secretary and general manager. The Bonner Oil Company, plaintiff, was engaged in selling lubricating oils; and in endeavoring to make sales to the Lake Austin Canal Company, its agent, Mr. J. H. Bland, called upon Mr. Savage and solicited him to buy, and was referred by Savage to Mr. Gaines, and after talking the matter over with Mr. Gaines the latter told the agent to go back to Mr. Savage and tell him to order what he wanted. Savage thereafter ordered from time to time oil in such quantities as he desired, the value of which amounted to \$890.40, no part of which was ever paid. Afterwards the Bonner Oil Company began trying to collect this sum, and to this end its said agent, Bland, went to Bay City, where the principal office of the corporation was located, and where the defendant Gaines lived, to see Mr. Gaines with ref-

erence to payment; but Mr. Gaines was away, and Bland did not then see him. Later he again went to Bay City for the purpose of making a collection, his purpose being to either collect the amount due, or a part of it, or to close the account with notes, and carried with him blank notes to be filled out and executed, in the event the amount was not paid. He called upon Mr. Gaines at his office, and the latter, after Mr. Bland had stated that his purpose in calling was to get some money on the debt, stated to Bland that the corporation had not sold its rice at that time, and that they had had bad luck, whereupon Bland presented the blank notes which were filled out for equal amounts, aggregating the amount of the debt, and were signed by the corporation by Mr. Gaines as its president and also signed by him in his individual capacity, and as thus signed were handed to Mr. Bland. Bland testified that when he handed the notes to Gaines for execution he said to him, in substance:

"Mr. Gaines, we would be glad to have the notes, because they will help us out with the bank; we might be able to handle the notes at the bank, and get the money, and if we can accommodate you, we will do it in that way."

He further testified that, when Gaines returned the notes to him after signing them, he stated:

"Mr. Bland, I am doing this for you, I don't for the company; I don't often do this, or this is something I haven't often done, or something to that effect, and I thanked him for it, and said I appreciated it very much that he did do it."

He further testified:

"If Mr. Gaines had simply given me two notes of the corporation, and had not executed the notes himself, I would not have accepted them."

He did not request Mr. Gaines to sign the notes individually, nor did he tell him that he would not accept the notes of the corporation without his individual signature.

Mr. Gaines, testifying as to the circumstances under which he signed the notes, stated:

"Mr. Bland came into the office and told me, as he stated, that the company needed the notes, or could use the notes, or something to that effect, and they asked to close the account with a note, or two notes, divided into two equal amounts, and make them payable 60 and 90 days after date, and after discussing it a little while we agreed to that. The purpose, as stated by Mr. Bland, was just to enable them to use the paper as collateral at the bank, that they might do it; he didn't say they would do it; he said they might need them, and that if they did they could use them to hypothecate them with the bank to obtain advances. That was the sole reason assigned for wanting the account settled by notes."

He further testified:

"I have been puzzled several times myself just why I did sign the paper at the time, to tell you the honest truth, and I couldn't tell you to this day why I did it. I don't know why I indorsed that paper. * * * It is a mystery to me."

After the note, which matured 60 days after its date, fell due, defendant Gaines

wrote to the plaintiff asking for a further extension of time in which to pay the same. In this letter, which is dated April 27, 1914, he says:

"In this connection I wish to say that if you will do so (extend time of payment until fall) the Lake Austin Canal Company will very much appreciate you carrying this account over until fall, as it is practically impossible for them to pay it at this time, and get through this season's work. I will re-indorse this paper, payable in the fall, and if you will do as above suggested, it will be a great accommodation to me and to the canal company."

It is undisputed that the debt was due at the time the notes were executed, and that the time of payment was extended 60 and 90 days by the giving of the notes.

Under the facts as above stated, the court held that the signing of the notes by John W. Gaines was without consideration, and upon this view rendered judgment in his favor; and in so doing, we think, committed error.

[1] When Mr. Bland accepted the notes by which the time of payment of the debt was extended 60 and 90 days, Mr. Gaines had signed his name thereto as surety. Mr. Bland did not request him to become surety upon the notes in so many words, but that he expected Mr. Gaines to sign them is shown by his uncontradicted testimony that he would not have accepted them had not Mr. Gaines so signed them. The corporation desired further time for payment, and hence was willing to execute the notes which bore 8 per cent. interest in lieu of the debt which drew less interest, if any at all. Mr. Gaines, for his corporation, desired that the extension be granted, and was willing to and did sign his name to the notes which effectuated the extension. That he considered himself bound as a surety is conclusively shown, we think, by his letter written after the note first maturing fell due, in which he requested a further extension of time of payment until fall and agreeing to re-indorse the note if the corporation would grant such extension.

[2] It seems to be well settled that the extension of time of past-due indebtedness will support a contract of suretyship. The plaintiff made no express promise to Gaines to forbear to sue, or to extend the time of payment. The negotiations were brief, consisting of a demand upon Gaines, as president of the debtor corporation, for payment of a past-due debt, a statement by him of the inability of the corporation to pay it and the reason why, the production of the notes and their execution by Gaines for his principal and himself, and the return to and acceptance thereof by Bland. The execution of the notes amounted to an extension of time by the plaintiff, but the notes would not have been accepted and the time extended if Mr. Gaines had not signed them individually. By accepting the notes the plaintiff conclusively bound itself not to collect

the debt until the maturity of the notes. It parted with its absolute right to sue and collect at once. *Hannay v. Moody*, 31 Tex. Civ. App. 88, 71 S. W. 325.

In 2 Para. Con. (6th Ed.) p. 5, it is said:

"If the original debt or obligation is already incurred or undertaken previous to the collateral undertaking, then there must be a new and distinct consideration to sustain the guaranty. * * * It is not necessary that any consideration pass from the one receiving the guaranty to the party giving it. If the party for whom the guaranty is given receive a benefit, or the party to whom it is given receive an injury, in consequence of the guaranty, and as its inducement, this is a sufficient consideration."

So in 1 Para. Cont., p. 443, it is said a waiver of any legal or equitable right is a sufficient consideration for a promise.

In *Hannay v. Moody*, supra, a case quite similar in many of its material facts to the present, this court said:

"By the acceptance of the notes, which, by their terms, were not payable until the lapse of 90 days, *Moody & Co.* effectually bound themselves not to collect it earlier, and thus abandoned their legal right to proceed at once against their debtor. The inference from these facts is a conclusion of law which they could not be heard to question except on the ground of fraud or mistake. That they might have proceeded in attachment sooner than the due date, if sufficient grounds existed, can make no difference. They parted with their absolute right to sue and collect at once, and had left to them the right to sue only under extraordinary conditions."

And it was held that the contract of the sureties, who signed the notes there sued upon, was binding upon them, although the only consideration therefor was the extension of time of payment of the past-due indebtedness of their principal.

In *Thompson v. Gray*, 63 Me. 230, cited in *Hannay v. Moody*, after holding that a promissory note given by one person for the antecedent debt of another is not void for want of consideration, if it is made payable at a future day, says:

"Such a note necessarily operates as a suspension of the right of the creditor to enforce payment of his debt till the note matures; and it is a rule of law too well settled to require the citation of authorities in support of it that such a suspension of the right of the creditor to enforce payment of his debt is a sufficient consideration for the promise of a third person to pay it. It is not necessary that there should be an express agreement for delay. The taking of a new security payable at a future day, by operation of law, and without any special agreement to that effect, imposes upon the creditor the duty of waiting for his pay till the new security matures."

To the same effect are *York v. Pearson*, 63 Me. 587; *Fulton v. Loughlin*, 118 Ind. 289, 20 N. E. 796; and *Bank v. Bridgers*, 98 N. C. 67, 3 S. E. 826, 2 Am. St. Rep. 317.

In *Fulton v. Loughlin*, supra, it is said:

"But a promissory note negotiable according to the law merchant, is not void for want of consideration, if it be given for the antecedent debt of a third person and be made payable at a future day. Such a note operates to satisfy the debt, prima facie, or at least to suspend the right of the creditor to enforce payment until the note matures, and an express or implied

agreement to delay the collection of a precedent debt is a sufficient consideration to support the promise of a third person."

From the facts stated and the authorities quoted it follows, we think, that John W. Gaines, by executing the notes for the debt of the Lake Austin Canal Company, bound himself, upon a sufficient consideration, to pay them, and therefore that the judgment in his favor was erroneous, and should be set aside, and that judgment should be here rendered in favor of the Bonner Oil Company against him on said notes for the principal, interest, and attorneys' fees, and it has been so ordered.

Reversed and rendered.

On Motion for Rehearing.

In his motion for rehearing, defendant in error, Gaines, contends that the action of this court in reversing the judgment of the court below in his favor, and in here rendering judgment against him, was erroneous for the reason that the record does not show that the trial court had jurisdiction to render judgment against his codefendant, the Lake Austin Canal Company; and, the judgment of this court being against him as a surety on the note of the canal company, no judgment could be rendered against him as a surety without a valid judgment against the canal company to support it. His contention that the record fails to show that the trial court had jurisdiction to render judgment against the canal company is based upon the fact that judgment was rendered against said company by default, and the record fails to disclose that the canal company had been served with citation, other than by the recital of that fact in the judgment itself.

[3] If, in these circumstances, the Lake Austin Canal Company had appealed, we would have felt, under the rules laid down in the following cases, that it was our duty to reverse the judgment against it: *Daugherty v. Powell*, 139 S. W. 625; *McMickle v. Texarkana Nat. Bank*, 4 Tex. Civ. App. 210, 23 S. W. 428; *Glasscock v. Barnard*, 125 S. W. 615; *Mayhew v. Harrell*, 57 Tex. Civ. App. 509, 122 S. W. 957; *Wheeler v. Phillips*, 22 S. W. 543.

[4] But the Lake Austin Canal Company did not appeal from the judgment against it, and Mr. Gaines not having, in his pleadings, sought any relief against the canal company by reason of his suretyship, the question raised cannot be presented for the canal company by its codefendant, Gaines, and is not therefore properly before us for review.

[5] He further contends that this court erred in considering the assignments of error presented by the plaintiff in error, for the reason that such assignments do not present, for the consideration of this court, the questions considered and determined by it. A similar contention was raised by the defendant in error in his brief and considered by the court in passing upon the case, and it was our conclusion then, and is now, that the ob-

jections to the assignments of error were untenable. The assignments are not as clear as they might be, but we then thought, and now think, they are sufficient to direct our attention to the errors complained of, and under article 1612, Revised Statutes, 1911, this was sufficient.

[6] Defendant in error further contends that, this court having rendered judgment against him as a surety for the canal company, the judgment should have been so framed as to first subject the property of the canal company to its satisfaction before proceeding against him for its collection. The answer to this is that no such relief was sought by his pleadings in the lower court, nor by him in his brief in this court.

Upon the merits of the case we will not add to what was said in our main opinion, other than that a further investigation has satisfied us of the correctness of the conclusions there stated; and in further support of the opinion cite the recent case of *People's State Bank v. Fleming-Morton Co.*, 160 S. W. 648.

The motion is overruled.

BANKS v. MIXON. (No. 5508.)

(Court of Civil Appeals of Texas. San Antonio.
Oct. 13, 1915. Rehearing Denied
Nov. 10, 1915.)

1. TRIAL ~~§~~349 — REFUSAL TO SUBMIT ON SPECIAL ISSUES.

Where the court would have been justified in peremptorily instructing the jury to return a verdict for the plaintiff, there was no error in its action in refusing defendant's request to submit the case on special issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 823-827; Dec. Dig. ~~§~~349.]

2. BILLS AND NOTES ~~§~~537 — LIABILITY ON ACCOMMODATION SURETY.

Where, in an action on a note in evidence, defendant admitted its execution, but alleged that he was an accommodation surety, and that the plaintiff had a mortgage on personalty of the maker to secure the note's payment, neither party seeking to have the mortgage foreclosed, but both asserting it was beyond their reach, no affirmative relief being asked by the defendant by way of being subrogated to any of plaintiff's rights, peremptory instruction to return a verdict for plaintiff was proper.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1893; Dec. Dig. ~~§~~537.]

3. APPEAL AND ERROR ~~§~~490—BILL OF EXCEPTIONS—SURREMISSION ON SPECIAL ISSUES—TIME OF REQUEST.

A bill of exceptions to the refusal of the trial court to submit the case on special issues should show at what point in the trial the request was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. ~~§~~490.]

Appeal from Frio County Court; S. T. Dowe, Judge.

Action by George K. Mixon against G. Longorio and T. H. Banks. Judgment for plaintiff, against Banks, and the latter appeals. Affirmed.

Kercheville & Dewald, of Devine, for appellant. Magus Smith, of Pearsall, for appellee.

CARL, J. Appellee, Geo. K. Mixon, sued one G. Longorio and T. H. Banks on a joint and several promissory note for \$243.90 principal, and for 10 per cent. interest per annum from September 1, 1913, and for 10 per cent. attorney's fees. The suit against Longorio was dismissed upon allegations that he was notoriously insolvent, and his residence unknown, he being a fugitive from justice, and judgment was prayed for as against T. H. Banks alone.

Banks admitted the execution of the note, but alleged that he was an accommodation surety, and that Mixon had a mortgage on certain personal property of Longorio to secure the payment of the note, but had negligently failed to reduce the same to possession, and had permitted said security to be lost and placed "where they cannot now be reduced to possession of the plaintiff, nor to the possession of said defendant T. H. Banks in case of his subrogation to the debt of his principal." The defendant Banks, in his pleadings, offered to pay the debt less the value of the mortgaged property. No affirmative relief is asked by Banks.

The judgment was for the full amount of the note, interest, and attorney's fees against Banks, and he has appealed.

[1-3] The first assignment of error complains of the action of the court in refusing to submit the case on special issues. There was no error in this respect, because the court would have been justified in peremptorily instructing the jury to return a verdict for the plaintiff. Neither party sought to have the mortgage foreclosed, but, on the contrary, both assert that it was beyond their reach. No affirmative relief is asked by Banks in the way of being subrogated to any of Mixon's rights, and the note was in evidence, the execution of which was admitted by him. And, by examining the transcript and bill of exceptions, it does not appear that the request to submit the case on special issues was made before the main charge was given to the jury. *G., H. & S. A. Ry. Co. v. Cody*, 92 Tex. 632, 51 S. W. 329. In the case cited Chief Justice Gaines says:

"A proper bill of exceptions would have shown at what point in the progress of the trial the request was made."

There is no necessity of commenting on the other assignments; for we have examined same, and believe them to be untenable. We have also examined the statement of facts, and find nothing therein, nor in the pleadings, which would make it necessary to even submit this cause to a jury.

Therefore all assignments are overruled, and the judgment is in all things affirmed.

PECOS & N. T. RY. CO. et al. v. WINKLER.
(No. 819.)

(Court of Civil Appeals of Texas. Amarillo.
Oct. 26, 1915.)

1. MASTER AND SERVANT ⇨278, 281—INJURIES TO SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence in an employe's action for injuries held sufficient to support findings that defendant negligently failed to provide a reasonably safe place for plaintiff to work, and that plaintiff was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977, 987-996; Dec. Dig. ⇨278, 281.]

2. MASTER AND SERVANT ⇨252—INJURIES TO SERVANTS—NOTICE OF CLAIM—WAIVER.

Where plaintiff, in obtaining employment, signed an agreement that failure to give notice to the employer within 30 days after injury should bar his action for damages thereon, and after he was injured the employer's agent took a written statement of the claim of the plaintiff, taking the statement waived the requirement of written notice.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 806; Dec. Dig. ⇨252.]

3. MASTER AND SERVANT ⇨252—CONTRACT OF EMPLOYMENT—LIMITATION OF LIABILITY.

Under Rev. St. 1911, art. 5714, providing that a stipulation in a contract requiring notice as a condition precedent to suit for damages for personal injuries must be reasonable, and making any stipulation for notice in less than 90 days void, and making void every stipulation between a railway and its employe for such notice in cases of injuries caused by negligence, a contract of employment of the plaintiff as a switchman for defendant requiring notice to be given in 30 days will not defeat plaintiff's action, whether notice is given or not.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 806; Dec. Dig. ⇨252.]

4. MASTER AND SERVANT ⇨203 — NEGLIGENCE ⇨101—INJURIES TO SERVANT—ASSUMED RISK—CONTRIBUTORY NEGLIGENCE—EFFECT.

Where a servant assumes a risk, it will defeat recovery for injuries caused thereby in any sum, but his contributory negligence on his part merely diminishes his recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. ⇨203; Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. ⇨101.]

5. MASTER AND SERVANT ⇨291—INJURIES TO SERVANT—INSTRUCTIONS—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

In a switchman's action for injuries, an instruction that if, in going in front of moving cars, plaintiff knew the danger, and that it was not required of him in the performance of his duty, and if he was negligent, he was guilty of contributory negligence, is erroneous for attempting to combine contributory negligence and assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. ⇨291.]

6. MASTER AND SERVANT ⇨224—INJURIES TO SERVANTS—ASSUMPTION OF RISK.

Where the servant is injured while at work, but in doing an unnecessary act of his own volition, the master is not liable; it being an assumption of the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 654; Dec. Dig. ⇨224.]

7. NEGLIGENCE ⇨101—INJURIES TO SERVANT—COMPARATIVE NEGLIGENCE.

In order to diminish recovery by the servant on account of contributory negligence, the employer need not show that the servant knew of the danger because of which he was injured, but it is sufficient that at the time he did not exercise due care.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. ⇨101.]

8. APPEAL AND ERROR ⇨1140 — MEDICAL CARE—AMOUNT—REMISSION.

Where a verdict allows an excessive amount for medical attendance, the error will be cured by plaintiff's filing a remittitur so as to conform the amount to that supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4476; Dec. Dig. ⇨1140.]

9. TRIAL ⇨260—REQUESTED INSTRUCTIONS—NECESSITY.

It is not error to refuse a requested instruction substantially covered by the charge of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. ⇨260.]

10. APPEAL AND ERROR ⇨730—MATTERS REVIEWABLE—RECORD.

Where an assignment of error fails to give the substance of the requested charge on the refusal of which it is based, and the statement thereunder does not set it out nor refer to the page of the record where it may be found, the court will regard it as waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3013-3016; Dec. Dig. ⇨730.]

11. TRIAL ⇨250—INSTRUCTIONS—CONFORMITY TO PLEADINGS AND EVIDENCE.

Refusal to instruct upon an issue not raised by the pleadings or evidence is proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. ⇨250.]

12. MASTER AND SERVANT ⇨289—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a switchman seeks recovery for personal injuries received when he went between cars to make a coupling, the question whether the coupler could have been operated from the side of the cars without going between them so as to make the plaintiff guilty of contributory negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. ⇨289.]

13. APPEAL AND ERROR ⇨1068—HARMLESS ERROR—INSTRUCTIONS.

The refusal of a requested instruction that, if plaintiff switchman was guilty of negligence in going in front of a car to make a coupling, and defendant railway company was not guilty of negligence, the jury should find for defendant, presents only harmless error, where the verdict shows that the jury found the defendant guilty of negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. ⇨1068.]

14. APPEAL AND ERROR ⇨1051—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where plaintiff, an experienced switchman, injured in coupling cars, was permitted to testify that he "had to" get down between the cars to make a coupling, the admission of such testimony, if error, was harmless; it already having been shown that the coupler would not

open the knuckle, so that the opinion evidence given was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. ¶ 1051.]

15. MASTER AND SERVANT ¶274—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—EVIDENCE—CUSTOM.

In the absence of a specific rule forbidding employes to make couplings by going between the cars, evidence of the custom of employes in that regard is admissible to rebut contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. ¶ 274.]

16. WITNESSES ¶396—CONFLICTING STATEMENTS—EXPLANATION.

Where the agent of defendant railway company by false and fraudulent representations procured a statement from plaintiff, injured while employed by defendant, that he had entirely recovered from all injuries received, and the statement is introduced on trial to contradict the plaintiff as to his injuries, evidence of plaintiff as to the circumstances surrounding the giving of the statement and as to its falsity is admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1261-1264; Dec. Dig. ¶ 396.]

17. WITNESSES ¶414—CORROBORATION—EVIDENCE—ADMISSIBILITY.

A report of defendant railway company's investigator on the condition of a car coupling, in operating which plaintiff was injured, is not admissible to corroborate the testimony of the investigator, unless made before motive for concealing defects arose.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1287, 1288; Dec. Dig. ¶ 414.]

18. EVIDENCE ¶359 — EXPERTS — PHOTOGRAPH.

Evidence of a physician attending plaintiff switchman injured while in the employ of the defendant, as explained by means of X-ray photographs of the plaintiff's anatomy after injury, is admissible, if preliminary evidence has established the correctness of the photographs.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1509-1512; Dec. Dig. ¶ 359.]

Appeal from District Court, Potter County; J. N. Browning, Judge.

Action by Frank Winkler against the Pecos & Northern Texas Railway Company and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Terry, Cavin & Mills, of Galveston, and Madden, Trulove, Ryburn & Pipkin, of Amarillo, for appellants. J. H. Synnott, of Dallas, and R. E. Underwood, of Amarillo, for appellee.

HUFF, C. J. Winkler sued appellants, railway companies, for damages occasioned by injuries received by him, alleged to have been inflicted on him while in the employment of appellants, on the 2d day of April, 1913, in and about the switchyards of appellants in Amarillo. The jury returned a verdict in his favor for \$6,000.

The negligence alleged is as follows:

"That about the 1st day of April, 1913, the defendants, their agents and servants, negligently dug, bored, and excavated a large and deep hole about 12 inches in diameter and about 18

inches deep near the center of said yards and plaintiff's aforesaid place of work, between the end of two ties and just on the outside and right against the rail of one of the said many tracks or switches over which it was plaintiff's duty, as aforesaid, to assist in the operation of defendants' trains, and thereafter negligently and carelessly allowed and permitted said hole to remain and refused to fill, close, or remove the same during the entire day of April 2, 1913."

He further alleged, while performing his duty, he stepped into the hole above set out and fell in front of a train of cars being switched, which ran over and injured him; that the train of cars was being switched on track No. 4, to be coupled onto other cars standing on said track, and that he rode on the north front car of the train, which was being switched, for the purpose of making the coupling; that the knuckle of the front car was defective, in that, when the pin was raised, the knuckle would not open as the car approached the stationary cars, the knuckle remained closed, and in order to make the coupling it was necessary that the knuckle on said car should be opened by hand, and it was his duty, under such circumstances, to descend from the moving car and overtake the knuckle and open the same before it came in contact with the standing cars, and as the moving cars came near the hole, and after appellee had endeavored to open the knuckle with the lever of the coupling, and could not do so, he descended from the car and stepped ahead of same and between the rails to open the knuckle, and as he turned around the end of the car for the purpose of stepping between the rails ahead of the moving car, his foot slipped and slid into said hole, which caused him to fall in front of the car and between the rails; and that he was thereby injured, etc.

The defendants denied specifically the acts of negligence set out, and that the accident was not due to any negligence upon the part of the defendants in the particulars alleged, but was due to the negligence of appellee in going in front of the car, when there was no necessity or duty requiring him to do so, pleading contributory negligence, assumed risk, etc.

[1] The trial court submitted to the jury whether the appellants were negligent in digging a hole at the place it did and whether it was negligent in leaving it there unfilled and level, and whether such negligence was the proximate cause of appellee's injury. The evidence will authorize the inference that some engine at some time previous to appellee's fall stopped at the point where the hole was, and that it was made by water from the overflow pipe attached to the engine, and that the hole was something near the size described in the petition; that it had been made previous to the day on which appellee was injured, and left in that condition, rendering it dangerous and unsafe for employes required to work in the yards switching cars

and trains. It will authorize the inference also that the employé whose duty it was to keep clear the track at that point either saw the hole the morning previous to the fall, and negligently failed to fill it, as was his duty, or that he negligently failed to discover it, which he could have done by proper care, and will authorize the inference that appellee stepped in this hole, and that it caused him to fall in front of the cars, and that some three or four passed over him, dragging him and injuring him in several portions of his body, as alleged, and that this was negligence on the part of appellants which proximately caused the injury to appellee. We therefore would not, under the facts of this case, be warranted in finding that there was no evidence, as a matter of law, warranting the jury to find that appellants negligently failed to provide a reasonably safe place in which for appellee to work. *M. & T. Ry. Co. v. Wise* (Civ. App.) 106 S. W. 465. This case was affirmed by the Supreme Court, 101 Tex. 459, 109 S. W. 112; *Railway Co. v. Manns*, 37 Tex. Civ. App. 356, 84 S. W. 254; *Railway Co. v. Toliver*, 37 Tex. Civ. App. 437, 84 S. W. 376; *Railway Co. v. Redeker*, 67 Tex. 181, 2 S. W. 513. Without stating our conclusion of the facts, we do not feel authorized to say there were no facts which would authorize an inference by the jury that appellee was not guilty of contributory negligence. *Railway Co. v. Adams*, 94 Tex. 100, 58 S. W. 881; *Railway Co. v. Smith* (Civ. App.) 101 S. W. 453.

[2, 3] The appellee made a written application for employment with the appellants, in which it is stated, if he should be injured while in the employment, that he would in 30 days after such injury give notice in writing of any claim for damages to the claim agent or general claim agent of appellants, and that a failure to give such written notice of such claim within 30 days should be a bar to the institution of any suit on account of such injury. This clause was set up as a bar to appellee's cause of action by the appellants. The facts in this case show that in less than a week after the injury appellant's claim agent called on appellee for a statement, which he gave to the agent. This statement was reduced to writing, and appellee signed it, and was referred to by the evidence in this case.

The trial court, at the request of the appellants, submitted to the jury whether the above provision contained in appellee's application was reasonable, and whether the notice stipulated for had been waived by appellants. The jury evidently found it was unreasonable or had been waived. We believe the fact that appellants obtained the statement of the claim of appellee in writing within a week after the injury would authorize the finding that the appellants had waived the giving of notice stipulated for. *Railway Co. v. Hendricks*, 49 Tex. Civ. App.

314, 108 S. W. 745. We do not believe, under our statutes, appellants could defeat the claim for damages occasioned by personal injuries by stipulating that notice thereof must be given within 30 days after such injury. Article 5714, R. C. S.; *Railway Co. v. Hudgins* (Civ. App.) 127 S. W. 1184.

For the reasons above expressed, we do not believe the trial court was in error in refusing appellee's special requested peremptory instructions, and the assignments Nos. 1, 2, 3, and 4, together with the propositions thereunder, will be overruled.

The fifth assignment of error will be overruled. Taking the second and sixth paragraphs of the court's charge together, we think the jury was sufficiently instructed as to the facts required to be proven by appellee by a preponderance of the evidence, and that the burden was on him to so establish such facts. The sixth assignment complains that the fourth paragraph of the court's charge is erroneous. The court instructed that the duty was on appellants to furnish appellee a reasonably safe place to occupy while in the discharge of his duties as switchman and use ordinary care to keep its railway tracks and sufficient space of ground adjacent to it clear of holes and excavations, which would likely interfere with the switchman in the discharge of his duty; that there was no duty on the switchman to inspect the premises where he was expected to work. The court did not instruct the jury that appellee "was not required to use any care to discover the presence of any hole," etc., as asserted by appellants in their proposition. The trial court did instruct that he was required to use ordinary care and prudence to avoid injury to himself. The objection taken to the charge is not sound. The charge of the court is substantially the language used by the Supreme Court in several cases, except the jury were not charged thereby that "he does not assume the risk arising from the failure of the master to do his duty, unless he knows of the failure and the attendant risk, or in the ordinary discharge of his own duty must necessarily have acquired knowledge." The appellants do not except to the charge because of this omission by the court. However, in the eighth paragraph of the court's charge this omission, if there was any error in omitting it, was covered, and no injury could have resulted to appellants thereby. *Bonnell v. Railway Co.*, 89 Tex. 72, 33 S. W. 334; *Railway Co. v. Hannig*, 91 Tex. 347, 43 S. W. 508; *American Machinery Co. v. Haley* (Civ. App.) 165 S. W. 83.

The seventh, eighth, and ninth assignments assail the sixth paragraph of the court's charge, on the ground that it assumes appellee exercised ordinary care in trying to make the coupling and ignores contributory negligence, or that it assumes the hole caused appellee to fall. We will not set out the charge or discuss these assignments further

than to say we do not think the charge assumes any of the facts, but leaves to the jury the duty of finding the facts. We do not regard the charge as being on the weight of the evidence.

[4-7] The appellant's tenth and eleventh assignments assail the ninth paragraph of the court's charge, which is as follows:

"(9) By contributory negligence, as used in this charge, is meant such act or omission on the part of plaintiff as an ordinarily prudent person would not do, under the same circumstances which act or omission, concurring with a negligent act of omission, if any, of the defendants, or where the defendants were free from negligence on their part, became the proximate cause of the injury complained of. Now, therefore, if you believe from the testimony before you that plaintiff, as defendants' switchman, knew that the duties he assumed were hazardous and dangerous, and that he knew of the condition of the tracks and yards on which he was working, and knew of the probable presence of the holes or excavations near such tracks, caused by the handling of engines and cars upon and over the same, or that he should have known or discovered the same in the exercise of ordinary care in the course of his employment, or if you believe from the evidence that he knew, or should have known, that it was dangerous, and not necessary or required of him, to go between the rails in front of moving cars in the performance of his duties, and you believe that he neglected and failed to exercise ordinary care for his own personal safety in so doing, and you believe that, under all the circumstances, such was negligence on his part and contributed to his injuries, then, if the defendants were not guilty of negligence on their part you will find for the defendants; but, if you find from the evidence that the defendants were guilty of negligence, as alleged by plaintiff, and that the same was the direct and proximate cause of plaintiff's injury, and that he suffered damages as the proximate result thereof, then the plaintiff would nevertheless be entitled to recover for such damages, if any, as were the direct and proximate result of the negligence, if any, of the defendants, and the jury in such case will diminish and deduct his damages in proportion to the negligence attributable to the plaintiff which contributed directly to such injuries and damages."

In this state the distinction between assumed risk and contributory negligence is recognized. If the servant assumes the risk, it will defeat a recovery for any sum; while, under our statute, contributory negligence concurring with the negligence of the master proximately producing injury will diminish recovery. *Railway Co. v. Hodnett* (Sup.) 163 S. W. 13. If the appellee knew of the hole in the track and the danger therefrom in performing the work, he was guilty of assumed risk, which would defeat a recovery for any amount, and he could not recover diminished damages, as charged by the court. *Railway Co. v. Bradford*, 66 Tex. 732, 2 S. W. 595, 59 Am. Rep. 639; *Railway Co. v. Shehan* (Sup.) 18 S. W. 151; *Railway Co. v. Lempe*, 59 Tex. 19. Again, if he knew of the danger "and that it was not necessary or required of him to go between the rails in front of moving cars in the performance of his duty," this, too, would be assumed risk on his part, which would defeat a recovery. 3 Labatt, Master & Servant (2d Ed.)

§ 1166; *Railway Co. v. Mathis*, 101 Tex. 342, 107 S. W. 530. Labatt says:

"In these, as in most other cases where the intentional adoption of a certain line of action is proved, the facts will also be suggestive of contributory negligence. But it is both unnecessary and disadvantageous to rely upon the conception which raises a disputable question, if a decisive element is supplied by the clear evidence of a deliberate choice on the servant's part, or the exercise of his own judgment in creating the conditions which occasioned the accident."

Judge Gaines, in the *Mathis* Case, supra, quotes the above section from Labatt with approval. Now, in this case the court tells the jury, if they find in going in front of the moving cars appellee knew the danger, and that it was not necessary or required of him in the performance of his duty, if he was negligent, he would be guilty of contributory negligence. If he knew the danger, and it was not necessary or required of him to go in front of the moving cars, it would be a deliberate choice or the exercise of his own judgment which occasioned the accident. If the jury so found the facts; they must necessarily have found he deliberately assumed the risk, knowing the danger. He selected an unnecessary way and one not required. The master could not, under the law, be made responsible for the servant's own voluntary act and choice. Of course, if there is an issue raised by the evidence whether going in front of the car was then necessary or required in order to perform his duty, the court should submit the question whether an ordinarily prudent man would have done so under the circumstances. The appellee claimed on account of the defect in the coupler he was required to go in front of the car. The appellants claim it was unnecessary, for the reason that the coupler would open the knuckle from the side of the car, and that the coupler was not defective. If the appellee did not then know the danger, even though the coupler was defective, it may be that the question of contributory negligence should have been submitted; but if, where he both knew the danger and that it was not necessary, he, by his own volition, assumed the risk, the master would not be liable for anything. The defect in the track may have been known to appellee; yet he may not have known that such defect was dangerous to him, or necessarily so. The *Lempe* Case, supra. The facts may present the issue if the defendant knew, or should necessarily have known, of the defect, but did not then know of the danger in performance of his duty, which, under the circumstances, was then necessary to be performed, by going in front of the moving train, whether he then under the circumstances acted as an ordinarily prudent person would have done; but, if he knew the defect and knew the danger and that it was unnecessary to go in front of the car, he could not recover anything on the ground that he assumed the risk. *Railway Co. v. Wilson*, 189 Ill. 89, 59

N. E. 573. In order for appellants to diminish the damages on account of contributory negligence, they were not required to show that the appellee knew the defect and danger. All they were required to show was that, under the then conditions or circumstances, appellee, in trying to make the coupling, did not act with ordinary care. The charge is defective in attempting to couple contributory negligence and assumed risk together, and in such way as to confuse the issue. This has frequently been held error in this state. *Railway Co. v. Bryant*, 8 Tex. Civ. App. 134, 27 S. W. 825. We do not regard the charge as harmless, even though the trial court may have properly instructed the jury on assumed risk. We are unable to say the jury did not find the facts constituting assumed risk and followed this charge on contributory negligence, instead of one on assumed risk; that is, they may have found the facts which would defeat a recovery, but diminished the damages as directed in this charge. This charge must necessarily reverse the case.

The twelfth assignment is overruled. We believe the tenth paragraph of the charge substantially correct.

[8] The thirteenth assignment will be sustained, as we find no evidence that the amount paid for drugs and the doctor's bill were reasonable. The evidence shows that the amount paid was \$75. However, this error could be cured by a remittitur.

The fourteenth assignment is overruled. The eleventh paragraph of the court's charge, in our judgment, is not subject to the criticism here urged.

[9] The fifteenth assignment of error is overruled. The ninth paragraph of the court's charge substantially gave the same rule for diminishing the damages on account of contributory negligence as here requested.

[10] The sixteenth assignment. This assignment does not give the substance of the charge requested, and the statement thereunder in appellants' brief does not set out the charge or refer to the page of the record where it may be found. This assignment will be considered waived.

The seventeenth assignment complains at the action of the court in refusing the fifth specially requested charge. This charge presents the issue of assumed risk. The court substantially gave this charge in the main instruction, which is embodied in paragraphs 4 and 8 thereof.

[11] The eighteenth assignment is overruled. Special charge No. 6 was properly refused. There was no issue raised, either by the pleadings or evidence, that called for the charge. There was not the slightest chance of the jury finding negligence on the part of the appellant because the string of cars was permitted to roll down the track detached from the engine.

[12] The nineteenth assignment is overruled. The charge as drawn was not correct

under the issues of the case. There was no recovery sought on account of the defect in the coupler, and such defect was not submitted to the jury by the charge of the court as a ground of recovery. If the coupler had worked properly, it may be there was no necessity to open the knuckle with the hand. Under such circumstances, it may have been negligence on the part of the appellee to go in front of the car to open it, but this would be a question for the jury to determine under the circumstances of the case, and the court would not have been authorized to instruct the jury that, because the coupler worked properly, they should find for appellants. Whether it was contributory negligence or not was a question for the jury under the facts of this case, and if it was contributory negligence, that would not have defeated a recovery entirely, but would have only diminished the recovery in proportion to appellee's negligence.

[13] The twentieth assignment is overruled. The refusal of this charge is shown to be harmless by the verdict of the jury. The charge requested sought to have the jury instructed that, if appellee was guilty of negligence in going in front of the car to make the coupling, and appellants were not guilty of negligence, then they would find for appellants. The jury, by their verdict, found from the evidence that the appellants were guilty of negligence. Hence they could not have found for appellants under the charge. If the charge had told the jury to diminish the damages in proportion to appellee's negligence, then its refusal might have been harmful, and perhaps such a charge should have been given.

[14] The twenty-first assignment complains of the following testimony, admitted over appellants' objection, that is, that it was the opinion of the witness:

"When I got down in order to get in front of the car and open it with my hand, I had to do so so the car would couple."

He had testified that the lever of the coupler would not open the knuckle. It was shown that the knuckle had to be opened to make the coupling. The appellee had sufficient experience to give an opinion as to what was required to make a coupling. This, if an opinion, was so immaterial under all the facts as to render it harmless.

[15] The twenty-second assignment complains at the action of the court in permitting appellee to testify:

"When these couplers do not open that way it is customary to open them by hand"

—and in permitting Nick Browning to testify:

"Men do step in front of cars to make couplings when there is no necessity for it. I do not think they do that when the couplers can be worked on the outside."

The appellants objected because this testimony was the opinion of the witnesses and that there was no pleading of custom, and such custom could not be made the basis

of negligence on the part of appellants. The appellants, on cross-examination of appellee, sought to show there was a rule forbidding employes going in front of moving cars, and sought by Browning to show the same fact on direct examination. On the redirect examination of appellee, and the cross-examination of Browning, the above testimony was elicited. There was no such rule as was sought to be proven shown. Appellee sought to show that when the lever would not raise the knuckle that there was no other way to make the coupling, except by lifting it by the hand, and this was the manner in which it was done by the employes. This evidence was offered, as we conceive it, not to prove negligence on the part of the appellants, but to show that appellee acted in the usual and customary way and as an ordinarily prudent man would have acted. The evidence indicates that this practice was of such a nature that appellants must necessarily have known of it, and, if so, then appellants would be bound by it. In the absence of any specific rule on the question, the practice of the employes of appellants would be admissible. On the question whether the appellee acted in the ordinary way in making the coupling, it occurs to us that it was proper for this testimony to go before the jury as a circumstance on the question of appellee's negligence. This appears to be the holding of authorities in this state, and that such testimony and evidence as here admitted has been admitted with approval on the issue of contributory negligence. *Gallaway v. Railway Co.* (Civ. App.) 78 S. W. 32; *Railway Co. v. Engelhorn*, 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68; *Railway Co. v. Still* (Civ. App.) 100 S. W. 182; 3 *Labatt on Master & Servant* (2d Ed.) § 1269. This was not a ground of negligence charged against appellants, but simply an effort to show that appellee acted in the usual and ordinary way. We think, in the light of all the evidence in this record, the admission of the testimony could not have injured appellants.

[16] The twenty-third assignment complains of the action of the court in permitting appellee to testify what he told one West as to this condition from his injuries at Ft. Worth, etc. It appears that West came to Amarillo and induced appellee to go to Ft. Worth after his injuries with him, under a promise of procuring appellee a position as the manager of an accident insurance company. While there West ostensibly was instructing him in his duties. It appears that appellee and West went in bathing, and appellants procured and offered in evidence photographs of appellee and West while in bathing. While at Ft. Worth the appellee filled out application for insurance, in which he stated:

"I now state that I am fully recovered from said accident and physically able to perform the duties pertaining to insurance work."

Appellee testified he told West about the accident and the truth about his physical condition, and that West tried to get him two or three days to make the statement introduced by appellants, and he told West he would not do so. West insisted, and continued to urge appellee to sign the statement, stating that it was not material and would do no harm, and that it was a matter of form, and West said appellee could not get the position without signing it. This testimony as to what occurred between West and appellee is the evidence objected to. The appellee contends that West was a secret detective for the Santa Fé appellants, and for the purpose of entrapping him induced appellee to sign the statement. There are facts and circumstances from which a jury might infer such contention to be true. The appellants had introduced the above quotation from the application signed by appellee. We understand the rule to be, where the statement of the witness is introduced to contradict his testimony on trial, he may explain the reasons which induced him to make it. *Smith v. Traders' National Bank*, 82 Tex. 368, 17 S. W. 779, 783; *Railway Co. v. Walden* (Civ. App.) 46 S. W. 89; *Comer v. Thornton*, 38 Tex. Civ. App. 287, 86 S. W. 19.

[17] The twenty-fourth assignment urges that the court was in error in excluding the statement or report of T. H. Farrell made to the appellants upon the condition of the coupler on the car which the appellee claims would not open and shortly after the injury. This witness testified fully as to its condition and referred to his statement as a memorandum while on the witness stand. Upon appellants offering the report made by this witness to appellants, the appellee interposed objection, which the court sustained. It is contended that this should have been admitted, for the reason that the credibility of the witness was questioned, and that the condition of the coupler was controverted. This witness was offered to show that appellee's testimony as to the coupler was not correct. There was no effort to impeach Farrell, but he himself acted as a controverting witness of the testimony of appellee. The witness evidently had the same motive for making the statement contained in the report that he had in giving his testimony upon the trial. After the accident he examined the car for the purpose of his report. This report or statement will not be admissible in corroboration of his testimony, unless such declaration was made at a time when there was no motive existing to assist the appellants in obtaining testimony in this case. This is not shown in the record. *Insurance Co. v. Eastman*, 95 Tex. 34, 64 S. W. 863.

[18] The twenty-fifth and twenty-sixth assignments complain at the action of the court in permitting the introduction of X-ray photographs of appellee's neck and that of Dr. Gist. Dr. Vineyard owned the machine

making the photographs and made them, and testified very fully to his experience in such work, and it was shown by the witnesses that the photographs correctly represented the condition of appellee's neck. We believe a sufficient predicate was laid for the introduction of the photographs, and there was no error in admitting them. We see no objection to the testimony of Dr. Gist in explaining the photographs and showing the bones which were exhibited thereby and in explaining what bones were named in the testimony. We believe it would be an aid to the jury in understanding the testimony of the witnesses as to the bones which were claimed to have been injured by appellee and denied by appellants. We see no error in the action of the court in this particular. All that is required for the introduction of photographs of this kind is that preliminary evidence should be given of its correctness. This was done in this case. Jones' Blue Book on Evidence, vol. 3, § 411.

The judgment will be reversed, and the cause remanded.

HART-PARR CO. v. ALVIN-JAPANESE NURSERY CO. et al. (No. 473.)

(Court of Civil Appeals of Texas. El Paso. Oct. 28, 1915.)

1. APPEAL AND ERROR \S 101 — ORDERS APPEALABLE—APPOINTMENT OF RECEIVER.

Where a receiver was appointed, and subsequently on an amended petition the order of appointment was vacated, but was followed by a later order in the same decree reappointing the receiver, an appeal from the order of appointment lies under the express provisions of Vernon's Sayles' Ann. Civ. St. 1914, art. 2079.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 575-589; Dec. Dig. \S 101.]

2. APPEAL AND ERROR \S 1052—RECEPTION OF EVIDENCE—CURE OF ERROR.

In a proceeding for the appointment of a receiver, the admission of secondary evidence as to the contents of the books of defendant was cured by the production of the books in court although the entries therein were not read.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. \S 1052.]

3. PLEADING \S 245 — AMENDMENTS — CONDITION OF CAUSE.

In proceedings for the appointment of a receiver, it was not error to permit the plaintiffs to file a trial amendment after the evidence was closed and argument had begun, and to consider such amendment as a basis for the appointment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 635, 653-675; Dec. Dig. \S 245.]

4. CORPORATIONS \S 557 — RECEIVERS — APPOINTMENT—GROUNDS.

Where a petition for the appointment of a receiver alleged that defendant was indebted to plaintiffs for goods, wares, and merchandise; that defendant's assets were greater than its liabilities, and if permitted to operate, defendant would be able to pay all its obligations in full; that practically all the creditors were willing that the business continue; that one creditor was threatening to levy an attachment, which, if levied, would be followed by others,

with the result that the defendant's assets would be dissipated; that if such assets were thrown upon the market at the present time they would not bring a sum sufficient to pay the obligations; that in order to conserve such assets, the appointment of a receiver was necessary, when supported by proof, stated grounds for the appointment of a receiver, under Vernon's Sayles' Ann. Civ. St. 1914, art. 2128, providing that receivers may be appointed, where the corporation is in imminent danger of insolvency.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2227, 2228, 2230-2236; Dec. Dig. \S 557.]

5. CORPORATIONS \S 553 — APPOINTMENT OF RECEIVER—COLLUSION.

In proceedings for the appointment of a receiver for a corporation, where it appeared that the managers of the corporation, realizing that its assets were such, when compared with its liabilities, that if the creditors were to foreclose and collect their debts by public sale, insolvency would result, and that they apprised the creditors of such fact, such action was not sufficient to constitute collusion for the purpose of covering up the debts of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201-2216; Dec. Dig. \S 553.]

6. CORPORATIONS \S 557 — APPOINTMENT OF RECEIVER — APPOINTMENT IN FRAUD OF CREDITORS.

In a proceeding for the appointment of a receiver for a corporation, in danger of becoming insolvent, allegations that the assets would be conserved by the appointment of a receiver, that all its debts would be paid and something would be left over; that it would be a great benefit to the community to allow defendant to continue its business—were not sufficient to show that the creditors were attempting to delay the collection of debts of others.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2227, 2228, 2230-2236; Dec. Dig. \S 557.]

Appeal from District Court, Harris County; J. W. Woods, Special Judge.

Suit by the Hart-Parr Company against the Alvin-Japanese Nursery Company and others. From an interlocutory order appointing a receiver, plaintiff appeals. Affirmed.

Love, Channell & Fouts, of Houston, for appellant. Sam, Bradley & Fogle, of Houston, for appellees.

HARPER, C. J. [1] This appeal is from an interlocutory order, appointing a receiver of the property and assets of the Alvin-Japanese Nursery Company. Appellee filed motion to dismiss the appeal because it is from an order overruling the motion of appellant to vacate the order appointing, instead of an appeal from an order appointing a receiver. The facts are that upon petition, on September 9, 1914, the court appointed one Brown receiver. Upon the 5th day of December, 1914, the court, after amended petition, entered an order vacating the said order of appointment, but followed this latter order in the same decree with the following:

"But the court is of the opinion, further, that the amended pleadings are sufficient to authorize and support the appointment of a receiver. * * * It is therefore ordered, adjudged, and decreed that the said S. B. Brown is here now reappointed receiver."

And this is an appeal from this order of appointment, and such is permitted under the statute, article 2079, Vernon's Sayles' Stat.; *Rubber Co. v. Wilson*, 137 S. W. 710.

[2] The first assignment is that it was error to allow one Jones as a witness to testify as to what he found the books of the defendant company to contain with reference to indebtedness due by it and other matters, because it was secondary evidence. The bill of exceptions is qualified by the trial court:

"The books were afterwards produced in court and offered in evidence, but the entries they contained were not read."

If error, this would cure it. Besides, there is no attempt to show that the court before whom the hearing was had considered the evidence complained of in arriving at his conclusions. There is no question as to the extent of the liabilities of the defendant.

[3] The second is that it was error to permit plaintiffs to file a trial amendment after the evidence was closed and argument of counsel had begun, and to consider such amended pleadings as a basis for the appointment of the receiver. Pleadings may be amended after argument has begun. *Telegraph Co. v. Bowen*, 84 Tex. 477, 19 S. W. 554. The provisions of article 1824, R. S., forbidding amendments after announcing ready for trial, is directory only. *Pitzer v. Decker*, 135 S. W. 161. The facts here do not show that the court abused his discretion; therefore there was no error in permitting the amendment to be filed, nor in considering it as a basis for the appointment.

[4] The third and fourth urge that the order of the court overruling appellant's motion to vacate the original appointment and that portion reappointing the receiver are not authorized by the pleadings and evidence. The original plaintiffs, viz., W. T. Stevens, Northrup & Clark Saddlery Company, Richards & Schulte Company, the Texas Company, H. F. Montgomery, South Texas Implement & Vehicle Company, Citizens' State Bank of Alvin, Tex., S. J. Daugherty, and K. Kishi, allege by their second amended original petition, also called the trial amendment, that the defendant Alvin-Japanese Nursery Company is a corporation; that it is engaged in the business of propagating, buying, and selling nursery stock, planting oranges and other crops, etc.; that it has liabilities aside from its capital stock amounting to about \$111,000; that it is indebted to plaintiffs in the various sums set out, total about \$39,100; further alleging that the amounts were for goods, wares, and merchandise, etc., furnished the defendant company or evidenced by notes, etc. Further alleged that the assets of the defendant company are much greater than its liabilities, and, if permitted to operate, will be able to pay all of its obligations in full, naming the assets and their probable value; that practically all of the creditors are willing that the business continue that the assets of the company may

be realized on without sacrifice; that one creditor to the extent of about \$3,000 is threatening to levy an attachment; that if such attachment be levied, other creditors, in an effort to protect their interests, will likewise levy; that the effect thereof would be to dissipate the said assets, render its business and good will worthless, etc.; that the defendant has not now money with which to pay its obligations now due, and cannot realize the money therefor except in the due course of business of said company; that if it is permitted to continue its business, it can pay, but if the assets are thrown upon the market at the present time, they would not bring a sufficient sum to pay the obligations, etc.; that in order to conserve the assets of said company and to protect the rights of the creditors' petition herein, it is necessary that a receiver be appointed, etc. Article 2128, Sayles' Stat. 1914, provides that receivers may be appointed: (1) In an action by a creditor to subject any property or fund to his claim; (2) where it is shown that the property is in danger of being lost, removed, or materially injured; (3) in cases where a corporation is in imminent danger of insolvency. The petition is sufficient to authorize the court to appoint the receiver as it did, and there is evidence to support the allegations in the petition. The appointment, therefore, cannot be disturbed. *Ripley v. Red W. L. Co.*, 48 Tex. Civ. App. 311, 106 S. W. 474. It is clear from the allegations and proof that the defendant corporation is in imminent danger of insolvency.

[5, 6] Appellee, by propositions, urges that a receiver will not be appointed for a corporation: (a) Upon its own application; (b) nor at the instance of creditors acting in collusion with the corporation for the purpose of covering up its assets or delaying the collection of other debts; (c) that it is evident from the facts proved that the request for a receiver was made for the purpose of assisting the defendant corporation to pay its debts and have sufficient capital left to continue business upon a profitable basis; that therefore the court was not authorized to make the appointment. The pleading and proof do not support the propositions. This suit was not filed by the corporation, and the facts show no more than that the managers of the corporation, realizing that its assets were such, compared with its liabilities, that if the creditors were to foreclose and collect their debts by forced public sale, it would result in insolvency, frankly told the creditors the facts as they existed. This is not sufficient to constitute collusion for the purpose of covering up the debts of the corporation. There is an allegation in the petition that by means of a receivership the assets of the defendant may be conserved to the payment of all its debts and leave something with which the corporation could continue its business, and that it would be a great benefit for the community, where the cor-

poration's principal place of business was located, to have the defendant continue its going business, but these allegations were no more than matters of inducement in urging the appointment, and in no wise show that the creditors were in any way attempting to cover up anything or to delay the collection of the debts of others. It is true the appointment of a receiver might result in such delay, but because such might be the result would be no reason to set aside the appointment, where the pleadings and proof show that the parties praying for the receivership are clearly entitled to it. The trial court must have resolved these matters in favor of the receiver, i. e., that the petitioners were acting in good faith with no ulterior or improper motive, and it will be presumed that the court, being present, observing the witnesses and their manner of testifying, was in a better position to arrive at the facts than an appellate court, and the court is still in charge of the property through the receiver, and if at any time it shall be made to appear by motion in the trial court that through a receivership is not the best way to administer the affairs of the corporation to the end that the best interests of all concerned may be subserved, the receiver, upon such showing, will be discharged.

Finding no error in the record, the cause is affirmed.

INTERNATIONAL & G. N. RY. CO. v. REEK et al. (No. 5506).*

(Court of Civil Appeals of Texas. San Antonio. Oct. 13, 1915. On Motion for Rehearing, Nov. 10, 1915.)

1. PLEADING \hookrightarrow 369—INJURIES TO SERVANT—ELECTION BETWEEN COUNTS.

Where, in an action by the surviving wife and children of a railroad employe for his death, the pleadings were intended to meet proof as to his having been engaged either in intrastate or interstate commerce at the time of his death, such pleadings were not improper as an attempt to recover under federal and state statutes at the same time, and plaintiffs were under no necessity to elect under which statute they would proceed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1190-1200; Dec. Dig. \hookrightarrow 369.]

2. TRIAL \hookrightarrow 232 — SUBMISSION ON SPECIAL ISSUES—INSTRUCTION CALLING FOR GENERAL VERDICT.

Where a cause was submitted on special issues, a charge correctly embodying the law, but calling for a general verdict, should not be given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 524, 525; Dec. Dig. \hookrightarrow 232.]

3. APPEAL AND ERROR \hookrightarrow 564—RECORD—NECESSITY FOR FILING STATEMENT.

Where the appeal bond was filed December 9, 1914, the transcript was filed in the Court of Civil Appeals March 6, 1915, and on April 14, 1915, a purported statement of facts which had never been filed in the lower court was filed in the appellate court, such statement could not be considered, since the law requires that it be filed in the lower court at some period within

90 days from the date the appeal was perfected by filing an appeal bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. \hookrightarrow 564.]

4. APPEAL AND ERROR \hookrightarrow 644—RECORD—LATE FILING OF STATEMENT OF FACTS—NOTICE OF COURT.

Courts of Civil Appeals will notice a failure to file a statement of facts in time, although the question be not raised by the appellee.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2795-2798; Dec. Dig. \hookrightarrow 644.]

5. TRIAL \hookrightarrow 232 — REQUEST FOR SUBMISSION ON SPECIAL ISSUES—PROPRIETY OF INFORMING JURY OF PARTY MAKING REQUEST.

There was no error in informing the jury which party had requested that the cause be submitted on special issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 524, 525; Dec. Dig. \hookrightarrow 232.]

On Motion for Rehearing.

6. APPEAL AND ERROR \hookrightarrow 564 — RECORD — STATEMENT—EXCUSE FOR LATE FILING.

Where the statement of facts is filed late in the trial court, more than 90 days after perfection of the appeal by filing an appeal bond, upon proper showing, made in the motion for rehearing, that counsel had difficulty in getting the statement prepared, thus excusing the delay, the statement will be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. \hookrightarrow 564.]

7. APPEAL AND ERROR \hookrightarrow 564 — RECORD — CONSIDERATION OF STATEMENT—ESTOPPEL OF COURT.

As no power resides in the clerk of a Court of Civil Appeals or any justice thereof to refuse to permit the filing of a statement of facts which was not filed in the lower court, filing in the Court of Civil Appeals does not preclude such court from refusing to consider the statement or estop it from exercising the duty to reject such purported statement. The duty to determine the validity of a statement of facts devolves upon the court only when the matter is called to its attention in a motion to strike out the statement or in its own independent investigation of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. \hookrightarrow 564.]

8. APPEAL AND ERROR \hookrightarrow 564 — RECORD — STATEMENT OF FACTS — TIME FOR FILING — AGREEMENT OF COUNSEL—EFFECT.

Agreement by appellee's counsel that the statement of facts might be filed out of time could not relieve appellant of the duty and necessity of filing such statement in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. \hookrightarrow 564.]

Appeal from District Court, Bexar County; R. B. Minor, Judge.

Action by M. C. Reek and others against the International & Great Northern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Wilson, Dabney & King, of Houston, and Cobbs, Eskridge & Cobbs, of San Antonio, for appellant. Perry J. Lewis, Champe G. Carter, Randolph L. Carter, and H. C. Carter, all of San Antonio, for appellees.

FLY, C. J. This is a suit by M. C. Reek, surviving wife of Christian Reek, Sr., deceased, and Christian Reek, Jr., Kate Reek Felle, Edward Reek, and Mary Reek, surviving children of said Christian Reek, Sr., deceased, to recover damages for the negligent killing of said Christian Reek, Sr., by appellant. The cause was tried by jury and resulted in findings, in answer to special issues, that Mary C. Reek should recover \$12,000, Edward Reek \$5,000, Mary Reek \$3,000, Kate Reek Felle \$1,000, and Christian Reek, Jr., \$100. Judgment was accordingly so rendered.

[1] The first and second assignments of error assail the action of the court in overruling exceptions to those paragraphs of the petition in which it was alleged that the plaintiffs did not know whether the deceased was engaged in intrastate or interstate commerce at the time of his death, and it is contended that an attempt was made to recover under federal and state statutes at the same time, and that appellees should have been compelled to elect under which statute they would proceed. The exceptions were properly overruled. There was no effort to recover under two statutes, but the pleadings were intended to meet proof as to one class of commerce or the other. If the evidence showed that deceased was engaged in interstate commerce, then the federal statute would apply; but, if it showed that he was engaged in intrastate commerce, then the state statute would apply. It would have been a remarkable fact if the evidence had shown that deceased was engaged in both classes of commerce at one and the same time. The assignments are overruled. Certainly appellant was in no wise injured by the action of the court in regard to the exceptions. There are propositions under the second assignment of error that have no possible connection with it and are not germane thereto; for instance, the seventh proposition, which seeks to show that the pleading was in violation of section 1 of the fourteenth amendment to the Constitution of the United States.

[2] The third assignment of error is overruled. The charge asked by appellant was clearly erroneous, in that it would have taken the question of negligence from the jury. The evidence raised a question of fact to be determined by a jury as to whether the contributory negligence of deceased caused his death, and it would have been error for the court, under the circumstances of this case, to have charged the jury that his failure to do, or not do, certain things, was negligence. The cause was submitted on special issues, and, if the charge had embodied the law, it should not have been given because it called for a general verdict. *Railway v. Jones*, 175 S. W. 488, and authorities therein cited.

[3, 4] In connection with the third assignment, as well as the fourth, fifth, seventh, eighth, ninth, tenth, and eleventh assign-

ments of error, they must depend for their vitality and effectiveness on the existence of certain facts which have not been made known to this court through the medium of a statement of facts prepared and filed in the lower court in the manner and within the time provided by law. The purported statement of facts filed in this court in this suit fails to show that it was ever filed in the lower court at any time, while the law requires that it be filed at some period within 90 days from the date that the appeal was perfected by filing an appeal bond. The appeal bond was filed on December 9, 1914; the transcript of the proceedings was filed in this court on March 6, 1915, within the 90 days. On April 14, 1915, over 100 days after the appeal had been perfected, a purported statement of facts, which had never been filed in the lower court, was filed in this court. There is a certificate by the stenographer appended to the statement of facts which indubitably shows that the record was not completed until April 3, 1915, and consequently if it had been filed by the district clerk at that time it could not be considered because not filed within the statutory time. The purported statement of facts will not be considered. *Thomas v. Matthews*, 51 Tex. Civ. App. 304, 112 S. W. 120; *Belt v. Cetti*, 53 Tex. Civ. App. 102, 118 S. W. 241; *Railway v. Waggoner*, 102 Tex. 260, 115 S. W. 1172. Courts of Civil Appeals will notice a failure to file the statement of facts in time although the question is not raised by the appellee. *McKenzie v. Beason*, 140 S. W. 248; *Connally v. Saunders*, 142 S. W. 975; *Hines v. Sparks*, 146 S. W. 239; *Hayes v. Groesbeck*, 146 S. W. 327.

[5] There is no merit in the twelfth assignment. It could not have injured appellant to inform the jury that it had requested the cause to be submitted on special issues.

The thirteenth assignment of error is overruled. The error complained of has no foundation in law or in fact.

The fourteenth assignment is overruled.

No error is presented requiring a reversal, and the judgment is affirmed.

On Motion for Rehearing.

[6, 7] The affidavits appended to the motion for rehearing clearly show that counsel for appellant labored under great difficulties in getting a statement of facts prepared, and the showing made would fully exonerate counsel from any neglect in not filing the statement of facts within the 90 days if it had been filed at any time in the trial court. There was a failure to do but one necessary thing, and that was the filing in the lower court. Had that been done, upon the showing made in the motion for rehearing, the statement of facts would have been considered by this court. No power has been given the clerk of this court, or to any justice of the court, to refuse to permit the filing of a

statement of facts which was not properly prepared in the lower court, and the filing in this court does not preclude the court from a refusal to consider such statement, nor estop it from exercising the duty of rejecting a paper purporting to be a statement of facts, but which is not such statement because not filed in the lower court. If the statement of facts, so called, was properly filed in this court, that does not relieve appellant of the effects of a failure to file in the lower court. That filing is essential to the vitality and validity of a statement of facts, and the filing in this court could not give life to a document that had never been brought into legal existence. It is not the duty of this court, or any member thereof, nor of the clerk, to investigate a statement of facts and pass on its validity before it is filed; but that duty devolves on the court when the matter is called to its attention in a motion to strike out such statement, or in the investigation of the case.

[8] No excuse is given for a failure to file in the trial court, and the fact that counsel for appellee may have agreed that the statement of facts might be filed out of time did not relieve appellant of the duty and necessity of filing the statement in the trial court. The agreement may have put the statement of facts in the same position that it occupied before the time expired; that is, prepared it so that it could be filed in the lower court. The agreement could not dispense with the filing, and did not attempt so to do.

It is to be regretted that the agent to whom counsel confided the duty of filing the statement of facts did not file the same, and that he offers no excuse for such failure. It is not claimed, nor attempted to be shown, that the agent ever presented the statement of facts to the district clerk.

The motion for rehearing is overruled.

J. I. CASE THRESHING MACH. CO. v. LIPPER. (No. 482.)

(Court of Civil Appeals of Texas. El Paso. Oct. 28, 1915.)

APPEAL AND ERROR \S 79—DECISIONS REVIEWABLE—FINAL JUDGMENTS.

Where, in an action upon a note asserting a lien on an automobile, in which a number of parties are made defendants as asserting an interest, and by intervention, neither the judgment below nor the record on appeal shows any disposition of the issues between some of the parties plaintiff and defendant, the appeal must be dismissed, since it is not a final judgment so as to give jurisdiction to the Court of Civil Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 484-498; Dec. Dig. \S 79.]

Appeal from District Court, Harris County; N. G. Kittrell, Special Judge.

Suit by J. S. Jarrell against James J. Gorman on a promissory note and chattel mortgage. J. L. House, Thornton Hamilton, and

O. M. Lipper were made parties defendant, as asserting an interest in the mortgaged automobile. The J. I. Case Threshing Machine Company intervened, asserting a prior lien on the automobile. The intervener having sequestered the automobile, judgment was rendered in favor of Lipper against the intervener, but was silent as to the issues between Jarrell and Gorman, and as to lien rights between Jarrell and Lipper. Intervener appealed from such judgment. Appeal dismissed.

A. B. Wilson and Cole & Cole, all of Houston, for appellant. Lawrence Sochat, of Houston, for appellee.

WALTHALL, J. [1] This suit was originally filed by J. S. Jarrell against James J. Gorman on a promissory note for \$2,000, asserting a chattel mortgage lien upon certain automobiles, among which was the one involved in this controversy. J. L. House, Thornton Hamilton, and appellee, O. M. Lipper, were made parties defendant, as asserting some claim to certain of the automobiles upon which plaintiff Jarrell claimed the lien.

Appellant, the J. I. Case Threshing Machine Company, a corporation, intervened in the suit, asserting a prior lien upon one of the automobiles by reason of the execution and delivery by defendant Gorman of a certain chattel mortgage to intervener to secure the payment of the purchase price of said automobile.

Appellee, Lipper, was in possession of the automobile at the time the intervention was filed, claiming to be the owner thereof by reason of his having purchased it from defendant Gorman, paying a valuable consideration therefor. The automobile in question was sequestered by intervener, and on the trial before the court without a jury judgment was rendered in favor of appellee, Lipper, and against appellant intervener, for \$850, as the value of the automobile sequestered. Pursuant to a written agreement, defendants Hamilton, House, "and the intervener John Walker" were "dismissed out of this cause, and go hence without day; all costs as to said defendants and intervener to be adjudged against Walker, intervener."

The appeal was taken by appellant from the judgment rendered against it in favor of appellee, Lipper, for the value of the one car in controversy between appellant and appellee. The judgment rendered in the case is as follows:

"Be it remembered that on this, the 16th day of October, came on to be heard the above-entitled cause, upon the intervention of the J. I. Case Threshing Machine Company, as between them and the defendant O. M. Lipper; and both parties appearing by counsel, and the court, having heard the witnesses and argument, and having examined the authorities submitted, is of the opinion that the law is with the defendant Lipper; wherefore it is ordered, adjudged, and decreed that the defendant Lipper do have and re-

cover of the J. I. Case Threshing Machine Company the sum of \$850, with interest at 6 per cent. from the 14th day of November, 1913, as the value of the car taken by them on the sequestration, and together with all costs in this behalf incurred, for all of which let execution issue against the said J. I. Case Threshing Machine Company and the sureties on both the sequestration bonds and the replevy bond, jointly and severally—to which judgment, the said J. I. Case Threshing Machine Company excepted and gave notice of appeal.”

Neither the judgment nor the record in this court show what order or disposition, if any, was made in the trial court of the plaintiff Jarrell or the defendant Gorman, or of the issues as between them, nor of the asserted mortgage lien as between Jarrell and Lipper. Jarrell sued to recover judgment against Gorman on a promissory note, and asserted a mortgage lien on other property than the one car claimed by the appellant. The judgment does not dispose of either the parties or the issues between Jarrell and Gorman, and between Jarrell and Lipper, and is not a final judgment.

For the reasons stated, this court is without jurisdiction, and the appeal is dismissed.

DAVIS v. STATE. (No. 3730.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915.)

1. WEAPONS \S 17 — UNLAWFULLY CARRYING PISTOL—EVIDENCE—SUFFICIENCY.

Evidence in a prosecution for unlawfully carrying a pistol held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. $\S\S$ 20, 22–33; Dec. Dig. \S 17.]

2. CRIMINAL LAW \S 829—REQUESTED CHARGE—GIVING EFFECT.

Where, in a prosecution for unlawfully carrying a pistol, the court gave a charge fairly presenting the issue, and in the language selected by accused, it was unnecessary to give other special charges requested by accused on the same issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2011; Dec. Dig. \S 829.]

3. WEAPONS \S 8 — CARRYING PISTOL — INSTRUCTION—REFUSAL.

In a prosecution for unlawfully carrying a pistol it was not error to refuse to charge that, if the jury believed the pistol was broken and would not shoot, “or” that it was unloaded at the time when, etc., there should be an acquittal, since it is not the law that one carrying an unloaded pistol is guilty of no offense.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. \S 7; Dec. Dig. \S 8.]

4. CRIMINAL LAW \S 1028 — MISDEMEANOR—CONVICTION—QUESTIONS CONSIDERED.

Upon appeal from a conviction of a misdemeanor, the court can pass only upon such questions as are properly raised in the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S\S$ 2619, 2620; Dec. Dig. \S 1028.]

5. CRIMINAL LAW \S 822—CHARGE—CONTRA-DICTION—EFFECT.

In a prosecution for unlawfully carrying a pistol, the objection that the charge as given was contradictory cannot prevail, where the charge,

read as a whole, was clear in meaning, and could not have misled the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S\S$ 1990, 1991, 1994, 1995, 3158; Dec. Dig. \S 822.]

Appeal from Henderson County Court; O. D. Owen, Judge.

Sing Davis was convicted of unlawfully carrying a pistol, and he appeals. Affirmed.

Miller & Miller, of Athens, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of unlawfully carrying a pistol, and his punishment assessed at 60 days' imprisonment in the county jail.

[1] The first contention of appellant is that the evidence will not sustain a conviction. John Hill, John Ross, and Lillie Ross all testify that John Ross was working with an unbroken horse when appellant came walking along; that he stopped and began to assist Ross with the horse, and while doing so a pistol fell out of his pocket; that John Hill picked up the pistol and offered it to appellant, when appellant asked him to take care of it for him, as he (appellant) would go with John Ross to Franklin. John Hill testified that he carried the pistol to his home, and appellant afterwards came to his house and got it. This is certainly positive evidence that appellant had the pistol on that occasion; in fact, he so testifies himself, but says he had let his brother have the pistol to have it fixed; that his brother had neglected to do so, and, being over at his brother's that morning, he was carrying the pistol back to his home; that it was unloaded, was broken, and would not shoot. It would be a question whether or not the jury would believe his explanation of his possession on this occasion, and apparently they did not do so. The other witnesses present did not notice that the pistol was broken in any particular.

[2] At appellant's request the court instructed the jury:

“You are instructed that, if you believe from the evidence that the defendant, Sing Davis, was carrying a pistol from his brother's home to his own home at the time complained of, and that he was proceeding on his way home along a route a person would usually or ordinarily travel in going from the place or home of George Davis to defendant's home, you will acquit this defendant, and this although you may believe from the evidence that the defendant, while thus proceeding on his way home, stopped by at Ross' place to assist in the managing of the wild horse.”

This presented the issue fairly and in language selected by appellant; therefore it was unnecessary to give the other special charges on that issue requested by appellant.

[3] Appellant also requested the court to instruct the jury:

“I charge you, as a part of the law in this case, that if you believe from the evidence that

the pistol was broken and it would not shoot, or that it was unloaded at the time named, you will acquit the defendant."

The court did not err in refusing to give this special charge, for it is not the law of this state that, if one carries an unloaded pistol, he is guilty of no offense. He could very easily have cartridges in another pocket, and in a moment's time could convert it into a loaded one. Had the appellant requested the court to instruct the jury that, if the pistol was broken, or so out of repair that it would not shoot and could not be fired, he should have done so.

[4, 5] But this is a misdemeanor conviction, and we can only pass on such questions as are properly raised in the trial court. No exception was reserved to the court's charge, because he did not so instruct the jury in his main charge, although another exception to the charge was reserved, and that is that the charge as given was contradictory in its terms. This is not a correct construction of the charge, but, when read as a whole, its meaning is clear, and could not have misled the jury.

If appellant's contention, as made by his testimony alone, had been believed, of course he would not be guilty under the law, but the jury did not believe his explanation of his possession of the pistol, or as to its condition, and we cannot say, at this distance, they ought to have done so.

The judgment is affirmed.

HUGHITT v. STATE. (No. 3722.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915.)

FENCES §28—DESTRUCTION—PROSECUTION—EVIDENCE—ADMISSIBILITY.

Where, in a prosecution for unlawfully pulling down a fence, defendant offered to show that the prosecuting witness held possession only as agent for the real owner, and that the entry upon the land and destruction of the fence were done by accused under the authority of the real owner, such testimony was not inadmissible as an effort by accused to try the title to real estate, but was only a proper attempt to show that the entry and destruction of the fence were lawful.

[Ed. Note.—For other cases, see *Fences*, Cent. Dig. §§ 62-67; Dec. Dig. §28.]

Appeal from Mills County Court; G. H. Dalton, Judge.

Frank Hughitt was convicted of unlawfully pulling down a fence, and he appeals. Reversed.

J. C. Darroch, of Goldthwaite, for appellant. F. P. Bowman, Co. Atty., of Goldthwaite, and C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of unlawfully pulling down a fence of D. H. Trent, and his punishment assessed at a fine of \$10.

This case is a little out of the ordinary. Of course, the title to real estate is never to be tried in this character of case, and the court did not err in so holding. But, as we view the record, the evidence appellant sought to introduce was not offered to prove that he held a superior title to Trent to the land, but only to show that he, in fact, was in possession of the land on which the fence was situate, and rightfully so. The prosecuting witness, D. H. Trent, testified that the fence belonged to him and had been in his possession since 1895—about 20 years; that the land fenced was a part of the W. W. Williams survey, and was called the McClesky land; that he had been in possession of the land since 1895. If Trent was claiming the land as his own, then, of course, the question of title could only be tried in the district court, and evidence on that issue would not be admissible. But what appellant sought to prove was that, while Trent was in possession of the land, his possession was that of agent of McClesky, and offered in evidence the following letter of Trent:

"Goldthwaite, Texas, June 29th, 1914.

"Mr. J. H. McClesky, Belton, Texas—My Dear Sir: I have yours of the 28th relative to the land at Williams ranch. I have had this land fenced and taking care of it for fifteen years, and the wood has been saved thereby. I don't find any deed on record in favor of your father, but he told me that the land belonged to him, and he gave me authority to fence the same. However, old Frank Hewitt has put a deed on record and claims the land, says that he bought the land from your father, but the place is in my possession and will be until you are able to dispose of it, and if I can help you shall only be glad to do so. The land is a cheap grade of land and won't bring much; don't believe it will bring more than \$6.00 per acre, for it is just rough grazing land. There has not been any taxes paid on the place for years and years. I will keep and take care of the place and hold it until I am paid for my fence and something for taking care of it for the past fifteen years. Let me hear from you regarding the same. I am,

"Yours very truly, D. H. Trent."

Appellant offered to prove, further, that prior to the time this prosecution was begun he had gone into possession of the land by authority of Trent's principal, Mr. McClesky. If, in fact, Trent was holding the land as agent for McClesky, at will, certainly McClesky would have authority to authorize appellant to take possession of it. If Trent had been claiming the land as his own, no matter how defective his title, the owner of the superior title would not be entitled to show that fact in this character of case. But when Trent by his testimony does not claim to be owner of the land, on cross-examination appellant ought to have been permitted to show by him, if he could, that he did not claim the land as his own, but was merely in possession of same as agent for McClesky, and that his possession was, in fact, the possession of McClesky, and then to prove, if he could, he entered upon

the land by authority from McClesky, in fact, the person in whom the real possession of the land had been all these years. The court erred in excluding the testimony which would tend to show these facts.

If one is in possession of another's cow and had been in peaceable possession for two years, and one is alleged to have stolen the cow of A. (the person in possession) without his consent, and A. had so testified, certainly it would be permissible for one charged with the theft to show that, while A. was in possession of the cow, yet he was agent of B., the real owner of the cow, and if the person charged with the crime should offer to show that he had the consent of B. to take the cow, such testimony would be admissible, and if the jury should find that he had such consent, he would be guilty of no offense. If Trent had never claimed the land as his own, and did not do so at the time of this trial, but only claimed he was in possession of it as the agent of McClesky, and appellant had the permission and consent of and authority from McClesky to enter upon the land, and take possession thereof, he committed no offense in doing so. And if Trent placed a fence on the land, without McClesky's knowledge or consent, McClesky or those holding under him would have authority to remove it from off the land, and would be guilty of no offense in doing so.

What is above said indicates the errors of the court in excluding testimony, and we do not think it necessary to discuss each bill of exceptions in detail. It will also indicate to the court the issues to be submitted in his charge.

The judgment is reversed, and the cause remanded.

WINTERMAN v. STATE. (No. 3648.)

(Court of Criminal Appeals of Texas. Oct. 13, 1915. Rehearing Denied Nov. 3, 1915.)

1. INTOXICATING LIQUORS §236—OFFENSES—EVIDENCE—SUFFICIENCY.

In a prosecution for selling intoxicating liquor without a license in a county where prohibition was not in force, evidence held to warrant conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.]

2. INTOXICATING LIQUORS §150—OFFENSES—SALES WITHOUT LICENSE.

Under Pen. Code, art. 611, declaring that no person shall, directly or indirectly, sell intoxicants without taking out a license, the offense is selling intoxicants without a license, and not engaging in the business of selling without a license.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 164, 165; Dec. Dig. § 150.]

3. INDICTMENT AND INFORMATION §110—SALE OF LIQUOR—FOLLOWING STATUTE.

Pen. Code, art. 611, makes it an offense to sell intoxicating liquors without a license, while article 614 prohibits the carrying on of the busi-

ness and the sale of intoxicants at a place other than where the licensee is authorized. Rev. St. arts. 7436 and 7446, require an applicant for a license to give the number of the premises where the business is to be carried on and prohibit sales elsewhere. An information charged that on the 18th of April, 1915, in the county of T., accused, without having first obtained a license, did in a certain locality in said county where local option was not in force sell intoxicating liquor contrary to law. Code Cr. Proc. art. 453, declares that the information must be so certain as to enable accused to plead the judgment in bar of a second prosecution, while articles 460 and 464 declare that an information charging an offense in ordinary language so as to inform a person what is meant is sufficient, and that an information for selling intoxicants shall be sufficient if charging that accused sold intoxicating liquor contrary to any law of the state to named persons without stating the quantity. Held, that the information, which substantially followed the statute a violation of which was charged, was sufficient, while not averring the particular place in the county wherein accused made the sale, or that such place was a different one from the place where he was licensed to sell.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 271; Dec. Dig. § 100.]

Appeal from Tarrant County Court; Jesse M. Brown, Judge.

Joe Winterman was convicted of selling intoxicating liquor without a license where local option was not in force, and he appeals. Affirmed.

Baskin, Dodge, Baskin & Eastus, of Ft. Worth, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of selling intoxicating liquor where prohibition was not in force without obtaining a license.

[1] Phil Gibson testified that he had a barbecue stand near the corner of Thirteenth and Monroe streets, in the city of Ft. Worth, and had lived in Ft. Worth 20 years; that appellant lived with his son, Felix Winterman, just across the street from his barbecue stand. He further testified:

"On Sunday, the 18th day of April, 1915, about 9 o'clock in the morning, Dolly Chainey, a negro woman, came to my barbecue stand and gave me 40 cents, and asked me to get her a half pint of whisky. I took the 40 cents and went across the street to Felix Winterman's house, where the defendant, Joe Winterman, was staying, and knocked on the door. The defendant came to the door, and I gave him the 40 cents, and told him that I wanted to get a half pint of whisky. The defendant went back into another room of the house and brought out a half pint of whisky and gave it to me, and I carried the whisky across the street to the barbecue stand and delivered it to Dolly Chainey. About 11 o'clock that same morning Dolly Chainey came back to the barbecue stand and gave me 40 cents again and told me to get her another half pint of whisky. I went across the street again to the house where the defendant was staying and got another half pint of whisky from him and carried it across the street to the barbecue stand, where Dolly Chainey was, and delivered it to her. I bought a half pint of whisky from the defendant at his home on Sunday, April 4th, for 40 cents."

On cross-examination he testified:

"The defendant, Joe Winterman, does not run the saloon on the corner of Thirteenth and Monroe streets just back of which my barbecue is located. He runs a saloon on the corner of Seventeenth and Terry streets, which is about a half or three-quarters of a mile from where my barbecue stand is located. I bought this whisky from the defendant on Sunday, the 18th day of April, A. D. 1915, in Tarrant county, Tex."

Appellant's saloon was in a negro neighborhood.

E. H. Peters, a police officer of Ft. Worth, testified:

"About 8 o'clock on Sunday evening of the 18th day of April I saw two negroes come out of Felix Winterman's house, where the defendant, Joe Winterman, lives. After the negroes had gotten up the street about half a block from the house I stopped them and searched them. I found 12 half pints of whisky on one of the negroes. He had them stuffed about in all of his pockets, in his shirt bosom, and around the waistband of his pants under his coat, and the other had 4 half pint bottles of whisky and one quart bottle of whisky on his person."

It was agreed as follows:

"It is agreed that the defendant had a liquor dealer's license on the 18th day of April, A. D. 1915, to engage in the business of a retail liquor dealer at the corner of Seventeenth and Terry streets, in the city of Ft. Worth, Tarrant county, Tex., but that he did not have a license to engage in such business at any other place in Tarrant county, nor at the place where the sales were alleged to have been made in this case. It is further agreed that the sale of intoxicating liquors was not prohibited at the place where the sale of whisky herein alleged to have occurred took place."

Appellant denied making any of the sales to Gibson, and testified, and had some of his kinsfolk and others to so testify, which, if believed by the jury, would have been sufficient to show an alibi. The court gave appellant's special charge submitting this question, and the jury found against him.

The said two negroes the officer arrested with the whisky on them were Lovey Sparks and Willie Slaughter. Appellant had Lovey testify that both he and Willie worked for him in his saloon on the corner of Seventeenth and Terry streets, and that they bought said whisky found on them from him Saturday night before, to take to Gainesville, a prohibition city, and that about 25 minutes before train time, just before they were arrested, they went to appellant's residence for Willie to get money to make the trip on, but that appellant was not at home, "as far as I saw," and he and Willie were arrested as they started away. He claimed he paid appellant \$2.75 on the whisky when he bought it Saturday night, and was to pay the balance when he returned. On cross-examination he said he could name no one who saw him with the whisky from the time he claimed he bought it till he was arrested. Appellant testified he usually sold the half pint bottles of whisky at 30 cents per bottle, but he sold these 12 bottles to Lovey cheaper, —for \$2.75 for the 12 bottles; that when he settled with him that Saturday night he deducted the price of the whisky from Lovey's

week's wages and "paid him the balance in cash"; that he sold no part of it to him on credit, and Lovey had no part of it charged to his account. Appellant did not have Willie Slaughter to testify at all, nor did he testify to selling any whisky to Willie that Saturday night.

The evidence was clearly sufficient to sustain the conviction.

[2] It seems appellant made an oral motion to quash the information. At any rate, after the trial he made a motion in arrest of judgment on these grounds: (1) The information did not affirmatively allege he had engaged in the business of selling such liquor without a license; (2) it did not allege the particular place in Tarrant county where he made said sale; (3) it did not affirmatively allege such sale at a place in said county other than where he was licensed to sell.

The information, after the usual heading, alleges that:

Appellant "heretofore, on the 18th day of April, A. D. 1915, in the county of Tarrant and state aforesaid, without having first obtained a license under the laws of the state of Texas as a retail liquor dealer, did then and there, in a certain locality in said county and state where local option was not then and there in force, unlawfully sell, directly and indirectly, to one Phil Gibson intoxicating and spirituous liquors capable of producing intoxication in quantities of one gallon and less, to wit, two half pints of whisky, against the peace and dignity of the state."

The statute (P. C. 611) is:

"No person shall, directly or indirectly, sell spirituous or vinous liquors, capable of producing intoxication, in quantities of one gallon or less, without taking out a license as a retail liquor dealer. Any person who shall violate the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars, and by imprisonment in the county jail for a term not to exceed six months."

It will be noted the statute says, "No person shall, directly or indirectly, sell" etc., without taking out a license; not that "no person shall engage in the business." If the Legislature had intended not to make it an offense merely to sell without a license, but instead had intended to make it an offense only "to engage in the business," etc., it could and would have said so in clear and unmistakable language. But the language is clear and unequivocal; that no person shall sell without a license is the offense. This court has already decided appellant's first ground against him, and correctly so, in *Trezevant v. State*, 145 S. W. 1191. That the Legislature intended to make it an offense to merely sell without license is made manifest when we consider the former law. It was (White's P. C. 1895, art. 411a) "any person * * * who shall engage in the sale of" liquor etc. "without having obtained license therefor," etc.

[3] We will discuss his other grounds together. The law requires a person, when applying for license to sell liquor in nonprohibition territory to expressly state the ex-

act location where his business is to be conducted, giving the number of street, etc. (R. S. 7435, 7446), and the license, if granted, is issued to him to sell there, and nowhere else. He is expressly prohibited from carrying on his business—selling—elsewhere than the exact place his license authorizes. P. C. 614; R. S. 7433; Lolcano v. State, 72 Tex. Cr. R. 518, 163 S. W. 64.

Besides other statutes prescribing what allegations shall be sufficient in an indictment and information, we have this special one on selling liquor (C. C. P. 1911, 464):

"In an indictment (or information) for selling intoxicating liquors in violation of any law of this state, it shall be sufficient to charge that the defendant sold intoxicating liquors contrary to law, naming the person to whom sold, without stating the quantity sold; and, under such indictment (or information) any act of selling in violation of the law may be proved."

Some of the other statutes applicable are (C. C. P. 453):

"The certainty required * * * is such as will enable the accused to plead the judgment * * * in bar of any prosecution for the same offense."

And (article 460):

"An indictment (or information) for any offense * * * shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment."

In our opinion, the said information fully meets each and all of these statutes, and is clearly sufficient. It follows substantially, and practically literally, the statute (P. C. 611) prescribing the offense, which is itself generally sufficient (White's Ann. C. C. P. § 344, subd. 2, and section 347, and cases cited). In addition, it specifically avers the date of the particular sale, "on the 18th day of April, 1915." It does not even say on "or about" said date. It also avers sufficiently the place, "in the county of Tarrant," said state. It also avers the particular person to whom the sale was made, "Phil Gibson," the quantity of liquor, "two half pints," and the particular kind of liquor, "whisky," and that, "without having first obtained a license under the laws of the state of Texas, as a retail liquor dealer, did then and there in a certain locality in said county where local option was not in force *unlawfully* sell," etc.

It was wholly unnecessary for the pleading herein to allege the specific place in Tarrant county where appellant made said sale, and that that place was not the specific place where he was licensed to sell. Nor was it necessary for the pleading to allege, in another form, that appellant had a license to sell at a particular place only, giving it, but that the unlawful sale alleged was not at that place, but elsewhere, naming it. It is true the pleader might have made these allegations. So it is true in every such plead-

ing the pleader might allege much more of the details of the offense than is always done. But because that is not done does not render the pleading bad, if it contains sufficient, as was done in this case, to comply with the statutes prescribing the requisites of such pleading. Clark v. State, 174 S. W. 355; Wilson v. State, 61 Tex. Cr. R. 631, 136 S. W. 447; Sprague v. State, 44 S. W. 837; Lowe v. State, 4 Tex. App. 34; Slack v. State, 61 Tex. Cr. R. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112; Beatty v. State, 72 Tex. Cr. R. 634, 162 S. W. 877; Brown v. State, 168 S. W. 861, and cases therein cited; White v. State, 11 Tex. App. 476; Carter v. State, 29 Tex. App. 8, 14 S. W. 350.

The judgment will be affirmed.

REA v. STATE. (No. 3665.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915.)

1. CRIMINAL LAW §1120—APPEAL—MATTERS REVIEWABLE.

In a criminal prosecution, where questions are asked which the court rules call for opinions of the witnesses, but the record on appeal fails to include the questions asked, the ruling must be taken as correct, and no question is presented for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120.]

2. HOMICIDE §163—TRIAL—EVIDENCE—ADMISSIBILITY.

In a prosecution for uxoricide, defendant cannot show his kindness to his children, since his kindness to them was not in issue.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 310-317; Dec. Dig. § 163.]

3. CRIMINAL LAW §1169—APPEAL AND ERROR—MATTERS REVIEWABLE.

Defendant's exception to a ruling admitting evidence in his favor cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 4531-4539; Dec. Dig. § 1169.]

4. CRIMINAL LAW §1090—APPEAL—BILL OF EXCEPTIONS—NECESSITY.

Complaints in the motion for new trial of rulings on evidence, as to which no bills of exceptions appear in the record, cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2853, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.]

5. HOMICIDE §290—TRIAL—INSTRUCTIONS.

Instructions, in a prosecution for homicide, that unless the jury believe beyond a reasonable doubt that deceased died from arsenical poisoning, and from no other cause, they should acquit the defendant, sufficiently required the state to prove that the particular poison which caused death was arsenic.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 595; Dec. Dig. § 290.]

6. HOMICIDE §291—INSTRUCTIONS—SUFFICIENCY.

The evidence, in a prosecution for murder of accused's wife by arsenical poisoning, contained nothing to authorize an inference that she took any medicine the day of her death, except the capsule given by accused, but showed

that shortly after taking that she began to have convulsions, and to exhibit the other symptoms of arsenical poisoning, and died soon afterwards. Held not to require a charge on the issue of suicide, though it was shown that she was in ill health and despondent, and often wished she was dead.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 596; Dec. Dig. ¶291.]

7. HOMICIDE ¶234—TRIAL—EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

Circumstantial evidence, in a prosecution for homicide, held to support a verdict of guilty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 482-493; Dec. Dig. ¶234.]

8. HOMICIDE ¶233—MOTIVE—NECESSITY OF SHOWING.

Proof of motive is not essential to support a conviction for murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 481; Dec. Dig. ¶233.]

9. CRIMINAL LAW ¶1128—APPEAL.

On appeal from a judgment in a prosecution for homicide, the court can consider only matters which are a part of the record in the trial court, and cannot consider an ex parte affidavit as to disqualification of a juror for bias, made after adjournment of the term at which the verdict was rendered and to consider which would require a trial on the facts involved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2951-2953; Dec. Dig. ¶1128.]

Appeal from District Court, Van Zandt County; W. R. Heath, Judge.

W. M. Rea was convicted of murder, and he appeals. Affirmed.

Wynne, Wynne & Gilmore, of Wills Point, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of the offense of murdering his wife, by administering to her poison, and his punishment assessed at life imprisonment in the penitentiary.

[1] This was a case of circumstantial evidence, and the state adduced, as circumstances tending to show his guilt, that appellant's wife died at night, and he urged the ladies present to at once prepare clothing in which to bury her; that he requested a neighbor to go to town that night to secure a coffin, etc.; that when the neighbor objected to going, because it was raining and his team had been turned out, appellant told the neighbor that he neglected to turn his team out that night, and he would find it in the lot, and insisted on him going; and other circumstances tending to show hurried preparation for the burial of his wife. After this testimony was adduced, appellant placed some witnesses on the stand whom he says would have testified that such preparations as he sought to have made that night "were those that ordinarily occur under circumstances of this kind, and were not unusual." The court ruled that such questions as were propounded to the witnesses called for the conclusions of the witnesses, and not facts

known by them. The bill does not allege that appellant expected to or could have proven by the witnesses that in this neighborhood the coffins were sent for at night immediately after death, and the neighboring ladies urged to begin sewing on the burial shroud the very night of the death and within a short time thereafter. Doubtless it was usual and customary to send for a coffin, and have burial clothes prepared; but the bill ought to have gone further, and stated that in that neighborhood those who had those near and dear to them to die, sent for the coffin the very night that the death occurred, and, if burial clothes had to be prepared, that immediately upon the death of the wife the husband would ask the ladies to immediately proceed with the preparation, if such was a fact. The court says the questions propounded called for the conclusion of the witnesses, and not for the facts within their knowledge. The questions propounded are not included in the bill, and we must accept the bill as approved, and, as qualified, the bill presents no error.

[2] In the next bill it is shown that the appellant desired to prove by some witnesses that he was kind, affectionate, and loving in his conduct towards his children, and often had them in his lap. His conduct towards his children was not an issue in this case, but his conduct towards his wife, and the bill shows that the court permitted each of the witnesses to testify to everything they knew about defendant's conduct towards his deceased wife.

The next bill contends that the court permitted J. R. Kellis, sheriff of the county, to testify to a conversation had with appellant while under arrest. The court, in approving the bill, thus qualifies it:

"The witness J. R. Kellis testified as follows: 'I told the defendant that we came to investigate the death of his wife. He told me that he had bought some arsenic from John Pratt, with which to kill rats, and that his wife made the arsenic up in a cup, and set the cup containing the remainder of it up on the gallery plate. He told me that he put the rats that he killed with the arsenic over in a patch of woods in a pasture west of his house, and we went over there to see them, and when we got to the place I only found the carcass of one rat. It was dry skin and bones. He further stated that there was some arsenic left, and he put it and the paper both in the stove and burned it.' This witness further testified that previous to this conversation he had not arrested the defendant, nor said anything to him about arresting him, or about any case about him, or any suspicion against him; that he had not in any way restrained him of his liberty; that he was permitted to go at his will, and that, at one time after said statements were made, the defendant went out of his sight, going into his house, and remained there some minutes, while this witness was talking to Henry Rusk; and that it was only after his return from the house that he arrested him, which was some time after the foregoing statements had been made. At this time there were no facts nor circumstances proven in the trial of this case that the defendant was under arrest, or that he was even suspicioned as having com-

mitted the crime, or that there were any charges of any kind against him."

As thus qualified the bill presents no error. *Martin v. State*, 57 Tex. Cr. R. 264, 122 S. W. 558; *Grant v. State*, 56 Tex. Cr. R. 411, 120 S. W. 481; *Cordes v. State*, 54 Tex. Cr. R. 204, 112 S. W. 943; *Williams v. State*, 53 Tex. Cr. R. 2, 108 S. W. 371; *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188.

[3] Bill of exceptions No. 4 was not approved by the court, but instead of doing so the court states:

"The court overruled state's objection to the testimony complained of above, and permitted the defendant's attorneys to bring their books in court, and to read out of them in framing their questions to the witnesses."

This bill, under such circumstances, of course, presents no error.

[4] While there are other complaints in the motion for new trial in regard to the introduction of and rejection of other testimony, the above four bills are all that appear in the record, and, the other complaints not being verified in any way, we cannot consider them.

[5] The first exception to the charge of the court is that it does not present all the issues in the case, in that it failed to instruct the jury that it devolved upon the state to prove beyond a reasonable doubt that the particular poison from which deceased came to her death was arsenic. The court, in deference to this complaint, gave appellant's special charge, in which the jury was told:

"Unless you find and believe from the evidence, beyond a reasonable doubt, that the deceased, Nona Rea, came to her death from arsenical poisoning and from no other cause, you will acquit the defendant."

[6] The next exception is that the court erred in not submitting the issue of whether or not deceased committed suicide. The evidence, if any, which tended to raise this issue, is the testimony of appellant and his mother, Mrs. Lizzie Edgerton. Appellant testified that his wife had been in bad health for three years; that she suffered from goiter of the neck and had a womb trouble. He said on Friday, before his wife's death on Tuesday, Dr. Echols had given him a prescription for his wife; that he had the prescription filled on Sunday, and at the same time purchased a nickel's worth of arsenic to kill rats. A remarkable coincidence in this connection is that he had the prescription charged, but paid cash for the arsenic, thus avoiding a book entry of the purchase of arsenic. On the day of his wife's death appellant approached the doctor and asked him if it would not strengthen his wife to give her some quinine; he replying it could do no harm. Appellant did not purchase any quinine, but did purchase some empty capsules, saying that he got them to give her quinine in. He said, just before going to bed on Tuesday night, his wife complained of being worse, and asked him to give her a dose of quinine; that he gave her a capsule

of quinine, claiming his wife had filled it and had it ready. Soon after this his wife began to have convulsions and froth at the mouth, and complained of it lightening and thundering, when there was no lightning nor thunder. In a short time his wife died. He earnestly insisted that, if the capsule contained arsenic, he did not know it. The court instructed the jury:

"If you shall believe, beyond a reasonable doubt, that the defendant gave to Nona Rea a capsule containing arsenic in quantity sufficient to cause her death, and which did cause her death, but you further believe, or have a reasonable doubt thereof, that at the time defendant so gave said capsule to deceased (if he did) he believed the same to contain quinine, or he did not know that same contained arsenic in quantity sufficient to cause her death, then you will acquit the defendant."

Defendant and his mother both testified to her taking patent medicines of various kinds for her ailments, but did not testify as to the contents, or that either of the medicines so taken contained arsenic or any other poisonous substance; but they did testify that she was low-spirited, depressed, and often expressed a wish that she was dead, etc. This testimony did not call for a charge other than those above given by the court—that if deceased died from any cause other than arsenical poison, and that even though she died from arsenical poison, yet if it was given to her by appellant through a mistake, he should be acquitted. The charges as given fully covered the defensive issues as made by the testimony.

The charge on circumstantial evidence is in language frequently approved by this court, and the charge, as a whole, is not upon the weight to be given the testimony. This disposes of all the exceptions to the charge, and the special charges requested and refused were fully covered by the court's main charge, in so far as applicable to the issues presented by the testimony.

[7,8] In the brief filed, and in an able oral argument before this court, appellant's counsel earnestly insists that, this being a case of circumstantial evidence, the evidence is not of that cogency and force to authorize a conviction—that it does not exclude every other reasonable hypothesis than that of appellant's guilt. Admit that Mrs. Rea was in bad health; does the evidence raise the issue that she may have died from any other cause than arsenic poison, or does it raise the issue that the poison may have been self-administered, if she died from such poison, or does it raise the issue that appellant may have given her the poison by mistake? We do not think the issue that it may have been self-administered, if she died from arsenic poison, is raised by the testimony. There is no evidence that she took any medicine on the day of her death, other than that given her by her husband, appellant, and no evidence from which such inference could be deduced. The only medicine she took on that day was administered

by appellant, and shortly thereafter she began to have convulsions. The other two issues were clearly and succinctly submitted by the court, and the jury finds against appellant on such issues. Will the testimony support such finding?

Two days before Mrs. Rea's death appellant purchases arsenic, and, while he has his other purchases charged, the purchase of this arsenic is kept off the books; he paying cash for it, and it alone. The day of Mrs. Rea's death he asks the attending physician if quinine would not benefit her. He purchases no quinine, but does purchase empty capsules. That night he administers to his wife a capsule, which he contends contained quinine, but which the evidence would authorize the jury to find contained arsenic, for the witness from whom appellant says he borrowed quinine on that day testifies appellant borrowed no quinine from him. So the record would authorize the jury to find there was no quinine at appellant's house, and that he had knowledge of that fact. Shortly after administering the capsule by appellant, Mrs. Rea began to have convulsions, and exhibited other symptoms which the doctors say accompany a death occasioned by administering arsenic. He takes the rings from his wife's fingers before her death, saying it was her desire that they be removed before death, and makes other remarks which indicate that appellant was aware death would ensue, after his wife began to have convulsions. Expressions which would indicate a desire for a hurried burial, and the further fact that, when the body was exhumed, a portion of the stomach was found to contain arsenic. Dr. Louis Rosenberg testified:

"I made the examination, and made several different tests, and found traces of arsenic in the stomach. I did not make a quantitative test, for the reason that I only had a portion of the stomach to work with. In order to have made a quantitative test, it would have been necessary to have had the entire stomach and the intestines and the liver and kidneys. There is no such thing as normal arsenic in the stomach. The presence of arsenic in the stomach indicates that the patient has recently taken arsenic."

The evidence does not suggest that the arsenic was taken in any other way, except that it was administered to Mrs. Rea by appellant in the capsule given her shortly before she began to have convulsions. It is true appellant, by the testimony offered in his behalf, seeks to explain many of these circumstances; but the jury was not bound to accept the explanations, and when the record is read as a whole one is not surprised that the jury did not do so.

Appellant contends no motive was shown why appellant should desire the death of his wife. It is not essential, to sustain a conviction for murder, that motive be shown. It is true that when murder was divided into two degrees in this state—one upon express and one upon implied malice—it was held

to sustain murder of the first degree express malice must be shown, but an unexplained killing was always held to be murder in the second degree. And now this rule applies to all murder cases. So it was not essential that a motive be shown, but we think a motive was shown. Appellant had an invalid wife. The record would suggest that he had become enamored of an excellent young lady in the community, though it might be proper here to state that no improper relations of any character existed, and it is not shown that, prior to the death of the wife, the young lady knew of the infatuation of appellant. She, however, was made aware of it in a very few days after the death of Mrs. Rea. Appellant delivered her the rings taken from the fingers of his wife as she was dying, and claimed to have discovered a letter written by his wife. This letter, the evidence demonstrates, was not written by Mrs. Rea, but was written by appellant, and by him shown to the young lady in less than a week after the death of his wife. The letter is as follows:

"Letter of Request to my man and babys

"Wills Point Tex 5/10/1914

"Dear husband and babys Miron I want you at my death to Keep my to Little girls to geater and be good to thim as you have in the Past You have Been a true husband to me I never called on you to do eny thing But What you done it god en heaven only Knows how good you are to me sweet I am not going to Live Long But When I die Put me away nice Burie me en my brow skirt and that silk waist that is to Bee maid and dont Put no Jewelry on me take my Rings of and Let Etter Wallace have to of thim and You Keep Your own and as you all ways thought so much of etter I want you to go to see her for I had Rather she would Come Over My to Little girls than eny one that I know of she is a good girl and a Pure hearted Miron this girl Likes you and I no you do her for you all ways talked so much and I Told you that she was one of the Nacest girls en this country you write to Etter she cant do nothing but Refuse you are Let you come to see her Miron Please dont Part my to Little girls for this is my Prair sweet god have meray on my family and give thim Pure helth and when I am dead and gon take care of thim god bless my husband for he has Been Like a fater to me O god he has stayed with me through thick and thin when there was no one else to stay with me god may this couple reign to geather if it is you Powe Precious god if this so does hapen Let thim get along Like we did

"god bless my family is my Prair Amen
Noma Rea."

[9] Appellant also brings up what he terms a supplemental transcript, in which is shown the affidavits of Mr. Petit and wife, made September 23, 1915. The term of court at which appellant was tried adjourned April 9, 1915. So it is evident that the affidavit was made some five months after court had adjourned for the term. We are not authorized to consider this ex parte affidavit; but, if we were, as it would show that one of the jurors had formed and expressed an opinion prior to being impaneled on the jury, it would be necessary for us to hear evidence and determine the question wheth-

er or not the juror had expressed an opinion, for on the trial the juror must have sworn that he had no opinion that would influence him in rendering a verdict. On appeal we are not authorized by law to hear evidence on such an issue, nor consider matters not made a part of the record in the trial court. It is true appellant says he was not made aware of this matter until long after court had adjourned for the term; but we are bound by the law, which, on appeal, only authorizes us to review the record as made in the trial. It may be that such matters as this may suggest to the Legislature the advisability of authorizing an independent suit to be brought in the trial court to set aside the judgment, when grounds are discovered after adjournment of court, as has been provided in civil cases. But under the law as it now exists we are not authorized to take into consideration the affidavit, but must pass alone on the record as certified to us by the clerk of the court; and, finding no error therein, the judgment is affirmed.

WILLIAMS v. STATE. (No. 3697.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915. Rehearing Denied Nov. 10, 1915.)

1. HOMICIDE \S 89—ASSAULT WITH INTENT TO KILL.

Where defendant fired into a small room packed with people in reckless disregard of human life, with intent to kill some one, knowing that he would strike or kill some one, and did shoot some one, he was properly convicted of assault to murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 115-118; Dec. Dig. \S 89.]

2. HOMICIDE \S 157, 166—EVIDENCE—MOTIVE.

In a prosecution for shooting, evidence of defendant's difficulty with a person who had won his money, and whom he probably intended to kill, was admissible to show his state of mind and his motive.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 288-292, 320-331; Dec. Dig. \S 157, 166.]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

John Williams was convicted of assault to murder, and he appeals. Affirmed.

Chas. Ashworth and Monroe Ashworth, Jr., both of Kaufman, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a conviction for assault to murder, with the penalty assessed at five years in the penitentiary.

It is unnecessary to detail the testimony of the witnesses. As a whole it was sufficient to sustain the verdict, and to show that on February 21, 1913, appellant, a negro man, and 21 others, assembled at the house of one of them to gamble; that they did gamble, at least from early in the evening till some time in the night; that in the evening, when appellant and Joe Alexander, with Chase, were in a game gambling a dis-

turbance arose between appellant and Alexander about a quarter, when appellant drew his pistol and attempted to shoot Alexander, but Chase overpowered him, prevented the shooting, and took his pistol away from him. The gambling proceeded, various games going on between different groups of the negro men. In some or all the games all of appellant's money was won from him. He then went for his pistol, got and fired it in the room, the ball striking a negro woman, Estell Neal who was in the room, passing entirely through her body severing one of her intestines, and also striking the finger of her husband. In this room, which was only 14 by 16 feet, were 22 negro men, including appellant, and four negro women, including said Alexander and the others who had won his money. Immediately upon his firing John Polk, who was right at him, grabbed the pistol, and tried to get him to give it to him, but appellant refused. They scuffled over it for some time, appellant at last threw Polk down, wrenched the pistol from him, stating: "You heard them say I done shot this girl; I want to make my get-away;" and "that he was sorry it was like it was—if he had known it was like it was, it would have all been different." He then fled and made his "get-away." It was nearly a year before the officers caught him in a distant county, although they sought for him all the time.

The wounded woman was taken to a hospital, where she was treated, and lingered for some time, and then died. The testimony of the doctor showed that at last an operation was performed on her to cause the severed intestine to join, but his testimony tended to show her death was probably due to this operation; hence for that reason the judge did not submit murder to the jury. There is no complaint whatever of the charge of the court.

[1] Appellant did not testify. His defense was the shot was accidental. The court told the jury, if it was, to acquit him. Doubtless his shot was intended for Alexander, or some of the others who had won his money, or, at least, fired into a room packed with people "in such utter and reckless disregard of human life as showed him to be an enemy to all mankind," and with intent to kill some one, and when he is bound to have known he would strike or kill some one. It was doubtless on this ground he was rightfully and legally convicted. *Aiken v. State*, 10 Tex. App. 610, and authorities therein cited; *Lopez v. State*, 2 Tex. App. 204.

[2] Appellant contends the evidence was insufficient to sustain the verdict. We think it was sufficient. He also contends it was error to admit evidence of said difficulty between him and Alexander. We think this was admissible to show his state of mind and his motive. *McKinney v. State*, 8 Tex. App. 638 et seq.; *Blackwell v. State*, 29 Tex.

App. 200, 15 S. W. 597; Wh. Ann. C. C. P. §§ 1072, 1070; Belcher v. State, 71 Tex. Cr. R. 653, 654, 161 S. W. 459. No other questions are raised.

The judgment is affirmed.

SMITH v. STATE. (No. 3802.)

(Court of Criminal Appeals of Texas. Oct. 13, 1915. Rehearing Denied Nov. 10, 1915.)

1. WEAPONS \Leftrightarrow 11—UNLAWFUL CARRYING OF—DEFENSE.

Though accused came to a city as a traveler, that fact does not warrant him in carrying a pistol about the streets for several days while searching for work.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. §§ 10-14; Dec. Dig. \Leftrightarrow 11.]

2. WEAPONS \Leftrightarrow 11—UNLAWFUL CARRYING OF—DEFENSE.

The right of a traveler to carry a pistol will not defeat a prosecution for unlawfully carrying a weapon, where the journey was broken and temporarily abandoned while accused burglarized a house.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. §§ 10-14; Dec. Dig. \Leftrightarrow 11.]

Appeal from Tarrant County Court, Jesse M. Brown, Judge.

Leo Smith was convicted of unlawfully carrying a pistol, and he appeals. Affirmed.

Graves & Houtchens, of Ft. Worth, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of unlawfully carrying a pistol, and his punishment assessed at 30 days' confinement in the county jail.

[1, 2] Appellant presents but one assignment of error, and that is: He contends that the evidence raises the issue he was a traveler at the time of his arrest, and had a right to carry the pistol, and the court erred in refusing to give his special charge presenting that issue. He testifies his home is Atlanta, Ga., but the last place he worked was in New Orleans, La.; that he had been in Galveston, Alvin, Houston, Waco, Hillsboro, and Ft. Worth in search of work; that he had been in Ft. Worth at the time of his arrest for 5 days, but says that on the morning of his arrest, he boarded a freight train, intending to leave Ft. Worth, but was put off at Polytechnic. If this was all the testimony, the issue might be raised, although we are inclined to think not so, for from his testimony the conclusion is inevitable that he had the pistol on him all the 5 days he was in Ft. Worth, and, if so, he had, for the time being, ceased his journey, and could not carry a pistol on his person as he went about the streets of Ft. Worth day after day, even though he was searching for work, as he contends. Alexander v. State, 57 Tex. Cr. R. 252, 122 S. W. 387. But the evidence goes further in this case, and there is no dispute as to such facts. If appellant, as he con-

tends, got on the train to leave Ft. Worth, and was put off at Polytechnic, he was seen sitting on the railroad track about one-half mile from where he was arrested. When he left the railroad track, he was seen to go to several houses, and, when finally arrested at Mr. Latimore's house, with a pistol on his person, he admits he was engaged in burglarizing the house. This was not incident to his journey, and he had ceased his travels and engaged in an unlawful enterprise. Judgment affirmed.

JACKSON v. STATE. (No. 3662.)

(Court of Criminal Appeals of Texas. Oct. 13, 1915. Rehearing Denied Nov. 10, 1915.)

1. DISORDERLY HOUSE \Leftrightarrow 12 — INFORMATION—"LESSEE"—"TENANT."

That an information charging that defendant was the tenant of a house and unlawfully kept and knowingly permitted it to be kept for prostitution was no ground for quashing it, because it did not allege that she was a lessee; since the word "tenant" is synonymous with "lessee" [citing Words and Phrases, Lessee; Tenant].

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 14-19; Dec. Dig. \Leftrightarrow 12.]

2. DISORDERLY HOUSE \Leftrightarrow 9—OFFENSE—TENANT.

A married woman living with her husband, who herself leased the premises and paid the rent, though authorized by her husband to make the lease and furnished by him with money to pay the rent, might be convicted of unlawfully keeping the house for prostitution.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. § 1; Dec. Dig. \Leftrightarrow 9.]

3. CRIMINAL LAW \Leftrightarrow 390—EVIDENCE—REBUTTAL.

In a prosecution for unlawfully and knowingly keeping a house for prostitution, where defendant testified in her own behalf that, when arrested on a charge of vagrancy in that she was a common prostitute, she was mistreated by the police officers and induced to enter a plea of guilty through misrepresentations and false promises, it was proper in rebuttal to permit the officers to explain the whole matter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 862; Dec. Dig. \Leftrightarrow 396.]

4. CRIMINAL LAW \Leftrightarrow 954—MOTION FOR NEW TRIAL—REQUISITES.

In a motion for a new trial, appellant should specifically point out to the trial court the reasons why he should be granted a new trial, so as to give the court a chance to correct its own errors, if any.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2341, 2363-2367; Dec. Dig. \Leftrightarrow 954.]

5. CRIMINAL LAW \Leftrightarrow 1129—ASSIGNMENTS OF ERROR—TIME OF FILING.

Assignments of error filed after the term at which appellant was tried has adjourned have no place in the record and should not be copied therein, for under the law and the rules governing the Court of Criminal Appeals it cannot consider them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2964; Dec. Dig. \Leftrightarrow 1129.]

Appeal from Hunt County Court; H. O. Norwood, Judge.

Mrs. John Jackson was convicted of unlawfully and knowingly keeping a house for prostitution, and she appeals. Affirmed.

Spearman & Casey, of Greenville, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. [1] Appellant was convicted under an information charging that appellant "was a tenant of a house situate in Hunt county, Tex., and that she did then and there unlawfully keep, and was concerned in keeping, and knowingly permitted to be kept the said house for prostitution, and where prostitutes were permitted to resort and reside for the purpose of plying their vocation," etc. Appellant moved to quash the information because it alleged she was a tenant, and did not allege that she was the "lessee" of the house. In the sense the word "tenant" is used in the information it is synonymous with "lessee," and the court did not err in overruling the motion. Words and Phrases, vol. 8, p. 6904.

[2] Appellant also contends that as she was a married woman, living with her husband, he would be the tenant, and not her. In this particular instance the owner testifies that appellant was the person who made the trade with him for rent of the premises, and the person who paid him the rent. It is true the husband testifies he authorized his wife to make the rental contract, and furnished her the money to pay the rent. This question was decided adversely to appellant's contention by this court in *Curry v. State*, 24 S. W. 516, wherein it was held that either or both may be prosecuted and convicted.

[3] Appellant took the stand and testified in her own behalf, and testified that when arrested by the city officials, being charged with being a vagrant, in that she was a common prostitute, she was mistreated by the officials, and especially the chief of police; that she was induced to enter a plea of guilty through misrepresentations and false promises, etc. Having herself injected all this matter into the case by her testimony, to create sympathy for herself, it was proper in rebuttal to permit the officers to explain the whole matter, and the bills complaining of the admissibility of this testimony present no error. The state was not bound to accept her statement in regard to her arrest, treatment, etc., and why she entered the plea of guilty. The record before us discloses that the state elicited none of this matter in making its case, and, if we examine the record no further than the state's testimony in chief, we would not know that appellant had ever been arrested as a vagrant or that she had pleaded guilty of being a common prostitute. This testimony first appears in the record when she took the stand to testify in her own behalf. Under such circumstances,

the court was correct in holding that the testimony was admissible to contradict and impeach her.

The appellant's motion for a new trial was rather vague and indefinite. It first complains:

"That the court erred in its main charge to the jury, as shown by bills of exception Nos. 1 to 8; (2) because the court erred in refusing to give defendant's special charges Nos. 1 to 7 inclusive, and Nos. 10 and 11; (3) because the court erred in the admission and exclusion of testimony, as shown by bills of exception Nos. 4 to 60 inclusive; (3½) because the court erred in overruling defendant's motion to quash the information; and (4) because the verdict and judgment of the court are contrary to and not supported by the evidence."

[4, 5] This is all of the motion for new trial. The motion was overruled March 5th, and the term of court at which appellant was tried adjourned April 24, 1915, and none of the bills of exception were filed until after court had adjourned, consequently on March 5th the court was given but little, if any, information as to the reasons why appellant thought she was entitled to a new trial. There are no 60 bills of exception in the record, nor quite half that many. In the motion for a new trial appellant should have specifically pointed out to the trial court the reasons why she thought she should be granted a new trial, otherwise the trial court is given no chance to correct its own errors, if any committed. Assignments of error, filed long after the term of court has adjourned, have no place in the record, and should not be copied therein, for under the law and rules governing this court we cannot consider same. *Sue v. State*, 52 Tex. Cr. R. 122, 105 S. W. 804.

While this record is in the shape above pointed out, yet we have carefully considered each bill of exceptions contained therein, and none of them present any error. The evidence offered in behalf of the state amply supports the verdict, and the special charges given at the request of appellant, and the main charge, fully presented each and every issue in the case.

The judgment is affirmed.

SPICER v. STATE. (No. 3667.)

(Court of Criminal Appeals of Texas. Oct. 13, 1915. Rehearing Denied Nov. 10, 1915.)

1. PARENT AND CHILD — 17 — OFFENSES — FAILURE TO SUPPORT CHILD.

Under Acts 33d Leg. c. 101, § 1, making it an offense for a father to neglect or refuse to provide for its maintenance if under 16 years of age, it was immaterial that the child was born after he had deserted his wife.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176-181; Dec. Dig. — 17.]

2. CRIMINAL LAW — 577 — TIME FOR TRIAL — WAIVER.

Defendant, entitled to two whole days to prepare for trial, who announced ready for trial, who had a verdict of not guilty, and who, when an information was at once refiled, stated that

he would be ready for trial as soon as he could prepare a plea of former acquittal and a motion to postpone, and on inquiry by the court said he did not care whether they were ruled on then or not, and who announced ready, thereby waived the time allowed for preparation for trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1305, 1506; Dec. Dig. ☞ 577.]

3. CRIMINAL LAW ☞170—FORMER ACQUITTAL.

Where an information in a former complaint charged an impossible date, a conviction could not be had under it, so that an acquittal thereunder was not available as a plea of former acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 312-321; Dec. Dig. ☞170.]

Appeal from Jones County Court; J. F. Lindsey, Judge.

C. H. Spicer was convicted of deserting his wife and child, and he appeals. Affirmed.

Joe C. Randel, of Hamlin, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of deserting his wife and child. His first contention is that the indictment is insufficient to charge an offense. It is in language frequently approved by this court, and we do not deem it necessary to discuss it further.

[1] Another contention is that, as the baby was born after he deserted his wife, if he did do so, he cannot be convicted of the offense of deserting his baby. Section 1, c. 101, Acts 33d Leg., not only makes it an offense to desert the child, but also makes it an offense to neglect or refuse to provide for the support and maintenance of the child, if under 16 years of age. The information is brought under this provision of the Code.

[2] Appellant contends that he was placed on trial in less than two days after the complaint and information were filed. Under our procedure he was entitled to two whole days to prepare for trial, unless he voluntarily waived the time. The record discloses that an information had been filed against him, charging him with the commission of the offense on November 15, 1915, an impossible date, as that time has not yet arrived. When the case was called for trial he announced ready for trial. When the county attorney discovered his mistake, he desired to dismiss the case. Appellant insisted on a verdict of not guilty on that complaint, as he had announced in the case. The court entered a verdict of not guilty in accordance with appellant's request. The county attorney at once stated he would refile, and did so, charging the offense as of date March 20, 1915. When appellant was rearrested and was asked if he desired to make bond, appellant's counsel stated it was unnecessary, as he would be ready for trial as soon as he could prepare a plea of former acquittal. Time was given him, and when the case was called for trial, he filed a plea of former ac-

quittal, and also filed a motion with the clerk: "Now comes the defendant and moves the court to postpone this case until Saturday, May 1st." When these two pleas were filed, the court asked counsel for appellant if he desired to present them and have them ruled on at that time, when counsel replied, "I do not care whether you rule on them just now or not" and did not call the court's attention to the motion. Without further action he announced ready and proceeded with the trial. If appellant desired the two days to prepare for trial, he should have called the court's attention to his motion, had it acted on, and if the court overruled the motion and forced him to trial, took a bill of exceptions to the action of the court in so doing, and if he had taken that action, it would require us to reverse the case. But instead of doing this, he informs the county attorney he will be ready for trial as soon as his plea of former acquittal is prepared. When he gets this prepared, he files with it his motion to postpone, but does not call the court's attention to it, nor have it ruled on then. He announces ready for trial, and proceeds with the trial and not until after the verdict is rendered does he complain. His acts and conduct amount to a waiver in law.

[3] The only other contention is that the court erred in not sustaining his plea of former acquittal. The information in the first complaint charging an impossible date, a conviction could not have been had under it or, if secured, would have been a nullity. The information and complaint being void, the court did not err in overruling the plea.

The judgment is affirmed.

BENNETT v. STATE. (No. 3746.)

(Court of Criminal Appeals of Texas. Oct. 27, 1915.)

1. RECORDS ☞17—SUPPLYING LOST RECORDS—CHANGE OF VENUE—JURISDICTION.

Where defendant was indicted in the district court of F. county and pleaded not guilty, and his motion for a change of venue to M. county was granted and the copies of the indictment, orders, etc., were certified and sent to the clerk of the M. county district court and were lost, the jurisdiction of the M. county district court attached, and it might take proceedings to substitute the lost papers.

[Ed. Note.—For other cases, see Records, Cent. Dig. §§ 25, 26, 28-35, 43; Dec. Dig. ☞ 17.]

2. RECORDS ☞17 — SUBSTITUTION OF LOST PAPERS—NOTICE.

In view of Code Cr. Proc. art. 482, regulating when and how lost papers in a criminal case can be substituted and not expressly providing for notice to the accused, such papers can be substituted without notice and service thereof upon him; and, in any event, his appearance and answer to a motion to substitute lost papers without such service amounted to a waiver of notice.

[Ed. Note.—For other cases, see Records, Cent. Dig. §§ 25, 26, 28-35, 43; Dec. Dig. ☞ 17.]

8. INDICTMENT AND INFORMATION \Leftrightarrow 14—SUBSTITUTED COPY—TRIAL.

The fact that a substituted copy was not the indictment of a grand jury was no ground why accused could not be tried upon such copy.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 77-82; Dec. Dig. \Leftrightarrow 14.]

Appeal from District Court, McLennan County; Richard I. Munroe, Judge.

Horace Bennett was convicted of burglary of a private residence at night, and he appeals. Affirmed.

W. E. Rogers, of Marlin, for appellant. O. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of the burglary of a private residence at night and his punishment assessed at 20 years in the penitentiary.

There is no statement of facts. Appellant has three bills of exceptions which will be considered together. In substance, they show that the appellant was duly indicted in the district court of Falls county where the offense was committed; that he was duly arrested, confined in jail, made a motion for a change of venue which was assented to by the county attorney, and thereupon the court entered the proper order changing the venue to McLennan county, Tex., and ordered the sheriff to deliver him to the sheriff of McLennan county before the next term of the district court of that county. Before the order of change of venue was made, appellant was duly arraigned and pleaded not guilty. The district clerk of Falls county, in compliance with the statute, made properly certified copies of the indictment and other papers therein and also a proper certified copy of all the orders made in the district court of that county; that he sent the original papers and this properly certified transcript of the orders to the clerk of the district court of McLennan county, Tex. None of these papers were ever received by that clerk, but were shown to have been lost. The county attorney of McLennan county duly, by a motion in writing, suggested the loss of said papers and made two motions, one to substitute the said certified copy of the orders of the district court of Falls county, and the other to substitute the indictment. To these respective motions he attached properly certified copies from the district clerk of Falls county of all of the said orders and of the said indictment. The court made all the proper orders in compliance with the statute and the decisions of this court, and substituted the said copy of orders from Falls county and the indictment. There is no suggestion or claim by the appellant that these papers, as substituted, were not absolutely correct in every particular.

[1] He attacks the action of the district court of McLennan county in three particulars. First, he claims that because the said

papers from the district clerk of Falls county never reached the district clerk of McLennan county, but were lost in transit, the jurisdiction of the McLennan county court never attached, and that whatever proceedings to substitute the lost papers were necessary to be made in the district court of Falls county, instead of McLennan county. This question has been expressly held against him in *Berg v. State*, 64 Tex. Cr. R. 612, 142 S. W. 884.

[2] His second ground was that the court could not act on the county attorney's motions to substitute, unless and until he was duly served three days with notice thereof. He was present when the motions were acted upon by the court, and, before the court acted thereon, filed his objections to the court acting on the matter on both of the grounds just mentioned. So far as notice to him is concerned, the statute regulating when and how lost papers in a criminal case can be substituted (article 482, C. C. P.), and the decisions thereunder do not provide that notice shall be served upon an accused before such lost papers can be substituted, and this court has expressly held that such papers can be substituted without such notice and service thereof upon him. *Burrage v. State*, 44 S. W. 169, and *Id.*, 44 S. W. 1104. Even if it had been necessary to serve appellant with notice of the filing of these motions, his appearance and answer thereto, without such service, amounted to a waiver of notice and effected the same purpose as if he had been timely served with notice.

[3] Appellant's only other ground is that he claimed that he could not be tried under the substituted copy of the indictment because that substituted copy was not the indictment of a grand jury. His contention is wholly untenable. We deem it unnecessary to discuss at any length either of the questions raised by appellant.

The judgment is affirmed.

ALVEREZ v. STATE. (No. 3733.)

(Court of Criminal Appeals of Texas. Oct. 27, 1915.)

1. WITNESSES \Leftrightarrow 37—RECOLLECTION OF WITNESS—FIXING TIME—EVIDENCE—ADMISSIBILITY.

In a prosecution for selling intoxicating liquors in prohibition territory, evidence to fix the time of sale within the period of limitations held not objectionable as seeking to make the witness testify as to facts of which he had no recollection.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. \Leftrightarrow 37.]

2. CRIMINAL LAW \Leftrightarrow 949—NEW TRIAL—MOTION—SUFFICIENCY.

A motion for new trial in a prosecution for selling intoxicating liquors in prohibition territory, which states that defendant has found new evidence in support of his testimony, and to disprove the testimony of state's witnesses, but that he is unable to have the affidavits of the witnesses attached because they live at a distance from where defendant is kept in custo-

dy, which is not sworn to and which fails to give the names of the witnesses and what he expects to prove by them, was properly overruled as being too vague and indefinite.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2337, 2339-2344; Dec. Dig. § 949.]

Appeal from District Court, Atascosa County; F. G. Chambliss, Judge.

Chon Alvarez was convicted of selling intoxicating liquors in prohibition territory, and he appeals. Affirmed.

C. O. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of the offense of selling intoxicating liquors in prohibition territory, from which conviction he prosecutes this appeal.

[1] There were no exceptions reserved to the charge of the court and no special charges requested. The only exception reserved to the introduction of testimony recites:

"Jim Dillard, a witness for the state, being on the witness stand under oath as a witness, the following questions and answers ensued, it being redirect examination of said witness: 'Q. Jim, why did you tell me that was in January of this year? Mr. Brown: We object—(No ruling noted.) Witness: I told you I didn't know. Q. What month was it? A. I don't know what month at all. Q. You know it was this year? A. Yes, sir. Q. You know it was before you came into the room—into the grand jury room. A. Yes, sir. Q. Was it before that time? A. Yes, sir. Mr. Brown: We object to these questions trying to get this witness to tell something he doesn't know. The Court: Objection is overruled. Proceed. Mr. Brown: Note our exception.' Which testimony was objected to by the defendant at the time it was offered, upon the following grounds, to wit: The witness had testified as to his utter lack of knowledge as to the month and day on which the alleged sale of liquor was consummated. The course of questioning by the district attorney was calculated to refresh the mind of the witness, if possible, without any recollection of the facts in the mind of the witness upon which to base any hope of direct knowledge in the memory of said witness. Also, the same was calculated to strengthen the witness in the minds of the jury, and to prejudice them against the defendant."

The witness had testified that he did not remember the day nor month. On his cross-examination appellant had sought to show that his remembrance of the occasion of the purchase was vague, and witness could not, or would not, fix the date. It is shown he was a boy, who could neither read nor write, and very illiterate. To bring the date within the period of limitation, it was permissible to show that the purchase was made some time during this year, and the testimony was not subject to the objections made.

[2] In the motion for a new trial appellant states that:

"This defendant has found new evidence in support of his own testimony, and new evidence to disprove the testimony of state's witness Jim Dillard, all of which he is willing to verify by affidavit of said witnesses, and would have their affidavits attached hereto, but for the fact that he has not had the time nor the op-

portunity to obtain the same by reason of the fact that said new witnesses live at such a distance from where this defendant has been kept in custody since the trial herein, that it has been impossible for him to secure said affidavits."

This motion is not sworn to by appellant, nor any other person. It will be noticed he does not give the name of the witness or witnesses, nor what he expects to prove by the witness or witnesses. Under such circumstances, there was no error in overruling this ground of the motion for a new trial. It was too vague and indefinite.

The judgment is affirmed.

Ex parte NEYLAND. (No. 3828.)

(Court of Criminal Appeals of Texas. Oct. 27, 1915.)

RAIL § 52—AMOUNT OF BAIL—EXCESSIVENESS.

The Court of Criminal Appeals will not set aside a judgment, fixing the bail of a person indicted for murder at \$5,000, where, though he produced evidence with reference to his ability to give bail, putting the maximum that he could give at \$1,000, it does not appear that he has attempted to give bail in the amount fixed and failed.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 209; Dec. Dig. § 52.]

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

Application by T. L. Neyland for admission to bail. From the judgment fixing the amount of bail, he appeals. Affirmed.

Heldingsfelders, of Houston, for appellant. C. O. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Applicant was indicted for murder. The facts attending the homicide are not made a part of the record, and in fact the record shows the testimony was not introduced. The record shows the indictment, process, and return of the sheriff were introduced, and such documentary evidence as pertained to the cause after arrest. The judgment of the court refusing bail follows this. Applicant produced evidence with reference to his ability to give bail, putting the maximum that he could give at \$1,000. There is no evidence showing that he made an attempt to give this amount of bond, and failed. The record shows that upon placing the bond at \$5,000 he gave notice of appeal. As the matter stands, we are of opinion that the court would not be justified in setting aside this order of the court. If the party had not been able to give the bond, after making due and appropriate attempts, we would have a different question presented, but this is not here made to appear. In fact, it rather appears that he made no attempt by reason of the fact that, upon the entering of the judgment placing the bail at \$5,000, he gave notice of appeal. We suppose the theory of this appeal is that \$5,000, under the

circumstances, is too large. We cannot, in the state of the record, so hold. It may be that if, after due effort is made to give bail in the amount fixed, he fails, the trial judge should look into the matter and, if thought advisable, reduce the bail.

As the record is presented, the judgment will be affirmed.

Ex parte HENGY. (No. 3742.)

(Court of Criminal Appeals of Texas. Oct. 27, 1915.)

HABEAS CORPUS \S 113 — JURISDICTION — RELEASE PENDING APPEAL.

The Court of Criminal Appeals has no jurisdiction of an appeal from the judgment in a habeas corpus proceeding remanding the petitioner to custody, where he is admitted to bail pending the appeal.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. \S 102-115; Dec. Dig. \S 113.]

Appeal from Criminal District Court, Dallas County; W. L. Crawford, Jr., Judge.

Habeas corpus by Louis Hengy. Prisoner remanded to custody, and he appeals. Cause dismissed.

C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was arrested on a proper warrant issued on a complaint against him from the corporation court of the city of Dallas, and was held in custody by the chief of police of the city thereunder. He sued out before one of the district judges of Dallas a writ of habeas corpus seeking his discharge from said arrest and imprisonment. The judge heard the case and all the evidence and remanded him to the custody of the officer holding him. He thereupon appealed from the judge's order to this court and at once entered into a recognizance and was discharged from actual custody by virtue thereof.

Under such circumstances, it has uniformly been held by this court that it has no jurisdiction to hear and determine any such cause. The giving bond or recognizance and discharge thereunder prevents this court from acting on the appeal. Ex parte Snyder, 39 Tex. Cr. R. 120, 44 S. W. 1108; Ex parte Talbutt, 39 Tex. Cr. R. 12, 44 S. W. 832; Ex parte Richie, 177 S. W. 85; Ex parte Harvey, 177 S. W. 1174, and cases cited in these several cases.

This cause is therefore dismissed.

LOCKETT v. STATE. (No. 3751.)

(Court of Criminal Appeals of Texas. Oct. 27, 1915.)

HOMICIDE \S 340 — APPEAL — HARMLESS ERROR — INSTRUCTIONS.

Where, in a prosecution for homicide, the court charged on self-defense and further charged on manslaughter, giving the general definition of what is meant by "under the immediate

influence of sudden passion" "and adequate cause," and stating that the passion cannot be a result of former provocation, that the act causing the death must be caused directly by passion from provocation then given, it not being enough that the mind is merely agitated by passion from previous or other provocation, and that the jury should consider the matters occurring at and prior to the homicide in determining provocation, with a further charge on murder and manslaughter, submitting the punishment, and the jury assessed the lowest punishment for manslaughter against the defendant, the charge is not reversible error as being so general and abstract as to mislead the jury into thinking that defendant was offering some excuse under his right of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 715-717, 720; Dec. Dig. \S 340.]

Appeal from District Court, Fayette County; Frank S. Roberts, Judge.

Sidney Lockett was convicted of manslaughter, and appeals. Affirmed.

L. D. Brown, of La Grange, for appellant.
C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of manslaughter, his punishment being assessed at two years' confinement in the penitentiary.

The only bill of exception in the record complains of the fact that Mr. Sam Shelbourne, foreman of the grand jury, was not a citizen of Fayette county, and therefore not a competent grand juror, and, being incompetent, he was a person not entitled to be in the grand jury room at the time the indictment was found. It is unnecessary to discuss that question, inasmuch as the facts show that Mr. Shelbourne was a citizen of Fayette County and a qualified juror.

Appellant filed exceptions to the charge at the time it was given, first, because the court did not peremptorily instruct a verdict for the defendant. It is useless to discuss that in view of the testimony. We are of opinion the court was correct in not so instructing the jury. The second exception to the charge is because it gives general and abstract propositions of law upon the subject of manslaughter, not applicable to the facts and issues, and by the giving of which in such general and abstract form the jury were misled and confused to the prejudice of the defendant, and caused them to conclude defendant was offering some excuse under his right of self-defense. The charge on manslaughter we think is not subject to the criticism. It gives the general definition of what is meant by "under the immediate influence of sudden passion" and "adequate cause," and that the passion is not the result of a former provocation, and that the act causing death must be caused directly by the passion arising out of the provocation then given, and it is not enough that the mind is merely agitated by passion arising from some other or

previous provocation, but, in determining as to the provocation at the time, the jury should consider all the evidence in the case, of matters occurring at the time of the difficulty, and all matters occurring prior thereto. The court also gave the definition of "adequate cause," etc. The court charged on murder, submitting the punishment, and also on manslaughter, submitting the punishment. Take the charge as a whole, it seems to be sufficient. The court also gave a charge on self-defense, of which there is no complaint. Inasmuch as the defendant received the lowest punishment for manslaughter, and that being an issue in the case under the facts, we are of opinion there is no such error, even if the charge was not as full and specific as it might have been. Where the charge on manslaughter may be deficient in some respects, and the jury award the lowest punishment, we are of opinion the charge would not be error unless it interfered with defendant's rights to the extent of cutting off or minimizing his theory of self-defense. Had the defendant received above the minimum punishment, the charge would have been critically reviewed, but, as before stated, manslaughter being in the case, and the court having fairly presented that question, and the lowest punishment having been awarded, and in the absence of the fact that he contended it eliminated his self-defense or in any wise minimized it, we do not believe it should be cause for reversal.

The other matters are mainly with reference to the sufficiency of the evidence to support the conviction. This issue was sharply controverted. The state's evidence would make a case fully as high as manslaughter. That for the defendant presented the issue of self-defense. It is not the purpose of this opinion to review the testimony. The issues were made, and the jury decided them, and there is evidence which justifies the verdict. Under this view of the record, we think the judgment ought to be affirmed; and it is accordingly so ordered.

ORNELAS et al. v. STATE. (No. 3703.)
(Court of Criminal Appeals of Texas. Oct. 27, 1915.)

CRIMINAL LAW §1128—APPEAL—REVIEW—
MOTION FOR NEW TRIAL—CONSIDERATION
OF AFFIDAVIT.

After conviction an affidavit of a juror was filed, to the effect that after retirement of the jury one of the jurors mentioned that a defendant did not testify in his own behalf or in that of the other defendant, stating that his failure was a circumstance tending to show defendants' guilt, and that the fact was discussed by different members of the jury and considered by them in rendering the verdict. Such affidavit was not attached to or made a portion of or an exhibit to the motion for new trial, which was overruled on the same day that the motion was sworn to and filed. Held, that the judgment must be affirmed, as such affidavit could not be considered, since, before the defendants

could take advantage of it, it must affirmatively appear that it was called to the attention of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2951-2953; Dec. Dig. § 1128.]

Davidson, J., dissenting.

Appeal from District Court, El Paso County; W. D. Howe, Special Judge.

Gabino Ornelas and Alfonzo Munoz were convicted of burglary, and they appeal. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellants were convicted of burglary, their punishment being assessed at two years' confinement in the penitentiary.

The record is before us without a statement of facts or bill of exceptions. A motion for new trial was filed on the 5th day of June, alleging that the verdict was not supported by the evidence, and was contrary to the law and the evidence as submitted to the jury. On June 21st an amended motion for new trial was filed. It is unnecessary to notice the first ground. The second ground is as follows:

"Because the jury after they had received the charge they retired to their room to consider their verdict, discussed the fact that defendant Ornelas never testified in his own behalf, and considered that as a circumstance showing the guilt of the defendants herein."

On the same day, June 21st, the following affidavit was filed:

"Before me the undersigned authority this day personally appeared Luther Davenport, who after being by me duly sworn deposes and says that he was a juror that tried Gabino Ornelas and Alfonzo Munoz, and that after the jury had retired to the jury room to consider the evidence in said cases one of the jurors during the discussion of the evidence mentioned the fact that the defendant Ornelas did not testify in said case either in his own behalf or in the behalf of the defendant Munoz and that his failure to so testify was a circumstance which tended to show the guilt of the defendants, and this fact was discussed by different members of the jury and was considered by them in rendering the verdict herein.

"[Signed] Luther Davenport."

This was properly sworn to and filed on June 21st. On the same day, June 21st, the court entered this judgment:

"On this day came on to be heard the motion of the defendants, Gabino Ornelas and Alfonzo Munoz, to set aside the verdict and judgment and grant him a new trial of this cause, the said defendants Gabino Ornelas and Alfonzo Munoz being present in court, in person, and the court having heard said motion read, and being fully advised in the premises, is of the opinion that the same should be overruled. It is therefore ordered," etc.

The writer is of the opinion that this judgment should be reversed. This affidavit is uncontroverted, and is the only thing in the record bearing on the question of the discussion by the jury of the failure of defendant to testify. My Brethren are of the opinion that as this affidavit was not re-

ferred to in the motion for new trial, or made an exhibit to it explicitly, therefore it may not have been called to the attention of the trial judge, and that before appellant could take advantage of this it must affirmatively appear in some way that it was called to the attention of the court, and in this condition of the record they hold the judgment ought to be affirmed. In view of their conclusion about the matter, the judgment will be affirmed, but the writer believes that inasmuch as it is specifically alleged in the motion for new trial that the jury discussed the failure of Ornelas to testify, and that the affidavit was filed the same day as was the motion for new trial, and the court on the same day overruled it, this is sufficient evidence of the fact that it was called to his attention, and that he was aware of its existence as part of the motion for new trial. There is nothing to indicate the court did not know it, and it may be very reasonably presumed, and is in my judgment a just conclusion, that, if this affidavit had been filed after the action of the court on the motion for new trial, this record would have shown it. The district attorney certainly would not have let anything of this sort pass him, and especially as the court did not adjourn until the 20th of June, five days after the overruling of the motion for new trial. But, in obedience to the opinion of the majority, the order will be entered affirming the judgment.

HARPER, J. (concurring). I agree to the affirmation because the motion for new trial is sworn to by no person. The affidavit referred to in the opinion is not attached to nor made a portion of nor exhibit to the motion for new trial, but bears separate and distinct file marks, and I do not think we are authorized to consider it as a part of the motion. The order overruling the motion evidences no evidence or affidavit was introduced on the hearing of the motion.

DORRIS v. STATE. (No. 3738.)

(Court of Criminal Appeals of Texas. Oct. 27, 1915.)

1. BAIL § 65 — CRIMINAL PROSECUTION — FORM.

An appeal from a conviction in a criminal case will be dismissed, where the recognizance does not set forth the punishment assessed, as required by the statute.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 285; Dec. Dig. § 65.]

2. CRIMINAL LAW § 1099—APPEAL—RECORD—STATEMENT OF FACTS—APPROVAL BELOW—NECESSITY.

The statement of facts on appeal in a criminal case cannot be considered, where it fails to show a presentment to or approval by the county judge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.]

3. CRIMINAL LAW § 1097—APPEAL—REFUSAL TO CHARGE—STATEMENT OF FACTS—NECESSITY.

Upon appeal in a criminal case, the action of the trial court in refusing to give special charges, as requested, cannot be reviewed, in the absence of a statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2862, 2864, 2926, 2934, 2938, 2939, 2941, 2942, 2947; Dec. Dig. § 1097.]

Appeal from Fisher County Court; M. A. Hopson, Judge.

John Roe Dorris was convicted of wife desertion, and he appeals. Appeal dismissed.

J. D. Barker, of Roby, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of wife desertion, and his punishment assessed at a fine of \$200 and imprisonment in the county jail for a period of six months.

[1] The Assistant Attorney General moves to dismiss the appeal because the recognizance is not in compliance with the statute, and this motion must be sustained. *May v. State*, 40 Tex. Cr. R. 196 49 S. W. 402; *Johnson v. State*, 49 S. W. 594.

[2, 3] But if the recognizance was sufficient to give this court jurisdiction, the statement of facts does not show to have been presented to nor approved by the county judge, and we could not consider the paper alleged to be a statement of facts. The only complaint in the motion for a new trial relates to the failure of the court to give special charges requested. With no statement of facts we can consider, it would be impossible for us to determine whether or not they, or either of them, should have been given.

The appeal is dismissed.

GRUBBS v. STATE. (No. 3747.)

(Court of Criminal Appeals of Texas. Oct. 27, 1915.)

CRIMINAL LAW § 1134—APPEAL—BILLS OF EXCEPTION.

The only grounds in a motion for new trial were insufficiency of the evidence and improper argument by the district attorney. The motion was not sworn to, and that the district attorney used such language was verified in no way. *Held*, that as the only bill of exceptions in the record was reserved to the overruling of the motion for new trial, the one question for review was the alleged insufficiency of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. § 1134.]

Appeal from Criminal District Court, Travis County; A. S. Fisher, Judge.

John Grubbs was convicted of crime, and he appeals. Affirmed.

C. C. Parker, of Austin, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of assault with intent to commit the offense of rape on a girl under 15 years of age, and his punishment assessed at 6 years' confinement in the state penitentiary.

The only bill of exceptions in the record is reserved to the action of the court in overruling his application for a new trial. Consequently the only ground of the motion we can review is the one alleging the insufficiency of the testimony to support the conviction. The only other ground in the motion alleges that the district attorney used certain language in his closing address. The motion is not sworn to, and that the district attorney used such language is verified in no way.

We have carefully read the evidence adduced on the trial. There is a sharp conflict in the testimony. The little girl's evidence, like that of many other children, is not entirely satisfactory, but when we take the evidence of the other witnesses in the case, we cannot say that the jury was not authorized to believe her statement that the appellant did make the attempt. An officer swears that on the occasion in question he caught appellant and the girl in a house occupied alone by him, with the door locked and a pallet on the floor. We do not deem it necessary to recite all the evidence.

The judgment is affirmed.

McANINCH v. STATE. (No. 3763.)

(Court of Criminal Appeals of Texas. Oct. 27, 1915.)

1. CRIMINAL LAW §814—COUNTS CHARGING DIFFERENT OWNERSHIP—INSTRUCTIONS.

Where, in a prosecution for cattle theft on two counts, the first alleging ownership of the stolen cow in the husband, and the second count in the wife, whom the evidence showed to claim ownership, both having testified to lack of their consent, it was not error to charge on the question of theft of a cow as the property of the husband.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. §814.]

2. CRIMINAL LAW §775—ALIBI—INSTRUCTION.

A charge on alibi which told the jury that, if they had a reasonable doubt as to the presence of defendant at the time and place where the offense was committed, they should find him not guilty, sufficiently submitted the defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1833-1837; Dec. Dig. §775.]

3. LARCENY §70—CATTLE THEFT—INSTRUCTION—SUFFICIENCY.

A charge in a prosecution for cattle theft, in which the defense was that the cow was received in a trade, that if the jury believed that defendant received the cow in trade or sale, or if they had a reasonable doubt thereof, they must acquit, was not objectionable, as failing to charge when a theft is completed, and that defendant must be acquitted unless he participated in the actual taking as a principal; since

the charge, as given, directly applied the law to the facts.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 182, 183, 185, 186; Dec. Dig. §70.]

4. CRIMINAL LAW §792—CATTLE THEFT—PRINCIPAL—ACCOMPLICE—INSTRUCTION—SUFFICIENCY.

An instruction in a prosecution for cattle theft that all persons guilty of acting together in the commission of an offense are principals, as are also others present knowing the unlawful intent who aid or encourage those actually engaged, that the offense of theft is complete when the alleged thief has taken actual possession and assumed ownership of the property, and that defendant should be acquitted unless he had some connection with the original unlawful taking of the cow, was sufficient, and not objectionable for a failure to define principals or to instruct that defendant must be acquitted if shown by the evidence to be an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1818-1820; Dec. Dig. §792.]

5. LARCENY §70—CATTLE THEFT—INSTRUCTION—SUFFICIENCY.

In a prosecution for cattle theft, a charge that, if defendant bought or traded for the cow, or was not connected with the original taking, he should be acquitted, coupled with a further charge on circumstantial evidence, was not objectionable for failure to charge that defendant should not be convicted if he was a receiver, and not the thief, since, under the charge, the jury were bound to find defendant not guilty if he was not connected with the original taking, even though he had received the animal with knowledge.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 182, 183, 185, 186; Dec. Dig. §70.]

Appeal from District Court, Milam County; J. O. Scott, Judge.

George McAninch was convicted of cattle theft, and he appeals. Affirmed.

E. A. Camp, of Rockdale, for appellant.
O. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of cattle theft; his punishment being assessed at two years' confinement in the penitentiary.

[1] Exception was reserved to the court's charge on several grounds. The first was that the court erred in charging on the question of theft of the cow as the property of P. B. Hickson; it being claimed the cow did not belong to P. B. Hickson, but was the property of Lula Hickson, the wife of P. B. Hickson. The indictment contains two counts, one charging the cow to be the property of Lula Hickson, and the other charging the cow to be the property of P. B. Hickson. They both testified in the case, and to the want of consent on their part. There is some evidence showing that Mrs. Lula Hickson claimed the cow, and we suppose it was community property, though there is nothing said about it. These people were husband and wife, and she speaks of it in the nature of a milk cow—a noted cow in the neighborhood where it was stolen. But

there is no merit in this contention. Both counts were submitted to the jury, and they found appellant guilty.

[2] The second exception to the court's charge is he did not submit the issue of alibi. The court's charge contains a stereotyped charge on alibi, and, after defining "alibi," instructed them, if they had a reasonable doubt as to the presence of the defendant at the place where the offense was committed at the time of the commission thereof, to find him not guilty.

[3] The third exception is that it does not charge when a theft is completed, and does not charge that the defendant must be acquitted unless he participated in the acts constituting the theft as a principal. We do not believe the exception is well taken. The theory of the state was that appellant and another party committed the theft and drove the cow from Davilla to Cameron, and there was some evidence showing they were seen driving this cow at night. Appellant sold the cow at Cameron, and had the check made for the payment of the cow in the name of one W. J. Melear. His claim was that he traded for the cow with Melear, giving him a little mule valued at \$10 and some money for the cow, and sold her to the butcher. When the butcher went to make out the check, appellant had it made out in favor of W. J. Melear, and himself indorsed Melear's name on the back of it when he cashed it. He says this was done at Melear's request. Now, the court charged the jury, in this connection, that if they should believe from the evidence that the defendant received the cow described in the evidence in trade or sale from one W. J. Melear, or any other person, they will find the defendant not guilty, or if they had a reasonable doubt thereof, they will acquit the defendant. This directly applied the law to the facts.

[4] Another ground is that the court did not define who are principals, and did not instruct the jury that, if defendant is shown by the evidence to be an accomplice, he must be acquitted. The court charged on circumstantial evidence in the main charge, and then gave this charge at the request of appellant:

"You are further instructed that all persons are principals who are guilty of acting together in the commission of an offense. When an offense is actually committed by one or more per-

sons, but others are present, and, knowing the unlawful intent, aid by acts or encourage by words or gestures those actually engaged in the commission of the unlawful act, such persons so aiding or encouraging are principal offenders, and may be prosecuted as such. And in this connection you are further charged that the offense of theft is complete when the alleged thief has actually taken possession of and assumed ownership and control of the stolen property, and unless you believe from the evidence, beyond a reasonable doubt, that the defendant, Geo. McAninch, had some connection with the original unlawful taking of the cow, if the cow was unlawfully taken, you will acquit the defendant."

We think this sufficiently presented the failure of the court to so charge, if such error be found in the court's charge for its omission.

[5] Appellant also excepts to the court's charge for failing to instruct the jury that defendant should not be convicted if he was receiver, and not the thief. We have quoted a sufficient number of the charges, which, we think, presented this matter fairly to the jury, so they could not have made any mistake in finding on this particular question. His contention was that he did not steal the cow, but that he received it from Melear. The court instructed the jury directly, if that was true, to acquit and gave a charge on circumstantial evidence, and also upon the law of principals, which instructed the jury that, if appellant was not connected with the original taking, he could not be guilty of theft. This omission, if it be so treated, was not calculated to injure the rights of the accused in the face of the charges given. It would make no difference whether appellant received it or not; if he was not connected with the original taking, he should be acquitted, and the jury were so instructed, and this whether he received it innocently or fraudulently. If the jury believed he received the animal from Melear, as he says he did, and as was his contention, they would not have convicted him. They could have taken this view of it, but they did not, and there is evidence to support the finding that he was the original taker. The issues were, we think, fairly submitted to the jury on the different questions. There is no bill of exceptions in the record, and these are the matters we have thought necessary to mention in deciding the case.

The judgment is affirmed.

FIRST NAT. BANK OF GRANT CITY v. KORN. (No. 11705.)

(Kansas City Court of Appeals. Missouri. Nov. 1, 1915.)

1. APPEAL AND ERROR —193—GROUNDS FOR REVIEW—OBJECTION TO PETITION.

Unless a petition is so defective as to wholly fail to state any cause of action, and, on that account, is wholly insufficient to support a judgment, an objection that it does not state a cause of action first made in the appellate court cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1238, 1240; Dec. Dig. —193.]

2. BILLS AND NOTES —410—EVIDENCE—CERTIFICATE OF PROTEST—STATUTES.

Under Rev. St. 1909, § 6329, making a certificate of protest prima facie evidence, if filed 15 days before trial, a certificate of protest filed at the beginning of suit in a justice's court, but not verified until the day of trial therein, was sufficient, where the cause on appeal to the circuit court was tried de novo seven months later.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1120-1123; Dec. Dig. —410.]

3. BILLS AND NOTES —414—PROTEST—NECESSITY.

Under Rev. St. 1909, § 10125, providing that protest must be made on the day of dishonor, unless delay is excused, it was not necessary that the drawer of a check, who had notified the bank on which it was drawn not to pay it, be notified of its protest; since the bank was merely his agent in withholding payment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1142, 1148-1155; Dec. Dig. —414.]

4. EVIDENCE —423—PAROL EVIDENCE—INDORSEMENT OF CHECK.

Under Rev. St. 1909, § 10033, providing that one placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is an indorser, unless he clearly indicates his intention to be bound in some other capacity, the legal effect of a blank indorsement cannot be changed or varied by evidence from another source, as the statute fixes the legal effect of the instrument and excludes parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1967-1965; Dec. Dig. —423.]

5. BILLS AND NOTES —400—PRESENTATION FOR PAYMENT—DUE DILIGENCE.

Where plaintiff bank, located in Missouri, received a check on a bank in Iowa, and presented it through the ordinary channels of business, and protested it when payment was refused, there was no failure of due diligence.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1067; Dec. Dig. —400.]

6. BILLS AND NOTES —537—QUESTION FOR JURY—DILIGENCE IN PRESENTATION.

Whether a given state of facts constitutes due diligence in the presentation of a check to the drawee bank is a question of law for the court.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1893; Dec. Dig. —537.]

7. BILLS AND NOTES —421—NOTICE OF PROTEST—MAILING—SUFFICIENCY.

Where a notice of a check's dishonor was put in a post office to go by the proper post, it was immaterial to the rights of the holder whether it ever reached the drawer or not, as all the law requires is the sending of due notice

in proper time, which is met by putting it into the proper post office properly directed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1173, 1178-1187; Dec. Dig. —421.]

Appeal from Circuit Court, Worth County; Wm. C. Ellison, Judge.

"Not to be officially published."

Action by the First National Bank of Grant City against C. A. Korn. Judgment for plaintiff, and defendant appeals. Affirmed.

O. B. Hudson, of Grant City, for appellant. John Ewing and Kelso & Kelso, all of Grant City, for respondent.

TRIMBLE, J. Appellant, having a check drawn by Seasholtz & Scheller on the Kellerton State Bank of Kellerton, Iowa, indorsed and delivered it to the respondent bank, and received from it the proceeds thereof. On presentation to the Iowa bank payment was refused, and the check was protested and returned to respondent. Appellant declining to refund the money he had obtained, respondent brought this suit on appellant's indorsement to recover the amount of said check, with interest and protest fees. The case originated in a justice court, and, after trial there, was appealed to the circuit court, where it was tried anew, resulting in a judgment for the bank, and the other party has appealed.

Respondent has a motion to dismiss the appeal because of the alleged failure of appellant to properly arrange and present the record herein. The chief ground of this motion is that appellant has not distinguished between matters to be shown by the record and matters which can only appear in the bill of exceptions. We are of the opinion, however, that while the appellant's abstract is not in the usual stereotyped form, but is somewhat inartistic, and not as clear as it might be, yet nevertheless it is not so open to the objections made against it as to justify us in refusing to consider the case on its merits. The motion is therefore overruled.

[1] Appellant says the petition or statement on which the case is based does not state a cause of action. No attack was made on the pleading in any way either before judgment or in the motion for new trial. Unless the petition is so defective as to wholly fail to state any cause of action at all, and, on that account, is wholly insufficient to support a judgment, said objection, made for the first time in the appellate court, cannot be regarded. The petition is not so defective as this. The alleged defects it is said to contain are not such as cause the petition to state no cause of action whatever, but, if they exist at all, merely show that a good cause of action exists, but that it has been stated imperfectly in some respects.

The chief grounds of appellant's complaint

relate to the admissibility and sufficiency of the notary's certificate of protest.

[2] With regard to the first objection thereto, it seems that the certificate of protest attached to the note and originally filed with the justice at the time of the institution of the suit, to wit, May 29, 1913, was not verified by his affidavit, as required by section 6329, R. S. Mo. 1909. The case went to trial in the justice court on July 5, 1913, and on that day, before trial, respondent filed another certificate of protest, which was duly verified. Inasmuch as section 6329 makes the certificate prima facie evidence provided it is filed in the cause 15 days before the trial thereof, appellant takes the position that it was not admissible in evidence on the trial of the case in the circuit court. This trial did not occur till February 19, 1914. The certificate, therefore, was filed more than 7 months before the trial in question here. The trial in the circuit court on appeal from a justice is de novo. The issues are investigated and determined as if that were the first time they were ever presented, and as if the trial in the justice court had never been. The object of the statute in requiring the certificate to be on file 15 days is to give the opposite party that much time in which to obtain evidence to overthrow the prima facie case presented by the certificate. The trial in the justice court was wholly supplanted by the trial in the circuit court, so that only the last trial is the one in which the opportunity of the parties to present evidence is finally closed. Consequently, appellant had at that trial vastly more time than the statute allowed him in which to refute the prima facie case made by the certificate. We think the object of the statute was fully met, and that the certificate was not inadmissible on that account.

Turning now to the objections made to the sufficiency of the certificate, it is urged that the certificate should be annexed to the check. There is nothing in the record to show that it was not. Both certificates refer to the "annexed check." Besides, section 10123, R. S. Mo. 1909, says it must be annexed to the bill, "or contain a copy thereof," and the verified certificate contained such copy.

Other objections are made to the sufficiency of the certificate. We have examined them all, and find they are without merit.

[3] Section 10125, R. S. Mo. 1909, does provide that "protest must be made on the day of its dishonor, unless delay is excused." But the protest shows that the check was dishonored on March 17, 1913, and protested on same day. There is no showing to the contrary. The drawer of the check notified the Iowa bank on which it was drawn not to pay the check, for the reason that a horse for which the check was given had been misrepresented to the drawer by the payee. Under these circumstances there was no necessity for notifying the maker of the check;

since he had ordered the drawee bank not to pay it, and said bank was merely the drawer's agent in paying or withholding payment on the check.

[4] Appellant tried to show that at the time he indorsed the check to respondent there was an agreement that he should not become liable as an indorser, and it is urged that the court should have submitted to the jury the question of such an agreement or understanding. The evidence of appellant, however, does not disclose any such oral agreement, even if it could be allowed to prevail against his indorsement, which was in blank, and therefore contained nothing limiting his liability. Section 63 of the Negotiable Instruments Act (now section 10033, R. S. Mo. 1909), says:

"A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

It is held that this is a statutory command that the legal effect of a blank indorsement cannot be changed or varied by evidence from another source. *Porter v. Moles*, 151 Iowa, 279, 131 N. W. 23; *Neosho Milling Co. v. Farmers', etc., Co.*, 130 La. 949, 58 South. 825; *Deahy v. Choquet*, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N. S.) 847; *Baumelster v. Kuntz*, 53 Fla. 340, 42 South. 886; *Rockfield v. First Nat. Bank*, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; *First National Bank v. Bickel*, 143 Ky. 754, 137 S. W. 790. This last-named case, at page 757 of 143 Ky., at page 791 of 137 S. W., says:

"The purpose of the statute is to exclude parol evidence, and to make the written instrument control the rights of the parties. The statute fixing the legal effect of the instrument, parol evidence may not be received to give it a different effect."

The case of *Mudd v. Bank*, 175 Mo. App. 398, 162 S. W. 314, does not conflict with this. In that case the effect of section 10033 was not noticed or discussed, but the real question therein was not in regard to the terms of the indorsement, nor as to how those terms should be proved, but of authority to make any indorsement at all.

[5] It is also urged that the court should have submitted to the jury the question whether or not the check was presented to the Iowa bank within a reasonable time, and whether notice of dishonor was given to appellant. No such objection was made, or issue raised, at the trial. So far as the record shows, there was no evidence of delay. Respondent was located in Missouri; the bank on which the check was drawn was somewhere in Iowa. The check went through the ordinary channels of business to the Iowa bank, and was duly presented and protested when payment was refused.

[6] Whether or not a given state of facts constitute due diligence is a question of law to be determined by the court. *Sanderson's*

Adm'r v. Reinstadler, 31 Mo. 483; Linville v. Welch, 29 Mo. 203; Vogel v. Starr, 132 Mo. App. 430, 112 S. W. 27.

There are other objections made to the steps taken during the course of the trial. We have examined them carefully, and find that they are not sufficient to justify us in disturbing the judgment. The admissions and facts stated in appellant's own evidence show that respondent was entitled to recover provided the check was duly presented and protested. The certificate of protest, which we have held was sufficient and admissible, established the case on that point, and there was no contradiction thereof by the defendant.

[7] The fact that the latter claims he never received from the notary notice of the check's dishonor does not affect the question of his liability.

"If a notice is put in the post office to go by the proper post, it is not important to the rights of the holder whether the notice ever reaches the party entitled to it or not. All that the law requires of him is to send due notice in proper time, and he has discharged his whole duty when he puts it into the proper post office, in due time, directed in a proper manner." *Renshaw v. Triplett*, 23 Mo. 213, loc. cit. 220.

The judgment is manifestly for the right party, and it is accordingly affirmed. All concur.

INTERNATIONAL TEXT-BOOK CO. v. SCHWICKRATH. (No. 11451.)

(Kansas City Court of Appeals. Missouri. Nov. 1, 1915.)

CONTRACTS \S 319—FAILURE TO PERFORM—EFFECT.

Where plaintiff correspondence school agreed to furnish defendant a course of instruction in electrical engineering by correspondence, including instruction papers, examination questions, drawing plates, and corrected work, plaintiff, thereafter failing to furnish any instruction papers, could not recover the amount defendant had agreed to pay for the course.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. \S 1458, 1476, 1477, 1479, 1493, 1507; Dec. Dig. \S 319.]

Appeal from Circuit Court, Jackson County; A. O. Southern, Judge.

"Not to be officially published."

Action by the International Text-Book Company against Andrew Schwickrath. Judgment for defendant, and plaintiff appeals. Affirmed.

Stubenrauch & Hartz, of Kansas City, for appellant. Metcalf, Brady & Sherman, of Kansas City, for respondent.

ELLISON, P. J. This action is based on a written contract whereby for \$109.60 plaintiff was to furnish defendant with a scholarship in the International Correspondence Schools entitling him to a course of "instruction in E. A. D. complete electrical engineering," the instruction being given by corre-

spondence, including instruction papers, examination questions, drawing plates, and corrected work. The contract provided that these should be sent to him through the mails. Defendant paid \$10 in cash, and was to pay plaintiff the balance in monthly installments of \$5 each. The case was tried without a jury, and the court found for defendant; that result being reached by the court's finding that plaintiff had failed to comply with its contract. The evidence fully sustains this conclusion of the court. The court declared the law to be that, as plaintiff had not furnished defendant any instruction papers, plaintiff should have performed the conditions precedent and concurrent of the contract on its part before it would be entitled to recover.

Plaintiff has discussed, at some length, the difference and distinction between dependent, independent, and concurrent covenants, but we have not been impressed with the application of the argument or the authorities cited. The case could scarcely be more simple. Plaintiff agreed to do certain things, for which it was to be paid certain sums. There was evidence tending to support the court's finding, and that is the end of the matter.

The judgment, being manifestly for the right party, is affirmed. All concur.

STATE ex rel. WILLIAMS v. STIPP et al. (No. 11774.)

(Kansas City Court of Appeals. Missouri. Nov. 1, 1915.)

1. PLEADING \S 34, 408—INSUFFICIENCY OF PETITION—FAILURE TO OBJECT.

While an objection to the petition on the ground that no cause of action is stated may be taken at any time, yet, when a defendant fails to object, every intendment which can reasonably be drawn will be indulged in favor of its sufficiency.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. \S 51½, 66-74, 1362-1366; Dec. Dig. \S 34, 408.]

2. PLEADING \S 34—FAILURE TO OBJECT—SUFFICIENCY OF PETITION.

In an action on an attachment bond, the petition alleged the institution of the attachment suit, the execution of the bond, that its conditions were not performed, in that there had been a failure to prosecute the action, and a failure to pay plaintiff all damages and costs that had accrued to him by reason of the attachment, that on account of the wrongful attachment plaintiff had been damaged and lost time in making necessary preparations for the defense and in the defense of the attachment, that he had been damaged by way of traveling expenses, hotel bills, and livery bills necessarily incurred in and about the defense of the attachment, and that he had become liable for necessary attorney's fees incurred in and about the defense of the attachment. Held that, where the petition was not objected to by demurrer or otherwise, it sufficiently alleged that plaintiff's property was attached; since, while the word "attachment" was doubtless used in some cases as describing the character of the

action, in others it was intended to mean the levy or execution of the writ.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66-74; Dec. Dig. ¶34.]

3. GARNISHMENT ¶248 — WRONGFUL GARNISHMENT—INSUFFICIENT RETURN.

That a constable's return certifying that he had levied a writ of attachment by summoning as garnishee the cashier of a bank in which the attachment debtor had a deposit was so far defective as not to show a valid garnishment did not conclude the attachment debtor on the question of damages from the attachment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 470; Dec. Dig. ¶248.]

Appeal from Circuit Court, Bates County; C. A. Calvird, Judge.

"Not to be officially published."

Action by the State, on relation of S. S. Williams, against C. H. Stipp and others. From an order granting a new trial, defendants appeal. Affirmed.

Silvers & Silvers, of Kansas City, for appellants. Smith & Chastain, of Butler, and McGilvray, Woodbury & Woodbury, of Kansas City, for respondent.

ELLISON, P. J. Plaintiff's action, begun in the circuit court of Bates county, is on an attachment bond given in an action begun before a justice of the peace of that county. The trial court peremptorily instructed the jury that plaintiff could not recover. Afterwards that court granted a new trial, and defendants appealed.

[1, 2] The grounds upon which the peremptory instruction for defendants was given were that there was neither pleading nor proof that plaintiff's property had been attached, and that therefore there were no facts stated constituting a cause of action, as well as a failure of proof. The petition was not objected to by demurrer or otherwise. While it is true that an objection based on the ground that no cause of action is stated may be taken at any time, yet, when a defendant fails to object, every intendment which can reasonably be drawn will be indulged in favor of its sufficiency. *Thomasson v. Insurance Co.*, 217 Mo. 497, 116 S. W. 1092; *Lycett v. Wolff*, 45 Mo. App. 493. The present petition is faulty, but we think it may be reasonably inferred from the allegations therein that plaintiff's property was attached. It alleges the institution of an attachment suit, the execution of a bond describing it and its conditions, and that these conditions were not performed, specifying in what particulars. These particulars were charged to be a failure to prosecute the action "and have failed to pay to the relator all damages and costs that have accrued to him by reason of said attachment." Continuing, it was charged that:

"On account of the wrongful attachment aforesaid [plaintiff] has been damaged; he has lost — days' time, of value of — dollars per day in making necessary preparation for de-

fense and in the defense of said attachment; that he has also been damaged in the sum of — dollars by way of traveling expenses, hotel bills, and livery bills necessarily incurred in and about the defense of said attachment, and that he has become liable to and has paid, and become obligated to pay, the sum of — dollars for necessary attorney's fees incurred in and about the defense against said attachment—amounting in the aggregate to the sum of \$350, which remains wholly unpaid."

The word "attachment," as used in the petition, doubtless in some connections was used as describing the character of the action, while in others it is intended to mean a levy or execution of the writ of attachment.

[3] There was evidence tending to show an attachment of plaintiff's money in bank by garnishment. The constable's return certifies that he levied the writ by summoning C. C. White (the cashier) as garnishee, and requiring him to appear and answer interrogatories. It seems that this return was so far defective as not to show a valid garnishment of the money, but, manifestly, that fact ought not to conclude plaintiff on the question of damages. *State ex rel. v. McCullough*, 85 Mo. App. 68.

We think the order granting a new trial was proper. It may be well for plaintiff to obviate present objections by filing an amended petition and by making his proof sufficiently definite to make clear just what was done under the writ.

Affirmed. All concur.

NATIONAL NOVELTY IMPORT CO. v. DIEKMAN. (No. 11694.)

(Kansas City Court of Appeals. Missouri. Nov. 1, 1915.)

APPEAL AND ERROR ¶501 — MOTION FOR NEW TRIAL — EXCEPTIONS — FAILURE TO TAKE-EFFECT.

Where the bill of exceptions, as reproduced in the abstract on appeal, fails to show an exception to the overruling of the motion for a new trial, no errors are presented for consideration, except such as appear on the face of the record proper, since the saving of an exception to the overruling of the motion for a new trial is a necessary condition to the review of matters of exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2300-2303; Dec. Dig. ¶501.]

Appeal from Circuit Court, Macon County; Nat M. Shelton, Judge.

"Not to be officially published."

Action by the National Novelty Import Company against Simon Diekman. From a judgment for the defendant, plaintiff appeals. Affirmed.

Joseph Park, of La Plata, for appellant. Dan R. Hughes and John R. Hughes, both of Macon, for respondent.

JOHNSON, J. This is an action for the purchase price of certain merchandise plain-

tiff alleges it sold and delivered to defendant. The jury returned a verdict for defendant, and the cause is here on the appeal of plaintiff.

The only errors alleged and pressed upon our attention by counsel for plaintiff relate to matters of exception, and we find the abstract of record in such condition as to preclude us from reviewing them. There is no proper separation of record proper and bill of exceptions in the abstract, and no recital of an exception to the order overruling the motion for a new trial. The saving of an exception to the overruling of the motion for a new trial is a necessary condition to the review on appeal of matters of exception, and the failure of the bill of exceptions, as reproduced in the abstract, to show such exception, precludes the consideration of any errors, except those appearing on the face of the record proper. No such errors are assigned or appear in the record, and there is nothing for us to review. *Reed v. Moss*, 258 Mo. 172, 167 S. W. 523; *Recar v. Recar*, 171 Mo. App. 632, 154 S. W. 423; *Reimer v. Cement Co.*, 177 Mo. App. 198, 164 S. W. 181; *Hays v. Foos*, 223 Mo. loc. cit. 423, 122 S. W. 1038; *Ferguson v. Baker*, 187 Mo. App. 619, 173 S. W. 41.

The judgment is affirmed. All concur.

HARDESTY v. ATCHISON, T. & S. F. RY. CO. (No. 11632.)

(Kansas City Court of Appeals, Missouri, Oct. 4, 1915.)

1. CARRIERS \Leftrightarrow 205—CARRIAGE OF LIVE STOCK—INITIATION OF CARRIER'S DUTY.

The duty of a carrier of live stock begins when the stock is delivered into its receiving pens for shipment.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 918, 920, 923; Dec. Dig. \Leftrightarrow 205.]

2. CARRIERS \Leftrightarrow 215—CARRIAGE OF LIVE STOCK—DUTY OF CARRIER AS TO RECEIVING PENS.

It was the duty of a carrier of live stock to keep its receiving pens in reasonably safe condition to hold cattle offered for shipment until they could be loaded, considering the ordinary conditions attending cattle in such situation and their ordinary habits and propensities.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 923; Dec. Dig. \Leftrightarrow 215.]

3. CARRIERS \Leftrightarrow 230—CARRIAGE OF LIVE STOCK—ACTION FOR INJURY—QUESTION FOR JURY.

In an action for damage to a shipment of cattle from their escape from defendant railroad's receiving pens, issues of whether the cattle were normal, or wild and unruly, and whether the pens were not reasonably secure, held for the jury under the evidence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 961, 962; Dec. Dig. \Leftrightarrow 230.]

4. PARTNERSHIP \Leftrightarrow 199—ACTION—PARTIES PLAINTIFF.

Where, in an action for damage to cattle from their escape from defendant railroad's receiving pens, plaintiff sued both for injuries to animals owned by him individually and those owned by him in partnership with another, failing to show that his partner had assigned to him his interest in the cattle, only showing that he

himself had agreed to go ahead and sue for the whole damage to the whole shipment, he could not maintain his action for damage to the partnership live stock, since there was no showing of his partner's intention to transfer his interest in the cattle or his interest in the claim for damages to the plaintiff.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 362-368; Dec. Dig. \Leftrightarrow 199.]

5. PARTNERSHIP \Leftrightarrow 199—ACTION—PARTIES PLAINTIFF.

No formal assignment by a partner of his interest in partnership property is necessary to enable another partner to sue alone for injury thereto. Any action showing an intent to transfer the interest to the suing partner is sufficient.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 362-368; Dec. Dig. \Leftrightarrow 199.]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"Not to be officially published."

Action by J. E. Hardesty against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, who appeals from an order granting defendant a new trial as to the second count of the complaint, while defendant appeals from the overruling of its motion for new trial as to the first count. Judgment affirmed as to both counts.

Thomas R. Morrow, Geo. J. Mersereau, and John H. Lathrop, all of Kansas City, for appellant. J. Walter Farrar and E. Y. Blum, both of Kansas City, for respondent.

TRIMBLE, J. Plaintiff, having an arrangement with defendant's station agent for the shipment of a drove of cattle, placed them in defendant's stockyards late Monday night, preparatory to loading them early Tuesday morning. During the night, and while waiting for the cars, the stockyard's fence was broken down and the cattle escaped, involving expense to recover them and causing loss by reason of shrinkage and poor appearance for the market. This suit is for the resulting damage, and is based upon defendant's failure to maintain adequate and suitable pens in which to hold cattle preparatory to shipment over defendant's road.

The petition is in two counts. The cattle consisted of 84 head belonging to plaintiff individually and 120 head belonging to Burton & Hardesty, a partnership of which plaintiff was a member. The first count covered the individual cattle, and the second count covered the partnership cattle. A trial resulted in a verdict in plaintiff's favor for \$325 on the first count and \$350 on the second. A new trial was granted as to the second count, on the ground that the cause of action thereon was not shown to be in plaintiff; but, as to the first count, the motion for new trial was overruled. Whereupon both sides appealed, plaintiff from the order granting defendant a new trial as to the second count, and defendant on account of the overruling of the motion as to the first count. We will dispose of defendant's appeal first.

[1.] It is insisted that a demurrer to both counts should have been sustained, and the case taken from the jury. Defendant does not deny that its duty is to maintain reasonably secure facilities for holding cattle preparatory to loading them for shipment, and that it invites patrons of its road to use those facilities for that purpose, nor that, in this case, its duty to plaintiff began as soon as the cattle were delivered in the pens. Nor does it deny that it is liable if said pens were not reasonably safe and secure, and the cattle escaped by reason thereof. Its contention is that there is no evidence to show that the yards were not reasonably secure, and that, upon the evidence submitted, it is more likely the cattle escaped because of their wild nature and vicious propensities than that they escaped on account of the insecurity of the pens under ordinary circumstances, or, at least, that the evidence leaves it to conjecture whether the escape was from the one cause or the other. It is also contended that, since the evidence shows it erected sound and suitable fences, that condition is presumed to continue, and defendant is not liable unless knowledge of a defective condition is brought home to defendant, or unless it is shown that a defective condition had existed for such length of time as that knowledge thereof must be presumed, neither of which, according to defendant's view, was shown in this case.

In *Mason v. Missouri Pacific R. Co.*, 25 Mo. App. 473, it was held that the liability of the company begins at the time the cattle are delivered in the pens preliminary to their carriage, and that the carrier is in duty bound to keep the pens in a reasonably safe and secure condition. This rule has been adhered to ever since. *McCullough v. Wabash Western Ry. Co.*, 84 Mo. App. 23; *Cooke v. Kansas City, etc., R. Co.*, 57 Mo. App. 471, loc. cit. 478; *Tracy v. Chicago & Alton R. Co.*, 80 Mo. App. 389, loc. cit. 392. The duty of the carrier begins when the stock is delivered into the pens. *Covington Stockyards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 469, 35 L. Ed. 73. The same rule applies to pens as to cars. *Lackland v. Chicago & Alton R. Co.*, 101 Mo. App. 420, 74 S. W. 505; *Pruitt v. Hannibal & St. Joseph R. Co.*, 62 Mo. 527.

[2, 3] We are convinced the court did right in sending the case to the jury. The purpose of the pens was to hold the cattle until they could be loaded, and it was the duty of defendant to keep the stockyards in a reasonably safe condition for that purpose, taking into consideration the ordinary conditions attending cattle in that situation and their ordinary habits and propensities. We need not go into the question whether or not the defendant was bound to keep its stockyards so that cattle, however wild and unruly, could not get out, no matter how unusual their efforts. There was substantial

evidence that these cattle were neither wild nor unruly. There was no trouble in getting them into the yards, although it was dark when they put them in. As one witness said, who seems to have had great experience with all sorts of cattle: "They did not appear to be a wild bunch of cattle."

There was also evidence from which the jury could find that the yard fence was not reasonably secure for the purpose of holding cattle under ordinary conditions. According to evidence introduced by plaintiff, some of the posts were broken off and others were pushed over. Those that were broken were "well rotted"; that is, the outer ring or white of the post was rotten, leaving a small core or heart in the center. According to this testimony, also, most of the posts of the fences to the other stockyards along defendant's line—indeed, practically all of them—were six-inch posts, while these that were broken were four-inch posts.

Without holding that it is necessary to show knowledge of a defective condition on the part of the defendant, or that the condition must have existed for a time long enough to have enabled defendant to have discovered it, we may go so far as to place the matter even upon the plane defendant insists upon, since there was evidence that just outside the fence, where the break occurred, an old roadway had worn the ground down to a level lower than the ground of the stockyards, and the rains had washed the dirt away from the outside of the posts. The soil was a loose loam. This would sufficiently show that the yards were not reasonably secure, and also that it must have existed for some time, since such conditions would not arise suddenly.

It is true no one can tell whether the cattle got to fighting or milling around and broke the fence. But cattle under ordinary conditions will sometimes fight, and frequently will get to milling around; and defendant's duty is to provide a yard that will hold cattle under ordinary conditions. We think there was ample evidence from which the jury could find that the yard was not reasonably secure for the purpose for which it was intended. Defendant's contention that a demurrer to the evidence should have been sustained is therefore disallowed.

[4, 5] The trial court granted defendant a new trial as to the second count, for the reason that plaintiff failed to show an assignment of the cause of action from the partnership to him, or from Burton, his partner, to him. We think the court did right in this also. There is no testimony in the record that there was ever any assignment of the cause of action to plaintiff. In testifying concerning the cattle, plaintiff spoke of the 84 head as belonging to him and the 120 head as still belonging to the partnership, consisting of himself and Burton.

His testimony further on shows that the title to the partnership cattle still remained in the partnership; he having merely a half interest in them. In speaking of the present ownership of the cattle, plaintiff said he individually owned a portion and a half interest in the others, but that it had been agreed that he should bring the suit for the whole damage. In other words, there had been no transfer of any interest in the cattle or the claim, either orally or otherwise, but he had agreed to go ahead and sue for the whole thing. We admit the rule that no formal assignment is necessary, and that any act showing an intent to transfer a person's interest is sufficient. *Smith v. Sterritt*, 24 Mo. 262; *Sanguinett v. Webster*, 153 Mo. 343, loc. cit. 370, 54 S. W. 563. But we have searched the record in vain to find any proof of any intention on the part of Burton to transfer his interest in the cattle embraced in the second count, or his interest in this claim for damages. So far as the evidence shows, each partner now owns his interest therein, but one of them merely told the other to include the partnership claim in the suit for the individual claim. If this be true, the second count is not prosecuted in the name of the real party in interest. It may be, if the facts had been fully developed, and if the plaintiff had stated just what was done, the evidence would have shown an assignment of the cause of action. But as the record now is no assignment seems to have been made. For this reason, we are of the opinion the court did right in granting a new trial as to the second count. The judgment of the lower court is therefore affirmed as to both counts. All concur.

WOODS v. MISSOURI PAC. RY. CO.
(No. 11683.)

(Kansas City Court of Appeals. Missouri.
July 2, 1915. Rehearing Denied
Oct. 4, 1915.)

1. NEGLIGENCE §29—DUTY TO USE CARE.

Though the failure of a railroad company to keep the gate of a stock pen in reasonably safe repair was negligence, it was not actionable negligence unless the company owed to the particular person injured thereby the duty to keep its stock pen and premises reasonably safe.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 41; Dec. Dig. §29.]

2. NEGLIGENCE §32—INJURIES TO INVITEE.

Where a railroad company maintained stockyards and pens for the purpose of receiving live stock intended for shipment, and a shipper who had arranged to ship live stock purchased live stock from plaintiff and contracted with plaintiff to deliver the stock in the stockyards, and expressly directed plaintiff to put the stock in a particular pen, plaintiff in endeavoring to open the gate of such pen was not a trespasser nor a mere licensee, but an invitee to whom the railroad company owed the duty of observing ordinary care, as he was not on its premises solely on his own business nor merely for his own pleasure, curiosity, or benefit, and the company in maintaining the stockyards in-

vited not only shippers, but all whom they might have deliver stock for them, to enter the stockyards for the purpose of making shipments.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 42-44; Dec. Dig. §32.]

3. JUDGMENT §570 — CONCLUSIVENESS — "JUDGMENT OF NONSUIT."

Under Rev. St. 1909, § 1900, providing that if an action shall have been commenced, and plaintiff suffers a nonsuit, he may commence a new action within a certain time, where a demurrer to plaintiff's evidence was sustained, whereupon plaintiff took an involuntary nonsuit with leave to move to set it aside, and such motion was overruled and the trial court's action approved on appeal, the judgment did not bar a new action in which the testimony lacking in the first case was supplied, as a "judgment of nonsuit" is a complete determination of the suit, but not an adjudication of the merits of the controversy.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1028-1034, 1036-1040, 1042-1045, 1165; Dec. Dig. §570.]

Appeal from Circuit Court, Bates County;
C. A. Calvird, Judge.

"Not to be officially published."

Action by W. A. Woods against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

R. T. Rayley, of Jefferson City, and Scott & Bowker, of Nevada, Mo., for appellant. Silvers & Silvers, of Kansas City, Mo., and Silvers & Dawson, of Butler, for respondent.

TRIMBLE, J. Plaintiff, in attempting to open a gate leading into one of the pens in defendant's stockyards at its shipping station of Foster, Mo., was seriously and painfully injured by the gate falling upon him. He brought this suit for damages. The petition charged that defendant had allowed the gatepost to remain in a rotten condition, whereby the top hinge became loose, rendering the gate dangerous and unsafe, which defendant knew, or of which it could have known by the exercise of ordinary care, and which gate defendant was in duty bound to keep in reasonably safe repair. A trial resulted in a verdict and judgment for plaintiff, and defendant has appealed.

The record discloses substantial evidence from which the jury could find that, on account of the decayed condition of the gatepost at the place where the top hinge had been fastened, the same had become loose and the gate was liable to fall over upon any one who attempted to open it without knowledge of its defect; that the gate, when closed, was in proper position and gave no indication of its insecurity; that the loose hinge was on the inside of the pen and plaintiff approached the gate from the outside, and hence the condition of the hinge was not observable to him and he had no knowledge of the defect; that this condition was known to defendant for a sufficient length of time to have enabled it, in the exercise of ordinary

care and reasonable dispatch, to have repaired the gate long before the injury occurred. Consequently neglect on the part of defendant was shown, and there is no room for holding, as matter of law, that plaintiff was guilty of contributory negligence.

[1] It is insisted, however, that plaintiff sustained no relation whatever to defendant, save, perhaps, that of a mere licensee, and hence defendant owed no duty to plaintiff to keep its shipping premises and facilities in repair, but only the duty to refrain from wantonly injuring him. The evidence and the verdict unquestionably show that defendant omitted to keep the gate in reasonably safe repair. While this was negligent, yet it would not, in this case, constitute actionable negligence unless defendant owed to this particular plaintiff the duty of keeping its stock pen and premises reasonably safe. The question whether or not defendant owed this duty to plaintiff depends upon whether the "circumstances justly demand" that defendant observe care for plaintiff's safety.

[2] As disclosed by the record and found by the verdict, those circumstances were these: Defendant maintained the stockyards and pens therein for the purpose of receiving live stock intended for shipment over its road. A Mr. Smith, who was engaged in buying up cattle and hogs and shipping them over said road, had arranged for a car to ship some live stock from Foster to Kansas City. A part of the live stock intended for this shipment had been purchased by him of the plaintiff, and plaintiff was to deliver said stock in the stockyards, from whence Smith was intending to ship it. It was in opening the gate into the stock pen for the purpose of making this delivery that the plaintiff was injured. The stock thus delivered by plaintiff was received therein by Smith and was actually shipped out that day over defendant's road pursuant to the arrangement made with the agent for the car as hereinbefore stated. Smith, the shipper, was there on the ground to receive the stock in the pens and to attend to the immediate shipment thereof over defendant's line. Plaintiff was expressly directed by Smith to put the stock in the particular pen the gate to which plaintiff was endeavoring to open when he got hurt. From this it can be readily seen that plaintiff was not on defendant's premises solely on his own business, or merely for his own pleasure, curiosity, or benefit. The placing of the stock in the pen was a matter in which all three of them, plaintiff, Smith, and the defendant, had an interest. The facilities of the yards were extended to Smith as a shipper, and he was invited and expected to use them. In order for him to ship over defendant's road, he must have the stock in the defendant's shipping pen. Instead of driving the stock there himself, he stipulated with the one from whom he purchased that he should do that for him. The delivery of the stock in the pens was a

necessary preliminary to defendant's business as a carrier thereof and of its deriving profit therefrom. In maintaining the stockyards, defendant impliedly invited Smith, the shipper, and all whom he might succeed in getting to do such preliminaries for him, to enter said stockyards for the purpose of such shipments. Plaintiff was not a trespasser, nor did he enter the stockyards purely and solely for his own interest, profit, or pleasure. There was an interest or advantage accruing to Smith, plaintiff, and the railroad in the stock being placed in the pen. And this fact of common interest or advantage is what distinguishes plaintiff's position, making it that of an invitee rather than a mere licensee. *Bennett v. Railroad Co.*, 102 U. S. 577, loc. cit. 584, 585, 26 L. Ed. 235; *Archer v. Union Pacific R. Co.*, 110 Mo. App. 349, loc. cit. 353, 85 S. W. 934. The stockyards were maintained for the benefit of defendant's carrying business, and plaintiff's coming there was connected with that business, and that made him an invitee. 29 Cyc. 455; *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl. 478, loc. cit. 480; *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; *Parker v. Portland Pub. Co.*, 69 Me. 173, loc. cit. 176, 31 Am. Rep. 262; *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235; *Carr v. Mo. Pac. R. Co.*, 195 Mo. 214, loc. cit. 225, 92 S. W. 874; *Woods v. Missouri Pac. R. Co.*, 149 Mo. App. 507, loc. cit. 510, 130 S. W. 1123.

If plaintiff was an invitee, then the defendant owed him the duty to observe ordinary care that he does not receive injury. *Glaser v. Rothschild*, 221 Mo. 180, 120 S. W. 1, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576; *O'Donnell v. Patton*, 117 Mo. 13, 22 S. W. 903; *Welch v. McAllister*, 15 Mo. App. 492; *Archer v. Union Pacific R. Co.*, supra; *Brock v. St. Louis Transit Co.*, 107 Mo. App. 109, loc. cit. 116, 81 S. W. 219. Plaintiff, in putting the stock in the pen, was performing a part of his contract with Smith, it is true; but he was also doing more. He was performing one of the things necessary to be done in carrying out Smith's contract with the railroad, one of the necessary preliminaries to the defendant's business of carriage, and he was making that use of defendant's premises for which they were built and maintained, and clearly there was an implied invitation to him to use the stockyards for that purpose. To say that, merely because plaintiff himself was not intending to ship, he was a bare licensee and not an invitee, is to place a far too narrow limitation upon the rights of those who, at the direction of the shipper, assist him in using the yards for a purpose beneficial to the defendant.

[3] A former action for the same injury was instituted by plaintiff prior to the bringing of this suit. In that action a trial was entered into, but at the close of plaintiff's evidence the trial court sustained a demurrer thereto, whereupon plaintiff took an in-

voluntary nonsuit with leave to move to set the same aside. This motion was filed and overruled. Whereupon plaintiff appealed to this court, where the action of the trial court was approved. *Woods v. Missouri Pacific R. Co.*, 149 Mo. App. 507, 130 S. W. 1123. Plaintiff at once instituted this suit, and, at the trial, supplied the testimony which this court had held was lacking in the former case. Defendant contends that the present suit cannot now be maintained, since the cause of action, by reason of our former judgment, has become *res adjudicata*.

But it will be noticed that in the former suit there was no adjudication of the case upon its merits. The plaintiff suffered an involuntary "nonsuit," which was, in effect, a dismissal of his case. The ground of the judgment in the former suit was not that plaintiff had no cause of action, but that he had not brought forward sufficient proof to establish that cause of action. Section 1900, R. S. Mo. 1909, provides that if an action shall have been commenced and plaintiff suffer a nonsuit he may commence a new action within a certain time. In *Mason v. Kansas City, etc., R. Co.*, 226 Mo. 212, 125 S. W. 1128, 26 L. R. A. (N. S.) 914, it was held that the judgment of the lower court refusing to set aside an involuntary nonsuit was merely a judgment of involuntary nonsuit and not a final judgment upon the merits of the cause. It was also held, construing *Chouteau v. Rowse*, 90 Mo. 191, 2 S. W. 209, that an appeal from the order overruling the motion to set aside the nonsuit suspended the judgment of dismissal until the case was determined in the appellate court, and that plaintiff, under the statute, could begin another suit within one year thereafter. In other words, the appeal by plaintiff from the order refusing to set aside the involuntary nonsuit was merely a litigation of the correctness of the trial court's ruling on that point, and the judgment of affirmance in the appellate court went no further than did the order of the trial court. That order did not finally adjudicate the cause of action, but only dismissed plaintiff's suit. A judgment of nonsuit is a complete determination of the suit, but not an adjudication of the merits of the controversy. *Wielhaupt v. St. Louis*, 158 Mo. 655, 59 S. W. 960; *Manning v. Conn. Mut. Fire Ins. Co.*, 176 Mo. App. 678, 159 S. W. 750. In *Hewitt v. Steele*, 136 Mo. 827, 38 S. W. 82, plaintiff in a former suit, after suffering an involuntary nonsuit, appealed from the order refusing to set it aside, and the action of the trial court was affirmed. Defendant pleaded *res adjudicata*, but that plea was disallowed, although the case was reversed upon another ground, namely, because there was "no substantial evidence to support plaintiff's cause of action." In view of the foregoing, we are of the opinion that plaintiff's cause

of action did not become *res adjudicata* by reason of the former suit.

The case of *Johnson v. United Railways Co.*, 243 Mo. 273, 147 S. W. 1077, does not announce a different rule. The judgment of the trial court in the former suit therein referred to was leveled at the petition as stating no cause of action, and that judgment was upheld on appeal. The petition in the second suit stated the same facts. It differed from the first petition only in that it prayed for an accounting, while the first petition, in addition to praying for an accounting, asked for an injunction and for a rescission. The cause of action for an accounting being in both petitions, and, the facts being the same in both petitions, of course an adjudication on the first that it stated no cause of action was an adjudication of the question whether or not the second stated a cause. But that is not the situation in the case at bar. Neither in the first nor in the second cases in this controversy was there any issue over the sufficiency of the petition, and the adjudication in the first case did not extend to the cause of action itself, but only to the judgment of nonsuit for an insufficiency of proof.

The claim that plaintiff's instruction No. 1 is erroneous is without merit.

The judgment is affirmed. All concur.

GUFFEY v. HARVEY et al. (No. 11645.)

(Kansas City Court of Appeals, Missouri.

July 2, 1915. Rehearing Denied

Oct. 4, 1915.)

1. STREET RAILROADS §114—ACTIONS FOR INJURIES—WEIGHT AND SUFFICIENCY OF EVIDENCE.

In an action for injuries to a person struck by a street car, evidence held to show that he either failed to look before turning to drive across street car tracks, parallel with the direction in which he was driving, or that he took a dangerous and entirely unnecessary chance and drove into a zone of apparent danger.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-250; Dec. Dig. § 114.]

2. STREET RAILROADS §110—ACTIONS FOR INJURIES—PLEADING—ISSUES.

In an action for injuries to a person struck by a street car, the petition alleged that, when plaintiff was crossing the tracks, and while his horse and wagon were entering thereon, those in charge of the car could see him and the horse and wagon, or by the exercise of ordinary care could have seen them, in time to have avoided the collision, but that they so negligently conducted themselves in the management of the car and in permitting and causing it to be propelled at an excessive rate of speed, and in failing to slow down as required by a "slow" signal, and in failing to ring the bell or give any signal of the car's approach, that the wagon was struck, and plaintiff injured, and that, as a direct result of such negligent acts, plaintiff was knocked off of the wagon. Held, that this did not charge negligence under the humanitarian or last chance doctrine, but, construing the averment that those in charge of

the car, by the exercise of ordinary care, could have seen plaintiff in time to have avoided the collision in connection with the context, charged that the inability of the motorman to avoid the collision was due to negligence in running the car at a high speed without observing the "slow" signal and without ringing the bell, and contributory negligence was therefore a complete defense, especially where the principal instruction, given at plaintiff's request, predicated his right to recover on a finding that he was exercising ordinary care to look out for the car and avoid injury therefrom.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 224; Dec. Dig. ¶ 110.]

3. EVIDENCE ¶ 588—WEIGHT AND SUFFICIENCY—TESTIMONY CONTRARY TO PHYSICAL FACTS.

In an action for injuries to a person struck by a street car, the court is not bound to accord probative value to testimony which cannot be true, and plaintiff cannot recover on his impossible assertion that the car was not in sight at the time he looked, when it must have been not only in plain sight, but in dangerous proximity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. ¶ 588.]

4. STREET RAILROADS ¶ 99—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

It was the duty of a person about to drive across street car tracks to look for a car before driving into a zone of possible danger, and to stop in a place of safety if he saw one approaching at a place and in a manner making dangerous an attempt to cross in front of it.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 200-216; Dec. Dig. ¶ 99.]

Appeal from Circuit Court, Jackson County; Allen C. Southern, Judge.

"Not to be officially published."

Action by Marcus L. Guffey against Ford F. Harvey and another, receivers of the Metropolitan Street Railway Company. From a judgment for plaintiff, defendants appeal. Reversed.

John H. Lucas and Lyons & Smith, all of Kansas City, for appellants. E. C. Hall and T. V. Conrad, both of Kansas City, for respondent.

JOHNSON, J. Plaintiff was injured on a public street in Kansas City in a collision between an electric street car operated by defendants and a wagon in which he was driving, and sued to recover damages on the ground that his injury was caused by negligence of defendants in the operation of the car. The jury returned a verdict in his favor, and after their motions for a new trial and in arrest of judgment were overruled, defendants appealed.

[1] The injury occurred in the morning of July 12, 1913, at or near the intersection of Independence and Quincy avenues. Defendants operate a double-track street railway on Independence avenue, a public street which runs east and west and is 60 feet wide. Plaintiff drove eastward on the south side of the street, in a one-horse delivery wagon, until he reached Quincy avenue, when he turned northward, and proceeded to drive

across the tracks. He had almost cleared the south track, when an east-bound car running thereon collided with the rear end of the wagon and threw him from his seat. The first cross-street west of Quincy avenue was about 300 feet distant, and was on the top of a hill. Plaintiff testified that immediately before starting to cross the tracks he looked back and observed that no car coming from that direction was in sight.

"I looked when I was pulling from the curb," he said, "and saw no car, and the horse must have been over to the first set of rails when I heard something, and I turned my head around that way and the car was right on me, and I touched my whip a little bit, and the car came up, and it just caught the hind wheel—the end of the wagon. * * * In my judgment, it was 35 or 40 feet when I saw the car."

It had been raining, and plaintiff was seated under a wagon umbrella. He admits he looked back only twice, and in the interval his horse, which was traveling at a speed of about 4 miles per hour, did not traverse more than 35 or 40 feet. The car in that time, according to his testimony, must have covered a distance of about 275 feet; since, when he first looked, it had not reached the top of the hill, and when he looked again was only 35 or 40 feet away. It is conceded the car coasted down the hill, and no witness who observed it testified that its speed exceeded 15 miles per hour. The motorman, introduced as a witness by defendants, testified:

"That the speed of the car down the hill was about 8 miles per hour; that he observed plaintiff driving eastward along the middle of the pavement on the south side of the tracks; that suddenly and without warning plaintiff turned northward towards the tracks, when the car was only 20 or 25 feet away, and attempted to cross in front of the car; and that "as soon as I saw he was going to turn I applied my air on the emergency immediately. Before I stopped I run after I struck the wagon about 6 feet. I don't think I went over 6 feet after I struck the wagon."

A witness introduced by plaintiff who saw the accident stated:

"The man [plaintiff] was driving down the south side of the street, and I think he was hunting for No. 5000 [at the northeast corner of Independence and Quincy avenues], and at the same time was a car coming, and just as it dropped over the top of the hill this man turned at right angles across the street: * * * it [the car] must have been a car length this side of the street (at the top of the hill), just dropped over the line; it might have been just then, but the car was about there when I noticed this man turn. * * * at the extreme east line of Quincy. * * * Q. About how fast would you estimate that car was traveling coming down the hill from Brighton to Quincy? A. I couldn't say. Q. Was it going fast or slow? A. He didn't have any power on; no power at the time. Q. About how far did the car run past after it hit the wagon, if you noticed? A. It didn't run past but just a little ways. It stopped almost instantly after it hit the wagon."

On cross-examination:

"Q. What did you see the man do there with reference to stopping the car? A. I think he

done his best. The tracks were very slick that morning, as we had a little rain; they were a little damp. Q. It appeared to you there that he was exercising every effort to stop the car without colliding with the wagon? A. I think so. * * * Q. You don't know whether he [plaintiff] looked back before he started to turn or not? A. I don't remember. It seems to me he had an umbrella. One of these big umbrellas like they use on delivery wagons. Q. You didn't notice him at any time push the umbrella up to look back to see whether there was any car coming or not? A. I don't remember. Q. At least he wasn't doing that when his horse started to cross over the south track? A. Not that I remember. Q. He didn't stop his horse at any time while you saw him there, in making that swing around, until the wagon was struck by the car? A. I think not."

[2] The petition alleges:

"That at the time when plaintiff was crossing said tracks, and while his horse and wagon were entering thereon, the defendants' agents and servants in charge of said car could see him and said horse and wagon, or by the exercise of ordinary care could have seen him and them, about to cross and crossing said tracks, in time to have avoided such collision, but that defendants, their agents and servants, so negligently conducted themselves in the management of said car, and in permitting and causing said car to be propelled at an excessive rate of speed, and in failing to slow down as required by the 'slow' signal erected at said street crossing, and in failing to ring the bell attached to said car, or to give any other signal of its approach to said crossing, that plaintiff's said wagon was struck as aforesaid, and plaintiff injured; that, as a direct result of such negligent acts and each of them, the plaintiff was knocked off of said wagon as aforesaid," etc.

As we understand this language, it does not embrace a charge of negligence under the humanitarian or last chance rule. The averment that the motorman "by the exercise of ordinary care could have seen plaintiff about to cross said tracks in time to have avoided such collision" appears by the context to mean that the inability of the motorman to avoid the collision was due to negligence in running at high speed, without observing the "slow" signal at that crossing, and without ringing the bell, and not to mean that, under the existing conditions, the motorman could have discovered the peril of plaintiff and avoided the injury if he had exercised reasonable care.

In legal substance, the petition is similar to the petition before us in *Grout v. Railway*, 125 Mo. App. 552, 102 S. W. 1026, and for the reasons therein stated we must hold that it presents only issues of negligence to which contributory negligence would be a complete defense. Indeed, this is the view of the nature of the pleaded cause of action expressed in the principal instruction given at the request of plaintiff which, as a predicate of his right to recover, required the jury to find that he "was exercising ordinary care to look out for said car and avoid injury therefrom."

With no issue of "last chance negligence" in the case, the remaining subject of inquiry presented by the demurrer to the evidence

which defendants argue should have been given is whether or not the evidence most favorable to plaintiff will support a reasonable inference: First, that the motorman, in the operation of the car, was guilty of one or more of the acts of negligence pleaded; and, second, that plaintiff was free from negligence directly contributing to his injury. It may be conceded, for argument, the evidence of plaintiff tends to show that the motorman approached the crossing at a dangerous rate of speed, and negligently failed to ring the bell as a warning to plaintiff that the car would proceed over the crossing without stopping, but this concession does not aid plaintiff, whose own negligence is clearly and indisputably established by his evidence. Without any intimation of his purpose, he suddenly turned his horse from a course running parallel with the track and at a safe distance therefrom, into one which took him squarely across the tracks in front of the approaching car, which was too close to be stopped in time to avert a collision. His own evidence, from which we have quoted, shows that the motorman acted promptly upon the first disclosure of his purpose to leave a safe course for one of danger, but was unable to stop the car in time to avoid the collision, though he almost succeeded in doing so. The assertion of plaintiff that just as he altered his course he looked back and the car was not in sight is contradicted by his own eyewitness, who says it was in sight, and by the plain and indisputable physical facts, which conclusively proclaim that the car (which the evidence most favorable to plaintiff shows) was approaching at a speed less than four times that of the horse, and could not have been over 200 feet from the place of the collision at that time. If plaintiff looked when he started to turn, he must have seen the car, and the fact is indisputable that either he did not look, or, looking, negligently took a dangerous and entirely unnecessary chance and drove into the zone of apparent, and, as it turned out, inevitable, danger.

[3, 4] We are not bound to accord probative value to testimony which could not be true, and plaintiff will not be allowed to recover upon his impossible assertion that the car was not in sight, when it must have been, not only in plain view, but in dangerous proximity to the crossing. It was his duty to look for a car before driving into the zone of possible danger, and to stop in a place of safety if he saw one approaching at a place and in a manner to make dangerous an attempt to cross in front of it. It is apparent he failed to discharge this duty, and that his own negligence directly contributed to his injury.

The demurrer to the evidence should have been sustained.

Judgment is reversed. All concur.

GINTER v. O'DONOGHUE. (No. 11501.)
(Kansas City Court of Appeals. Missouri.
Nov. 1, 1915.)

1. MUNICIPAL CORPORATIONS — 706 — NEGLIGENCE — USE OF STREETS — LIABILITY FOR INJURIES — CONTRIBUTORY NEGLIGENCE.

Where an action for injuries to a person struck by an automobile is not submitted specifically upon the theory of the humanitarian or last chance doctrine, negligence on her part contributing to the injury will defeat a recovery.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. — 706.]

2. NEGLIGENCE — 136 — TRIAL — QUESTIONS OF LAW OR FACT.

In determining whether plaintiff's negligence appears indisputably as a matter of law, she must not only be given the benefit of all evidence favorable to her theory of the case, but also the benefit of every inference which the facts in evidence will reasonably bear.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. — 136.]

3. MUNICIPAL CORPORATIONS — 706 — NEGLIGENCE — USE OF STREETS — ACTIONS FOR INJURIES — QUESTIONS FOR JURY.

Where injury is inflicted by a conveyance such as an automobile which may occupy one portion of the street at one time and some other portion at another time, and is not confined, as street cars are, to tracks, which of themselves suggest danger, the matter of plaintiff's contributory negligence is usually for the jury, and it is an exceptional case when a recovery can be denied as a matter of law for contributory negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. — 706.]

4. MUNICIPAL CORPORATIONS — 706 — NEGLIGENCE — USE OF STREETS — ACTIONS FOR INJURIES — QUESTIONS FOR JURY.

In an action for injuries to a girl struck by an automobile while crossing the street diagonally, evidence held not to show conclusively that plaintiff did not look for approaching vehicles before starting to cross, or that she looked so carelessly as not to see what she should have seen.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. — 706.]

5. MUNICIPAL CORPORATIONS — 706 — NEGLIGENCE — USE OF STREETS — ACTIONS FOR INJURIES — QUESTIONS FOR JURY.

While the act of crossing the street at a place other than a crossing at a street intersection is a circumstance to be taken into consideration by the triers of the fact in determining whether a plaintiff is guilty of contributory negligence, it is not negligence as a matter of law; the street not being so dangerous that no reasonably prudent person would attempt to cross it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. — 706.]

6. MUNICIPAL CORPORATIONS — 706 — NEGLIGENCE — USE OF STREETS — ACTIONS FOR INJURIES — QUESTIONS FOR JURY.

Plaintiff, before starting to cross a street diagonally in the middle of a block, looked both ways before leaving the curb and again after passing between two automobiles standing at the curb, and saw no automobile approaching. After walking about 15 or 20 steps, or about 33½ feet, she was struck by an automobile which gave no warning of its approach. Held,

that her failure to continually look behind her to see if any automobiles were approaching was not negligence per se, as after looking and seeing no automobile she could presume in the short distance she traveled that, if a car did make its appearance, the driver would not negligently fail to warn her.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. — 706.]

7. MUNICIPAL CORPORATIONS — 705 — NEGLIGENCE — USE OF STREETS — ACTIONS FOR INJURIES — QUESTIONS FOR JURY.

A city ordinance, limiting the speed of automobiles and fixing the outside limit at 12 miles an hour, did not authorize that rate of speed under all circumstances, and was not conclusive that a person driving only 10 miles an hour was free from negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. — 705.]

8. MUNICIPAL CORPORATIONS — 705 — NEGLIGENCE — USE OF STREETS BY AUTOMOBILES — DEGREE OF CARE REQUIRED.

Under Rev. St. 1909, § 8523, providing that persons operating automobiles on public streets or places much used for travel shall use the highest degree of care that a very careful person would use under like or similar circumstances to prevent injuries or death to persons on such streets, the measure of care required of the driver of a motor vehicle is to be determined according to all the circumstances attending and surrounding the particular place, and, to determine whether the requisite care was observed, the running of the car must be viewed in the light of the exigencies of the situation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. — 705.]

9. EVIDENCE — 265 — ADMISSIONS — CONCLUSIVENESS — EXTENT OF PERSONAL INJURIES.

Where plaintiff suing for injuries testified that defendant's automobile struck and injured her, the fact that she said at the time that she was not hurt, and later told defendant that she had no grievance against him, was not conclusive against her, but was no more than a circumstance to be considered by the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. — 265.]

Appeal from Circuit Court, Buchanan County; Wm. H. Haynes, Judge.

"Not to be officially published."

Action by Delliham M. Ginter, by David M. Ginter, her next friend, against Francis C. O'Donoghue. From an order granting a new trial after a verdict for defendant, defendant appeals. Affirmed.

Culver & Phillips, of St. Joseph, for appellant. Duvall & Boyd, of St. Joseph, for respondent.

TRIMBLE, J. Plaintiff sued for damages, alleging, in substance, that defendant, while operating his automobile upon a public street, much used for travel, in the city of St. Joseph, negligently struck and injured her. The charges of negligence, upon which the case was submitted, were that the defendant ran his car "in a careless, negligent, and reckless manner," and negligently ran his car against plaintiff without giving any alarm or signal of his approach. The jury

found for defendant, and the court sustained plaintiff's motion for a new trial; whereupon defendant appealed.

No grounds were specified in the order granting a new trial, but it is practically conceded that the court erred in instructing the jury, in defendant's behalf, that the law required only the exercise of reasonable care on defendant's part; whereas, the statute (section 8523, R. S. Mo. 1909) imposes upon him "the highest degree of care that a very careful person would use, under like or similar circumstances, to prevent injury."

Defendant's position, however, is that the evidence shows that in no event ought a verdict for plaintiff to be allowed to stand; and that therefore a new trial should not have been granted regardless of errors in the trial. *Graney v. St. Louis, etc., R. Co.*, 157 Mo. 666, loc. cit. 680, 57 S. W. 276, 50 L. R. A. 153.

We do not understand defendant as contending that there is no substantial evidence tending to show that defendant was negligent, or that plaintiff was struck and injured. If such is defendant's claim, we answer it now by saying that clearly there was. The specific ground upon which defendant insists that plaintiff could not recover in any event is that plaintiff was guilty of contributory negligence.

Plaintiff was a girl not quite 16 at the time of the alleged injury. It occurred about 9 o'clock at night on Felix street between Seventh and Eighth streets, one of the much traveled thoroughfares in the city. This street has "white way" lamps and was "well lighted," or "very light." Plaintiff, leading her little five-year old sister by the hand, came out of a store on the south side of Felix street and went to the curbstone desiring to go diagonally across the street in a northeast direction to a fruit stand on the north side of the street. According to plaintiff's evidence, when she reached the curbstone she looked both east and west and, not seeing any automobile or vehicle coming, stepped out into the street between two "dead" automobiles which were standing close to the curb at that point. As she emerged from between the two automobiles and was about 6 feet from the curb out in the street, she says she again looked up and down the street, and, seeing no automobile coming, she started with her little sister to walk slowly in a northeastern direction across the street to the fruit stand. After she had gone about 15 or 20 steps and was in the center of Felix street, defendant in his automobile and going east approached her from the rear and struck her, knocking her down. She says no alarm was given by the automobile and that she did not see it until the instant it struck her. She says she was struck in the left arm, side, and back; that she remembered nothing after being struck until she found herself in a nearby drug store; that her left hip and side, left

arm and shoulder were bruised; that her right knee was also bruised; that she was confined to her room and bed about five weeks; was dizzy and sick at her stomach when she would raise her head or try to get up; that, in attempting to walk or to put her left foot to the floor, her left hip and side would pain her; that she continued to suffer thus for about five weeks and, at times, has "dizzy spells" yet; that for a period of about four weeks she was unable to walk without difficulty and cannot now straighten her foot without great pain in her hip; that before she was injured her sleep was unbroken, but after that, for about five weeks, whenever she dozed off she would dream of automobiles and teams running into her, and cannot sleep very well yet. The injury occurred December 13, 1913. She was examined by Dr. Sampson on January 7th following, and he testified that he found her left leg a half inch longer than the other, due, in his opinion, to some inflammation that had taken place in the hip joint causing an effusion of fluid therein which pushed the head of the thigh bone partially out of the socket. The testimony of physicians was that, while her injuries were not permanent, her recovery would be slow.

[1, 2] As the case was not submitted specifically upon the theory of the humanitarian or "last chance" doctrine, negligence on plaintiff's part contributing to the injury will defeat her recovery. But the question which we have to settle is, not whether there is evidence from which a jury could properly find contributory negligence, but whether such fault on her part appears so indisputably that we can declare it as matter of law. And in passing on the question we must not only give plaintiff the benefit of all the evidence favorable to her theory of the case, but also the benefit of every inference which the facts in evidence will reasonably bear.

[3] It is also proper to remember that:

"The cause is, indeed, an exceptional one where plaintiff's right of recovery should be denied as a matter of law for his contributory negligence, when it appears he was run upon and injured in the highway by a conveyance which is not required to travel in a particular place, as street cars on the tracks, which, of course, of themselves suggest danger as always present. In other words, in those cases where injury is inflicted by a conveyance which may occupy one portion of the street at one time and some other portion at another time and the injured person is not forewarned as by the danger incident to car tracks, the matter of plaintiff's contributory negligence is usually for the jury." *Bongner v. Ziegenhein*, 165 Mo. App. 328, loc. cit. 342, 147 S. W. 182, 186.

[4] The evidence in the case does not show that Felix street between Seventh and Eighth where the accident occurred was in such a constant state of turmoil from the passing to and fro of automobiles as to make the mere attempt to cross negligence as a matter of law. Plaintiff testified that she looked both ways twice before she started across, once on the curb and once as she emerged

from the two standing automobiles, and saw no vehicle coming. Defendant claims that the physical facts conclusively show that she did not look, else she would have seen it. We do not so regard the evidence. The street was slightly downgrade toward the east, the direction in which the automobile went. There was evidence that the automobile was going 10 miles per hour. Plaintiff was walking slowly leading her five-year old sister by the hand. Now, because the witness Mrs. Edds, who was behind plaintiff and was in the act of following plaintiff across the street, says she saw the automobile at Seventh street 79 feet away, and waited for it to pass, and another witness, Krecsakay, saw it before it reached Seventh, and still another witness, Mrs. Haas, saw it after it passed Seventh street, defendant argues that this conclusively shows that the automobile was in sight when plaintiff says she looked, and hence she did not look, or, looking, carelessly failed to see, for "to look was to see." But none of these witnesses state that they saw the automobile at or before the time plaintiff looked as she emerged from between the two standing automobiles. True, Mrs. Edds says at one place plaintiff was from three to six feet ahead of her, but later in another place she said she did not know how far ahead she was. And she nowhere gave plaintiff's location at the time she (Mrs. Edds) saw the automobile. She, however, says plaintiff stopped and looked as she emerged from between the automobiles, thus corroborating plaintiff in this regard. So that it is not shown that the automobile was in sight and was seen by others at the time plaintiff looked. For aught that this testimony discloses, plaintiff may have looked prior to that time, and, at the time the witnesses saw the car, was on her way across the street with her back to it. Indeed, the inference from the evidence is that she was in this position. If the car was going 10 miles per hour (and it was downgrade), it was traveling at the rate of 14.66 feet a second; if plaintiff, in going slowly leading a five-year old child, was traveling 2 miles an hour (which is only one-third less than the walk of an ordinary man), then she was traveling not quite 3 feet per second. She walked "15 or 20 steps," after emerging from between the automobiles, before she was struck, at least $33\frac{1}{10}$ feet, according to the measurements on the plat offered in evidence. In that time the automobile could have whisked down upon her from a point more than 67 feet beyond the nearest side of the crossing at Seventh street.

[5] It cannot be said, therefore, that the evidence conclusively shows that plaintiff did not look before she started, or, if she looked, was clearly negligent in failing to see the car. If plaintiff exercised the care of an ordinarily prudent person by looking before she started across, then she is entitled to have a jury pass upon her case unless the mere attempt to cross the street at a place

other than on the crossings at the street intersections is to be held negligent per se. We are not willing to so hold. It is well known that people frequently cross in the middle of the block, and, while such act is a circumstance to be taken into consideration by the triers of the fact in determining whether a plaintiff is guilty of contributory negligence, yet it is not to be so declared as a matter of law. The place was a public highway where both parties had a right to be. As hereinbefore noted, the street was not so dangerous as that no reasonably prudent person would attempt to cross it. As said in *Hodges v. Chambers*, 171 Mo. App. 563, loc. cit. 570, 154 S. W. 429, 432, it "could only be said to have been dangerous where made so by the failure of the drivers of vehicles to exercise the care required of them by law." This case also holds that the act of walking upon a public highway is not analogous to walking upon a railroad or a street car track, and is not therefore to be stamped as negligence per se. On the contrary, as said in *Meyer v. Lewis*, 43 Mo. App. 417, loc. cit. 418:

"In cases of this kind—collisions upon the highway, where both parties have a right to be—there is generally a fair question for a jury, both on the question of the negligence of the defendant and the contributory negligence of the plaintiff."

[6] Nor can it be said that the mere failure of plaintiff to continually look behind her to see if any automobiles were coming was negligence per se. After looking for an automobile and seeing none, she could then presume, in the short distance traveled, that, if a car did make its appearance, the driver thereof would not negligently fail to warn her.

[7, 8] As to whether there was negligence on the part of the defendant, the evidence was ample to the effect that no horn was sounded nor alarm of any kind given. All of the witnesses hereinbefore named who saw the automobile and watched it bear down upon the girl in the street say they heard no horn nor alarm of any kind. Mrs. Haas says that no alarm was given, and so does plaintiff. It will not do to say that, because there was no evidence of a greater speed than 10 miles per hour, therefore the autoist was not negligent in the operation of his car, because the city ordinance specifies a limit of 12 miles. That is merely an outside limit beyond which the automobile cannot go. But because the city specifies a limit of 12 miles does not mean that an automobile driver can run his car, under any and all circumstances, at any rate of speed within that limit and yet be free of negligence. The measure of care required by the statute of the driver of a motor vehicle is to be determined according to the circumstances attending and surrounding the particular place. Section 8523, R. S. Mo. 1909; *Bongner v. Zeigenheim*, 165 Mo. App. 328, 147 S. W. 182. In order to determine whether the requisite

care was observed, the running of the car must be viewed in the light of the "exigencies of the situation." *Haake v. Davis*, 166 Mo. App. 249, 148 S. W. 450.

[9] It is unnecessary to notice the other questions relating to whether the car actually struck plaintiff or not, whether her alleged injuries were simulated, or whether, if real, they arose from another cause. Clearly they are questions to be settled by a jury. The fact that plaintiff may have said at the time that she was not hurt, and later told defendant that she had no grievance against him, is not conclusive against her. She did not in express terms deny that she said these things, but she testified that the automobile struck and injured her, which was, in effect, a denial of the charge that she had no claim against defendant. The fact that she may have said these things is no more than a circumstance to be considered by the jury in weighing her case.

Inasmuch as defendant's contention that plaintiff cannot be allowed to recover in any event is untenable, the action of the trial court in granting her a new trial for error committed against her and in defendant's favor is affirmed. All concur.

MICHAELS v. HARVEY et al. (No. 11597.)
(Kansas City Court of Appeals. Missouri. Oct. 4, 1915.)

1. STREET RAILROADS ⇨117—PERSONAL INJURY — QUESTION FOR JURY — LAST CLEAR CHANCE.

In an action for damages for personal injury sustained in a collision between plaintiff's wagon and defendant's street car, evidence held to make defendant's negligence under the last clear chance rule a question for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. ⇨117.]

2. STREET RAILROADS ⇨108—PERSONAL INJURY—NEGLIGENCE—LAST CLEAR CHANCE.

In such action, the fact that plaintiff committed an error of judgment prompted by fear of imminent injury did not absolve defendant's motorman, who should have realized her peril in the exercise of his duty under the humanitarian rule of exercising reasonable care to avoid injury, as it then became his duty to make the saving effort regardless of whether she had been negligent in becoming imperiled or had acted with the best judgment in trying to escape.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. ⇨103.]

3. EVIDENCE ⇨506—FACT OR CONCLUSION—PROVINCE OF JURY.

In an action against a street railroad for personal injury from a collision, an offer of the facts which an expert medical witness had discovered on his examination, and his admissible opinions as an expert, was not objectionable as invading the province of the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. ⇨506.]

4. WITNESSES ⇨219—PRIVILEGED COMMUNICATION—PHYSICIAN—WAIVER.

Plaintiff in an action against a street railroad for personal injury from a collision, who introduced her family physician who had been called

to examine and treat her on the second day after her injury to testify fully as to the conditions which might be attributed to the injury, and who, on the day before, had allowed a practicing physician brought by a friend who was engaged in following injury suits, to make an examination of her as a patient, and to whom she disclosed all the secrets as to the consequences of her injury, thereby waived her right to exclude the latter's testimony as a privileged communication to a physician, within Rev. St. 1909, § 6362.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 769, 781, 782; Dec. Dig. ⇨219.]

5. WITNESSES ⇨208—PRIVILEGED COMMUNICATION—PHYSICIAN.

In an action for personal injury from a collision with defendant's street car, the refusal to allow the regular physician of the defendant, not employed by plaintiff, but who was allowed to make an examination of her injury in an attempt to settle her claim, to disclose his knowledge of her injury so obtained, was proper; as to permit him to disclose such knowledge would violate the rules designed to encourage the compromise of disputed claims and their settlement out of court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 768-770, 777; Dec. Dig. ⇨208.]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

Action by Mary E. Herman Michaels against Ford F. Harvey and another, receivers of the Metropolitan Street Railway Company. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

John H. Lucas, of Kansas City, for appellants. Platt & Marks, of Kansas City, for respondent.

JOHNSON, J. Plaintiffs sued the receivers of the Metropolitan Street Railway Company to recover damages for personal injuries she sustained in a collision between a wagon in which she was riding and an electric street car operated by defendants on Walnut street between Fourth and Fifth streets in Kansas City. The petition alleges that negligence in the operation of the car was the proximate cause of the injury, and specifies both negligence to which contributory negligence would be a defense (i. e., running the car at excessive speed and failing to give warning of the approach of the car), and negligence under the humanitarian rule; but the only issues submitted to the jury related to the latter specification, and there is no evidence in the record tending to show excessive speed, or that the failure to give warning (if none was given) was the proximate cause of the injury. The trial resulted in a verdict and judgment for plaintiff in the sum of \$3,650, and defendants appealed.

The injury occurred in the morning of April 11, 1912, at a point on Walnut street opposite the city market house and south of Fourth street. Plaintiff, who was 18 years old, and her mother, were driving south on Walnut street in a one-horse market wagon. Plaintiff was seated on the right side doing

the driving. The horse was large and heavy, weighing 1,700 or 1,800 pounds, and the load in the wagon consisted of only 6 or 8 empty lettuce boxes. The distance between the car track and the west curb line approximately was 30 feet, but many market wagons with their teams attached were backed up to the curb, and the clear space between the horses heads and passing cars was about 8 feet. There was a row of commission and produce houses on the east side of the street, and the clear space on that side between the car track and standing teams was less. The street at that time and place was the scene of great activity, and the portion occupied by the car track was required and much used as a passageway by vehicles of all sorts. Plaintiff drove her horse in an ordinary walk, and, after passing Fourth street, was compelled to turn onto the track to pass around an automobile which blocked the passageway on the west side. Passing this obstruction, she attempted to drive from the track back into this passageway, but there was a groove or flangeway in the rail into which the left front wheel dropped (the tires of the wagon wheels being only an inch and a quarter wide), and, instead of the wheel crossing the rail, it remained in the groove and slid along the rail. Forty or 50 feet south of the automobile a large transfer wagon was being backed across the track to the west curb, and just behind that wagon was a north-bound street car which advanced at a speed of 5 or 6 miles per hour as soon as the track was clear.

[1] Plaintiff and her mother state they saw the car when the transfer wagon backed out of the way, and, observing that it was approaching, both screamed in fright, and plaintiff tried to turn her horse far enough towards the west to pull the wheel out of the groove, but lack of sufficient space caused this effort to fail. The predicament the women were in was observed by eyewitnesses and should have been plainly apparent to the motorman when the car was 35 or 40 feet from the horse. There is evidence that he was not looking and made no effort to stop or reduce speed until the car collided with the horse and wagon, and that the car pushed them back a distance of 28 feet before it was stopped. There is proof that, under the conditions disclosed by the evidence of plaintiff, the motorman had abundant time to avoid the collision by stopping the car after he should have discovered the perilous situation of the two women. The wagon was overturned, and plaintiff was thrown to the cobblestone pavement and injured.

These are the principal facts disclosed by the evidence of plaintiff, and we think they warranted the trial court in refusing the request of defendants for a peremptory instruction. Great stress is laid by counsel for defendants upon the act of plaintiff in driving forward after she discovered the car and the danger of a collision. We are cited to the

following cases as authority sustaining the contention that, since plaintiff obviously was aware of the approach of the car, the motorman was not bound to anticipate that she would drive on and collide with the car, and that the same obligation rested upon her as upon the motorman to avoid the collision, which she could have avoided by stopping her horse. *Kinlen v. Railway*, 216 Mo. 145, 115 S. W. 523; *Pope v. Railroad*, 242 Mo. 232, 146 S. W. 790; *Hebeler v. Railway*, 132 Mo. App. 551, 112 S. W. 34; *Barnard v. Railway*, 137 Mo. App. 684, 119 S. W. 458. If this were a case where it was apparent to the motorman that the driver of a vehicle approaching on the track not only was aware of the presence of the car he was meeting, but was in a position to avoid a collision by driving from the track, he would apply the principle of the cited cases and hold that the motorman was under no duty to anticipate that such driver, either willfully or negligently, would remain upon the track until his position of safety had merged into one of danger, but this is not that kind of case. Here the plaintiff disclosed knowledge of the danger and was trying energetically and even frantically to escape at a time when the motorman, if he had been looking, would have discovered she was in a dangerous trap, from which she could not extricate herself and by the exercise of ordinary care could have saved her by stopping the car. There is abundant room in the evidence for the inference that she could not have saved herself by stopping the wagon, and it is apparent she pursued the only sensible course open to her, since she could not turn to the left for lack of room, and her only chance to escape was by turning the horse to the right as far as she could, to pull the wheel out of the groove and over the rail, if possible.

[2] But if, in this attempt which was prompted by fear of imminent injury, she committed an error of judgment, this did not absolve the motorman, who should have realized her peril, from the duty, under the humanitarian rule, of exercising reasonable care to avoid running her down and injuring her. Her evidence depicts her as being in obvious danger from which she could not save herself and the motorman as having a fair opportunity to save her by the exercise of reasonable care. In such circumstances, it became his duty to make the saving effort regardless of whether or not she had been negligent in becoming imperiled, or was acting with the best judgment in trying to escape. For a negligent breach of such duty towards plaintiff defendants would be liable for the resultant damages. The demurrer to the evidence properly was overruled.

From the evidence of plaintiff it appears that the injuries she sustained were severe, painful, and permanent. She was unmarried and lived with her parents who were gardeners of Belgian nativity. She had always been vigorous and healthy and had been do-

ing the work of a farm laborer. She testified:

"I could do most anything, lift a bushel of potatoes or get stuff in the garden and wheel the wheelbarrow with 200 or 300 pounds on there, and I could lift a bushel and a half or two bushels of potatoes on the side of the wagon and put them on the wagon."

Her testimony relating to her condition since the injury goes into the subject of its consequences with complete thoroughness, laying bare results of the most secret and delicate nature. She received a blow on the back that left a permanent soreness and tenderness along the spinal column and resulted in numerous manifestations of severe nervous shock. She cannot sleep well and wakes screaming from frightful dreams. Her appetite is gone, and she is so weak she can do none but the lightest work. She is nervous and apprehensive and for some time was afflicted with melancholia and had to be watched to prevent her from attempting self-destruction. Her menstruation became irregular and was accompanied with great pain. She was married in September, 1912, and in the following June gave birth to a puny, undersized baby. Dr. White, her family physician, introduced by her as a witness, testified to these conditions, and in addition found that one of her kidneys had been displaced and had become what is known as a "floating kidney." He was called to examine and treat her the second day after her injury, and his direct testimony omits no detail of the conditions which may be attributable to the injury.

A specialist in nervous and mental diseases who, at the request of plaintiff, examined her in August, 1912, testified:

"I examined her physically. She presented no paralysis of the limbs, trunk, motor, or sensor, but she presented a painful condition of the spinal column between the shoulders and accentuated in the middle of the back and along the left side of the spinal column over the left kidney region. She was very nervous, agitated. She had a weak, rapid pulse; her reflexes were all exaggerated, that is, the muscular responses, throwing the muscles into certain activities, were irritably active, showing exhausted, irritable condition of the central nervous system. Mentally she was very much agitated, rather frenzied, sad, despondent, depressed condition, so far as I could see without cause outside of herself. She lost all interest in everything, nothing interested her," etc.

He diagnosed her nervous malady as melancholia, produced by a severe nervous shock. The day following the injury and preceding the day Dr. White was called in to treat plaintiff, Dr. McCall, a practicing physician called at her home in company with a Mr. Counties, and, without objection, was allowed to make an examination of her. He states that he made the visit at the request of Counties, but thought he was summoned at the patient's request and made the examination as her physician for the purpose of treating her. Plaintiff testified that Counties (who appears to have been a hunter of damage suits known in common parlance as

"a snitch") was "a friend of ours" and, as a friend, called and brought Dr. McCall with him. She denied that either she or any one authorized by her had authorized Counties to employ a doctor, but she accepted his services on that occasion, and we think the evidence sufficiently discloses that the confidential relation of physician and patient was established and existed between McCall and plaintiff during that examination. The relationship was not continued after that day, Dr. White being called in immediately after, nor did Counties succeed in obtaining employment to bring suit for damages for plaintiff.

Defendants offered Dr. McCall as a witness to testify concerning the results of his examination of plaintiff, but the court sustained the objection that he was incompetent to testify under section 6362, R. S. 1909, which provides that a physician shall be incompetent to testify "concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician." Counsel for defendants then offered:

"To show by this witness that he made a thorough examination of plaintiff, of her entire body, and examined the plaintiff in response to all complaints made by her, and will testify that there was no evidence of injury, either internally or externally, and that from the examination of plaintiff by the witness she sustained no injury by her fall except an injury to the right leg and a small bruise on the hip, both of which were of no consequence whatever."

The offer was objected to on the grounds "that the testimony offered is of a privileged character in the testimony of a physician, and it also invades the province of the jury," and the objection was sustained. We are asked to review these rulings and to hold that they constituted prejudicial error for the reason that plaintiff had waived the privilege of a patient vouchsafed by the statute and had opened wide the door to a full and complete judicial inquiry into the subject of her injuries and their consequences.

[3, 4] There is no merit in the objection that the offer of proof, if allowed, would have invaded the province of the jury. This was an expert witness, and the manifest, and we think clearly expressed, purpose of the offer was to elicit testimony of the facts he had discovered on his examination and his admissible opinions as an expert. The fact that the examination occurred during the existence of a confidential relationship between the witness and the plaintiff is essential to the creation of the privilege invoked by her under the statute, and, regarding that fact as established, the resultant privilege must be conceded, and the only question for our solution is whether or not it was waived by plaintiff when by her own testimony and that of her other physicians

she disclosed all secrets concerning the consequences to her of the physical injury she received at the hands of defendants.

At common law there was no privilege as to communications between physician and patient, and the beneficent purpose of our statute granting such privilege is to protect those who from shame or sensitiveness might be deterred from employing the aid of physicians and thereby suffer serious consequences. "If the patient is suffering from a malady, the physician should not be allowed to first bring to light that affliction of the patient." *State v. Long*, 257 Mo. loc. cit. 221, 165 S. W. 755. But in the dissenting opinion of Judge Lamm in *Smart v. Kansas City*, 208 Mo. loc. cit. 207, 105 S. W. 709, 14 L. R. A. (N. S.) 563, 123 Am. St. Rep. 415, 13 Ann. Cas. 932, and in the later decisions of the Supreme Court in *Epstein v. Railroad*, 250 Mo. 1, 156 S. W. 699, 48 L. R. A. (N. S.) 394, Ann. Cas. 1915A, 423, and *State v. Long*, supra, the sensible rule is adopted and applied that when the patient, for purposes of gain or advantage to himself, discloses in evidence the nature and secrets of his malady, he renounces his statutory privilege so far as that action is concerned and opens the door to a full judicial inquiry into the subject-matter of his own importation into the case. As is well said in *State v. Long*, 257 Mo. loc. cit. 221, 165 S. W. 755:

"The very purpose of the statute is to hide, as with a veil, the malady and trouble for which the physician treated her, and what may have passed between them in the confidential relationship of physician and patient. But when the veil has been lifted by the patient or with her consent, and the secrets of the sick chamber given to the world, what logic is there in saying that the patient can clog the wheels of justice itself, by closing the mouth of other physicians, who know the real facts. In other words, if the patient raises, or permits to be raised, the veil of secrecy with lying lips as to what the conditions were, should this waiver of secrecy still leave to her the power of suppressing the truth, by objecting to other physicians who about the same time treated her for the same identical alleged trouble? We think not. In other words, if a patient is suffering from a given malady, and is treated by several physicians near the same time, for the said same trouble or malady, then, if she and one of her physicians with her consent make public the character of her trouble, she has waived the right to longer keep the exact character of that trouble further secret, and the other physicians are competent to testify as to what this malady or trouble was in reality."

It is immaterial that Dr. McCall and Dr. White were not employed at the same time but examined plaintiff on different days. "If the several physicians treat for the same trouble (as is the case here), then it can make no difference that their treatment was at different dates." *State v. Long*, 257 Mo. loc. cit. 217, 165 S. W. 754. The subject-matter of the two examinations being the same, the waiver of the privilege as to one waived it as to the other. The court erred in ruling that the privilege was not waived.

[5] We do not think the refusal to allow

Dr. Luen to testify was erroneous. He was the regular physician of defendants, was not employed by plaintiff, and states that he was suffered to make an examination of her pursuant to an attempt to compromise or settle her claim against defendants. To permit him to disclose the knowledge of her condition obtained in this manner would be violative of the rules designed to encourage the compromise and settlement out of court of disputed claims and rights.

Objections urged against the rulings of the court on instructions have been carefully examined and are found to be without merit.

The case was tried without prejudicial error, except in the matter we have noted, and for that error the judgment is reversed, and the cause remanded. All concur.

HALL v. HALL. (No. 11565.)

(Kansas City Court of Appeals. Missouri.
Nov. 1, 1915.)

1. DIVORCE ⇐285—APPEAL—RECORDS—SUFFICIENCY.

An appeal from an order denying suit money in a divorce case will be considered, though the bill of exceptions in the principal case was not in the record and the printed abstract had not been prepared, for that is the principal purpose for which suit money is necessary.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 768; Dec. Dig. ⇐285.]

2. DIVORCE ⇐224—ACTIONS—SUIT MONEY.

Since the Married Women's Act gave married women the powers of *femes sole*, suit money in divorce cases will not be awarded unless the wife has no adequate separate income; but where she is entirely destitute of means she is entitled to a reasonable allowance for suit money to prosecute an appeal from an adverse judgment in a divorce action.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 646; Dec. Dig. ⇐224.]

3. DIVORCE ⇐221—ACTIONS — ORDERS FOR SUIT MONEY.

An order allowing or denying suit money to enable wife to prosecute an appeal from an adverse judgment in a divorce suit is entirely independent from the issues in the divorce suit, and the right thereto is in no way dependent on the right to divorce.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 642, 643; Dec. Dig. ⇐221.]

4. DIVORCE ⇐223—ACTIONS—RIGHT TO SUIT MONEY.

Where the lower court which denied a wife divorce awarded her temporary alimony pending appeal; that order showed that she was also entitled to suit money; it appearing that she was destitute, so the denial of suit money was an abuse of discretion.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 645; Dec. Dig. ⇐223.]

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

"Not to be officially published."

Action by Sylvia M. Hall against John W. Hall, in which there was a judgment dismissing the petition and cross-petition, and plaintiff appealed. From an order granting

alimony pendente lite but denying suit money, plaintiff also appeals. Order reversed and remanded.

House, Manard, Allen & Johnson, of Kansas City, for appellant. Sparrow & Page and W. S. Gabriel, all of Kansas City, for respondent.

JOHNSON, J. Plaintiff brought suit for divorce alleging indignities which would constitute a statutory ground. Defendant answered and filed a cross-bill praying for a divorce for a similar cause. At the conclusion of the trial the court dismissed both petition and cross-petition. Motions for a new trial and in arrest, filed by plaintiff, were heard and overruled, and plaintiff appealed.

Before the appeal was allowed, the court heard a motion filed by plaintiff for alimony pendente lite and for suit money to prosecute the appeal, and adjudged that plaintiff recover alimony in the sum of \$6 per week "for the support of plaintiff and her minor child pending appeal," but overruled the motion for suit money. The present appeal is prosecuted by plaintiff from the latter order.

[1] The bill of exceptions on the motion for alimony and suit money pending appeal appears in plaintiff's abstract of the record, and, from the evidence therein which was adduced on the hearing of the motion, it appears beyond question that defendant is permanently employed and is earning \$5 per day, and that plaintiff, who has the custody of their minor child, is working for \$7 per week and is entirely destitute of other means.

The bill of exceptions in the main case has not been made up and, of course, is not before us, and it is argued by respondent that we cannot review the ruling of the trial court on the motion for suit money "in the absence of a bill of exceptions, or some record of the case proper disclosing the facts as they were before the trial court." If we should sanction this view of the law, the practical result would be to deny the right of appeal in nearly every instance where a destitute wife loses her divorce suit in the trial court, since the principal need for suit money for an appeal is to furnish the defeated and indigent wife with the means to defray the cost of the bill of exceptions and printed abstract of the record.

[2] Formerly the right of the wife to alimony pendente lite and suit money was absolute, and such allowances were made as a matter of course. But, since the enactment of the married women statute which with respect to property and property rights has given to married women the rights and privileges of a feme sole, the old rule as to alimony pendente lite and suit money has given place to the rule that such allowances will be made only in instances where the wife's

necessities demand they should be made. If she possess sufficient means of her own, she must use them in the prosecution or defense of the action.

"Suit money is given only to the wife in need, so that if she has an adequate separate income, it is withheld. Or, if she has sufficient in part the husband must supply the residue." 2 Fish-op on Marriage and Divorce (1891) § 978; Rutledge v. Rutledge, 177 Mo. App. 469, 119 S. W. 489.

Where it appears she is entirely destitute of means, she is entitled to a reasonable allowance for suit money to prosecute an appeal from an adverse judgment in the trial court, and it would be a clear abuse of judicial discretion to deny her such allowance. In such cases the wife is entitled to alimony and suit money so long as the litigation continues. *State ex rel. v. Seddon*, 93 Mo. 520, 6 S. W. 342; *Libbe v. Libbe*, 166 Mo. App. 240, 148 S. W. 460.

[3] And the matter of allowing such alimony and suit money, "although an adjunct of the action of divorce, is an independent proceeding standing upon its own merits and in no way dependent upon the merits of the issues in the divorce suit, or in any way affected by the final decree upon those merits." *State ex rel. v. Seddon*, supra; *Dowling v. Dowling*, 181 Mo. App. 675, 164 S. W. 643.

[4] The finding of the trial court that the wife was the guilty party does not deprive her of her right to an appeal or of her right to the means of prosecuting it and of sustaining herself during its pendency. *Libbe v. Libbe*, supra; *Robbins v. Robbins*, 138 Mo. App. 211, 119 S. W. 1075; *Rosenfeld v. Rosenfeld*, 63 Mo. App. 411; *Adams v. Adams*, 49 Mo. App. 592. Recognition of this rule is found in the instant judgment on the motion for alimony pendente lite and suit money. The allowance of alimony pending the appeal for the support of plaintiff and the child, not only was a proper recognition of the rule just stated, but amounted to an adjudication that none of the exceptional reasons for denying suit money referred to in *Adams v. Adams*, supra (such as a lack of good faith in prosecuting the appeal), exist in the present case, since such objections would apply equally as strong against the allowance of alimony pendente lite as against the allowance of suit money.

That adjudication relieved plaintiff from any duty of bringing up the record in the main case on the present appeal and vitally distinguishes this case from that before the St. Louis Court of Appeals in *Adams v. Adams*, supra, where it was held that, in the absence of such record, the appellate court could not know whether the action of the trial court in overruling the motion was not based on the finding, compelled by the evidence adduced at the trial of the cause on its merits, that the wife was not prosecuting the action and appeal in good faith. We withhold expressing our opinion relative

to the soundness of the decision in that case, but, conceding it to be sound, for argument, we hold that it has no application to the case in hand, where all possible issues pertaining to the good faith of plaintiff are settled in her favor by the adjudication that she shall have alimony pendente lite.

The evidence heard on the motion is properly before us and is sufficient for all present purposes. It shows a state of facts which entitles the wife to a reasonable allowance of suit money, and we hold that it was not a proper exercise of judicial discretion to refuse such allowance.

The judgment is reversed, and the cause remanded. All concur.

CHAMBERLAIN v. FT. SMITH LUMBER CO. (No. 11624.)

(Kansas City Court of Appeals. Missouri.
July 2, 1915. Rehearing Denied
Oct. 4, 1915.)

1. FRAUDS, STATUTE OF § 143—CONTRACTS RELATING TO LAND.

Under the statute of frauds (Rev. St. 1909, § 2783), an oral contract for the sale of land is not absolutely void, and if the vendor is able and willing to fulfill his agreement, the vendee cannot, on the ground of invalidity of the contract, recover money paid on the contract.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 344-350; Dec. Dig. § 143.]

2. VENDOR AND PURCHASER § 334—RESCISION—RECOVERY OF PAYMENTS.

Where an agreement for the sale of land contained no provision as to retention of payments in case of default, and the vendor, who rescinded, sold the land at the original price, the purchaser, who defaulted, is entitled to recover his payments.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. § 334.]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

"Not to be officially published."

Action by William Chamberlain against the Ft. Smith Lumber Company, begun in justice court, and appealed to circuit court. From a judgment for plaintiff, defendant appeals. Affirmed.

C. L. Orr, of Kansas City, for appellant.
H. L. Hassler, of Kansas City, for respondent.

JOHNSON, J. Plaintiff brought this suit in a justice court to recover \$205 he alleges he deposited with defendant on an option agreement to purchase 80 acres of land in Yell county, Ark. Defendant filed an answer alleging that the money was paid under a contract for the purchase of the land by plaintiff, and that plaintiff failed to make further payments as agreed, and "abandoned and refused to proceed further with the said agreement, although defendant, at the time of plaintiff's abandonment, never refused, but was well able and willing, to perform

and carry out its part of the said agreement." At the trial in the circuit court the jury returned a verdict for plaintiff pursuant to a peremptory instruction given by the court, and after unsuccessfully moving for a new trial, defendant appealed.

Defendant, a corporation, was engaged at Kansas City in the business of selling lands in Arkansas upon a plan which required the purchaser of a tract to make a down payment of \$3 per acre, and to enter into a written contract with defendant which provided for the payment of the remainder of the purchase price in monthly installments, and bound defendant to execute and deliver a deed to the land on the payment in full of the purchase price. The contract also contained a non-forfeiture clause, and provided certain insurance benefits for the purchaser. Plaintiff, a workman, called at defendant's office in March, 1911, and entered into an oral agreement for the purchase of a tract of 80 acres at \$15 per acre. The terms of sale proposed by defendant required plaintiff to make a down payment of \$240, and to enter into a regular form of contract which would provide for monthly payments of \$15 each. Plaintiff only had about \$100, and defendant accepted it with the understanding, as plaintiff states:

"That I could deposit this money with him [defendant's manager], and as soon as I had paid in \$240, he would give me a contract for this land, and then, after I got this contract, I was to pay, I believe, \$15 a month. Q. That is, the contract would contain a clause that you would have to pay \$15 per month? A. Yes, sir. * * * Q. What was said with reference to how this money [the down payment] should be paid by you? A. Nothing said at all. I was just to pay it until I paid it. There was no stated time."

The testimony of the manager relating to the agreement was not materially different from that of plaintiff, except in one particular. He said:

"When Mr. Chamberlain came in, we went through our literature and discussed the land. Then we went into the financial side of it, and he explained that he could not pay. He was not certain whether he could pay the payments regularly each month, and I stated definitely that, provided he paid the \$240, or \$3 an acre, within one year from the date of our agreement, it would be all right. * * * Directly he paid the \$240 he was to receive a printed contract which contained special benefits under our proposition."

Nothing was said in the conversation on the subject of forfeiture or of what disposition would be made of the payments plaintiff would make in the event he failed to pay \$240 within a year. The manager receipted for the payment of \$100 as a "part deposit on northeast quarter of northwest quarter and northwest quarter of northeast quarter, section 17, township 4, range 21, Yell county—80 acres." Under this agreement plaintiff paid \$50 April 21, 1911, \$40 June 19, 1911, and \$15 June 24, 1912. The latter payment was preceded by correspondence in which

plaintiff, who had removed to Texas, explained that his failure to pay more was due to lack of employment, and defendant answered that:

"It will be necessary for your payments to be made up to date from the time the sale was entered into and on the terms stated in your agreement with us. If you are unable to do this, would it not be well to take only forty, instead of eighty, acres, as that seems to be a little too much for you from a financial point of view."

On October 1, 1912, defendant wrote plaintiff, who had returned to Kansas City:

"We have had no payment from you on the above land since last June. It is quite impossible for us to hold land for which there is a great demand, and to receive no revenue for doing so. We are not desirous that you should forfeit this tract, but at the same time we cannot reserve it for you unless you bring your payments up to date. We shall hope to hear from you within ten days from date, failing in which we will understand it is not your desire to proceed any further."

Plaintiff did not answer this letter, and defendant sold the tract to another purchaser. Plaintiff wrote defendant under date of February 10, 1913:

"I understand that you placed the land back on the market that I started to make payments on. I am sorry that I failed to keep in a position to hold it, but was not, but I have paid in over \$200.00 on this, and I think I have something coming. Will be here for a few days and would be much pleased to hear from you in regard to the matter."

Defendant replied March 1, 1913:

"We have your letter of Feb. 10th with reference to the 80 acres you originally bought from us in section 17-4-21, which you have forfeited. We may as well tell you at once that no contract with us comes into force until the deposit of \$3.00 per acre is in our hands. We have received from you only \$205.00, but to have the benefit of our contract containing the insurance and nonforfeiture clauses, we should have received \$240.00. We held the land for a long time and have been very lenient. Legally, of course, you forfeited any right the day after the date on which payment was due. We are not desirous, however, of being hard on you, and for that reason, if, at any future date, you desire to purchase another tract from us, we will give you the benefit of the amount we have received from you. We may mention that we are not prepared to go farther than this."

This closed the correspondence, and this suit in the nature of an action for money had and received followed.

[1] We agree with counsel for defendant that an oral contract for the sale of land is not absolutely void under the statute of frauds (section 2783, R. S. 1909), which merely forbids the bringing of an action to enforce such contract, and that a vendee who advances money on such contract cannot recover it back if the vendor is able and willing to fulfill the contract on his part. *Galway v. Shields*, 66 Mo. 313, 27 Am. Rep. 351; *Lang v. Murphy*, 137 Mo. App. 217, 117 S. W. 665; *Richards v. Allen*, 17 Me. 296; *Lane v. Shackford*, 5 N. H. 130; *Col-*

lier v. Coates, 17 Barb. (N. Y.) 472; *Coughlin v. Knowles*, 7 Metc. (Mass.) 57, 39 Am. Dec. 759. And where the vendor has not rescinded the contract on account of the default of the vendee, the latter cannot maintain an action for money had and received to recover back payments on the purchase price; the vendor being willing to carry out the oral agreement. *Webb v. Steiner*, 113 Mo. App. 482, 87 S. W. 618; *Norris v. Letchworth*, 140 Mo. App. 19, 124 S. W. 559; *Id.*, 167 Mo. App. 553, 152 S. W. 421; *Mining Co. v. Price*, 176 S. W. 474. Where the vendee has breached the contract by failing to make payments as stipulated therein, he cannot have a right of action to recover back the money he has paid as long as the contract is in force, and it will be considered as being in force unless rescinded by the vendor. As we said in the case last cited:

"Such cause arises only in instances where the contract of sale is properly rescinded."

[2] When the contract is rescinded by the vendor on the ground of nonperformance by the other party, and it contains no provision for the retention by the vendor of payments made by the vendee in part performance, an action for money had and received will lie in favor of the latter, and he may recover back the money he has paid, "less, of course, the damages the vendor has sustained by his breach." *Sanders v. Brock*, 230 Pa. loc. cit. 609, 79 Atl. 772, 35 L. R. A. (N. S.) 532; *Mining Co. v. Price*, supra; *Norris v. Letchworth*, 167 Mo. App. 553, 152 S. W. 421. Taking defendant in the position it has assumed, that the oral agreement was a contract of sale, and not a mere option to purchase, we think defendant is in no position to claim that it did not elect to rescind, but is standing on the contract. Its letters show unequivocally that it declared the contract forfeited, i. e., rescinded, on account of plaintiff's breach, and claimed the right to retain the money paid by plaintiff on the ground that it had been forfeited. The absence of any agreement giving it the right to claim such payments as a forfeiture or as liquidated damages left it in the position of having elected to stand on its right to recover damages for plaintiff's breach. It is conceded that defendant suffered no actual damages, since it resold the land at the same price plaintiff agreed to pay, and by rescinding the contract, defendant undertook in law to place the plaintiff in statu quo by returning the purchase money received from him. *Sanders v. Block*, supra.

In this view of the case it is not necessary to discuss whether the oral agreement was a contract of sale or an option agreement. In neither case would defendant be entitled to keep the money. The court did not err in directing a verdict for plaintiff.

Affirmed. All concur.

LUMPKIN v. STRANGE et al. (No. 11752.)
(Kansas City Court of Appeals. Missouri.
Nov. 1, 1915.)

1. TRIAL \S 251—INSTRUCTIONS—CONFORMITY TO PLEADINGS.

In an action on a note, where the amended answer admitted there was a partial consideration, as it only pleaded a partial failure of consideration, the giving of an instruction submitting the hypothesis that there was no consideration for the note was error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 587-595; Dec. Dig. \S 251.]

2. TRIAL \S 199—INSTRUCTION—SUBMISSION OF QUESTION OF LAW TO JURY.

In an action on a note, where the defense was that the consideration rendered by defendant for plaintiff's release of his right to collect the note was a special and specific agreement on defendant's part to release plaintiff from certain obligations in regard to land sold defendant by plaintiff, the giving of plaintiff's third instruction, which, in referring to the question whether plaintiff agreed to release defendant from the payment of the note, submitted whether the agreement was for a valuable consideration, was erroneous, as leaving the jury to determine what facts constituted valuable consideration, a question of law for the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 467-470; Dec. Dig. \S 199.]

3. BILLS AND NOTES \S 537—RELEASE—CONSIDERATION—QUESTION OF LAW.

What is valuable consideration for the release by the payee of a note of his rights thereunder is a question of law.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1862-1893; Dec. Dig. \S 537.]

Appeal from Circuit Court, Miller County;
Jack G. Slate, Judge.

"Not to be officially published."

Action by William M. Lumpkin against William H. Strange and others. Judgment for defendants, and plaintiff appeals. Reversed, and cause remanded.

Robert F. White, of Eldon, for appellant.
Barney Reed, of Ulman, and Sid C. Roach, of Linn Creek, for respondents.

ELLISON, P. J. This action is based on a promissory note for \$130. The judgment in the trial court was for the defendant. Defendant's amended answer admitted the execution of the note. It was conceded that it was given as the purchase price of certain lots in Aurora Springs, Miller county, Mo. It was alleged in the amended answer that there was a partial failure of consideration. It was also alleged that the note had been fully discharged by a verbal settlement between the parties.

The evidence in defendant's behalf was that he bought a large number of lots from plaintiff, an old man over 80 years of age, for which the latter was to make him a warranty deed, with abstract of title, and he, in turn, was to execute a deed of trust on the property to secure the payment of the note. The evidence further showed that these deeds were executed by the parties re-

spectively, but that by mistake plaintiff omitted to include in his deed a part of the ground he was to convey, and likewise defendant omitted it from the deed of trust. The testimony of defendant in his own behalf tended to show that when he discovered the mistake he mentioned it to plaintiff, and that it was thereupon verbally agreed between them that he (plaintiff) need not convey the property omitted, and need not procure an abstract of title, and that plaintiff would deliver up the note, and defendant could keep, without price, the property plaintiff had deeded him.

In the course of this examination the court asked how many lots were conveyed by plaintiff's deed to the defendant, and counsel answered that there were 65. This was not disputed, and defendant admitted that he had sold some of them. When asked if he had not sold as many as 51 of them, he answered: "If I did, I don't recollect it; I don't recollect." He was asked if he had not sold 60 cords of wood off of them at \$3 per cord, and also 100 ties. He answered that he had not; but, when asked if he had not sold \$300 worth of timber, he answered, "No, I didn't get the third or the fourth"—saying further on, "I worked the timber off a part of them, and part I didn't." We thus have presented the remarkable situation that defendant, without paying one cent, got and kept, without tender of reconveyance, 65 of plaintiff's lots, a large number of which he has sold outright, and has disposed of the timber growing on others.

[1] An instruction was given submitting the hypothesis that there was no consideration for the note. This was error. The amended answer admitted there was a partial consideration, in that it only pleaded a partial failure.

[2, 3] Error was committed in plaintiff's third instruction. In referring to the question whether plaintiff agreed to release defendant from the payment of the note, it submitted whether this agreement was "for a valuable consideration." The defense was that the consideration rendered by defendant for plaintiff's release was a special and specific agreement on his part to release plaintiff from certain obligations. This should have been submitted to the jury to find as a fact; the court stating that, if found to be a fact, it would be a valuable consideration. As written, the instruction leaves for the jury to determine what facts constitute a valuable consideration. That was a question of law for the court.

Plaintiff has raised several points against the defense that we need not notice, since the judgment is to be reversed. Among these defenses is that of the statute of frauds. We do not say whether the case involves that statute. It is suggested that, if the case is to come to another trial, that question

should be examined. It is further suggested that, if it does come to such other trial, the defendant, if he is to succeed, should explain, in terms plainer than now appears, how he proposes to get plaintiff's property, dispose of most of it, and yet pay nothing for it.

The judgment is reversed, and the cause remanded. All concur.

FLEMING v. MEALS et al. (No. 11284.)

(Kansas City Court of Appeals. Missouri.
May 3, 1915. On Motion for Rehearing, Oct. 4, 1915.)

1. APPEAL AND ERROR \S 671—REVIEW—ABSTRACT OF RECORD—MOTION FOR NEW TRIAL.

Where the abstract of the bill of exceptions contained the motion for a new trial and showed that it was filed and overruled, but the abstract of the record proper failed to show the filing and overruling of the motion, only the record proper could be considered, so that the question of the sufficiency of the evidence to support the pleaded cause of action, a matter of exception, could not be considered; and such requirement was not changed by Kansas City Court of Appeals rule 26 (169 S. W. xv), providing that record entries perfecting an appeal need not be perfected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. \S 671.]

2. APPEAL AND ERROR \S 300 — MOTION FOR NEW TRIAL.

Matters of exception cannot be reviewed in the appellate court, unless reserved in a motion for a new trial filed in proper time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1740-1742; Dec. Dig. \S 300.]

3. APPEAL AND ERROR \S 590—ABSTRACT—REQUEST FOR LEAVE TO AMEND—TIME.

The filing of a supplemental abstract, if treated as a request for leave to amend the original, would be denied, where it was not filed until after appellees had attacked the original abstract, and no good reason was given for the appellant's failure to present a sufficient abstract in the first instance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2611-2615; Dec. Dig. \S 590.]

On Motion for Rehearing.

4. APPEAL AND ERROR \S 590—ABSTRACT—LEAVE TO AMEND.

Leave to amend an abstract of the record cannot be inferred from the mere granting of permission to file a supplemental abstract, subject to further decision of the question whether an amendment should be allowed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2611-2615; Dec. Dig. \S 590.]

Appeal from Circuit Court, Randolph County; Samuel Davis, Special Judge.

Action by Fred Fleming against T. T. Meals and another, administrators of the estate of John W. Meals, deceased. Judgment for defendants, and plaintiff appeals. Affirmed.

Whitcotton & Wight and M. J. Lilly, all of Moberly, for appellant. Willard P. Cave, of Moberly, W. M. Williams, of Boonville, and A. C. Gladney and E. F. Gutekunst, both of Moberly, for respondents.

JOHNSON, J. This is an action against the administrators of the estate of John W. Meals, deceased, upon a demand for personal services rendered their intestate in his lifetime. A directed verdict for defendants was returned in the circuit court at the close of plaintiff's evidence, and plaintiff appealed. The only issue raised by the demurrer to the evidence and discussed in the brief and argument of counsel for plaintiff is the sufficiency of the evidence to support the pleaded cause of action.

[1] Counsel for defendants contend that this question, which relates entirely to a matter of exception, is not before us, since the abstract of the record filed by plaintiff fails to show the filing and overruling of a motion for a new trial.

The abstract of the bill of exceptions contains the motion for a new trial and shows that it was filed and overruled, but that part of the abstract devoted to the record proper fails to refer to that motion. No effort was made by plaintiff to correct this error until after attention was called to it in the brief of defendants, which was served on plaintiff February 20, 1915. The cause was argued and submitted March 2d, and leave was granted plaintiff to file a reply brief within ten days, but no permission was given him to file a supplemental abstract. On March 10th he filed a "supplemental abstract and reply brief," in which he set forth record entries showing the filing and overruling of the motion for a new trial. No excuse or explanation was offered for his failure to show these record facts in his original abstract.

In Dalton v. Register, 248 Mo. 150, 154 S. W. 67, decided after the promulgation by the Supreme Court of rule 32 (169 S. W. xi), which is the same as our rule 26 (169 S. W. xv), the opinion has this to say of the failure of the abstract of the record proper to show the filing of a motion for a new trial:

"It is true that in the abstract of a purported bill of exceptions it appears that such a motion was filed, but in a line of cases we have held this insufficient. These cases are of such long standing and so numerous that the lawyers of the state must abide by them; and so consistent is the ruling that we shall not further restate the rule, other than to state that under these we have held that the abstract of the record proper, as distinguished from the abstract of the bill of exceptions, must show the filing and overruling of a motion for new trial. And if it does not so show, then we have only the record proper before us for consideration. It is true that we have recently adopted a new rule of practice in this court, which we hope may be better understood and more generally followed than the one under which the cases suggested were decided, but this new rule cannot avail this appellant, for two reasons: (1) Because his abstract was filed before the rule was adopted by the court; and (2) because the abstract as filed does not comply either with the old or new rule."

And in State v. Scobee, 255 Mo. 273, 164 S. W. 198, it is held:

"That, since that which has been called the record proper to distinguish it from that part

of the record made so by the timely and proper filing of a bill of exceptions, fails to show either that the motion for a new trial was filed or that it was overruled, there is nothing before us except the record proper. *State v. George*, 221 Mo. 519 [120 S. W. 35]; *Hill v. Butler Co.*, 195 Mo. 511 [94 S. W. 518]."

To the same effect are the cases of *Smith v. Russell*, 171 Mo. App. 324, 157 S. W. 813, and *State ex rel. v. Sly*, 180 Mo. App. 379, 167 S. W. 1197, decided by this court after the adoption of rule 26.

[2] Matters of exception cannot be reviewed in the appellate court, unless they were preserved in a motion for a new trial filed in proper time, and it is just as necessary now as it was before the adoption of rule 26 that the filing and overruling of the motion appear in the abstract of that part of the record called the record proper to distinguish it from the bill of exceptions.

[3] If we should treat the filing of the supplemental abstract as a request for leave to amend the original, the request should be denied, on the ground that it did not come until after defendants had attacked the original abstract, and no good reason is given for the failure of plaintiff to present a sufficient abstract in the first instance. *Thorp v. Railroad*, 157 Mo. App. loc. cit. 502, 138 S. W. 100; *Langstaff v. City*, 246 Mo. 223, 151 S. W. 456; *Harding v. Bedoll*, 202 Mo. 625, 100 S. W. 638; *Nickey v. Leader*, 235 Mo. 30, 138 S. W. 18.

There is nothing before us but the record proper, and, since the only error claimed by plaintiff relates to matters of exception, it follows that the judgment must be affirmed.

It is so ordered. All concur.

On Motion for Rehearing.

JOHNSON, J. Appellant insists in his motion for a rehearing that at the argument of the cause in this court leave was granted him to file a supplemental abstract correcting the error in the original abstract to which respondents had called attention in their brief. We did not hear argument on the questions of the sufficiency of the abstract or of appellant's right to remedy any material defect therein at that time, but took those questions with the case and allowed the proffered supplemental abstract to be filed, subject to the solution of the questions we thus reserved for future decision. We are convinced of the soundness of the view we expressed in the foregoing opinion that the omission of the abstract of the record proper to show the filing and overruling of the motion for a new trial precluded consideration of matters of exception on appeal. After respondents made the point of a defective abstract, permission to correct the defect by amendment should not be granted the appellant except for good cause.

[4] And leave to amend cannot be inferred from the mere granting of permission to file a supplemental abstract received subject

to the further decision of the question of whether or not an amendment should be allowed.

We are deciding the case on the ground that matters of exception are not properly before us, but it is proper to add that we have examined the case on the merits, and find no prejudicial error in the record. In our opinion, the learned trial judge took a proper view of the case presented by appellant in sustaining a demurrer to the evidence.

The judgment is affirmed. All concur.

BIGGERSTAFF v. RILEY. (No. 11710.) (Kansas City Court of Appeals. Missouri. Nov. 1, 1915.)

1. WITNESSES \S 138 — PARTY TO ACTION AGAINST DECEDENT'S ESTATE — SISTER OF CLAIMANT.

Under Rev. St. 1909, \S 6354, providing in part that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, and that where an executor or administrator is a party the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, where a young negro rendered services for his aged and deceased grandfather for a number of years, nursing the old man and working to support the family, the testimony of his sister, who likewise had lived with her grandfather, that the old man had repeatedly promised to pay plaintiff for his services, was admissible; since plaintiff's action was not founded on a joint contract made by the grandfather with plaintiff and his sister, or that she was a proper witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. \S 574, 575; Dec. Dig. \S 138.]

2. EXECUTORS AND ADMINISTRATORS \S 227—ALLOWANCE OF CLAIM—FORM OF PRESENTATION.

Where the demand filed in the probate court embodying plaintiff's contractual claim against a decedent's estate was not attacked by motion or otherwise prior to trial, the point being first raised by an objection to the introduction of evidence that the first item for services rendered in working decedent's farm might have been sufficient, but that, when the second was added, containing a charge for caring for and waiting on decedent, together with a charge for board and provisions furnished, the whole became so indefinite as to be an insufficient statement on which to base a finding, such demand was sufficient, since no formal pleadings are required in the presentation of demands for allowance in the probate court, and, if the demand presented be sufficient to advise the opposite party of the nature of the claim and to bar another action on the same cause, all other defects will be cured by the defendant if he suffers the case to go to trial on the merits without attacking the demand.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. \S 811-818, 342; Dec. Dig. \S 227.]

3. EXECUTORS AND ADMINISTRATORS \S 221—DISPUTED CLAIM—DECEDENT'S PROMISE TO PAY—SUFFICIENCY OF EVIDENCE.

In an action against the estate of an aged and diseased negro to recover for his grand-

son's services in working for and nursing decedent during a term of years, evidence held sufficient to support finding that the parties had a mutual and often expressed understanding that the services were not gratuitous, but to be compensated.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 901-9034, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. ¶221.]

4. EXECUTORS AND ADMINISTRATORS ¶206—
DECEDENT'S PROMISE TO PAY ON DEATH—
IMMATERIALITY OF FORM OF RECOMPENSE.

Where an aged negro, whose grandson was supporting and nursing him, working the old man's farm, agreed that such grandson should receive compensation for such services out of his estate upon his death, such grandson was entitled to the promised remuneration upon his grandfather's death, even though he could not get it in the form he expected; the only question being whether the parties intended that the services be gratuitous or performed for hire.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 733; Dec. Dig. ¶206.]

Appeal from Circuit Court, Clinton County; A. D. Burnes, Judge.

Action by Charles Biggerstaff, Jr., against H. R. Riley, administrator of the estate of Charles Biggerstaff. Judgment for plaintiff, and defendant appeals. Affirmed.

W. S. Herndon, of Plattsburg, for appellant. Frost & Frost, of Plattsburg, for respondent.

JOHNSON, J. This action originated in the probate court of Clinton county upon the following demand filed by plaintiff against the estate of Charles Biggerstaff, deceased:

To working on the farm, looking after and caring for stock, for and beginning March 6, 1905, for ten years, ending March 6, 1914, at the rate of \$25 per month or \$300 per year....	\$3,000.00
To caring for and waiting on deceased and furnishing board and provisions for and from March 6, 1905, to and ending March 6, 1914, at the rate of \$15 per month.....	\$1,500.00

The cause was tried in the probate court, and on appeal in the circuit court, resulting each time in a verdict and judgment for plaintiff for the full amount of the demand.

The facts of the case, as disclosed by the evidence introduced at the trial in the circuit court, are as follows: Charles Biggerstaff, an aged negro, died intestate in Clinton county, March 6, 1914, leaving neither widow nor descendant, but leaving an estate consisting of a farm of 70 acres near Plattsburg, the county seat, and cash and solvent notes amounting to about \$7,000. He was born and reared in slavery in Kentucky, and was married in that state to a negress called in the evidence "Aunt Jane," who, at the time of the marriage, had a son named John. The three were slaves of Wilson Biggerstaff, who brought them with him on his removal in 1857 from Kentucky to Clinton county. When they were freed from slavery, the three left the service of their former owner

and made a home for themselves on a part of the farm which now belongs to the estate. John, who took the name of Biggerstaff, married and made another home, leaving his mother and stepfather. Two children were born to him by his wife, viz., the plaintiff, Charles, and a daughter whom they named Ruth. The mother of these children died in their early infancy, and John returned with them to the home of his mother and stepfather, where they lived as one family until the death of John, which occurred in 1893. Thereafter the two children continued to live with the decedent until February, 1913, when Ruth married and left the old home. Plaintiff remained with the old man, who became a widower in 1898, until his death, which, as stated, occurred in March, 1914. At that time plaintiff was 28 and Ruth 30 years of age.

After the death of their father, the children were supported by their grandparents, and, in their childhood, were sent to school. They were industrious and worked faithfully. Four years before her death their grandmother was stricken and rendered helpless by paralysis, and the work of the children grew heavier. During the last 10 years of his life the deceased was infirm and afflicted with a malady which required the almost constant attention of a nurse. Plaintiff discharged those duties, and, in addition, performed all of the work on the farm, for which he received no compensation. In addition to doing such work, he worked for farmers in the neighborhood, using the money he earned for the support of the family. In short, during the period for which he now claims compensation, he was farmhand and nurse for a helpless and diseased old man, and most faithfully and efficiently performed his onerous duties.

There is evidence tending to show that plaintiff and deceased had a mutual understanding that the services were not being gratuitously rendered, but were to be adequately compensated. Plaintiff's sister testified that on different occasions during the last 10 years of his life the old man, in her presence, declared his intention to plaintiff to pay him well for his services. "He said he was going to pay Bud [plaintiff] and pay him well for what he had done, and my brother said 'All right.'"

Two daughters of Wilson Biggerstaff, who exhibited an unselfish interest in their father's old slave, especially after he became helpless, testified to having repeatedly urged him to pay or make some provision for paying plaintiff. One of them said:

"I talked to old Charles about Bud's being so good, and he ought to be paid for it, and old Charles would tell me, 'At my death Bud and Ruth will get everything I have; there is no one else to leave it to, and I expect them to have it.' He didn't pay them a thing while he lived. * * * He said that he was going to

leave them everything he had, and at his death they would get it. He wasn't paying them now, but they would get what he had at his death. He said they were good and kind to him, and he wanted them to have everything he had at his death."

Another disinterested witness testified to having had a conversation with the old man in which the latter said—

"he intended to pay Bud for everything he done. He said Bud was good to him, and was the only one that stayed by him when he was sick and waited on him and he intended to pay him and pay him well."

Another witness testified:

"He always said he intended to will them his property at his death. He didn't pay them for their services on that account. They would get all he had anyway."

A neighbor who had known deceased for 20 years said:

"I have had frequent talks with the old man, and he said that Bud was doing the work, him and his sister, and he expected to pay them well for it."

[1] We are asked to disregard the testimony of plaintiff's sister and to reverse the judgment and remand the cause for the reason that she was incompetent to testify as a witness under section 6354, R. S. 1909. In substance, the ground of her asserted incompetency is that she is prosecuting a demand for her services rendered to the deceased, is a party to the contract for services which plaintiff is seeking to have enforced, and therefore comes under the ban of the provision of the statute that, "where one of the original parties to the contract or cause of action in issue and on trial is dead, * * * the other party to such contract or cause of action shall not be admitted to testify * * * in his own favor."

The action of plaintiff is not founded on a joint contract, and the evidence which tends to show that his services were rendered under a contractual agreement for compensation does not disclose a joint employment or hiring of plaintiff and his sister. All that the record shows is that the deceased promised to pay plaintiff for his services, and that such promise, which was accepted and acted upon, in no wise was connected by the parties with the services of the witness, nor with any obligation the old man assumed towards her. The respective contracts and actions are entirely separate and independent, the parties are different, and a witness does not come within the terms of the statute excluding one who is a party to the contract or cause of action "in issue and on trial." *Gunn v. Thruston*, 130 Mo. 339, 32 S. W. 654; *Carpenter v. Coats*, 183 Mo. 52, 81 S. W. 1089.

[2] The sufficiency of the demand filed in the probate court to support the verdict and judgment is challenged on the ground that:

"The first item, standing alone, might have been sufficient, but when the second was added, in which a charge for caring for and waiting on deceased is intermingled with a charge for

board and provisions furnished, the whole is so indefinite and uncertain that it is not a sufficient statement on which to base a finding."

The demand was not attacked by motion or otherwise prior to the trial in the circuit court, and the point first was raised by an objection to the introduction of evidence. No formal pleadings are required in the presentation of demands for allowance in the probate court, and if the demand presented be sufficient to advise the opposite party of the nature of the claim and to bar another action on the same cause, all other defects will be cured by the defendant if he suffers the case to go to trial on the merits, without attacking the demand. *Rassieur v. Zimmer*, 249 Mo. 175, 155 S. W. 24; *Iba v. Railroad*, 45 Mo. 469; *Bronze Co. v. Doty*, 99 Mo. App. loc. cit. 198, 73 S. W. 234, 78 S. W. 850; *Christianson v. McDermott*, 123 Mo. App. loc. cit. 455, 100 S. W. 63; *Jarrett v. Mohan*, 142 Mo. App. 29, 126 S. W. 212.

It cannot be said with any show of reason that the instant judgment would not be a complete bar to another action for services and for advances made by plaintiff on account of board and provisions, and this being so, defendant, failing to raise the point of indefiniteness or uncertainty in the statement at the proper time and in the proper manner, is in no position to complain.

[3, 4] It is argued by defendant that the evidence shows conclusively that the decedent was in loco parentis to plaintiff during the period in which the alleged services were rendered, and fails to show the existence of a contractual agreement or understanding that the services were not to be performed gratuitously, out of filial love and reverence, but were to be compensated. Defendant offered no evidence, but relies on the testimony of some of the witnesses from which it is argued that the decedent, in his lifetime, went no further than to give voice to his gratitude for the kindness of plaintiff and to his voluntary intention to bestow a testamentary bounty upon his benefactor. But we find ample evidence in the record to support an inference that the parties had a mutual and often-expressed understanding that the services were not gratuitous, but were to be adequately compensated. They were not allowed by the parties to remain entirely in the field of sentiment, but were made the subject of a contractual agreement under which plaintiff was to serve his employer faithfully, and, in turn, was to be paid for what he had done. Grant that the parties did not intend that payment should be made during the lifetime of the employer, if they mutually intended that the services were to be paid for in some way out of the estate of the recipient, we say, as we did in the case of *Christianson v. McDermott*, supra, that:

"We are at loss to know why, if a remuneration was expected and promised for the services, plaintiff would not be entitled to it, although she did not get it in the form so expected."

The only question in such cases is whether the parties intended the services to be gratuitous, or performed for hire, and we find the evidence amply supports the conclusion expressed in the verdict that plaintiff was to be paid.

Nothing we have said is in conflict with the cases relied upon by defendant. *Bircher v. Boemler*, 204 Mo. 562, 103 S. W. 40; *Erhart v. Dietrich*, 118 Mo. 418, 24 S. W. 188; *Snyder v. Free*, 114 Mo. 366, 21 S. W. 847; *Morris v. Barnes' Adm'r*, 35 Mo. 412; *Hart v. Hart's Adm'r*, 41 Mo. 441; *Aul Savings Bank v. Aul's Adm'r*, 80 Mo. 190; *In re Helpbringer*, 175 Mo. App. 325, 162 S. W. 288; *Brand v. Ray*, 156 Mo. App. loc. cit. 630, 137 S. W. 623; *Crowley v. Dagley*, 174 Mo. App. 561, 161 S. W. 366.

We have sufficiently answered objections urged against the rulings of the court on instructions. The case was tried without prejudicial error.

Judgment affirmed. All concur.

HOPFINGER v. YOUNG. (No. 11608.)

(Kansas City Court of Appeals. Missouri.

July 2, 1915. Rehearing Denied

Oct. 4, 1915.)

1. MUNICIPAL CORPORATIONS—§705—STREETS—AUTOMOBILE ACCIDENT—LIABILITY.

Where plaintiff's minor son roller-skated down a sidewalk to a street crossing at a negligent rate of speed, so that he was unable to change his course to avoid running into an automobile driven by defendant owner's chauffeur in the course of his employment, who was negligent in not seeing the child, as did the other occupants of the car, soon enough to stop it to avoid the collision, which he might have done, the owner of such car was liable to the plaintiff for the boy's resulting death.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515-1517; Dec. Dig. §705.]

2. TRIAL—§260—INSTRUCTIONS—REPETITION.

Where the essential elements of a requested instruction were fully embodied in the party's given instructions, the refusal of the request was proper.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. §260.]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

"Not to be officially published."

Action by Lena Hopfinger against W. B. Young. Judgment for plaintiff, and defendant appeals. Affirmed.

O. C. Mosman, of Kansas City, for appellant. Langsdale & Howell, of Kansas City, for respondent.

JOHNSON, J. Plaintiff, the mother and only surviving parent of Henry Flaig, deceased, sued to recover damages for his death, which she alleges was caused by negligence of defendant. Henry was 12 years old at the time of his death, which occurred August 14, 1910, at the intersection of Twenty-Fifth and Charlotte streets, in Kansas

City. He and another boy were racing on roller skates downgrade on the granite sidewalk on the west side of Charlotte street. He had on a pair of freshly oiled, ball-bearing skates, and was striving to overtake his companion, to whom he had given a handicap at the top of the hill, where the race started. Both were moving at high speed—perhaps 25 miles per hour—as they approached Twenty-Fifth street; the other boy being still in the lead. An automobile owned by defendant and occupied by four persons approached the street crossing at a speed of 12 or 14 miles per hour from the east on Twenty-Fifth street, and proceeded over the crossing without change of speed at a time when the boys were in a place where to avoid a collision with the car they would be compelled either to stop or to change their course. The boy in front carried a stick, which he skillfully used as a brake and guide, and, so using it, was able to turn westward at the corner on to a dirt path and come to a stop without injury, but Henry carried no stick, and was going at such high speed that he could neither stop nor alter his course. There is evidence tending to show he was aware of his peril, and that it had become apparent before he reached Twenty-Fifth street, and when the automobile was at or near the east line of Charlotte street, and could have been prevented from passing athwart his compulsory line of travel. A woman and her adult daughter were riding in the car, which an agent of defendant was attempting to sell to them. The mother sat in the rear seat with the agent, and the daughter in the front seat with the chauffeur. The agent testified he realized that the boy had lost control of himself and was in peril when he was 100 feet and the car about 50 feet from the place of collision. The agent halloed, as did others who were witnesses of the accident, but the attention of the chauffeur, who was conversing with his companion, was not diverted to the boy until the latter crashed into the side of the car and was run over by the rear wheel. The chauffeur testified:

"Q. How fast were you driving this car, if you know, at the time of the collision? A. We were traveling very slow. Q. Well, about what rate of speed would you say? A. In the vicinity of 12 or 14 miles an hour. Q. When did you first see the boy that the machine collided with? A. After we stopped. Q. When did you first know that there had been a collision? A. Well, I heard all of a sudden somebody scream, something hit the car, and I was very much astonished, and stopped as quick as I could. Q. How far did you run after you started to stop? A. I think—we measured it; I think it was right close to twelve feet, as I remember it."

The petition alleged acts of ordinary negligence, and also negligence under the humanitarian rule. Other parties were joined as defendants, but an involuntary nonsuit was taken as to one, and the action was dismissed as to others, leaving Young, the

owner of the car, as the sole defendant. His demurrer to the evidence was overruled, and the cause was submitted to the jury in instructions which allowed a recovery for plaintiff only on the ground of a negligent breach by defendant's chauffeur of a duty he owed the deceased under the humanitarian rule.

On behalf of plaintiff the jury were instructed:

"That if you believe and find from the evidence that the plaintiff was, on the 14th day of August, 1910, the sole surviving parent of Henry Flaig, a minor, and that the said Henry Flaig came to his death by reason of a collision with the automobile mentioned in evidence, and if you further believe and find from the evidence that said automobile was the property of defendant W. B. Young, and the driver thereof the employé of said Young, and at said time was acting within the scope of his employment, and that said Henry Flaig was just before said collision rapidly coasting down Charlotte street and approaching Twenty-Fifth street, and in imminent danger of being struck by said automobile, and that the driver of said automobile saw, or by the exercise of ordinary care might or would have seen, said Henry Flaig approaching the intersection of the streets mentioned in evidence and in a position of imminent peril, if you find and believe from the evidence he was in a position of imminent peril, in time thereafter, by the exercise of ordinary care on his part and by means of the appliances at hand, and with reasonable safety to the occupants of said automobile, to have stopped the said automobile or to have changed the course thereof, and thereby to have averted the collision with said Henry Flaig, and negligently failed to do so, and that by reason and as a direct result thereof the said Henry Flaig was killed, then your verdict will be for the plaintiff and against defendant W. B. Young, even though you may further find from the evidence said Henry Flaig was guilty of negligence on his part which directly contributed to his death."

The jury returned a verdict for plaintiff, and defendant appealed.

In the argument of the demurrer to the evidence which defendant insists should have been given counsel for both parties proceed from the hypothesis that the boy was negligent in law in racing downhill on a public sidewalk at such high speed, under conditions which deprived him of the power to stop at the street crossing or even to alter his course. His negligence, thus conceded, will be assumed for present purposes, and will be regarded as a potent cause of the perilous situation which arose from the co-operation of that cause with the act of the chauffeur in driving the car across his unalterable course over the crossing. It required the joint action of both of these agencies to produce the injury; since the boy would have cleared the crossing in safety if the car had been kept out of his way, and the passing car would not have been a menace to his safety if he had not lost control over himself by his own negligence.

[1] In such state of case plaintiff could not recover on a cause founded upon negligence of the chauffeur which concurred in the production of the dangerous situation since such negligence, if any, was relegated to the field

of nonactionable wrongs by the contributory negligence of the boy. Therefore the principal question for determination is whether or not the evidence of plaintiff discloses a cause of action under the "last chance" rule. Should the chauffeur, if he had been in the exercise of reasonable care, have discovered the dangerous situation of the boy in time to have averted the collision by stopping or checking the speed of the car? Surprised by the collision which gave him his first knowledge of the presence of the boy, the chauffeur stopped the car in 12 feet, and it is fair to assume that he could have stopped in that distance if he had looked up Charlotte street as the car passed over the intersection and have discovered, as every one else who was looking did discover, that the boy was rushing to a collision and was without ability to save himself. Counsel for defendant contend there was nothing in the appearance of the boy to suggest that he was in danger and would not follow the example of his companion and turn on to the dirt path, but the eyewitnesses, observing that he carried no stick and was making visible, though futile, efforts to stop or change his course, realized his peril, and it is obvious that the chauffeur would have been similarly impressed if he had looked in that direction. His failure to look, which he concedes, was a direct cause of the injury, and was negligence under the humanitarian rule, unless it should be said that he was under no duty to anticipate that boys would be making a negligent and dangerous use of a public sidewalk and crossing.

In the recent case of *Rowe v. Hammond*, 172 Mo. App. 203, 157 S. W. 880, a boy coasting down a public street in Kansas City, in violation of an ordinance, collided at a street intersection with an automobile running on the cross-street. The chauffeur did not look to either side as he approached the crossing, and it was argued by the defendant that he owed the plaintiff no duty under the last chance rule to be on the lookout for him. We rejected this argument, on the ground that the plaintiff was not a trespasser on the street, but was exercising a lawful right to travel a street for pleasure in an unlawful manner, that his rights were to be measured by the duty the chauffeur owed the public using the streets, and that such duty required the chauffeur to keep his car under control at street crossings and to look both to right and left on cross-streets for persons in positions of danger. We are satisfied with the justice and humanity of that decision, and repeat that it is negligence for an autoist to run at dangerous speed over such crossings without looking to see whether or not the way is clear. The boys were lawfully on the street, were exercising a lawful right in a negligent manner, and the chauffeur was negligent in not looking in their direction and stopping the car on the first appearance

of danger. The demurrer to the evidence was properly overruled.

The quoted instruction given at the request of plaintiff is criticized on the ground that it failed to require the jury to find "that the deceased was oblivious to his own danger or ignorant of the presence of defendant's machine, or that, being aware of his danger, deceased was unable to protect himself or do anything to avert the accident." The proof shows beyond question that the boy was aware of his danger, but was unable to avert it, and that his danger was obvious. His negligence which had brought him into peril had been succeeded by helplessness, and the fact that he was conscious of impending and imminent danger did not relieve the chauffeur of his duty not to injure him, but required the chauffeur to make every reasonable effort to save him. Obliviousness to peril on the part of an endangered person is material in last chance cases only in instances where such person has means of saving himself, and his peril consists, in part at least, of his ignorance of the approaching danger. The instruction properly presented every essential element of a good cause of action.

[2] Instruction numbered 8, asked by defendant, was properly refused, since its essential elements were fully embodied in defendant's given instructions numbered 6 and 7.

There is no substantial error in the record, and the judgment is affirmed. All concur.

YOUNT v. PRUDENTIAL LIFE INS. CO. (No. 11657.)

(Kansas City Court of Appeals. Missouri.
Oct. 4, 1915.)

1. INSURANCE — 136 — LIFE INSURANCE — DELIVERY OF POLICY — NECESSITY.

Where, according to the terms of negotiations between a life insurance company and an applicant for insurance, embodied in the application, which provided that it should be part of the insurance contract, there was to be no contract of insurance until the policy had been issued and delivered to the insured while in good health, and where the insured died while the policy, unissued to him, was yet in the hands of the agent who had procured him to insure in the company, which had shortly before written the policy, such company was not liable to the beneficiary on the policy; delivery being a condition precedent to liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.]

2. INSURANCE — 141 — LIFE INSURANCE — REQUIREMENT OF DELIVERY OF POLICY — WAIVER.

Where the application for life insurance, expressly made a part of the policy, provides that the policy must be actually delivered to the insured in good health before the contract of insurance is in force, actual manual delivery of the policy as a condition precedent to its liability may be waived by the insurance company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 75, 253-262; Dec. Dig. § 141.]

Appeal from Circuit Court, Jackson County; Daniel E. Bird, Judge.

"Not to be officially published."

Action by Estella E. Yount against the Prudential Life Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Sherman & Landon, of Kansas City, Mo., and McAnany & Alden, of Kansas City, Kan., for appellant. Haff, Meservey, German & Michaels, of Kansas City, Mo., for respondent.

TRIMBLE, J. As the widow of Leon L. Yount, deceased, plaintiff seeks to recover upon an alleged contract of insurance between her late husband and the defendant, of which contract, if it exists, she is the beneficiary. Defendant insists that, according to the express terms of the negotiations between it and deceased, there was to be no contract of insurance until the policy had been issued and delivered to the husband while in good health, and that, as there was no delivery of the policy to him, no contract of insurance was in existence at the time of his death.

[1, 2] So far as we can ascertain from the record, there does not seem to be any dispute as to the facts in the case, though there is considerable difference of opinion as to the legal conclusions to be drawn from those facts. Leon L. Yount was a piano salesman for the Starr Piano Company of Kansas City. On the evening of January 22, 1914, he signed and delivered to H. C. Garnett, one of defendant's agents who had solicited his insurance, a written application to defendant for a ten-year term policy of life insurance for \$5,000, the quarterly premium on which was to be \$14.65, and the beneficiary therein to be the applicant's wife. Among the stipulations in the application, and appearing just above the applicant's signature, was an agreement that the application should become a part of the contract of insurance, and that the policy applied for should be accepted subject to the privileges and provisions therein contained, "and said policy shall not take effect until the same shall be issued and delivered by the said company, and the first premium thereon paid in full, while my health, habits, and occupation are the same as described in this application."

It seems that Garnett agreed to purchase a piano on the installment plan, and the arrangement between the two men was that Yount caused his employer, the Starr Piano Company, to give Garnett a receipt for \$10, being first payment of the piano, while Garnett gave to Yount a receipt for \$10 "on account of first quarterly premium." No cash actually passed in the transaction, but each party accounted to his principal for the money represented by the receipt he had given; and when Garnett turned the application in to Sullens, defendant's local su-

perintendent, he also turned in \$10 in cash as the amount collected on same. This was in accordance with the rules of the company and the terms of his contract of employment. The receipt given by Garnett to Yount was as follows:

"Jan. 22, 1914.

"Received from Mr. Yount [applicant] the sum of ten dollars, being a payment on account of the first quarterly premium on a policy applied for in the Prudential Insurance Company of America. It is understood that this payment is in no way binding upon the said company, except that said company agrees to return the amount mentioned hereon in case the company declines to grant a policy on the life of said applicant.

"[Signed] H. C. Garnett, Agent."

Mr. Yount was examined by the defendant's local medical examiner on January 26, 1914, and this report, constituting a part of the application, and the whole showing applicant to be in good health, was sent to the home office of the company in Newark, N. J., on the same day. On January 30, 1914, the home office approved the application and made out the kind of policy applied for, and mailed it to the local office of the defendant, from whence the application had been received. Pinned on the face of the policy when it was sent out was a red slip bearing these words:

"Important.

"This policy must not be delivered unless the applicant is in a satisfactory condition of health. Superintendents, agency organizers, assistants, agents, managers, and special agents will be held responsible for a strict observance of the rules regarding the delivery of policies as stated in the ordinary rate book.

"The Prudential Insurance Company of America."

The policy, with this red slip attached, reached the local office and went into the hands of the agent, Garnett. The precise date it reached him is not shown, but it could not be very far from February 5th or 6th. He says he had obtained it "one or two days" before he read in the papers an account of Mr. Yount's death, whereupon he returned the policy to the company. He never notified Mr. Yount, or any of his family, prior to his death, that the application had been accepted or that the policy had been received; and Mr. Yount died without knowing that his application had been acted upon, or that it had been accepted by the home office, or that the policy had been made out and sent to the local office.

Yount left home in ordinary health on the morning of February 6th about 8:30 o'clock. It was a very cold day—snowy and storming. So far as the record discloses, the next time Yount was seen was at 9:30 that night, when he was found lying unconscious in the basement of his home. He died about 5 o'clock the next morning, February 7th. He had no negotiations or communications with Garnett after January 22d, the night he signed the application. Nor did he, or anyone else for him, tender to defendant the \$4.65 remain-

ing due on the first premium. Upon being notified of Yount's death, the defendant tendered to plaintiff the \$10 in gold, and, denying all liability, refused to furnish blanks for proof of death.

Under the foregoing facts, the trial court could not do otherwise than to sustain defendant's demurrer to the evidence. It is undisputed that the policy was never delivered, and also that the written application signed by the deceased expressly provided that it should be a part of the insurance contract, and that the policy should not take effect until its issuance and delivery, and the first premium thereon paid in full, while the applicant was in good health. Consequently we are unable to see what there was to submit to the jury. The provision that the policy should not take effect until its delivery is an agreement the parties could lawfully make, and, having made it, there is no reason why it should not be enforced. *Gallop v. Royal Neighbors of America*, 167 Mo. App. 85, 150 S. W. 1118; *Kirk v. Woodmen of the World*, 169 Mo. App. 449, 155 S. W. 39. All that was done by either party to the proposed contract was merely preliminary to and dependent upon, its final consummation by delivery to Mr. Yount while he was in the good health he was enjoying at the time he made the proposal to defendant to be insured. No contract could come into existence until his proposal had been accepted upon the terms required, and notice of such acceptance conveyed to him. *Kilcullen v. Metropolitan Life Insurance Co.*, 106 Mo. App. 64, 82 S. W. 960. Clearly a delivery of the policy to the applicant during his lifetime and while he was in good health was required before the things done by the parties could ripen into a contract. It was a condition precedent to a completion of the contract. *Rhodus v. Kansas City Life Ins. Co.*, 156 Mo. App. 281, 137 S. W. 907; *Cravens v. N. Y. Life Ins. Co.*, 148 Mo. 533, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628. And no recovery can be allowed if the death of the applicant occurs while such condition remains unperformed. *Pierce v. New York Life Ins. Co.*, 174 Mo. App. 383, 160 S. W. 40. Of course, actual manual delivery of the policy may be waived by the insurance company, but there was nothing of this kind in the case. The proof clearly shows that the company sent the policy to its local office in strict accord with its requirements and the terms specified in the application. The way in which the company sent the policy was not offered to bind either Yount or the plaintiff by any secret instructions issued to the company's agent. The applicant and plaintiff were bound by the application; and evidence of what the company did was to show that it stood upon the strict terms of the application; that is, that there was no intent upon the part of the company to send the policy out to its own agent as an uncondi-

tional delivery to the applicant or to waive the condition of delivery to him while in good health. Hence plaintiff's objection to this evidence was properly overruled. That plaintiff's evidence conclusively shows that no contract of insurance was in existence at the time Mr. Yount died is supported by many authorities, among which are the following: *Horton v. New York Life Ins. Co.*, 151 Mo. 604, loc. cit. 619, 52 S. W. 356; *Bell v. Missouri State Life Ins. Co.*, 166 Mo. App. 390, 149 S. W. 33; *Paine v. Pacific Mutual Life Ins. Co.*, 51 Fed. 689, 2 C. C. A. 459; *Kohen v. Mutual Reserve Fund Life Ass'n (C. C.)* 28 Fed. 705; *McCully's Adm'r v. Phoenix Life Ins. Co.*, 18 W. Va. 782; *Bowen v. Prudential Ins. Co. of America*, 178 Mich. 63, 144 N. W. 543, 51 L. R. A. (N. S.) 587; *Powell v. Prudential Ins. Co. of America*, 153 Ala. 611, 45 South. 208; *Russell v. Prudential Ins. Co. of America*, 176 N. Y. 178, 68 N. E. 252, 98 Am. St. Rep. 656; *Mutual Life Ins. Co. v. Jordan*, 111 Ark. 324, 163 S. W. 799; *Snedeker v. Metropolitan Life Ins. Co.*, 160 Ky. 119, 169 S. W. 570.

There are other questions discussed in the briefs, but, as the foregoing fully disposes of the case, we see no reason for noticing them.

The action of the trial court upon defendant's demurrers was right, and the judgment must be, and is, affirmed. All concur.

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POWELL v. BATCHELOR et al.
(No. 11134.)

(Kansas City Court of Appeals. Missouri.
Oct. 4, 1915.)

1. PRINCIPAL AND AGENT §42—AGENT'S AUTHORITY—TERMINATION—INSANITY.

Where defendant's brother authorized defendant to enter into a contract with plaintiff concerning the assets, stock, and business management of a corporation, his subsequent insanity did not terminate the defendant's authority, or release him from liability for the acts of the defendant as his agent.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 64-66; Dec. Dig. § 42.]

2. WITNESSES §159—COMPETENCY—INTEREST.

In an action for breach of a written contract concerning the assets, stock, and business management of a corporation, where plaintiff's testimony as to any acts or declarations on the part of a codefendant, insane at the time of the trial, tending to show that his codefendant was his agent, was excluded and only disinterested parties were allowed to testify thereto, there was no violation of Rev. St. 1909, § 6354, providing that in actions where one of the original parties to the contract or cause of action in issue and on trial is insane, the other party shall not be admitted to testify in his own favor.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 629, 664, 666-669, 671-682; Dec. Dig. § 159.]

3. NEW TRIAL §75—GROUNDS—INADEQUACY OF DAMAGES.

In an action for damages for breach of a written contract concerning the assets, stock,

and business management of a corporation for six months, during which plaintiff was to have the option of buying defendant's interest, and to have the business run by defendant and its debts paid, brought on the ground of defendant's disposition of the assets within such time, where there was evidence that the corporation's furniture, equities, etc., were worth a substantial amount, the trial court was within its rights in setting aside a verdict for plaintiff for \$1.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 151, 152; Dec. Dig. § 75.]

4. APPEAL AND ERROR §977—TRIAL COURT'S DISCRETION—NEW TRIAL.

The trial court's discretion to grant a new trial should not be interfered with by an appellate court, unless that discretion has been clearly abused; but where no verdict in favor of the party to whom the new trial is granted could be allowed to stand, the order granting the new trial will be reversed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.]

5. CONTRACTS §328—ACTION FOR BREACH—DEFENSES.

In an action for damages for breach of a contract, concerning the assets, stock, and the business management of a corporation for six months, during which plaintiff was entitled to have the business run and its debts paid, and to have an option to purchase defendant's interest, brought on the ground of defendant's disposition of the assets during such time, defendant, who had put it out of his power to perform, could not defend on the ground that plaintiff would not have found a purchaser.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1571-1584; Dec. Dig. § 328.]

6. DAMAGES §175—ACTION FOR BREACH OF CONTRACT—EVIDENCE.

In such case, the value of the assets and business at the time they were turned over by defendant to a codefendant, and the consequent probability of plaintiff being able to find a purchaser, and the question whether an offer to plaintiff was genuine or a frame-up, would be admissible on the question of damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 469-471; Dec. Dig. § 175.]

7. CONTRACTS §349—ACTION FOR BREACH—EVIDENCE.

In such action, where the contract itself released plaintiff from all liability for representations made to defendant at the time defendant bought into the corporation, evidence of such representations was properly excluded; but evidence for defendant as to the actual value and extent of the company's business when he first bought in, and whether it was then making or losing money as compared with its extent and value during the time he managed the business and at the time he sold out and quit, was admissible.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1096, 1781-1784, 1788-1798, 1809, 1811-1814, 1817, 1818; Dec. Dig. § 349.]

Appeal from Circuit Court, Jackson County; F. G. Johnson, Judge.

Action by W. L. Powell against D. L. Batchelor and another, with counterclaim by D. L. Batchelor. Judgment for plaintiff, and for D. L. Batchelor upon his counterclaim, and from the granting of a motion for a new trial, defendants appeal. Affirmed.

Williams, Hunter & Guffin, of Kansas City, for appellant Batchelor. Edward D. Ellison and James O. Williams, both of Kansas City, for appellant Hoefer. Cook & Gossett, of Kansas City, for respondent.

TRIMBLE, J. This suit is for damages for breach of a written contract, concerning the assets, stock, and business management of a corporation called the Investment Security Company. The contract is dated December 17, 1909, and by its terms is between plaintiff and the defendant D. L. Batchelor, but the petition charges that the latter was acting for himself and as agent for his codefendant, James P. Batchelor.

It seems that some time in October, 1909, D. L. Batchelor, who for years had been the station agent for the Santa Fé Railroad at Las Vegas, N. M., came to Kansas City to look after some business for his brother James P. Batchelor. While in the city he became acquainted with plaintiff through an advertisement of the latter's concerning the business (and the opportunity of securing an interest therein) of the Investment Security Company. This was a corporation organized under the laws of Missouri, in 1904, as the Powell-Moore Realty Company, but which had shortly thereafter changed its name to that it now bears. Originally its capital stock was \$10,000, but this had been increased to \$35,000. At the time Batchelor's attention was called to the company, all its stock was practically owned and controlled by the plaintiff. It was then maintaining what appeared to be an extensive and profitable real estate brokerage and rental business. Its office occupied five or six rooms, and presented an imposing appearance fitted up with desks, furniture, filing cases, cabinets, maps, and all the paraphernalia usually found in a large and prosperous business of that kind. It was also imposingly organized, having a legal department, in charge of an ex-judge from Leavenworth, a rental department, a real estate department, a "business chance" department, a "stock-selling" department, and perhaps others. The five or six men who worked under the company did so on a plan by which each man obtained what business he could and divided his commissions with the company. The personnel of these men changed from time to time, some going out, others taking their places.

Whether the company really had a valuable and extensive business or was a mere pretentious shell does not definitely appear, for reasons which will be hereinafter stated. Evidently, however, plaintiff must have made Batchelor some very flattering representations in regard thereto, judging from the stipulation for the release of Powell from liability on account thereof contained in the contract sued on, and which will be set forth later. At any rate, Batchelor desired to purchase an interest in the corporation, but

thought the capital stock was larger than necessary. Thereupon Powell reduced the capital stock to \$12,000. Whether this was done regularly as provided by statute or merely by "unanimous consent" does not appear. It was done, and thereupon Batchelor bought of Powell one-half of the stock paying therefor the sum of \$6,000. This money, for some unexplained reason, was not paid to Powell, but went into the treasury, and a little over one-third of it seems to have been checked out by Powell to pay old debts of the company.

Batchelor went into the corporation the latter part of October, 1909, and was made president, while Powell was elected secretary and treasurer. The business was conducted by both of them from that time until December 17, 1909. At that date trouble had been brewing for some time between Powell and Batchelor. The latter was claiming that Powell had fraudulently misrepresented the condition of the company to him, and Powell was perhaps objecting to the unauthorized withdrawal by Batchelor of \$4,200, the amount remaining in the treasury of the \$6,000 Batchelor had paid in. Matters being in this condition, the contract sued on was entered into on the date last above mentioned. It recited that, whereas Batchelor and Powell were the joint owners of the Investment Security Company, and Batchelor was dissatisfied, therefore Powell agreed to turn into the company's treasury a farm of 120 acres in Greene county, and withdraw entirely from the management of the business. He also guaranteed that the liabilities of the company at that time (aside from mortgages on real estate) did not exceed the sum of \$1,500. Batchelor agreed and bound himself to pay said liabilities, to continue the business under the same name for a period of six months, during which time Powell was to have the option of buying Batchelor's interest at the price of \$6,000. Batchelor further agreed not to sacrifice any of the money or assets of said company without Powell's consent, to maintain said business in good running order, keeping its expenses paid and obligations promptly met during said six months, so that Powell might have an opportunity to get others interested with him in finally taking over the business, or so that a reasonable sale of said business would be possible at any time during that period. It was further provided that said Powell was released from any and all obligations of any kind whatever, and absolved from any alleged liability regarding any previous representations of every kind; that the stock then held by both parties, or either of them, should be offered for sale, and, when any was sold, the proceeds were to be applied to the purchase of Batchelor's stock, and if said Batchelor failed to receive \$6,000 within six months, then Powell was to forfeit all interest in the company and its assets. Powell also agreed to assign his \$6,000 of stock to

said Batchelor pending the final completion of this contract.

Pursuant to the execution of this contract, Powell deeded the Greene county farm to the company (subject to incumbrances aggregating \$1,500, with interest accrued thereon since the summer and fall of 1909), assigned his stock to Batchelor, turned over the entire management of the business to him, and engaged in another business. Batchelor carried on the business from December 17, 1909, until the 30th of March, 1910. He says that during this time, although he cut down expenses as low as he could, the business was conducted at a loss of \$150 per month.

According to Batchelor's testimony he called on Powell about March 20, 1910, and asked him if he desired to exercise the option contained in their contract, and Powell told him he did not, as he had no intention of ever embarking in that business again. Thereupon, on March 30, 1910, Batchelor caused the corporation to deed the Greene county farm to Blanche Batchelor, wife of James P. Batchelor. He also caused the company to transfer a 25-foot lot on Jackson Avenue in Kansas City to his son C. D. Batchelor, and to turn over to C. D. Batchelor and J. H. Batchelor, sons of J. P. Batchelor, certain stock in the Automatic Rapid Mail Service Company, a corporation organized to manufacture and sell a device for picking up mail sacks by railway trains when going at high speed. This device, however, had not been approved by the United States government and its value depended wholly upon that approval. The recipients of these pieces of property and shares of stock paid nothing to the company for them. On the same day, said D. L. Batchelor made a conditional sale of three-fourths of the capital stock of the Investment Security Company to three men who were then in the company's offices, retaining a one-fourth interest himself. It was provided in this contract of sale that Batchelor would hold the purchasers harmless from anything growing out of the contract between him and Powell, but it was further provided that in case Powell chose to exercise his option thereunder, then said purchasers of said capital stock would assign their respective stock in accordance therewith and Batchelor would pay them back the consideration he had received from them, plus 20 per cent. profit, they to have all the earnings of the company that might accrue in the meantime. Batchelor then turned the corporation, its offices and furniture, over to these men, and returned to Las Vegas.

The answer filed in behalf of James P. Batchelor denied that he was a party to said contract, or that he was in any way bound thereby. The defendant D. L. Batchelor admitted the execution of the contract on his part, but denied that in doing so he was acting in any way for James P. Batchelor. He also set up that he was induced to purchase

his \$6,000 of stock in the corporation by the false and fraudulent representations of the plaintiff (upon which he relied) that the corporation was solvent, had a good-paying business, with assets worth \$12,000, when in fact it was not solvent, did not have a paying business, and its assets consisted only of a few hundred dollars. His answer further alleged that, on the representation of plaintiff that the liabilities of the corporation on December 17, 1909, were only \$1,500 (aside from mortgages on real estate), he bought and paid for plaintiff's 600 shares of the corporate stock, but that such representation was false and fraudulently made, and known to be so by plaintiff, but relied upon and believed to be true by defendant, who thereupon assumed and agreed to pay said liabilities; that in fact said liabilities amounted to \$2,017.34, which defendant was required to and did pay, thus making defendant expend the sum of \$517.34 in excess of the \$1,500 represented by plaintiff to be the full amount of said liabilities, for which sum of \$517.34, with interest, defendant prayed judgment on his counterclaim.

The jury returned a verdict assessing damages in the sum of \$1 against both defendants on plaintiff's petition, and for defendant D. L. Batchelor in the sum of \$578.34 on his counterclaim. A motion for new trial filed by plaintiff was sustained, the trial court assigning as a reason therefor that:

"Under the law and the evidence the verdict for the plaintiff on the cause of action set up in the petition is insufficient and inadequate and should have been for a substantial sum."

Whereupon the defendants appealed.

The first contention to be disposed of is that there is no evidence to connect James P. Batchelor with the contract. This claim is untenable. There was evidence tending to show that D. L. Batchelor was James P. Batchelor's general agent; that the money with which half of the stock was originally purchased by D. L. Batchelor belonged to James P. Batchelor, and that the latter gave the former full authority to act for him in reference to such stock and the affairs of the company, and left the whole matter of his investment therein to D. L. Batchelor to settle as the latter might think best. The name of James P. Batchelor did not appear in the written contract, but, of course, this makes no difference if D. L. Batchelor was in fact acting for himself and James P. Batchelor. Mechem on Agency, § 701.

[1] It is true James P. Batchelor became insane on the 21st of February, 1910, and was placed under guardianship and appears in this case by his guardian, Charles C. Hoefler. But the authority given by James P. Batchelor to his brother D. L. Batchelor was conferred prior to such insanity, and all the acts and declarations of James P. Batchelor offered in evidence by plaintiff to show such authority were matters that occurred prior

to February 21, 1910; and, while D. L. Batchelor's acts in disposing of the assets of the company as complained of in the petition, occurred March 10, 1910, that is, after James P. Batchelor became insane, yet such insanity did not have the effect, under the circumstances of this case, to terminate D. L. Batchelor's authority or to release James P. Batchelor from liability for the acts of his said agent. *Hill v. Day*, 34 N. J. Eq. 150; *Matthiessen v. McMahon*, 38 N. J. Law, 536; *Davis v. Lane*, 10 N. H. 156.

[2] The record shows that the court sustained the objection to Powell testifying to any acts or declarations on the part of James P. Batchelor tending to show that D. L. Batchelor was his agent, and allowed only disinterested parties to testify thereto, consequently, the evidence tending to show James P. Batchelor's connection with the contract or cause of action in issue and on trial did not come under the ban of section 6354, R. S. Mo. 1909. Under the foregoing circumstances, therefore, the demurrer offered in behalf of James P. Batchelor was properly overruled.

This point being disposed of, it is not seen how we as an appellate court can reverse the action of the trial court in granting plaintiff a new trial.

Under the contract in question, Powell was entitled to have Batchelor carry on the business, in its then condition, for six months from December 17, 1909, and carefully preserve its assets, so as to enable him, Powell, within that time, to find some one who could advance the \$6,000 necessary to pay for Batchelor's stock. It would seem that under the contract Powell had this right, not only to enable him to get a purchaser for the Batchelor stock, but also, if possible, to sell all of the stock and receive for his own stock everything over and above the \$6,000 going to Batchelor. If so, then he had the right to insist on Batchelor's performance of the contract for the full period of six months, even if he himself did not intend personally to go back into the business.

[3] But, however this may be, Batchelor's claim that Powell told him he did not intend to exercise any option under the contract was not pleaded as a defense, either by way of estoppel or otherwise. And even if it had been, it was denied by Powell, and thus an issue was made for the jury, which found for plaintiff, but allowed him only the sum of \$1. Now, the evidence shows, without dispute, that the corporation had assets of more than a mere nominal value. The property owned by it may have consisted largely of "chips and whetstones," and the value of its business and the vastness of its clientele may have been greatly exaggerated by the testimony adduced in plaintiff's behalf. If we were passing on the matter, with our conservative ideas of such things, we might incline to the view that they were. But even if this be so, the furniture in the office,

the cash on hand, and the equities in the scattered pieces of real estate were worth a substantial amount. How much we would not undertake to say, but certainly more than a merely nominal sum. Batchelor admits the execution of the contract, and that he disposed of the property, refused to continue the business, and turned it over to others before the expiration of the six months. He neither pleaded nor proved any defense for so doing. We say he did not prove any defense because the jury found against him. But it found only nominal damages, when there was substantial evidence that the damages were more than that. Hence the court was strictly within its rights when it set the verdict aside. *Morris v. Missouri Pacific R. Co.*, 136 Mo. App. 393, 117 S. W. 687; *Noble v. Kansas City*, 222 Mo. 121, 120 S. W. 779.

[4] The trial court's discretion to grant new trials should not be interfered with by an appellate court, unless that discretion has been clearly abused. *Hoepper v. Southern Hotel Co.*, 142 Mo. 378, loc. cit. 387, 44 S. W. 257. If there is any substantial basis for the granting of a new trial, it will be upheld. *Fitzjohn v. St. Louis Transit Co.*, 183 Mo. 74, 81 S. W. 907. Of course, if the case is such that no verdict in favor of the party to whom the new trial is granted could be allowed to stand, then the order granting a new trial will be reversed. *Ottomeyer v. Pritchett*, 178 Mo. 160, 77 S. W. 62. Clearly the case at bar does not present a situation where the court's order sustaining the motion for new trial can be interfered with.

[5, 6] Whether the offer of Brown to buy the Batchelor stock at \$6,000 was a mere "bluff" or pretense "framed up" by Powell, as claimed by defendants, in order to give some semblance of great loss on his part, or was a genuine opportunity for Powell to re-enter the company and get back his own stock, had the business been kept intact as required by the contract, need not be decided here. Doubtless there are some suspicious circumstances connected with it. But at that time Batchelor had already violated the contract and put it out of his power to perform, and thus Powell was deprived of the opportunity, during the remainder of the time the contract gave him, of redeeming his stock and again obtaining possession of the property. Under such circumstances it would be no defense on Batchelor's part to say that Powell would not have found a purchaser anyway, though, of course, the value of the assets and business at the time they were turned over to Batchelor, and the consequent probability of Powell being able to find a purchaser, and the question of whether Brown's offer was genuine or a "frame-up," would all have a bearing upon the amount of damages sustained. We cannot say that the evidence offered by plaintiff tending to show that his loss was substantial was no evidence at all, or that the court acted arbi-

trarily in granting a new trial. Consequently the case does not come within an exception to the general rule that the trial court's discretion in granting a new trial will not be interfered with.

[7] As the case will have to be tried again, it may be well to observe that, since the contract in question released Powell from all liability for any representations made to Batchelor at the time he first bought in, and was a settlement of their differences at that time, evidence of such representations was properly excluded. However, we think the court unduly limited the evidence in not allowing Batchelor to state and show the actual value and extent of the business of the company at the time he first bought in, and whether it was then in reality making or losing money as compared with its extent and value during the time he managed the business and at the time he sold out and quit. Powell was suing for \$12,500 damages for the alleged depreciation in the value of his stock put up as a forfeit in the hands of Batchelor under the contract, claiming that such stock had been rendered worthless by Batchelor's conduct in dissipating the assets and destroying and rendering unprofitable an otherwise prosperous business. Under the circumstances, Batchelor should have been allowed to show that the business he is charged to have ruined was not in fact prosperous nor valuable.

Upon the grounds hereinbefore stated, the judgment is affirmed. The other Judges concur.

MORGAN v. CITY OF KIRKSVILLE. (No. 11690.)

(Kansas City Court of Appeals. Missouri.
Nov. 1, 1915.)

1. MUNICIPAL CORPORATIONS §818—INJURIES TO PERSONS ON STREETS—EVIDENCE.

In an action for injuries received by one who fell on a sidewalk where there was nothing to show that the condition of the walk at the time of the second trial was the same as it had been at the time of the injury, evidence of its condition at the time of the second trial was inadmissible.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1726-1738; Dec. Dig. §818.]

2. APPEAL AND ERROR §1050—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for injuries received by one who fell on a defective sidewalk, the erroneous admission of evidence of the condition of the walk subsequent to the action is prejudicial; for the jury must have considered it on the question whether the walk was dangerous at the time of the accident.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063, 1069, 4153-4157, 4166; Dec. Dig. §1050.]

3. MUNICIPAL CORPORATIONS §805—STREETS—SIDEWALK ACCIDENTS—DUTY OF CARE.

Though plaintiff knew a sidewalk was defective and dangerous, she is entitled to use it, provided she exercise the care that an ordinarily prudent person would exercise under like cir-

cumstances, but, if the defect be so glaringly dangerous that an ordinarily prudent person would not have used it, no recovery can be had; hence an instruction should clearly indicate that a verdict cannot be rendered for plaintiff, where the walk was dangerous, unless reasonable care was exercised.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1677, 1683; Dec. Dig. §805.]

4. MUNICIPAL CORPORATIONS §822—STREETS—INJURIES—ACTIONS—INSTRUCTIONS.

An instruction in an action for injuries received by one who fell on a sidewalk that, if it was dangerous, and plaintiff knew it was dangerous, or could have known it by the exercise of ordinary care, yet negligently attempted to use the walk, no recovery could be had, is erroneous, as making a mere attempt to use a defective walk negligence, without regard to the manner of the use.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1753-1762; Dec. Dig. §822.]

Appeal from Circuit Court, Adair County; C. D. Stewart, Judge.

"Not to be officially published."

Action by Nancy Morgan against the City of Kirksville. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

A. Doneghy, of Kirksville, for appellant.
Weatherby & Frank, of Kirksville, for respondent.

TRIMBLE, J. Plaintiff seeks to recover for a fall upon a defective sidewalk. It is charged that at the point where the brick in the walk ceased the city maintained a board set on edge across the walk to hold the brick in place, and that this board extended above the surface of the brick, rendering the walk dangerous, and causing plaintiff to fall.

The injury occurred November 27, 1911. Suit was brought and a trial had at the October term, 1913. Upon an appeal being taken to this court, the judgment was reversed and the cause remanded for a new trial. See 181 Mo. App. 348, 168 S. W. 835. A second trial was had in October, 1914, resulting in a hung jury. Thereafter a third trial was had in January, 1915, in which the jury found for defendant, and plaintiff appealed.

[1] Error is charged in that the trial court allowed the city to introduce evidence as to the condition of the walk at the time of the second trial, which was nearly three years after the date of the alleged injury. This evidence tended to show that at that time the board did not extend above the surface of the brick. Of course, the material question was whether it did or did not extend above the brick at the time of the injury. The city seeks to justify the introduction of the evidence as to the condition of the walk subsequent to the injury on the ground that plaintiff had admitted that the sidewalk was in the same condition at the time of said second trial as it was at the time of the in-

jury. But a careful search of the record fails to disclose that she made any such admission. A reading of plaintiff's testimony shows that the comparison defendant, on cross-examination, compelled her to make, over plaintiff's objection, was not between the condition of the walk at the time of her fall and the date of the second trial, but between its condition at the time of the first trial as compared with its condition at the time of the second. Plaintiff said that the board had been split off at the time of the second trial. She was then asked:

"Q. That was the change that was made, and the only change? A. All that I noticed particularly, but the board was split off."

Defendant construes this answer as meaning that the board being split off was the only change in its condition at the time of the second trial from that at the time of the injury; but clearly the witness was talking of the change at the time of the second trial as compared with its condition at the time of the first trial, instead of at the time of the injury. As stated, it occurred November 27, 1911. The first trial did not take place until nearly two years thereafter, and the second trial was not had until nearly three years after the accident. The city did not offer any testimony showing affirmatively that there was no change in the condition of the walk between the date of the injury and the second trial. Plaintiff testified that the board was there at the first trial, but nowhere stated that it or the walk was in the same condition as at the time she fell. Certainly the city should not have been allowed to introduce witnesses showing that nearly three years after the injury the board did not project above the brick, in the absence of an affirmative showing that the conditions were the same then as at the date of the injury. The trial judge by his rulings indicated that he thought plaintiff had so testified. He was doubtless led into this error because the city stated that the questions about to be asked plaintiff were for the purpose of showing that the conditions were the same, but, when the questions were asked, the record shows that both the examiner and the witness were talking about the condition of the walk at the time of the first trial as compared with its condition at the time of the second. There being no evidence that the walk was in the same condition at the time of the first trial that it was at the date of the injury, nearly a year prior thereto, it was error to admit the evidence as to its condition at the time of the second trial, even though plaintiff did say that the conditions were the same at the second trial as at the first, except that the board had been broken off. 5 Thompson on Negligence (2d Ed.) § 6228; Hoyt v. City of Des Moines, 76 Iowa, 430, 41 N. W. 63; Williams on Municipal Liability for Tort, § 149.

[2] We cannot agree with respondent that the admission of this testimony as to the sub-

sequent condition of the walk was harmless. The jury would undoubtedly think they had a right to consider whether the board projected above the brick in October, 1914, as bearing upon whether it projected above it in November, 1911—something they could not do unless there was evidence before them that conditions had not changed.

[3] As the case will have to be retried, it is necessary to notice two instructions given, one for plaintiff, and the other for defendant. Plaintiff's instruction No. 3 told the jury that, even though the walk was dangerous, and plaintiff knew it was dangerous, she is not to be denied the right to recover a verdict against the city on that account, unless the walk was so glaringly dangerous that a person of ordinary care would have refused to use the same. If the instruction means that she could not be deprived of a verdict merely or solely because of such knowledge, then it was perhaps correct, and a careful analysis of the instruction may disclose that such was its meaning. As the instruction is worded, however, it is quite possible for the jury to have understood from it that, if they believed the walk was not glaringly dangerous, a verdict could not be denied her, regardless of the manner in which she went over the place. If she knew the walk was defective, and that it was dangerous, she would still have had the right to use it, provided that, in doing so, she exercised the care that an ordinarily prudent person would exercise under like circumstances. Of course, she could not exercise ordinary care if the walk was so glaringly dangerous that an ordinarily prudent person would not have used it. But, even if the defect was not so glaringly dangerous, still, if plaintiff knew of the defect, and yet walked over it without exercising ordinary care, the jury could find her guilty of contributory negligence. As the instruction is drawn, it might lead a jury to think that they could not consider the manner in which she walked over the place in order to determine whether she was negligent or careful, but could deny her recovery only in case they found that the walk was so glaringly dangerous that an ordinarily prudent person would not have used it. We think the instruction should be so drawn as not to be open to this misconception.

[4] Defendant's instruction No. 3 told the jury that, if the walk was dangerous, and plaintiff knew it was dangerous, or could have known it by the exercise of ordinary care, and yet negligently attempted to walk on it and suffered injury, she is not entitled to recover. The trouble with this instruction is that it makes the mere attempt to walk over it negligence, when, as we have seen, negligence can arise only in the manner in which she went over it if the walk was not glaringly dangerous. Of course, if it was so glaringly dangerous that an ordi-

rarily prudent person would not have used it, and plaintiff knew of the defect, then the mere attempt to use the walk was negligence; but the instruction said nothing about such a state of affairs. These errors in the instructions should be avoided upon the next trial.

For the reason hereinabove given, the judgment must be reversed, and the cause remanded for a new trial.

It is so ordered. All concur.

McCRACKEN et al. v. SCHUSTER.
(No. 11701.)

(Kansas City Court of Appeals. Missouri.
Nov. 1, 1915.)

1. APPEAL AND ERROR — 209—RESERVATION OF GROUNDS OF REVIEW.

Where a party asks no demurrer to the evidence but joins in submitting the case to the jury, he cannot assign as error on appeal that on the undisputed facts the adverse party is not entitled to judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1290-1298, 1300, 1303; Dec. Dig. —209.]

2. LANDLORD AND TENANT — 291—UNLAWFUL DETAINER—QUESTION FOR JURY.

In a suit in unlawful detainer, question whether the premises occupied by defendant were verbally rented to him by plaintiffs' predecessor in title, or by the latter's lessee, held for the jury under the evidence.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1217-1241, 1243-1269; Dec. Dig. —291.]

3. WITNESSES — 175—COMPETENCY — TRANSACTION WITH DECEDENT.

In a suit in unlawful detainer, where the defendant verbally rented the premises either from plaintiffs' deceased predecessor in title or the latter's lessee at a meeting between the parties in the office of the lawyer of plaintiffs' predecessor, the defendant was not rendered competent to testify concerning his conversation with the deceased predecessor on account of the presence at the conference of the decedent's attorney, living and testifying for plaintiffs, who was not the decedent's agent and attorney to make the particular contract, and who was merely a passive listener, the decedent making any agreement himself.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 711-713, 715, 720, 721, 915; Dec. Dig. —175.]

4. WITNESSES — 175—COMPETENCY — TRANSACTION WITH DECEDENT.

Where the evidence, given in a prior suit, of the predecessor in title of plaintiffs in unlawful detainer was preserved and introduced at the trial, which evidence embodied such predecessor's version of a conversation had in his lawyer's office with defendant and his own lessee, at which conversation defendant claimed plaintiffs' predecessor had verbally rented the premises to the lessee and not directly to himself, defendant was competent to testify concerning the conversation with the decedent, though he had introduced his preserved testimony himself.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 711-713, 715, 720, 721, 915; Dec. Dig. —175.]

5. EVIDENCE — 211—ADMISSIBILITY—EVIDENCE GIVEN AT FORMER TRIAL.

The testimony of the predecessor in title of plaintiffs in unlawful detainer, bearing on the issue whether such predecessor verbally rented the premises to defendant, although given in a prior suit for rent, was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 738-744; Dec. Dig. —211.]

Appeal from Circuit Court, Harrison County; George W. Wanamaker, Judge.

"Not to be officially published."

Suit in unlawful detainer by Ellen McCracken and others against Fred Schuster. Judgment for plaintiffs, and defendant appeals. Reversed, and cause remanded for new trial.

Du Bois & Miller, of Grant City, for appellant. O. B. Hudson, of Grant City, for respondents.

TRIMBLE, J. This is a suit in unlawful detainer, wherein it is charged that defendant's tenancy of a certain farm of 120 acres terminated on March 14, 1914, but that he wilfully and unlawfully held over and detained the same after that date and after demand in writing for the delivery thereof.

The defense was that no tenancy existed between him and plaintiffs, but that defendant was a mere subtenant under one, Frank Hass, to whom the farm had been leased. The land in question was owned by plaintiffs and their father, Alexander McCracken. The latter, acting for himself and as agent for plaintiffs, made a verbal contract to sell the land to Frank Hass for \$7,200 some time in the latter part of the year 1911. Owing to the discovery of the fact that a part of the land at least stood in the name of a deceased unmarried brother of plaintiffs and son of Alexander McCracken, and that no administration was had on his estate, Hass refused to pay for and accept a deed to the land until an administration should be had on said deceased's estate. Thereupon Alexander McCracken, acting for himself and as agent for the other owners, made a written lease to Hass for a term beginning March 1, 1912, and ending March 1, 1913, wherein Hass agreed to pay \$360 rent for said term, payable January 1, 1913. It was also recited therein that McCracken had agreed to sell the farm to Hass at \$7,200 and Hass had agreed to buy on condition that the title was perfected, and that, when this was done, the money paid as rent should be treated as a payment on the purchase price and deducted from the \$7,200. It seems that all parties then thought that an administration on the deceased's estate could be had and closed in a year under the new law, providing that such can be done within that time. And Alexander McCracken immediately took out letters of administration thereon. However, before the end of the administration year, Hass objected to the estate being closed up in one year

on account of some defect in the giving of the notice of grant of letters. (It seems that said notice allowed two years for creditors to present their claims instead of one.) And the probate court refused to allow it to be closed in one year on this account. Consequently, long before the expiration of the term called for in the written lease, both McCracken and Hass knew that the defect in the title could not be cured, nor the trade consummated, within the time contemplated by the parties at the time the lease from March 1, 1912, to March 1, 1913, was made. Under the lease, Hass had sublet to the defendant Schuster, and he went into possession.

In September, 1912, Hass and Schuster met McCracken in James Anderson's law office in Grant City and made a verbal arrangement for the renting of the farm for the year beginning March 1, 1913, and ending March 1, 1914. And here is where the disputed tenancy in question in this case arises. It is the contention of plaintiffs that in this conversation McCracken, at the suggestion of Hass, made a verbal lease of the land to Schuster. On the other hand, it is defendant's contention that there was no renting contract entered into between McCracken and Schuster, but that McCracken rented the land to Hass by verbally agreeing to extend the terms of Hass' written lease for another year. It is thus seen that both sides agree that a new contract was entered into verbally, the only difference in the contention being that plaintiff's claim is that McCracken rented the land to Schuster for the term ending March 1, 1914, while Schuster claims McCracken merely extended Hass' tenancy for another year, and that he, Schuster, in turn rented a part of the land from Hass. This clearly illustrates the difficulty men get themselves into by verbally making contracts extending over so long a time, instead of making them certain by having them reduced to writing.

The case was taken by change of venue from Worth to Harrison county and there tried before a jury, which returned a verdict finding defendant guilty and assessing plaintiffs' damages at the sum of \$120 and the value of the monthly rents and profits at \$30. Defendant has appealed.

[1, 2] Defendant very earnestly contends that the undisputed facts show that plaintiffs are not entitled to recover. But this is clearly untenable. In the first place, defendant asked no demurrer to the evidence, but joined in submitting the case to the jury. In the next place, we do not agree with defendant that the written lease between McCracken and Hass provided that the latter should go on indefinitely year after year renting the land at \$360 per year until the vendors should be able to present a title satisfactory to vendee, or which he would be willing to accept, and then allow him to credit all of

the prior years' rent on the purchase price. The lease, by its explicit terms, was to end March 1, 1913. There was no provision therein calling for a tenancy beyond that date. Consequently it cannot be said that McCracken had no right to make a new renting thereafter to Schuster. Indeed, Hass, who testified for defendant, says that McCracken, at the meeting in Anderson's office where plaintiffs claim the land was rented to Schuster, extended the lease to him, Hass, for another year. Hence, even the testimony adduced by defendant shows that the tenancy claimed for Hass arose, not by virtue of anything in Hass' written lease giving him the right to stay there for any year subsequent to March 1, 1914, but arose out of the alleged agreement of McCracken, as defendant claims, to extend the lease to Hass for another year. Even if the written lease might be construed as giving Hass the right to rent the land during the succeeding years, still the parties could, by mutual agreement, abandon that feature of it, thus leaving McCracken free to make a contract with Schuster. According to the evidence for plaintiff, Hass told McCracken that Schuster wanted to rent the land for the next year, which would begin March 1, 1913, and that as his, Hass' term would end on that date, he could not rent it to Schuster, and that only McCracken could, and that as it was desirable that certain plowing should be done before that date, arrangements for the next year should be made, whereupon, McCracken rented it verbally to Schuster for said next year. So that, according to the evidence for both sides, there was a new verbal contract entered into in Anderson's office in September, 1912. Plaintiffs contend that McCracken rented the 120 acres to Schuster, while defendant insists it was rented again to Hass. The question to whom it was rented, therefore, became a question for the jury to determine.

Prior to the institution of the present suit by plaintiffs, Alexander McCracken brought suit against Schuster for the rent of the land for the year ending March 1, 1914, and in that suit McCracken testified as a witness, and his testimony was taken down by the official court stenographer. This evidence, proven by the stenographer's deposition to be correct, was offered in evidence in the case at bar by defendant as an admission on the part of McCracken that he had merely extended the lease to Hass for another year and had not rented the land to Schuster. Defendant claims that McCracken's testimony conclusively shows this. We cannot agree to this. Without regard to whether plaintiffs, who were not parties to the other suit, could be bound by any admission of McCracken, if made, still we do not think his testimony conclusively shows such an admission. It is true some of his answers to questions on cross-examination might be con-

strued that way, taking into consideration the elements contained in the questions, but other parts of his testimony show that he said he rented it to Schuster. There is nothing in the record of the present case expressly stating that McCracken was aged and infirm at the time he testified and was not able to fully hear and understand what was asked him, as plaintiffs claim he was, but the record does disclose that he was a grandfather to full-grown children, and the way he answered many of the questions shows that he was evidently an old man, and was unable to draw the nice distinctions necessary in order to make correct answers to skillful questions propounded to him on cross-examination. It is in the record also that he died shortly after he testified in the rent suit, and before the present suit in unlawful detainer was brought. Aside from whether the jury in the present case would be compelled to accept as true the statements made by the old man in testifying in the former suit, still we think it was for the jury to construe that testimony and determine just what construction should be placed on what he said. So much for defendant's contention that plaintiffs are not entitled to recover, and that he is entitled to have the case reversed and remanded, with directions to enter up judgment for him.

[3, 4] It is urged that error was committed by the court in not permitting the defendant Schuster to testify concerning the conversation between McCracken, Hass, and Schuster in Anderson's office at the time of the verbal renting either to Hass or to Schuster. Plaintiffs objected to his testifying about what took place on this occasion because McCracken, the opposite party to the contract in issue, was dead. Defendant says he was competent for two reasons: (1) Because James Anderson, McCracken's agent and attorney, was present at said conversation and is still living and testified in plaintiffs' behalf; (2) because McCracken's evidence given in the other suit was preserved and introduced at this trial. With reference to the first reason, namely, that Anderson, who was McCracken's agent, was present and is living, we are clearly of the opinion that defendant was not made competent on this account. There was no showing that the contract in question was made by Anderson acting as McCracken's agent. Indeed, all the evidence shows that whatever contract was entered into on that occasion was made by McCracken himself. Anderson was his agent and attorney, it is true, but not to make this particular contract. So far as the record shows, Anderson had nothing to do with the making of it, but merely sat at his desk and heard the three men, McCracken, Schuster, and Hass, talk the matter over, so that Anderson was merely an ordinary witness, and not an agent of McCracken in the making of the contract. But the fact that McCracken's

testimony in the other suit had been preserved by the stenographer, as established by his deposition, entitled the defendant Schuster to testify. *Stone v. Hunt*, 114 Mo. 66, 21 S. W. 454; *Coughlin v. Haeussler*, 50 Mo. 126; *Galvin v. Knights of Father Mathew*, 169 Mo. App. 496, 155 S. W. 45; *Leahy v. Rayburn*, 33 Mo. App. 55.

The fact that defendant himself introduced the deceased's evidence makes no difference. He had to show that the deceased's testimony had been preserved in order to make himself competent. The best way to do this was to introduce the deposition as he did. Neither does the fact that he claims now that deceased's testimony agrees with him as to what took place. As we have heretofore shown, McCracken testified the other way, though there is room for the contention that some parts of his testimony are open to the construction placed upon it by defendant. The proper construction to be placed on deceased's testimony was for the jury, and therefore defendant could not know how it would be construed by them. In addition to this, the preservation of McCracken's testimony entitled Schuster to testify, and he had a right to the cumulative effective of his own testimony, even if McCracken's agreed with his. In *Leahy v. Rayburn*, supra, it is held that the preservation of McCracken's testimony would have entitled Schuster to testify even if neither party had introduced deceased's evidence.

[5] Plaintiffs say that the record of McCracken's testimony should not have been introduced in evidence. The record shows no objection made to its introduction. And we know of no reason why it should not have been admitted upon the one question as to whom the verbal renting was made. The fact that the other suit was for rent and this one in unlawful detainer makes no difference. The issue involved in both cases was the same, namely: Did McCracken rent the place to Schuster? And this was the gist of the subject-matter of McCracken's testimony.

For this error in excluding defendant from testifying, the cause must be reversed and remanded for a new trial. It is so ordered. All concur.

MORRILL v. KANSAS CITY. (No. 11617.)

(Kansas City Court of Appeals. Missouri.
Nov. 1, 1915.)

1. MUNICIPAL CORPORATIONS ⇨812—DEFECTIVE STREET—ACTION FOR INJURIES—STATUTE.

Under Laws 1913, p. 545, providing that no action shall be maintained against any city on account of any injuries growing out of any defect in the condition of any street, until notice shall first have been given in writing to the mayor within 90 days of the occurrence for which damage is claimed, stating the place where and the time when such injury was received, and the character and circumstances of

the injury, where plaintiff driver of a truck was injured through the defective condition of a street in defendant city, and filed his petition within 6 days of the accident, the city filing answer within 30 days thereof, plaintiff could maintain his suit, since the petition itself constituted a sufficient notice; the object of the statute being to give the city opportunity to investigate the case while conditions are fresh.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1696-1707; Dec. Dig. ¶812.]

2. TRIAL ¶194—INSTRUCTION—CREDIBILITY OF WITNESSES.

Where, in an action against a city for injuries received by a truck driver through the defective condition of a street, the testimony of witnesses on each side as to the depth of the crack in the roadbed into which the wheel of the truck sank was based on measurements, an instruction, in effect, that if the testimony of witnesses as to the depth of the hole was based on mere estimates, then the jury should accept the testimony of witnesses "on the other hand" who made actual measurements, being plainly based on the idea that the city's witnesses testified to actual measurements, while plaintiff's testified from mere estimates, was improper, as invading the province of the jury to determine the weight of evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. ¶194.]

3. TRIAL ¶260—INSTRUCTION—REPETITION.

It is not error for the court to refuse a request covered and stated by other instructions given for the party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. ¶260.]

4. MUNICIPAL CORPORATIONS ¶767—STREETS—LIABILITY FOR DEFECTS.

A municipality is not required to keep its streets free from ruts, and the mere fact that an injured truck driver's wagon wheel went into a rut, he being thrown out thereby, did not render the city liable, unless the rut rendered the street not reasonably safe for travelers exercising ordinary care.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1623; Dec. Dig. ¶767.]

5. MUNICIPAL CORPORATIONS ¶821—ACTION—NEGLIGENCE—QUESTION FOR JURY.

In an action against a city for injuries to plaintiff truck driver through the unsafe condition of a street, it was within the jury's province to determine whether the city had been negligent in the premises.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. ¶821.]

6. DAMAGES ¶130—PERSONAL INJURIES—EXCESSIVE VERDICT.

Where plaintiff truck driver sustained injuries when the wheel of his truck sank into a rut in the street, throwing him from his seat, so that he broke three or four ribs, was bruised, suffered injuries to the pleura, was confined to his bed for two weeks, and the house for five weeks, was treated for three weeks daily by a physician, every other day for the next two weeks, thereafter received treatment at the physician's office, required a nurse for twelve days, and five months after the accident still suffered and was unable to follow his usual employment or to do any work requiring lifting or the raising of his arms above a certain level, verdict for \$2,000 in his action against the city was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370; Dec. Dig. ¶130.]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"Not to be officially published."

Suit by William F. Morrill against Kansas City. Judgment for plaintiff, and defendant appeals. Affirmed.

A. F. Evans and Francis M. Hayward, both of Kansas City, for appellant. Cowherd, Ingraham, Durham & Morse and Wilkinson & Wilkinson, all of Kansas City, for respondent.

TRIMBLE, J. The suit herein is to recover damages on account of personal injuries resulting from an alleged defective street. A verdict was returned against the city, and it has appealed.

Plaintiff was driving a double-decked soda pop delivery wagon west on Twelfth street between Troost avenue and Harrison streets. A double-track street railway line lay in the center of Twelfth, and plaintiff was on the north or right-hand side of the street between the railway and the curb. A laundry wagon standing in plaintiff's path near the north curb caused him to turn out to the left and on to the tracks in order to pass it. While he was yet on the tracks he heard a street car approaching rapidly from behind, and as soon as he had passed the laundry wagon he again turned into the space between the track and the north curb. His vehicle was longer than the ordinary wagon, and, in order to get the rear end of it far enough from the track to escape being struck by the car, he had to drive the front wheels close to the curb. Just as he was about getting his wagon parallel with and between the track and the curb, his right front wheel suddenly and unexpectedly dropped into a crack or opening in the pavement, which was filled with water and soft sediment, and the wheel instantly stuck fast, causing the wagon to give a sudden downward jolt and jerk, throwing plaintiff out of the driver's seat to the pavement, breaking several ribs and otherwise bruising and injuring him. His helper, on the seat beside him, was also jerked off, but, as his hands were not engaged in holding the lines, he managed to catch and save himself. The break or crack in the pavement (which was of cobble stones) was four inches wide, and, for a distance of two and one-half to three feet, was from six to seven inches in depth, though the crack extended, at a lesser depth, for a distance of about eight feet. The iron fellow of the wheel caught in this crack as in a vise causing the wagon to stop with a jerk in conjunction with the jolt arising from the drop of the wheel into the cavity. There was ample evidence tending to show that the defect had existed in that condition for nearly a year prior to the injury, and that the street officials of the city knew it was there, and that it was getting worse all the time.

[1] Plaintiff's injury occurred on the 16th of August, 1913. His suit was filed 6 days later, to wit, on August 22, 1913, and on September 5, 1913, the city filed its answer to the petition.

Point is made that the court erred in admitting in evidence the notice plaintiff gave the city of the occurrence and of his intention to claim damages therefor. No attack was made on the sufficiency of the contents of the notice, nor was any assault made upon the petition. The grounds of the objection to the introduction of the notice in evidence were that notice was not alleged in the petition, and that the notice was not served until after suit had been brought. The statute requiring notice to be given the city is the act approved March 21, 1913, found in Laws of Missouri, 1913, p. 545, and, so far as applicable to this case, is as follows:

"No action shall be maintained against any city of this state * * * on account of any injuries growing out of any defect in the condition of any * * * street * * * in said city, until notice shall first have been given in writing to the mayor * * * within 90 days of the occurrence for which such damage is claimed, stating the place where, the time when such injury was received, and the character and circumstances of such injury," etc.

Plaintiff, therefore, had 90 days from the 16th of August, 1913, to give his notice. His petition was filed within 6 days, and the city filed answer thereto within 30 days of the occurrence.

"The object of the statute is to give the city opportunity to investigate the case while conditions are fresh, and thus protect itself against actions which may be brought long after the occurrence." *Jacobs v. City of St. Joseph*, 127 Mo. App. 669, 106 S. W. 1072.

In the case of *Meyer v. Mayor, etc., of New York*, 14 Daly (N. Y.) 395, the statute provided that:

"No action * * * shall be maintained * * * unless notice of the intention to commence said action * * * shall have been filed * * * within six months," etc.

No notice was filed, but the suit itself was brought within the time. The court held that the statute was complied with where the suit was filed within the time notice is required to be given; "for the notice required for the protection of the city is given in the fullest manner by the action itself." It would seem that the wording of that statute affords more ground for the view that the notice must be given before the suit is filed than does ours; for it requires "notice of an intention to commence" an action. But the court held that the complaint "conveys all the information which the statutory notice is designed to give," and that the statute was not intended to apply to suits brought within the time required for notice, and that the enactment in question is of a different character from those which require presentment of the claim to the city authorities a certain time before suit is brought, so that the city may have an opportunity to pay the claim and settle costs, if it so desires. Many of the

cases cited by defendant on the point now under consideration were where either no notice was given at all, although required, or were cases in which the statute provided that notice must be given before suit is brought, such, for example, as *Pardee v. Mechanicsville*, 101 Iowa, 266, 70 N. W. 189; *Reining v. City of Buffalo*, 102 N. Y. 308, 6 N. E. 792; *Curry v. City of Buffalo*, 135 N. Y. 366, 32 N. E. 80. Again, other cases cited are dealing with statutes which require the claim to be first presented to the council for allowance or rejection and making their action thereon an absolute bar to an action in any court on such claim, unless the council's order is appealed from or the council agrees that a suit may be filed. Such, for example, is the case of *O'Donnell v. City of New London*, 113 Wis. 292, loc. cit. 295, 89 N. W. 511. For a similar reason Minnesota cases are not in point, because their statute provides that "before the city shall be liable" the party injured must present his claim to the governing body of the city and allow it a certain time in which to decide whether it will pay or not and upon the course it will pursue. As said in the *Meyer Case*, supra, our statute is "an enactment of a different character."

Other cases cited by defendant are where the statute under consideration created or gave a cause of action which did not theretofore exist and provided for the giving of notice as a necessary element of, or condition precedent to, such cause of action. In *Mathieson v. St. Louis, etc., R. Co.*, 219 Mo. 542, 118 S. W. 9, the cause of action was on a Kansas statute which gave a right of action to a railroad employé injured by the negligence of another employé provided he gave notice. Of course, the notice was a necessary element in his right of action, and was therefore a condition precedent to his bringing suit. The same should be said of *Madden v. Missouri Pacific R. Co.*, 167 Mo. App. 143, 151 S. W. 489.

The case cited from Michigan is not in point; for there the general law of the state did not give a right of recovery for mere neglect to keep the streets in a reasonably safe condition for travel, and where a city charter provided that the city should never be liable for damages to persons for failure to keep streets safe, then, although a general law was afterwards passed giving such liability, yet it was held that the general law did not repeal the charter provision. However, certain charters did provide a cause of action where written notice of the defect was actually served upon the city, and it thereafter failed to repair. In other words, the only cause of action given was for failure to repair within a reasonable time after receiving written notice of the defect. As said in *Forsythe v. City of Saginaw*, 158 Mich. 201, loc. cit. 204, 122 N. W. 523, 524:

"Under the charter, written notice of the defective condition of the highway must be given to the board of public works, and thereafter

unreasonable delay in repairing must occur, or else there is no liability."

Of course, the written notice to the city of the *defect*, not of the *injury*, was an essential element of the cause of action, and both the notice and the failure to repair thereafter, coupled with an injury, were necessary to create a cause of action.

In the case at bar the cause of action existed independently of the statute. It merely seeks to regulate the remedy—the right to maintain the action. As said in *Jacobs v. St. Joseph*, supra, 127 Mo. App. loc. cit. 672, 106 S. W. 1073:

"Our statute does not say a notice must be given before bringing the suit. It reads that: 'No action shall be maintained against a city, * * * unless notice shall first have been given,' etc. To bring an action and to maintain an action are not necessarily the same thing. One may bring an action, and yet, from reasons disconnected from his right to bring it, he may fail to maintain it."

In *National Fertilizer v. Fall River, etc., Bank*, 196 Mass. 458, loc. cit. 460, 82 N. E. 671, 672 (14 L. R. A. [N. S.] 561, 13 Ann. Cas. 510), the court, in speaking of the meaning of the word "maintain" in a statute, say:

"Using the words in their ordinary significance 'maintain' carries a different meaning from 'institute' or 'begin,' and implies that an action must be begun before it can be maintained."

Our Supreme Court in *Carson-Rand v. Stern*, 129 Mo. 381, loc. cit. 387, 388, 31 S. W. 772, 773, 32 L. R. A. 420, in dealing with a statute providing that no foreign corporation failing to comply with our laws concerning such could maintain a suit, say:

"The statute does not, in express terms, forbid the bringing of an action by such a company. It declares that it cannot 'maintain' an action, not having complied with the law. * * * Keeping the general purpose of the law in view, what are we to understand by the word 'maintain,' as used in the third section. As its structure suggests, it signifies, literally, 'to hold by the hand'; hence (in ordinary use) 'to uphold; to sustain; to keep up.' While in pleading it is defined to mean 'to support what has already been brought into existence.' *Anderson's Law Dict.* * * * We are bound to assume that the word 'maintain' was chosen to express the exact shade of meaning intended by the lawmakers. It does not, with its present context, seem to us to include also the word 'begin.' *Philpott v. Jones* (1834) 2 Ad. & El. 41."

In view of all that is hereinbefore said, we are of the opinion that the Legislature chose the right word to express the exact shade of meaning it intended when it used the word "maintain," and, as said in the case last cited, the statute "should not be enlarged beyond its natural meaning to accomplish the forfeiture of a right of action."

[2] The refusal of defendant's instruction No. 7 was not error. It sought to tell the jury that, if the testimony of the witnesses as to the depth of the hole were based on mere estimates, then the jury should accept the testimony of witnesses "on the other hand" who made actual measurements, if the jury believe they testified truthfully.

The instruction plainly was based on the idea that the city's witnesses testified to actual measurements, while those of plaintiff gave their testimony from mere estimates, and the construction naturally to be placed on the instruction would be that the plaintiff's witnesses on the subject should be disregarded. All of plaintiff's witnesses, with possibly one exception, made measurements, and their testimony was that they measured through the mud and slush. The one witness who testified upon estimates did not differ very materially from the city's witness who testified upon measurements, and the city's witness made no attempt to clean the mud out to see how deep it would allow a wagon wheel to sink. The state of the evidence, therefore, did not present a situation where a mere guess was opposed to actual measurements. And, as intimated above, the effect of the instruction would have been to invade the province of the jury.

[3-5] The refusal of instruction No. 9 was not error. The correct element therein was fully stated and covered in other instructions given in defendant's behalf. The rest of the instruction told the jury that, if they found the rut did not exceed four inches in depth, they should return a verdict for defendant. This, however, was only one feature of the defect. The evidence shows it was filled with mud and slush, and was of such a nature as to allow a wheel to drop therein and instantly catch as in a vise, thus making a trap which could, and did, catch and injure plaintiff. The defendant was entitled to an instruction that the city was not required to keep its streets free from ruts, and that the mere fact that plaintiff's wagon went into a rut would not authorize the jury to find for plaintiff. This the court gave. The plaintiff's instruction told the jury, before he could recover, he must prove that the rut rendered the street not reasonably safe for travelers exercising ordinary care and caution. Instruction No. 9, if given, would have invaded the province of the jury, and, under all the evidence, was improper. *Heberling v. City of Warrensburg*, 133 Mo. App. 544, 113 S. W. 673; *Blair v. Mound City R. Co.*, 31 Mo. App. 224.

[6] It is lastly claimed that the verdict is excessive, but clearly this point is without merit. Plaintiff had three or four ribs broken. There were bruises and injuries to the pleura. He was confined to his bed for two weeks, and to the house for five weeks. For the first three weeks he was treated every day by the physician, then every other day for the next two weeks, and after that he received treatment at the physician's office. He required a nurse for twelve days, and at the time of the trial, five months after the accident, was still suffering and unable to follow his usual employment or do any work requiring lifting or the raising of his arms above a certain level. In view of all this, we cannot say a verdict of \$2,000 was ex-

cessive. Feddick v. St. Louis Car Co., 125 Mo. App. 24, 102 S. W. 675; Jones v. Mo. Pac. Ry. Co., 31 Mo. App. 614; Dawson v. St. Louis Transit Co., 102 Mo. App. 277, 76 S. W. 689; Black v. Missouri Pac. R. Co., 172 Mo. 177, loc. cit. 190, 72 S. W. 559.

Finding no error in the record, the judgment is affirmed. The other Judges concur.

HELLRIEGEL v. DUNHAM et al.
(No. 11625.)

(Kansas City Court of Appeals. Missouri.
Oct. 4, 1915. Rehearing Denied
Nov. 1, 1915.)

1. MASTER AND SERVANT §202 — MASTER'S LIABILITY FOR ACTS OF SERVANT.

Where M., one of several employés of a railroad company operating a rail-bending machine, was ordered by the foreman to turn a rail, which had to be turned so it could be put on the bender, and M., being angry and actuated by malice toward the foreman, turned the rail in a reckless manner, injuring another employé, the employer was liable, though the rail was intentionally thrown or swung around by M. for the purpose of striking the foreman, as his act was in the prosecution of the employer's work and his personal motive did not exempt the employer from liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 535-537; Dec. Dig. § 202.]

2. MASTER AND SERVANT §177—MASTER'S LIABILITY FOR ACTS OF SERVANT.

To make a master liable for the act of his servant, it must be done, not only while the servant is employed in the master's business, but in the course of the employment and in furtherance of the master's business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 307, 352, 353; Dec. Dig. § 177.]

3. MASTER AND SERVANT §302 — MASTER'S LIABILITY FOR ACTS OF SERVANT.

If a servant is doing the work for which he is employed, the master is liable to a third person for an injury caused by either the manner or the mode of performance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. § 302.]

4. MASTER AND SERVANT §305 — MASTER'S LIABILITY FOR ACTS OF SERVANT.

If the act of a servant is within the scope of his employment, the master will be liable, though the servant does not obey his orders as to the manner of its performance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1223, 1224; Dec. Dig. § 305.]

5. MASTER AND SERVANT §302 — MASTER'S LIABILITY FOR ACTS OF SERVANT.

A master is liable for the willful or malicious acts of his servant, where they are done in the course of the employment and within its scope.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. § 302.]

6. APPEAL AND ERROR §1001 — REVIEW — QUESTIONS OF FACT.

In an action for injuries to an employé struck by a railroad rail which M., another employé, was directed by the foreman to turn, where, though defendant claimed that M. threw the rail at the foreman intending to assault him,

this question of fact was submitted to the jury, and there was ample evidence from which they could find that the rail was turned in the service of the employer, thereby striking plaintiff, their finding must be respected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.]

7. APPEAL AND ERROR §1002 — QUESTIONS FOR JURY — INCONSISTENT TESTIMONY OF WITNESS.

Plaintiff's affirmative answers to the carefully worded questions of a skillful cross-examiner, requiring careful discrimination to answer them strictly, could not conclusively overturn his clear, plain, and unequivocal statement of the facts whenever asked to give his version of them, and, notwithstanding such answers, it was for the jury to look at the whole evidence and determine the effect thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.]

8. MASTER AND SERVANT §264 — ACTIONS FOR INJURIES—VARIANCE.

Where an employé in swinging a railroad rail around in a reckless manner was actuated by a wrongful, intentional motive toward the foreman, his act was nevertheless negligent in so far as another employé, struck by the rail, was concerned, and in his action for injuries, where the petition alleged the character of the act in relation to him, there was no variance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.]

9. MASTER AND SERVANT §198—LIABILITY FOR INJURIES — NEGLIGENCE OF FELLOW SERVANTS—STATUTORY PROVISIONS—"RAILROAD."

Rev. St. 1909, § 5434, makes every railroad corporation owning or operating a railroad in the state liable for all damages sustained by any agent or servant while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant, and section 5439 defines "railroad" as used in that article as including street railways and electric railroads. In an action for injuries to an employé in the shops of a street railway company, who at the time of the injury was working on a rail-bending machine, defendant's operation of the railroad system and its maintenance of shops for the purpose of repairing the tracks was admitted, and the evidence showed that the rails being bent had been in use and were being bent for use at a particular place. *Held*, that it sufficiently appeared that the rails were intended for use in connection with a railroad already in operation, and not for one being constructed, and the fact that plaintiff and the person whose negligence caused the injury were fellow servants was not a defense, as they did not have to be actually engaged in running a car to come within the statutory phrase "operating a railroad," and it was sufficient that they were doing work for the railroad which was directly necessary for the operation thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 493-514; Dec. Dig. § 198.]

For other definitions, see Words and Phrases, First and Second Series, Railroad.]

Appeal from Circuit Court, Jackson County; Jos. A. Guthrie, Judge.

"Not to be officially published."

Action by Charles Hellriegel against Robert J. Dunham and another, receivers, and the Metropolitan Street Railway Company.

Judgment for plaintiff, and defendants appeal. Affirmed.

John H. Lucas and Bruce Barnett, both of Kansas City, Mo., for appellants. Griffin & Orr, of Kansas City, Mo., for respondent.

TRIMBLE, J. [1] Plaintiff was employed in the shops maintained by defendants in connection with the operation of their street railway system in Kansas City for the repair of the rolling stock, tracks, etc., of said railway. He, in company with two others, Bronstein and Manlove, was operating a rail-bending machine under the direction of Sunner, a foreman or straw boss. Rails were being bent in a somewhat circular form for use in a curve on the tracks of the system at a street intersection. The rail-bending machine was on wheels set upon a track, and the rails to be bent were lying in a pile alongside the machine. In order to place one of these rails upon the machine, it was necessary that the rail be turned end for end. Sunner, the foreman, ordered Manlove to "take the top rail and put it around so they can put it on the rail bender." Manlove seized hold of the top rail which, owing to its position or shape, rested as on a pivot in the middle, and swung it violently around, causing the flange of the rail to strike and injure plaintiff's knee. This suit for damages followed. Plaintiff obtained judgment for \$762, and defendants have appealed.

It seems that Manlove was frequently late in coming to work, or slow in getting at it after he arrived, and on this morning he either did not commence work as soon as boss Sunner thought he should, or else did not enter into it with the spirit or zest the boss thought necessary. At any rate, as the four men were about the rail-bending machine in the performance of their work, Sunner scolded Manlove for his remissness and gave him the above-mentioned order to turn the rail around. Manlove, angered by the reprimand, seized the rail and threw it around with violence, and plaintiff was struck on the knee as above stated. Plaintiff exclaimed "Manlove, what are you trying to do, break my leg?" Manlove replied "No, not yours, but this _____," referring to Sunner.

[2-5] It is defendant's contention that under these circumstances there is no liability on the part of the master. It is insisted that Manlove, in angrily turning the rail around, was not within the scope of his employment nor acting in the line of his duty, but was attempting to commit an assault upon the foreman, an act of his own, for which the defendant should not be held liable. The difficulty in determining whether a master is liable for injuries inflicted by a servant, under circumstances similar to these, arises, not on account of vagueness or uncertainty in the rules of law on the point, but in the application of the law to the particular facts

of each case. To make the master liable for an act of the servant, under circumstances such as we are here considering, the act must be done, not only while the servant is employed in the master's business, but it must be done in the course of that employment, and be one that is in furtherance of the employer's business. *McPeak v. Missouri Pacific R. Co.*, 128 Mo. 617, 30 S. W. 170. If the servant is doing the work for which he is employed, the master is liable to a third person for an injury caused by either the manner or the mode of performance. *Collette v. Rebori*, 107 Mo. App. 711, 82 S. W. 552. If the act of the servant is within the scope of his employment, the master will be liable, although the servant does not obey his orders as to the manner of its performance. *Sherman v. Hannibal, etc., R. Co.*, 72 Mo. 62, loc. cit. 66, 37 Am. Rep. 423. It was formerly considered that the master was not liable for willful or malicious acts of his servants, as distinguished from his neglect, unless the act was done pursuant to the master's express orders or with his consent, even though it was done in the line of the servant's duties. 26 Cyc. 1527. But it is now well settled that the master is liable for the willful or malicious acts of his servant where they are done in the course of his employment and within its scope. 26 Cyc. 1528. As said in *Whiteaker v. Chicago, etc., R. Co.*, 252 Mo. 438, loc. cit. 458, 160 S. W. 1009, 1014:

"At bottom, the doctrine of all well-reasoned cases is that, under the maxim respondent superior, the master must answer in certain circumstances for the wrongful act of his servant precisely as the principal must answer for those of his agent. The general rule is that the maxim respondent applies when the servant, in the line of his employment about his master's business, seeks to accomplish his master's purposes and in doing so acts negligently, or willfully and maliciously, or even contrary to his orders or criminally, in some instances. That general rule is hornbook doctrine and beyond dispute."

Or, as stated in *Grattan v. Suedmeyer*, 144 Mo. App. 719, loc. cit. 723, 129 S. W. 1038, 1040:

"If the servant, in performing the work of the master, injures a person, either through malice or negligence, the master is liable, but if the servant is not doing the work of the master at the time of the injury, but is, at that particular time, following his own inclinations aside from his master's work, the master is not liable, and this is the rule by which to test the master's liability."

See, also, *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405; *Cansfield v. Chicago, etc., R. Co.*, 59 Mo. App. 354; *Landers v. Quincy, Omaha, etc., R. Co.*, 134 Mo. App. 80, 114 S. W. 543. In *Stranahan Bros., etc., Co. v. Colt*, 55 Ohio St. 398, 45 N. E. 634, 4 L. R. A. (N. S.) 506, it is held that a master is liable for the malicious acts of his servant, whereby others are injured, if the acts are done within the scope of the employment, and in the execution of the service for which he was engaged by the master. In 2 *Mechem on Agency* (2d Ed.) § 1929, it is said:

"The tendency of the modern cases is to attach less importance to the motive with which the act was done, and to give more attention to the question as to whose business was being done and whose general purposes were being promoted."

Or, as stated in section 1957 of that work, we should—

"attach less importance to the motive with which the act was done and give more attention to the question whether or not it can be deemed to fall within the course of the servant's employment."

And in section 1960, the author says:

"It has been held in a great variety of cases that the master is liable for the wanton or malicious acts of his servant if they were committed while the servant was acting in the execution of his authority and within the course of his employment."

Now the evidence in this case shows that the injury resulted from the manner in which the rail was turned around preparatory to being placed on the machine. Manlove, the servant, was doing what he was employed to do and what he was specifically directed by the straw boss to do. The act of turning the rail was in furtherance of the master's business and within the scope of the servant's employment. In doing this, the servant did it angrily and without a due regard for the safety of his coemployees. But defendants say he was actuated by a malicious motive toward Sumner, the straw boss. True, but he did not step aside from his employment to do an act outside thereof to effectuate that motive. He did the very thing required of him, but in the method or manner of doing that act, he performed it negligently toward plaintiff and maliciously toward the boss. His duty to turn the rail about was performed, but his feeling of animosity toward the boss caused him to perform that duty in a violent and reckless manner, resulting in injury to the plaintiff. This being so, the application of the principles above mentioned constrain us to hold the master liable. It is true, if the servant turns aside from his work, for however short a time, to effect a purpose of his own, the master will not be liable. As, for instance, where the servant on a hand car concluded to put his hat on the floor, and in doing so placed his body in the way of the flying handles of the car, whereby he was catapulted against another, throwing the latter off and injuring him, it was held the master was not liable. Here the putting of the hat on the floor was no act in furtherance of the master's business. *Overton v. Chicago, etc., R. Co.*, 111 Mo. App. 613, 86 S. W. 503. Or where a servant, leading a colt to water, invites a boy to ride the colt and the boy is injured, the master is not liable, since the invitation to ride was no part of the servant's work. *Bowler v. O'Connell*, 162 Mass. 319, 38 N. E. 498, 27 L. R. A. 173, 44 Am. St. Rep. 359. In the same way, a servant who, being in charge of a compressed air hose, turned aside from the work he was en-

gaged in and sprayed an associate with air in a spirit of fun and killed him, the master was held not to be liable. *Galveston, etc., R. Co. v. Currie*, 100 Tex. 136, 98 S. W. 1073, 10 L. R. A. (N. S.) 367. But there was no turning aside from his work on the part of the servant in the case at bar. The turning of the rail was the thing he was required to do, and it was the act that did the injury. The servant did that which was in the line of his duty and which was in the prosecution of the master's work. The only unusual feature in it was the presence of personal motive in the mind of the servant. But the personal motive cannot exempt the master where the act done which causes the injury was in the line of the servant's duty and in the prosecution of the master's work. As said in the *Currie Case*, supra, 100 Tex. at page 143, 98 S. W. at page 1074:

"It may be further conceded that if, in directing the hose at a fire to put it out, he had also struck with it one of the other servants, either to make him get out of the way, or for some other purpose, the motive thus partly influencing his act towards such other would not deprive it of its legal character, as done in the master's business. It is in cases of the character supposed, where there has been a mingling of personal motive or purpose of the servant with the doing of his work for his employer, that much of the difficulty and conflict of opinion have arisen in determining whether or not the wrong committed should be ascribed to the master or be regarded as the personal tort of the servant alone. It is now settled, in this state at least, that the presence of such a motive or purpose in the servant's mind does not affect the master's liability, where that which the servant does is in the line of his duty, and in the prosecution of the master's work. But, when he goes entirely aside from his work, and engages in the doing of an act not in furtherance of the master's business, but to accomplish some purpose of his own, there is no principle which charges the master with responsibility for such actions."

In *Bitchie v. Waller*, 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361, it is held that in most cases it is a question of fact whether or not the act of a servant for which it is sought to hold the master responsible was done in the execution of the master's business and within the scope of the servant's employment. The act of turning the rail was in the line of the servant's duty, and it was in furtherance of the master's business. The motive of animosity the servant had toward the boss did not cause him to throw the rail, but did cause him to throw it recklessly. This was merely the manner of performance for which, as we have seen, the master is liable.

[6,7] In making the foregoing observations, we are not unmindful of defendant's very earnest insistence that the evidence does not show that the injury was caused by Manlove's turning of the rail around in the service of getting it ready for placing on the machine, but that he threw the rail at Sumner intending to assault him and was not engaged in the service of turning the rail. An unbiased and careful examination

of the whole evidence, however, discloses that such view is untenable, and that the act was done as we have stated. Whether the act was done as plaintiff contends or as defendants construe it was a question of fact, and was submitted in instructions to the jury; and, as there was ample evidence from which they could find that the rail was turned in the service of the master as we have stated, their finding must be respected. We do not think plaintiff's answers of "Yes, sir," to the carefully worded questions of a skillful cross-examiner should be deemed to conclusively overturn the clear, plain, and unequivocal statements of the facts as detailed by the plaintiff whenever asked to give his own version of them. Notwithstanding these artless answers of the old man to questions which required nice discrimination in order to answer them strictly, we think it was the province of the jury to look at his whole evidence and determine the effect thereof.

[8] There was no variance between the petition and proof. The petition alleged the character of the act in relation to the plaintiff. In so far as he was concerned, the act was negligent, although the one doing the act may have been actuated by a wrongful intentional motive toward another.

[9] The fact that plaintiff and Manlove were fellow servants is no defense in this case. Sections 5434 and 5439, R. S. Mo. 1909. They did not have to be actually engaged in running a car in order to come within the meaning of the statutory phrase "operating a railroad," but only that they should be engaged in doing any work for the railroad which was directly necessary for the operation thereof. Callahan v. St. Louis Merchants Bridge, etc., R. Co., 170 Mo. 473, loc. cit. 495, 71 S. W. 208, 60 L. R. A. 249, 94 Am. St. Rep. 746; Salmon v. Chicago, etc., R. Co., 181 Mo. App. 414, 168 S. W. 829; Vannest v. Missouri, K. & T. R. Co., 181 Mo. App. 373, 168 S. W. 782; Madden v. Missouri Pac. R. Co., 167 Mo. App. 143, 151 S. W. 489. It is conceded that if rails were being bent for the purpose of repairing an existing track then being operated, then the bending might be considered as incidental to the operation of the road. But it is urged that the evidence does not show whether the rails were for use in a new track or for a track already in operation, or, in other words, there is nothing to show whether this work was not in construction of a new track instead of maintenance and operation of a railroad. The evidence, however, shows that defendants admitted the operation of the railway system in Kansas City and the maintenance of the shops for the purpose of repairing the tracks. The evidence shows that the rails being bent were rails that had been in use, and at the time of the injury the rails being bent were for use at

Twenty-Seventh and Lister streets. It would seem from all this that the rails were intended for use in connection with a railroad already in operation and not for one being constructed.

There was no error in refusing defendants' instructions Nos. 6 and 7. They were erroneous because they told the jury, without qualification, that if the rail was intentionally thrown or swung around by Manlove for the purpose of striking Sumner, then plaintiff could not recover. But, as we have seen, the personal motive commingled with the servant's act will not have the effect of conclusively relieving the master of liability. That question "cannot always be determined merely by putting a label on the motive" of the servant. 2 Mechem on Agency (2d Ed.) § 1929. As said by the same author (section 1962):

"The question is rather, as has been explained, whether the act can fairly be regarded as a natural incident to, a direct outgrowth of, a natural ingredient in, the execution of the service which the master confided to the servant. If that be the character of the act, the master is liable, though the act were done willfully or maliciously."

There being no error in the record, the judgment is affirmed. All concur.

TRAVIS v. CONTINENTAL INS. CO. (No. 11700.)

(Kansas City Court of Appeals. Missouri.
Nov. 1, 1915.)

1. INSURANCE — § 388 — PROVISIONS IN POLICY — IRON-SAFE CLAUSE — WAIVER.

Provisions in a fire insurance policy that the insured keep his books and inventory either in an iron safe or in a place outside of the building insured, being in the nature of conditions subsequent, the breach of which will not work a forfeiture of the policy unless the insurer so elects, where the adjuster of the insurance company assured the person insured that if he would obtain duplicate bills from the wholesale houses from which the amount of goods lost could be ascertained, such advice, when acted upon, constituted a waiver of forfeiture because of violation of the clause requiring the insured to keep his books in an iron safe.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1026, 1027, 1030, 1035, 1040, 1057; Dec. Dig. § 388.]

2. TRIAL — § 191 — ACTION ON POLICY — INSTRUCTIONS.

In an action on a fire insurance policy, an instruction on the question of waiver, reciting hypothetically the taking of an inventory just before the fire, and the action of the insured in obtaining duplicate wholesale bills in accordance with the direction and request of the agent, was not objectionable as assuming the existence of disputed facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.]

• Appeal from Circuit Court, Harrison County; Geo. W. Wanamaker, Judge.

"Not to be officially published."

Action by William A. Travis against the Continental Insurance Company on a fire in-

insurance policy. Judgment for plaintiff, and defendant appeals. Affirmed.

Fyke & Snider, of Kansas City, for appellant. Barlow, Barlow & Kautz, of Bethany, for respondent.

JOHNSON, J. This is a suit upon a policy of fire insurance for \$1,000, issued by defendant August 27, 1913, upon a grocery, meat market, and restaurant owned and operated by plaintiff in Eagleville, Harrison county. The property was totally destroyed in the night of November 8, 1913, by a fire which originated in a business building across the street. The defense of present concern is based upon the alleged breach by plaintiff of provisions in the policy which required him:

First to "take a complete itemized inventory of stock on hand at least once in each calendar year and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of the issuance of this policy"; second, to "keep a set of books which shall clearly and plainly present a complete record of the business transacted, including purchases, sales, shipments, both for cash and credit from date of inventory"; and, third, to "keep said books and inventory, if such has been taken, securely locked in a fireproof safe at night and at all times when the building mentioned in the policy is not actually open for business, or failing in this, the assured will keep such books and inventory in some place not exposed to a fire which would destroy the aforesaid building."

The penalty prescribed for a failure to comply with any of these requirements was that the policy should become null and void, and that "such failures shall constitute a perpetual bar to any recovery thereon." Plaintiff contends, and his evidence tends to show, that he substantially complied with the requirements prescribed in the first two clauses above quoted, and that he was in process of taking a new inventory of his stock and had almost completed it at the time of the loss. He left the incomplete inventory in the store that night, but succeeded in saving it, and produced it at the trial. He had valued the goods therein at their selling, instead of their cost, prices, and the total value of the goods inventoried, which he testified did not include all of the stock, was about \$1,500. Plaintiff admitted that he had no iron safe in the store, and claims that the local agent of defendant, through whom he procured the policy, had knowledge of that fact before the policy was issued. Further, he admitted he had kept no regular books of his business, but testified that he kept files of his wholesale bills and credit slips which, with his invoices, constituted a complete record of his stock and business. Usually he kept these files at home overnight, but had suspended this practice during the taking of the inventory, and the files of papers were destroyed in the fire. To meet the contention of defendant that these facts disclose noncompliance with the iron-safe clause, plaintiff adduced evi-

dence tending to show a waiver by defendant of the requirements of that clause. In substance the evidentiary facts relied upon by plaintiff to sustain his position on that issue are as follows: The local agent notified defendant of the loss, and in two or three days Mr. Maloney, defendant's state agent and adjuster, visited Eagleville and had interviews with plaintiff in which, after being informed of all the facts relating to the non-performance by plaintiff of the iron-safe clause and of the destruction of all the documents and papers relating to the stock and business, except the partial invoice which was exhibited to him, he stated that he could not adjust the loss on that invoice, for the reason that it did not show cost prices of the goods, but advised plaintiff to procure duplicate bills from the wholesale dealers, and assured him that with the aid of such bills the loss could and would be adjusted. Plaintiff immediately acted upon this advice, wrote to the various wholesale houses of the loss, and procured all duplicate bills, which could be procured, and made out and forwarded proofs, but defendant refused to keep the agreement of its adjuster, declined to adjust or pay the loss, and this suit followed. The evidence of defendant contradicts that of plaintiff relating to the issue of waiver; but, for the purposes of our consideration of the demurrer to the evidence, which was overruled, we must regard the case from the viewpoint of the evidence of plaintiff.

At the request of plaintiff the court instructed the jury upon the issue of waiver as follows:

"The court instructs the jury that although you may believe from the evidence that the inventory and books of account presenting a record of the business transacted from the date of the inventory until the time of the fire were not kept by plaintiff in accordance with the terms of the policy, or, if they were made and kept in accordance with the terms of the policy, but were left in the building and destroyed by the fire, yet, if the state agent of the defendant company visited the locality of the fire, after the occurrence of the loss, and if he was the defendant's adjuster, and as such was informed and became possessed of the knowledge that said inventory and books were not kept by plaintiff in accordance with the terms of the policy, or were destroyed by said fire, and, after becoming possessed of such knowledge, directed and instructed the plaintiff to secure duplicate invoice bills of all the goods which he had purchased from the various wholesale houses up to the time of the fire, and to use said wholesale bills in determining the cost price of the goods on the invoice, being taken just before the fire, and to make up his proofs of loss and send same to the defendant company, and, if you further find that the plaintiff did secure said duplicate invoice bills and did make up said proofs of loss in accordance with the direction and request of said state agent and adjuster and did forward same to the defendant company within 60 days from the date of said fire, as directed by said state agent, and if plaintiff incurred any expense or loss of time in securing said duplicate invoice bills, making up said proofs of loss and sending same to the defendant company, then the defendant company waived any right of forfeiture of said policy by reason

of the failure of plaintiff to keep or produce said inventories and books of account."

The jury returned a verdict for plaintiff, and after its motion for a new trial was overruled, defendant appealed.

[1] The contract evidenced by the policy imposed upon plaintiff, the insured, the performance of the alternative condition of keeping his business books and inventory, at night, either in an iron safe in the store, or "in some place not exposed to a fire which would destroy the aforesaid building." The failure of plaintiff to perform this condition is virtually conceded and is apparent, since he admits he had no iron safe, and that he left what he calls his books in the store. He did not perform a condition of the contract upon the performance of which his right of recovery depended (*Crigler v. Insurance Co.*, 49 Mo. App. 11; *Hollenbeck v. Insurance Co.*, 133 Mo. App. 57, 113 S. W. 217), and we would hold that defendant would have been entitled to a peremptory instruction for a verdict in its favor if plaintiff had not introduced evidence in substantial support of his claim of a waiver of the ground of forfeiture which the nonperformance of the iron-safe clause afforded to defendant.

The accepted rule in this state is that such provisions in a policy are in the nature of conditions subsequent, the breach of which will not work a forfeiture unless the insurer so elects; that nonperformance of them may be waived as a ground of forfeiture, and that such waiver does not require the support of a new consideration, but will be inferred where it appears that the insurer, with knowledge of all the facts, so conducts himself that the insured is justified in believing that the right of forfeiture will not be invoked, and is led thereby into the expenditure of effort or money in presenting his demand to the insurer. *Pace v. Insurance Co.*, 173 Mo. App. loc. cit. 503, 158 S. W. 892; *Myers v. Casualty Co.*, 123 Mo. App. loc. cit. 687, 101 S. W. 124; *Ramsey v. Insurance Co.*, 160 Mo. App. loc. cit. 242, 142 S. W. 763; *Bolan v. Fire Association*, 58 Mo. App. loc. cit. 233; *Bowen v. Insurance Co.*, 69 Mo. App. loc. cit. 277; *McCollum v. Insurance Co.*, 61 Mo. App. loc. cit. 355; *Burgess v. Insurance Co.*, 114 Mo. App. loc. cit. 180, 89 S. W. 568; *Hollenbeck v. Insurance Co.*, 133 Mo. App. loc. cit. 64, 113 S. W. 217; *Weber v. Insurance Co.*, 35 Mo. App. loc. cit. 524.

If, as plaintiff insists, the adjuster assured him that the loss would be adjusted and paid notwithstanding the breach of the iron-safe clause, upon the procurement and production by plaintiff of duplicate wholesale bills, and plaintiff thereby was induced to act upon such assurance and went to the trouble of writing to the wholesale dealers for such bills and submitting the bills thus obtained to defendant, the assurance, and

plaintiff's reliance upon it, constituted a waiver of the ground of forfeiture. The issue of waiver is shown by the evidence to be one of fact for the jury to determine, and the court did not err in overruling the demurrer to the evidence.

[2] We do not agree with defendant that the quoted instruction is subject to the criticism of assuming the existence of disputed facts. The expression "on the invoice being taken just before the fire" appears as a part of an hypothesis, the whole of which the jury was required to adopt as an indispensable prerequisite to finding for plaintiff on the issue of forfeiture. The same may be said of the objection to the expression "in accordance with the direction and request of said state agent and adjuster." The instruction must be read as a whole, and none of its parts should be made the subject of a strained or forced construction. Construed in its entirety, it cannot be said to have given the jury room for inferring that it assumed the existence of any disputed fact.

Some other points are made by defendant but they are without merit and need not be mentioned. The case was tried and submitted without prejudicial error. The judgment is affirmed. All concur.

STATE v. FLICK. (No. 11757.)

(Kansas City Court of Appeals. Missouri.
Nov. 1, 1915.)

CRIMINAL LAW §598—TRIAL—CONTINUANCE—INABILITY TO OBTAIN WITNESS.

Where defendant was indicted by the grand jury at 11 o'clock a. m., and was brought into court at 11:30, and her trial was set for next morning, when she moved for change of venue for prejudice of the judge in refusing a continuance to enable her to obtain the presence of a witness, and the case again came up next morning before another judge, who refused the same motion for a continuance, such refusal was error, where the presence of the witness could not have been obtained without continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.]

Appeal from Circuit Court, Cole County; D. H. Harris, Special Judge.

"Not to be officially published."

Nettie Flick was convicted of keeping a bawdyhouse, and she appeals. Reversed and remanded.

Fenton E. Luckett, of Jefferson City, for appellant. D. W. Peters, of Jefferson City, for the State.

ELLISON, P. J. Defendant was indicted for keeping a bawdyhouse in Jefferson City. She was convicted, and has appealed.

The chief complaint is that the trial court erred in overruling her motion to continue the cause. The circumstances were these: The indictment was returned by the grand

jury at 11 o'clock a. m. of March 10, 1915. In one half hour she was brought into court under arrest, arraigned, and pleaded not guilty. The court then set the case for trial the next day. She appeared and filed an application for a continuance on account of a witness absent in Kansas City, about 150 miles distant. The trial court overruled the motion, and defendant thereupon immediately applied for a change of venue on account of the prejudice of the judge. The application was granted; the court stating that the other judge (from an adjoining circuit) would be requested to sit the next day for disposition of the case. Next day, the 12th of March, the other judge called the case, and defendant again applied for a continuance on account of the absence in Kansas City of the witness mentioned in her first application. The court overruled the application.

It is insisted by the state that the overruling of the application for a continuance was justified by a failure to disclose due diligence. It is said that no effort was made to subpoena the witness until the second day after the arraignment of defendant and setting the case for trial.

We think, the circumstances considered, that the court machinery was operated too rapidly. So far as the application for a continuance is concerned, defendant must be regarded as innocent, and, under the law, entitled to reasonable time in which to get witnesses in her defense. Certainly she must be diligent, but we do not see where she had opportunity for the diligence which the state's counsel says is absent. She was indicted at 11 o'clock a. m., and arrested and brought into court at 11:30, and her trial set for the next morning. That left no chance for a subpoena reaching Kansas City until that night, and would not reach the sheriff until the following morning at about the time (in ordinary mail delivery) she was to go to trial. The sheriff then must find the witness, and, if he did, she must have time to go to Jefferson City. On the morning she was indicted and her case set for trial she appeared and made known, by proper affidavit, that she had had no chance to get her witness, and asked for time. This was denied, and but for her application for a change of venue she would have been put upon trial without her witness. The change of venue being granted, the court set it for trial before the second judge on the next day. Here again the time was too short to subpoena and have present the absent witness; and when that was made known through a proper affidavit a continuance should have been granted, if not to the next term, to some certain day far enough ahead to give her reasonable time to get a subpoena in the hands of the sheriff at Kansas City and time for him to serve it, and then time for the witness to get to the place of trial.

Trial courts must necessarily be left with wide discretion in the matter of continuances, but, of course, it must not be exercised so as to cut off the right of an accused for reasonable preparation.

The judgment is reversed, and the cause is remanded. All concur.

WESTERN AUCTION & STORAGE CO. v. SHORE et al. (No. 11578.)

(Kansas City Court of Appeals. Missouri.
July 2, 1915. Rehearing Denied
Oct. 4, 1915.)

1. CHATTEL MORTGAGES \S 172 — QUESTION FOR JURY—PAYMENT.

In replevin for furniture claimed under a chattel mortgage executed to secure the purchase price, *held*, that whether plaintiff had accepted a subsequent note and mortgage in payment and release of the original mortgage was for the jury.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 306-308, 310-315; Dec. Dig. \S 172.]

2. NOVATION \S 4—SUBSTITUTED NOTE.

Where it is agreed that a substituted note shall be an absolute payment of the original debt or note, it will operate as an extinguishment of the original indebtedness by way of novation.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 4; Dec. Dig. \S 4.]

3. CHATTEL MORTGAGES \S 241—EXTINGUISHMENT—TAKING OF NEW NOTE.

The taking of a new note as absolute payment of one secured by a chattel mortgage extinguishes the lien thereof, which is a mere incident to the note.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 503, 504; Dec. Dig. \S 241.]

4. ESTOPPEL \S 68—CLAIM IN JUDICIAL PROCEEDING.

In replevin for furniture claimed under a chattel mortgage executed to secure the purchase price, defendant, a purchaser of the business in which it was used, who gave his note to the seller for the balance secured by chattel mortgage, and who had escaped conviction for selling the furniture as clear of incumbrances on the plea that he signed the papers in blank on the understanding that they related only to other property, could not set up the inconsistent position that the papers signed were a new note and mortgage, intended as a substitution for the note and mortgage of the first purchaser.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. \S 68.]

5. EVIDENCE \S 231—CONVEYANCE OF TITLE—SUBSEQUENT ADMISSIONS.

In such action, defendant, the real party in interest, who derived her title through the second mortgagor and was in privity with him, was not bound by his admissions after he conveyed the title to the one through whom defendant acquired title.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 835-839, 852-859; Dec. Dig. \S 231.]

Appeal from Circuit Court, Jackson County; Joseph A. Guthrie, Judge.

"Not to be officially published."

Replevin by the Western Auction & Storage Company against Mrs. S. W. Shore and

others. Judgment for defendants, and plaintiff appeals. Affirmed.

Clarence I. Spellman and William T. Latham, both of Kansas City, for appellant. Leon E. Bloch and Harry Friedberg, both of Kansas City, for respondents.

JOHNSON, J. This is an action in replevin, brought in a justice court, to recover possession of the furniture in a certain hotel, which plaintiff claims under a chattel mortgage executed by S. A. Dyson, who purchased the furniture of plaintiff and executed the mortgage to secure the payment of the purchase price. The defense is that "the chattel mortgage, if any, has been fully paid and satisfied." The jury, in the circuit court, where the cause was tried on appeal, returned a verdict for defendants, and plaintiff appealed.

The material facts of the case are as follows: Dyson purchased furniture from plaintiff of the value of \$882 to furnish a hotel or rooming house he operated in Kansas City, and gave his promissory note for the purchase price, dated November 29, 1911, payable in weekly installments of \$10 each. At the same time he executed a chattel mortgage on the furniture to secure the payment of the note, and a copy of this mortgage was filed by plaintiff in the office of the recorder of deeds of Jackson county December 1, 1911. He operated the hotel 11 months, reduced the note by payments to about \$650, and then sold the business, including the furniture, to a Mrs. Burns, for \$1,250. She executed a chattel mortgage on the furniture to him for \$650, the amount he still owed plaintiff, and paid the remainder of the purchase price to him in money. He did not file her chattel mortgage and she made monthly payments on his mortgage to plaintiff, without plaintiff knowing of the change in the ownership of the property. On June 19, 1913, Mrs. Burns sold the business to L. L. Campbell, who, on or about July 2, 1913, entered into an agreement with plaintiff relating to its lien on the furniture which culminated in the present controversy. It appears that plaintiff, on learning of the sale to Campbell, desired him to reduce the amount of plaintiff's lien by a payment of \$50 and to give his note to plaintiff for the remainder, payable in weekly installments and secured by a new chattel mortgage on the furniture. Campbell agreed to this proposal, but could not pay \$50 in money, and in lieu thereof delivered a piano he owned to plaintiff on the understanding that when he had paid \$50, in addition to the weekly payments, the piano would be returned to him. Pursuant to this arrangement Campbell executed and delivered to plaintiff his promissory note, dated July 2, 1913, for \$513.13, the amount then due plaintiff on the Dyson note and mortgage, payable in weekly installments of \$8 each, and at the same time he executed and delivered to plaintiff his chattel mortgage on the furniture to secure the payment of

that note. Plaintiff did not file that mortgage in the office of the recorder of deeds of Jackson county until July 28, 1913.

There is evidence tending to show that, in consideration of the execution of the new note and mortgage, plaintiff agreed to accept them in payment of the Dyson note and mortgage. Indeed, such is the only conclusion that may be drawn from plaintiff's evidence. But it is claimed by plaintiff that the Dyson securities were not to be released until the Burns mortgage was surrendered to plaintiff, which was not done until July 28th, the date on which plaintiff filed the Campbell mortgage. There is, however, evidence which contradicts this claim, and supports the inference that plaintiff received the Campbell note and mortgage on the date of their execution in full payment and discharge of the Dyson note, without reference to the surrender of the Burns mortgage. On July 21, 1913, one week before the Campbell mortgage was filed, Campbell sold the furniture to Marie Kretchmer as clear of incumbrances, and without informing her of the mortgage he had given plaintiff. He was prosecuted in the criminal court for doing this, but was acquitted; his defense being that he signed the note and mortgage to plaintiff in blank, on the understanding that they would refer only to the piano transaction, and without knowledge that plaintiff would convert them into a note and mortgage creating a lien on the furniture. On August 25, 1913, Marie Kretchmer sold the property to a Mr. Valentine as clear of incumbrances, and on August 30th Valentine sold it to defendant Shore, who was in possession when this action was begun. At that time there was a remainder of \$456 due plaintiff on the purchase price of the furniture. The Dyson mortgage was not released of record by plaintiff, and is the mortgage under which plaintiff claims the possession of the property. There are other facts in the record, but those stated control the disposition of the case.

At the request of plaintiff the court instructed the jury:

"The court instructs the jury, if you find from the evidence that S. A. Dyson gave a mortgage to the plaintiff on goods in question to secure debt to the plaintiff, and that said debt or a part thereof was due at the time this suit was brought, September 27, 1913, then plaintiff was entitled to the goods, and your verdict will be for the plaintiff, unless you further find that said debt was paid, or the mortgage was released, as defined in other instructions."

And it gave the following instruction for defendants:

"If you find from the evidence that the plaintiff took from Dyson a chattel mortgage on the property in question, and if you further find that thereafter, and after the property had been transferred to Campbell, the plaintiff took from Campbell a mortgage and note under an agreement with Campbell that it was in payment of and release of the Dyson mortgage, then the Dyson mortgage became discharged; and if you further believe and find from the evidence that one Kretchmer purchased the property in question and gave a valuable consideration

therefor, before the Campbell mortgage was filed for record, and that Kretchmer sold the property in question to one Valentine, and the said Valentine sold it to the defendant Shore, your verdict should be in favor of the defendant."

[1-3] Thus instructed, the verdict of the jury for defendants expressed the finding of fact that plaintiff accepted the Campbell note and mortgage "in payment of and release of the Dyson mortgage," which, if thus paid and discharged, was not a lien on the property at the time of the sale by Campbell to Kretchmer, and therefore cannot be allowed to serve as the basis of the present action. We do not think the evidence would warrant us in declaring as a matter of law that the Dyson mortgage was in force at the time of the sale of the property by Campbell to Kretchmer, and we find the instructions we have copied correctly expressed the law of the case in submitting to the jury as an issue of fact the question of whether or not plaintiff received the Campbell securities as an absolute payment and satisfaction of the Dyson mortgage. From an early time it has been held in this state that, where it is agreed that the substituted note shall be an absolute payment of the original debt or note, it will operate as a satisfaction or extinguishment thereof. "The receipt of a promissory note of a third person in payment of the debt will amount to a positive extinguishment of the original debt, by way of novation, as well by our laws as the foreign law, if so intended by the parties." *Appleton v. Kennon*, 19 Mo. 637; *Wiles v. Robinson*, 80 Mo. 47; *Riggs v. Goodrich*, 74 Mo. 108; *Leabo v. Goode*, 67 Mo. 126. And the taking of a new note as absolute payment of one secured by a deed of trust or mortgage extinguishes such security, which is a mere incident to the note thus discharged by payment. *Strine v. Williams*, 159 Mo. 582, 60 S. W. 1060.

The fact that plaintiff did not surrender the Dyson note and mortgage would be a strong circumstance against an inference that it accepted the Campbell securities as an absolute payment, since, in the ordinary course of business dealings, the security is given up to the party who pays it (*Balmer v. Sunder*, 11 Mo. App. 454); and were it not for the evidence of plaintiff, which shows beyond question that plaintiff and Campbell intended that the new note and mortgage should operate as a discharge of the old, we would hold, as a matter of law, that no such extinguishment had occurred at the time of the sale of the property by Campbell. The only real conflict is over the question of whether the parties intended that the delivery of the Campbell note and mortgage to plaintiff should, ipso facto, release the Dyson mortgage, or that such release should not occur until the surrender of the Burns mortgage. Plaintiff's contention is that such surrender was made essential to the comple-

tion of the substitution; but there is abundant evidence to the contrary, tending to show that the substitution should occur contemporaneously with the delivery of the new note and mortgage. This conflict in the evidence presented a vital issue of fact, which the court properly submitted to the jury.

[4, 5] We do not agree with plaintiff that defendants are bound by the position Campbell took in defense of the criminal prosecution. Of course, Campbell, who escaped conviction on the plea that he signed the papers in blank on the understanding that they related only to the piano, would not be allowed to derive any benefit from the inconsistent position that the papers he signed were a new note and mortgage on the furniture, intended as a substitution for the Dyson note and mortgage. *Bensieck v. Cook*, 110 Mo. loc. cit. 182, 19 S. W. 642, 33 Am. St. Rep. 422. But Campbell is a mere nominal party. Plaintiff and Mrs. Shore are the only real parties in interest, and while she derived her title through Campbell, and is in privity with him, she is not bound by any admissions he made after he conveyed the title of the property to Kretchmer.

The criticism of defendant's second instruction has been answered in what we have said. The release of Dyson from liability on his note, if made by plaintiff, had the effect of releasing the incidental mortgage. There is no prejudicial error in the record.

The judgment is affirmed. All concur.

INGINO v. METROPOLITAN ST. RY. CO.
et al. (No. 11621.)

(Kansas City Court of Appeals. Missouri.
Oct. 4, 1915. Rehearing Denied
Nov. 1, 1915.)

1. NEGLIGENCE — 93 — ACTION FOR INJURIES — IMPUTED NEGLIGENCE.

The negligence of a driver of a wagon cannot be imputed to a person who is injured while riding therein at the driver's invitation.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 147-150; Dec. Dig. — 93.]

2. STREET RAILROADS — 103 — OPERATION — ACTION FOR INJURIES — LAST CHANCE DOCTRINE.

Where a person, who was riding in a wagon at the invitation of the driver, saw a street car approaching when they were about to drive across the track, his knowledge of the approach of the car and his failure to mention it to the driver would not defeat a recovery under the last chance doctrine, where the motorman saw, or could have seen, the peril of the wagon and its occupants in time to have avoided collision by the exercise of ordinary care.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 219; Dec. Dig. — 103.]

3. STREET RAILROADS — 117 — OPERATION — ACTION FOR INJURIES — QUESTIONS OF FACT.

In an action against a street car company for injuries to a person riding in a wagon at the invitation of the driver thereof, caused by collision with a car at a street crossing, evi-

dence as to the negligence of defendant under the last clear chance doctrine held for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.]

4. EVIDENCE §553 — EXPERTS—QUESTIONS—OPERATION OF STREET CARS.

In an action against a street railroad company for injuries to an occupant of a wagon in a collision at a street crossing, it was not error to predicate questions as to the distance in which a car could be stopped upon the assumption that the rails were dry, when there was evidence, although not direct, to show such fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.]

5. PLEADING §370—FACTS TO BE PROVED—ACTION FOR INJURIES — OWNERSHIP OF STREET CAR.

In an action for injuries to the occupant of a wagon struck by a street car at a street crossing, evidence as to the ownership of the car was not necessary, where both sides assumed that defendant's servants were in charge thereof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1225-1227; Dec. Dig. § 376.]

6. STREET RAILROADS §78—OPERATION—ACTION FOR INJURIES—LIABILITY OF RECEIVERS.

Where a street railroad is operated by receivers, they alone, and not the company itself, are responsible for personal injuries due to the negligence of the company's servants.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 166-171; Dec. Dig. § 78.]

Appeal from Circuit Court, Jackson County; Thos. J. Seehorn, Judge.

Action by John Ingino, by Alexander Ingino his next friend, against the Metropolitan Street Railway Company, Robert J. Dunham, and another, receivers. Judgment for plaintiff, and defendants appeal. Reversed as to the Railway Company, and affirmed as to the receivers.

John H. Lucas, of Kansas City, for appellants. Strother & Campbell and Cowherd, Ingraham, Durham & Morse, all of Kansas City, for respondent.

TRIMBLE, J. An east-bound Twelfth street car struck the left rear wheel of a dairy delivery wagon going north on Holmes street. Plaintiff, a boy of 16, having accepted an invitation to ride home, was sitting in the seat with and to the left of the driver of the wagon. The force of the collision threw the boy out and injured him. He brought this suit by next friend to recover damages. In addition to the charge that the operator of the car negligently failed to give warning of the car's approach to the intersection, and that he negligently operated the car at a high and dangerous rate of speed, without keeping the same under control and without keeping a vigilant watch, the petition also set up a violation of the last chance or humanitarian rule. It was upon this ground only that the case was submitted to the jury, namely, that plaintiff, in crossing said track was in a perilous situation,

arising from danger of being struck by said car, and those in charge of the car saw, or by the exercise of ordinary care could have seen, plaintiff in a situation of danger, and with ordinary care and due regard to the safety of passengers could have stopped the car and avoided the collision. Plaintiff obtained a verdict of \$650, and defendant has appealed.

Defendant's most important point is that, accepting the testimony introduced at its full face value and giving it the benefit of every inference which it will reasonably bear, there was no case made authorizing the sending of the same to the jury. This contention is based upon several grounds. The first is that, inasmuch as plaintiff testified that when the horse's front feet went over the south rail of the east-bound track he looked west and saw a car at Cherry street a block west of Holmes and about 300 feet away, but said nothing about it and paid no further attention to it, as he thought they had plenty of time to cross and get out of the way, he, therefore, knowingly placed himself in a position of danger, and cannot recover. This idea is based upon certain remarks in *Kinlen v. Metropolitan Street Ry. Co.*, 216 Mo. 145, loc. cit. 164, 115 S. W. 523, 530, to the effect that the law will not—

"permit a recovery where the injured party knowingly places himself in a place of danger and knowingly or willfully permits the train to strike him," etc.

An examination of that opinion, however, will show that it is not applied to facts like those at bar. The judge who used the language above referred to was speaking of one who "knowingly drives in front of an approaching car when he knows he will not have time to cross in safety." Of course when he does this, he goes from a place of safety into a place of danger so shortly before the collision as to afford the operator of the car no time in which to stop or avert the accident. But if he goes on when the car is so far away that he reasonably supposes he has time to get safely across, he has knowledge of the car, but is oblivious of the danger. If now, at the time he goes into danger, the motorman sees that he is going to continue in danger until he gets across, and the car is yet far enough away to enable him, by the exercise of ordinary care and with due regard to the safety of his passengers, to stop and thereby avert a collision, it is his duty to do so. As said in the *Kinlen Case*, at page 155 of 216 Mo., at page 527 of 115 S. W.:

"The streets of our cities are public thoroughfares upon which all have the right to travel, but neither the pedestrian, the street car, nor the carriage drawn by horses has the exclusive right to the use thereof. Their rights and duties are relative, and all must exercise reasonable care in order not to injure each other."

Again, plaintiff was a boy riding as a guest of the driver of the wagon. He was in a

covered vehicle, which had glass in the sides, it is true, but there was nothing in the conduct of the occupants of the wagon observable to the motorman which would lead him to think they were conscious of the approach of the car. Nor were they so situated as to get out of danger at a moment's notice. From the time the horse's head came into the danger zone until the rear of the wagon would pass out of it, the plaintiff would be in danger, and would have to stay in such danger until the rate at which the horse was going would carry him out of it. Considering the length of the horse and the wagon, plus the width of the track, the wagon would have to travel twenty feet or more; and, if the motorman saw the slow but steady approach of the horse before it got into danger, but saw it going with every indication of intending to cross, then it traveled further than that. But, at any rate, the moment the horse started into the danger zone it was apparent to the motorman that plaintiff could get out of danger only when the wagon was safely and fully across. If, now, the car was far enough away, at the time the horse started on the track, to enable the motorman to have slackened and stopped the car, with ordinary care and safety to his passengers, before the collision, then he should have done so. He could not continue on at uniform speed, trusting to chance for the wagon to get out of the way, and making no effort to stop or slacken the car. Plaintiff was not in the situation of a pedestrian who could, in an instant, step out of harm's reach.

[1, 2] Speaking of the language in the *Killen Case* first hereinabove quoted, the Supreme Court, in *Pope v. Wabash Railroad*, 242 Mo. 232, loc. cit. 240, 146 S. W. 790, says that language must be understood as applying to a person who could have gotten out of danger when conscious of the train's approach. Now those who were in a wagon following, and a little to the left of, the one plaintiff was in say they saw the car 60 feet away, when the wagon was on the track, but the car did not slacken speed till it struck the wagon. The motorman swore he stopped the car in about 40 feet, but did not see plaintiff's wagon till he was 35 feet away. Plaintiff's witness swore that a car going from 15 to 20 miles per hour could be stopped in from 35 to 50 feet on a dry rail and in 75 to 80 feet on a slippery one. It was down-grade from Cherry to Holmes, and plaintiff's witness said the car was going 20 miles per hour, while defendant's said it was going 12 miles per hour. All say it was light enough to see the wagon a block away. The driver of the wagon said he looked west before he went on the track, but saw no car. His negligence cannot be imputed to plaintiff. *Petersen v. St. Louis Transit Co.*, 199 Mo. 331, 97 S. W. 860; *Zalotuchin v. Metropolitan Street Ry. Co.*, 127 Mo. App. 577, 106 S. W. 548; *Ebert v. Metropolitan Street Ry. Co.*, 174 Mo. App. 45, 160 S. W. 34.

Hence, unless plaintiff's knowledge that there was a car to the west of him and his failure to say anything about it to the driver, are sufficient to deprive him of recovery, the driver's negligence, if any, will not. But, as we have seen, the mere fact that plaintiff saw a car and mistakenly thought it was so far away as to afford no danger will not defeat a recovery under the humanitarian rule, if there is evidence tending to show that, after the entry into danger, the motorman saw, or by the exercise of ordinary care could have seen, the peril of the wagon occupants in time to have avoided the collision by the exercise of ordinary care. Mere negligence on the part of plaintiff in going into danger will not defeat recovery under the humanitarian rule, if after his perilous situation is apparent there is yet time for the motorman to avoid injuring him by the exercise of ordinary care. Besides, plaintiff was a minor, and the circumstances under which a minor is held guilty of contributory negligence are usually left to the jury.

[3] But it is also claimed, in behalf of the soundness of defendant's demurrer to the evidence, that the physical facts deducible from the testimony of plaintiff and his witnesses conclusively show that at the time he entered into danger, or at the time it first became, or should have become, apparent to the motorman that he was going into danger, the car was so close to him that ordinary care could not stop it in time to avoid a collision. In other words, that a calculation based upon the rate of speed plaintiff's witness says the car was going, compared with the rate the horse is supposed to have been going, and taking into consideration the length of the horse and wagon, plus the width of the track, it was impossible for the car to be 300 feet from the crossing as plaintiff says it was when the horse's front feet went over the south rail. It is certainly true that such calculation does show that the car could not have been that far away, but it also shows that nevertheless the car was far enough away to have enabled the motorman to have stopped had he exercised ordinary care. If this is the case, then defendant is liable even if plaintiff was mistaken as to the distance the car was away when he started to cross. According to these "physical facts," the car, at the time the horse's front feet went on to the rail, was more than three times farther away than the distance in which defendant's motorman says he stopped the car, nearly three times the distance plaintiff's witness says the car could have been stopped on a dry rail, and nearly twice the distance it could have been stopped on a slippery one. There was nothing to prevent the motorman from seeing the horse the instant its nose was poked over the rail. Indeed, the horse could have been seen before that, and also that it was going across as it kept steadily on. The motorman was approaching a crossing on a street in a city

where much travel could be expected, and indeed where there was much travel at this time, since the evidence is that he struck two wagons at the same time. It was his duty to see the vehicles about to cross, and especially when it was apparent they were going into danger. For these reasons we cannot say the "physical facts" show plaintiff is not entitled to recover. We are of the opinion the case was one for the jury.

[4] Point is made that error was committed in admitting evidence of the distance in which a car could be stopped under given conditions. The ground of the objection is that the witness was asked as to the distance a car could be stopped on a dry rail when there was no evidence as to the rails being dry. No one testified in so many words that the rail was dry, but they did testify to facts from which the jury could naturally and logically find the rails were dry. There was testimony that the day was cool and clear, with no moisture. The facts in evidence tended to prove a dry rail, and this authorized the incorporation of that fact in the question. *O'Neill v. Kansas City*, 178 Mo. 91, 77 S. W. 64; *Turney v. Baker*, 103 Mo. App. 390, 77 S. W. 479; *Hicks v. Citizens' Ry. Co.*, 124 Mo. 115, 27 S. W. 542, 25 L. R. A. 508; *Ridenour v. Wilcox Mines Co.*, 164 Mo. App. 576, loc. cit. 594, 147 S. W. 852. Besides, under the evidence, the car could have been stopped in the distance the physical facts showed it to be from the point of collision, whether the rail was slick or dry, and the defendant's motorman showed that he actually stopped the car in a less distance than the plaintiff's expert required on a dry rail.

[5] It is also urged that there is no evidence as to the ownership of the car in question and the operation thereof, but this is wholly untenable. There was not only evidence of that fact, but the instructions on both sides assumed that defendant's servants were in charge of and operating the car. This was sufficient. *O'Keefe v. United Railways Co.*, 124 Mo. App. 613, 101 S. W. 1144.

Complaint is made of the instructions largely on the ground that there was no evidence to sustain them, especially plaintiff's instruction No. 3, the claim being there was no evidence tending to show the car could have been stopped after plaintiff's danger became apparent, but, as we have stated, this is not maintainable. The instructions follow approved precedents, and if they contain any errors, they are not specifically pointed out. We think the instructions unobjectionable.

[6] The suit is against the company itself and also the receivers. We are asked to reverse the judgment on this account. The injury occurred December 11, 1912. The answer of the receivers admits that on June 3, 1911, they were appointed receivers of the Metropolitan Street Railway Company, and ever since have been and now are in charge

of the property of said company. The case was tried by both sides on the assumption that those operating the car were the servants and agents of defendants, and no point whatever was made calling in question the fact that the receivers were in charge. The company itself cannot be held responsible for an act committed while the entire control of its affairs is in the hands of the receivers, but the receivers are liable. *Moore v. Metropolitan Street Ry. Co.*, 189 Mo. App. 555, 176 S. W. 1120 (No. 11504, decided May 24, 1915).

The judgment is therefore reversed as to the Metropolitan Street Railway Company and affirmed as to the receivers. All concur.

CHAPMAN v. BROWN. (No. 11314.)

(Kansas City Court of Appeals. Missouri. Oct. 4, 1915.)

1. TRIAL \hookrightarrow 343—VERDICT—EVIDENCE.

A verdict resolves all conflicts in the evidence in favor of the successful party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 809-812; Dec. Dig. \hookrightarrow 343.]

2. BREACH OF MARRIAGE PROMISE \hookrightarrow 20—ACTIONS—BURDEN OF PROOF.

An action for breach of marriage promise being founded on contract, it will, in the absence of averment and proof to the contrary, be presumed that the complaining party possessed legal capacity to enter into such relation, and hence in a suit by a woman the man has the burden of proving her incapacity.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. §§ 26, 27; Dec. Dig. \hookrightarrow 20.]

3. APPEAL AND ERROR \hookrightarrow 1033—REVIEW—HARMLESS ERROR.

In an action for breach of marriage promise, where defendant's answer admitted plaintiff's legal capacity to marry, an instruction submitting that question to the jury was harmless as to defendant, casting an unnecessary burden on plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. \hookrightarrow 1033.]

4. TRIAL \hookrightarrow 192—INSTRUCTIONS—ASSUMPTION OF FACTS.

Where defendant, in an action for breach of marriage promise, admitted his unwarranted refusal, it was not error for instructions to assume those facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. \hookrightarrow 192.]

5. BREACH OF MARRIAGE PROMISE \hookrightarrow 13, 29—DEFENSES—OFFER.

A breach of promise of marriage gives an instant right of action, and a subsequent offer of defendant to fulfill his promise is no defense, and will not mitigate damages, particularly where the offer is hedged around with conditions.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. §§ 4-10, 44, 45; Dec. Dig. \hookrightarrow 13, 29.]

Appeal from Circuit Court, Cass County; A. A. Whitsett, Judge.

Action by Grace M. Chapman against J. F. Brown. From a judgment for plaintiff, defendant appeals. Affirmed.

J. S. Brierly, of Harrisonville, and J. T. Burney and Chas. S. Owsley, both of Kansas City, for appellant. Kyle & Coon, of Kansas City, and T. N. Haynes, of Harrisonville, for respondent.

JOHNSON, J. This is an action for breach of promise of marriage. The petition states a good cause of action, and specifically alleges that plaintiff had legal capacity to intermarry with defendant. The answer admits the promise, but alleges, in substance, that it was conditioned upon plaintiff's agreement to enter into a prenuptial contract with defendant providing that in the event of "a serious disagreement and separation" after marriage neither party "should have any interest or title or right in the property of the other by reason of their marriage," and further alleges that plaintiff refused to perform this condition, and that defendant "is now ready and willing to carry out and perform the contract of marriage with plaintiff, and does hereby offer in good faith to marry her at any time she may suggest, on the terms and conditions originally agreed upon; that is to say, after plaintiff and defendant shall have entered into their contract in writing concerning their property rights as above stated." The answer states that defendant "knows of no reason why plaintiff and defendant may not intermarry." The jury returned a verdict for plaintiff in the sum of \$2,000, and on the overruling of his motions for a new trial and in arrest of judgment, defendant appealed.

Plaintiff, whose maiden name was Millie M. Mitchell, was married in 1897 to Edwin M. Chapman, and lived with him until 1901, when they separated, and Chapman removed to Mangum, Okl., where he engaged in the practice of dentistry. Plaintiff remained in Kansas City and supported herself by keeping a rooming house. The proof shows, and defendant concedes, that she is a woman of good character. At the trial plaintiff testified she was single at the time of the events in controversy, and her counsel introduced in evidence a duly authorized copy of a decree of divorce rendered in February, 1904, by the district court of Greer county, Okl., in an action brought against her by her husband. This decree, which gives the title of the case as "E. M. Chapman v. M. M. Chapman," recites that:

"Defendant having wholly failed to appear, and being wholly in default for answer or plea, and it appearing to the court that due, legal, and proper service has been made and for the required length of time, the defendant is by the court adjudged to be in default. And the court, having heard the allegations of plaintiff's petition and the testimony of plaintiff's witnesses, and being fully advised in the premises, finds the issues in this cause in favor of the plaintiff."

Some time before her marriage plaintiff, becoming dissatisfied with the name of "Millie," announced to her family and friends her wish to be called "Grace," but she was

married under her proper name, and during her cohabitation with her husband was called by him and their friends by her initials, "M. M.," her husband being known by his initials, "E. M." After their separation she resumed the name of Grace, and was introduced to and known by defendant as Grace M. Chapman.

Defendant is a bachelor about 50 years of age who owns and resides upon a farm of 200 acres in Cass county. He and plaintiff met in February, 1910, at her home in Kansas City, where he called in response to an advertisement published by her sister who desired employment as a housekeeper. It is not necessary to go into the history of the courtship that had its genesis in this chance encounter. According to the evidence of plaintiff, it followed the usual and natural course and culminated in a mutual agreement to intermarry. Defendant's version of their relationship does not differ widely from hers, except that he would have it appear that his was the passive role, and that she was the aggressor until his reluctance to enter into the state of matrimony was overcome, when he became masculine enough, and exhibited proper anxiety to hasten the advent of the happy day. But he was cautious, and would not be swept off his feet by the floods of passion. Plaintiff had separated from one husband—for good cause, he was convinced—and might become disposed to separate from another. She might not like country life, though she protested her fondness for it, and might yearn to return to the city. He desired that his marriage should be permanent, or, if not, that he would escape the burdens and annoyances of rights of dower and alimony. Consequently he would not listen to plaintiff's importunities until she unequivocally agreed to enter into an antenuptial contract that would render a separation disastrous to her from a practical viewpoint.

Plaintiff denies that any such humiliating condition was attached to their mutual promises, and states that nothing was said by defendant about entering into a contract of that character until some time after their engagement. Defendant came to Kansas City one day to buy a wagon and found himself without sufficient money to pay the purchase price. He asked his fiancée to lend him \$30.00 for that purpose. She hesitated, but finally drew her check for that amount and gave it to him. After buying the wagon he returned to plaintiff and said: "I have used the check you wrote out for me. You didn't seem very willing to let me have it. I expect it will be just that way after we are married." "No," replied plaintiff, "things will be different after we are married." "Aren't we as good as married now; we are engaged?" defendant inquired. Plaintiff answered: "Oh, no; not exactly." Then defendant asked plaintiff if she would be willing to sign a contract that neither should have any interest in the property of the other if they separated. Plain-

tiff, astounded, replied: "That sounds like a funny question to ask a woman that you are intending to marry." Defendant exclaimed: "I didn't mean it. I was just trying you out to see if you would do it."

The parties agreed to delay the wedding until plaintiff could sell her business. She encountered many delays and disappointments before she finally procured a purchaser. But finally she succeeded in selling everything but some personal belongings, which she boxed and shipped to defendant. Pursuant to plans they had agreed upon, she removed to a nearby hotel, had cards announcing the wedding printed, and wrote defendant giving the date she had selected for the wedding. Unfortunately she put a one-cent stamp on the letter and defendant did not receive it until after the announced date. He hastened to Kansas City and went to plaintiff's hotel, inquired for her, and was told she had gone to a nearby restaurant for dinner and desired him to join her there if he should arrive during her absence. It had chanced that after taking her seat at a table in the restaurant a man with whom she was acquainted entered, seated himself at the same table, and was conversing with her when defendant appeared at the door. She beckoned him to come in, but he retreated, and waited outside until she finished her meal and joined him. A disagreeable conversation followed, and was continued until after midnight. Defendant professed the belief that he had discovered plaintiff in a compromising situation, and declared his purpose of breaking the engagement. Plaintiff offered explanations which would have convinced any reasonable person of the innocence of her conduct, and implored defendant to keep his promise to marry her. Finally, so plaintiff states, he said: "If I do marry you, you will have to sign a contract before I marry you." "What kind of a contract do you mean?" asked plaintiff. "That your property will be yours, and my property will be mine." Plaintiff refused, saying: "It don't look to me that you are on the square, since you have treated me the way you have; it don't look to me as though you are acting in good faith." Defendant refused to be married to plaintiff, and this suit followed. Two or three days before the trial defendant had a conversation with plaintiff in which he offered to marry her if she would sign the contract. He told her he had "investigated this matter, and never found nothing but what she was all right, and had decided, if she was willing to do as we talked, * * * I will go out and get the contract drawn up, and you sign that and get the license, and we will marry." Plaintiff declined this conditional offer.

In his version of the incidents leading to the breaking of the engagement defendant assigns as his reason for refusing to marry plaintiff the honest belief, which he admits subsequent investigation demonstrated to be false, that plaintiff was sustaining an im-

proper relationship with her companion at the restaurant table. He did not complain at that time of her failure to enter into his proposed antenuptial contract, nor was the subject of such contract referred to in the conversation which preceded the breaking of the engagement. Defendant places himself in the position of having broken his promise to marry plaintiff without just cause, and the only defense he offers to the merits of the action is that his original promise was conditioned upon the execution by her of an antenuptial contract, and her refusal to accept his subsequent offer to perform this conditional promise left her without a meritorious cause of action. On the other hand, plaintiff's evidence tends to show that the promise was unconditional, and that defendant in breach of its terms, on two occasions, cunningly and falsely tried to turn innocent acts of hers into measures for coercing her into a degrading antenuptial agreement, and then breached his promise when the final effort proved unsuccessful.

[1] The verdict resolved this evidentiary controversy in favor of plaintiff, and, as her evidence is substantial, we are bound by the verdict, and must look at the facts of the case from the viewpoint of her evidence.

[2, 3] The first point urged against the judgment is that the court erred in submitting to the jury in the instructions asked by plaintiff the issue of whether or not plaintiff, "at the time of entering into said contract, was single and unmarried." It is argued that her capacity to enter into a contract of marriage was a question of law for the court to determine upon the record of the judgment for divorce, which she procured from Oklahoma and introduced in evidence, and which, defendant contends, does not show that the Oklahoma court had jurisdiction, either of the person of plaintiff or of the subject-matter of the action. We do not find it necessary to go into the question of the sufficiency of that record to show that the former husband of plaintiff had been lawfully divorced from her. The legal capacity of plaintiff to enter into a contract of marriage was expressly admitted in the answer, and was not questioned in the proof of defendant or treated as an evidentiary issue. An action for breach of promise of marriage is founded on contract, and the general rule that a party to a contract will be presumed, in the absence of an averment and proof to the contrary, to have possessed legal capacity to enter into such contract, obtains in such cases. 4 Am. & Eng. Encyc. of Law (3d Ed.) 884; 5 Cyc. 1011; Tucker v. Hyatt, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872; Jones v. Layman, 123 Ind. 569, 24 N. E. 363; Ortiz v. Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581. As is well said by the Supreme Court of Indiana in Tucker v. Hyatt, supra:

"She did not need to allege or prove that she was a woman, that she was of marriageable age,

that she was unmarried, or that she was otherwise competent to enter into a contract of marriage. Her capacity to enter into such contract will be presumed, in the absence of averment and proof to the contrary. In *Jones v. Layman*, 123 Ind. 569, 24 N. E. 363, which like this was an action on breach of marriage contract, it was contended that the complaint was bad because it was not alleged that the parties were of marriageable age. The court said: "There is nothing in this objection. The presumption is, as to all contracts, that the parties were competent to contract, until the contrary is made to appear."

The burden was on defendant to plead and prove want of capacity in plaintiff to contract, and his admission in his answer that she had such capacity settled that question for all the purposes of this case. The most that may be said of the instructions in the respect under consideration is that they imposed a burden upon plaintiff she was not required by law to bear. Of this defendant could have no cause to complain.

[4] Further, defendant objects to instructions given at the request of plaintiff which assumed to cover the whole case and to direct a verdict without requiring the jury to find that defendant refused to marry plaintiff, or that plaintiff was ready and willing to marry defendant. The truth of both of the facts was conceded by defendant in his testimony, where he not only admitted that plaintiff was ready and willing to marry him, and that he refused to perform the contract, but went further, and admitted that his refusal was without good cause. It is not error for instructions to assume the truth of conceded facts. *Davidson v. Transit Co.*, 211 Mo. loc. cit. 859, 109 S. W. 583; *Sotebler v. Railroad*, 203 Mo. 702, 102 S. W. 651; *Edwards v. Schreiber*, 168 Mo. App. 197, 153 S. W. 69; *Murphy v. Railroad*, 168 Mo. App. 588, 153 S. W. 271.

[5] We do not approve the contention that defendant's offer to marry plaintiff, made after his breach of the contract, and after this suit was brought, constitutes a good defense to the action. There may be circumstances under which a bona fide offer to marry, following an undue delay in the performance of the promise, but before the promisee has signified her intention to end the matter, will be treated as a substantial compliance with the promisor's contractual obligation. *Kelly v. Renfro*, 9 Ala. 325, 44 Am. Dec. 441. But this is not that kind of case, and the court was right in instructing the jury to give no effect to defendant's offers, if they believed they were "not made in good faith, but to avoid this suit."

The general rule is that a breach of promise of marriage, as a breach of any other contract, gives an instant right of action, and an offer of defendant to fulfill his promise made after suit is brought by the promisee should be disregarded by the jury, either as a defense or in mitigation of damages. *Waneck v. Kratky*, 69 Neb. 770, 96 N. W. 651,

66 L. R. A. 798; *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208; *Kurtz v. Frank*, 76 Ind. loc. cit. 596, 4 Am. Rep. 275; 4 Am. & Eng. Encyc. of Law, 895.

Other criticisms of the rulings are found to be clearly without merit, and need not be discussed. We do not wish to be understood as implying that the antenuptial contract proposed by defendant would have been valid if entered into by the parties. We express no opinion on that subject, since the validity of such an agreement may be conceded for argument, and, as we have shown, the judgment still would be free from the taint of prejudicial error.

The case was fairly tried and submitted, and the judgment is affirmed. All concur.

TROWBRIDGE v. KANSAS CITY & W. B. RY. CO. (No. 11639.)

(Kansas City Court of Appeals. Missouri. Oct. 4, 1915.)

1. COMMERCE §27 — FEDERAL EMPLOYERS' LIABILITY ACT—INTERSTATE COMMERCE.

Where a railroad company accepts a car billed from a point without the state and transports it to a point on its line for delivery to the consignee, the shipment constitutes interstate commerce, although the car was billed only to the point of connection with defendant's line.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. §27.]

2. COMMERCE §27 — FEDERAL EMPLOYERS' LIABILITY ACT—INTERSTATE COMMERCE.

Where a railroad company accepts a car billed from a point without the state and transports it to a point along its line, where delivery is made to the consignee, and then returns the empty car to the railroad from which it came, where it is taken by such railroad and sent to a point outside the state in accordance with a rule sending all empty cars to such point, but of which point defendant had no knowledge, the movement of the empty car in leaving the place of unloading constitutes interstate commerce, and a switchman injured while coupling such car is engaged in interstate commerce within federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8666), which defines transportation to include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit and handling of property transported, the service that is actually rendered, and not the intent with which the carrier performs its work, being determinative of the nature of the carriage.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. §27.]

3. MASTER AND SERVANT §270—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—EVIDENCE.

In an action by a switchman under the federal Employers' Liability Act, where it was alleged that the injury was due to the failure of the engineer to observe that the couplers would not meet, it was not error to allow plaintiff to testify that they would not meet because they were broken, although the action was not based on a violation of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 631,

as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. 1913, § 8613).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.]

4. MASTER AND SERVANT § 286—INJURIES TO SERVANT—QUESTION OF FACT.

In an action by a switchman whose foot was crushed between the couplers of a car which he was attempting to couple, evidence held sufficient to submit to the jury the negligence of the engineer in failing to stop the engine on signals.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.]

5. MASTER AND SERVANT § 240—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a switchman, riding on the front end of an engine in order to couple onto a stationary car, saw that the couplers would not meet, he was not guilty of contributory negligence as a matter of law in kicking the coupler on the engine to one side, whereby his foot was caught, where the engineer failed to heed his signals to stop.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 751-756; Dec. Dig. § 240.]

6. EVIDENCE § 352 — RAILROAD COMPANY'S RECORDS—INJURIES TO SERVANT.

In a switchman's action for injuries while coupling cars under the federal Employers' Liability Act, railroad company records as to the movement of the car were admissible, where their identity and correctness had been properly attested by the railroad company's agent, although another agent was on the stand when they were introduced.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1398-1403; Dec. Dig. § 352.]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

Action by William Edward Trowbridge against the Kansas City & Westport Belt Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John H. Lucas, of Kansas City, for appellant. Watson, Watson & Alford, of Kansas City, for respondent.

TRIMBLE, J. In this case damages are sought under the federal Employers' Liability Act, for personal injuries received by plaintiff while employed as a switchman in defendant's yard.

The principal contention of the defendant, and the one to be first considered (since it will effectually dispose of the case if defendant is right), is that plaintiff was not engaged in interstate commerce at the time he received his injury. To create a right of recovery under the federal act in question, not only must the employer be a common carrier by railroad engaged in interstate commerce, but the injury must have occurred "when the particular service in which the employé is engaged is a part of interstate commerce." *Illinois Central R. Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163.

There is no question but that defendant

was, and is, a common carrier by railroad, and it was, and is, engaged in interstate commerce. Defendant's railroad is about nine miles long, and extends from Thirty-Ninth street and Westport avenue in Kansas City, Mo., to Dodson, Mo. This last-named point is not far from the Kansas line. At Dodson the road connects with the Missouri Pacific, the Kansas City Southern, and the St. Louis & San Francisco Railroads. It receives freight in car load lots, coming from points on these railroads outside of the state of Missouri, consigned to points on defendant's line of railway within this state. Defendant operated its road under a regular tariff filed with the Interstate Commerce Commission, and under this tariff collected its charges on all cars that came to it from Kansas or elsewhere outside of Missouri. These incoming cars were billed to Dodson, Mo., but, as a matter of fact, they went on through to the various points along defendant's line of railway, being transported by defendant from Dodson to their various destinations. When cars thus received and transported had been unloaded by their consignees, defendant took them back to Dodson and set them on its switches, from whence they were taken by the particular connecting road over which they had come to defendant's line. Empty cars, thus taken back to Dodson by defendant, were not billed to any point, but were merely taken there where the road which had brought them loaded to defendant either sent them back to point of origin or elsewhere as it chose. Defendant in bringing the empty cars back to the road it got them from did so without ascertaining or inquiring where they were going after being taken charge of by the connecting road.

On July 8, 1913, a box car loaded with brick and consigned to Coen Building Material Company, located on defendant's line, was received at Dodson, Mo., by defendant, having been shipped from Bufile, Kan., over the Missouri Pacific, and was transported from Dodson by defendant to its consignee. The car was unloaded, and on July 8th plaintiff was injured while engaged, as an employé of defendant, in switching the car preparatory to returning it to Dodson to be there again taken charge of by the Missouri Pacific. At that time the Missouri Pacific Railroad Company had given orders at Dodson that all box cars should be sent west to a point in Kansas, to be there loaded with wheat. After plaintiff's injury, the car he was attempting to couple was, on the same day, taken to Dodson, from whence it was, on the 9th of July, by the Missouri Pacific Railroad, sent west to Osawatomie, Kan., the place where said road was at that time sending every freight car suitable for hauling wheat to Eastern markets, and from which place said cars were distributed to

the points where they were needed for that purpose. The evidence further shows, not only that that car, but others coming in loaded from Kansas, came on through Dodson, without unloading, to their destinations at points along defendant's line in Missouri, and that after defendant had delivered them to their consignees and they had been unloaded, defendant would return the cars to the Missouri Pacific at Dodson, and from thence they would be taken west to the point from whence they originated. The train that took the particular car in question west from Dodson, Mo., to Osawatimie, Kan., was a local freight which ran every day from Osawatimie, Kan., to Kansas City, Mo., and return. Cars going west on that local went to Osawatimie, from whence they were distributed to various points as hereinbefore stated.

The disputed question now under consideration is whether the movement of the particular car sought to be coupled at the time of the injury was a part of interstate commerce. If so, then the particular service being rendered by the plaintiff, at the time he was hurt, was a part of such commerce, and, in that event, the federal act applies.

[1] Had the injury occurred during the movement of the loaded car prior to its delivery to the consignee, there could be no question but that plaintiff would have been engaged in interstate commerce. The shipment of the brick from Buffville, Kan., to the Coen Building Material Company at a point on defendant's line in Missouri constituted interstate commerce; and the carrying of such loaded car by defendant from Dodson, and its delivery to the consignee, was a participation by defendant in such commerce. This is true notwithstanding the fact that the car was billed only to Dodson. While it and all other cars were billed to this point, yet, as stated, they went on through to the various consignees located along defendant's railroad. The work of defendant in taking the loaded cars from Dodson to the consignee on its route and then returning it after it had been unloaded to Dodson, where it could be again taken possession of by the railroad over which it had come to defendant's line, was a participation by defendant in interstate commerce. And for this service it collected a charge from the Missouri Pacific, which was included in the freight bill collected by the latter for the entire transportation. The carrying of the loaded car over the nine miles of defendant's road from Dodson to Westport avenue was as necessary a part of the carriage between shipper and consignee as the carriage from Buffville to Dodson. In performing the above-mentioned part of the transportation, the defendant was also furnishing switch and terminal facilities for this shipment, and for all others coming to it from the railroads connecting with it at Dodson. In the Interstate Com-

merce Act, as it now exists, the term "railroad" is defined to include—

"all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of persons or property * * * and all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property."

So that the participation by the defendant in the transportation of this shipment was undoubtedly a participation in interstate commerce. And this is true regardless of the fact that the car was billed to Dodson. Neither it nor other cars stopped there, but went on through to the point of delivery. It is the nature of the service performed by the carrier, and not the way in which goods are billed, that determines whether the carriage is interstate or not. *Ohio Railroad Commission v. Worthington*, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004; *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310. The service performed by the defendant in the case at bar is quite of the same nature as that performed by the Chicago Junction Railway Company and the Union Stockyard & Transfer Company in the case of the *United States v. Union Stockyard & Transfer Co.*, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226. The railway in that case operated wholly within the city of Chicago, and neither of the corporations issued through bills of lading. The Supreme Court held that the fact that the service is performed wholly in one state makes no difference if it is a part of interstate commerce, that "it is the character of the service rendered, not the manner in which goods are billed, which determines the interstate character of the service," and that the corporations were engaged in interstate commerce.

[2] However, in the case now before us, plaintiff's injury occurred after the car had been unloaded and while he was switching it preparatory to taking it back to Dodson where it could be taken possession of by the Missouri Pacific. Was the movement of this empty car a part of interstate commerce? We are of the opinion that it was, under the circumstances disclosed by this case. In the first place, the service undertaken by the defendant when it received the loaded car from the Missouri Pacific at Dodson was not finished until it had transported the car to its consignee and had returned it empty to Dodson and placed it again at the disposal of the Missouri Pacific. Under these circumstances the particular trip of this car from Buffville, Kan., might be said not to have ended until it was returned empty to Dodson, since it was not the purpose of any one that the car, when unloaded, should remain at the point of delivery to the consignee. The return of the car to Dodson was a necessary part of the movement of any cars carrying commerce from the state of Kansas to

points in Missouri on defendant's line. To enable the railroad, bringing freight from Kansas to such points, to continue that commerce, certainly the cars, after they have been received and emptied of their goods, must be returned to that road. However, there is more in the facts of this case than simply the return of the car to Dodson, and we need not go so far as to hold that its mere return to Dodson was a part of its incoming trip, and therefore a part of the interstate commerce of that trip. In this case the Missouri Pacific Road had directed that all box cars returned to Dodson should be sent to its distribution point at Osawatomie, Kan., for use in the transportation of wheat. The car in question was not one belonging to the Missouri Pacific, but belonged to the Delaware, Lackawanna & Western Railway (an eastern railroad). When the car was unloaded at the Coen Building Material Company's plant and started by defendant to Dodson, the defendant was in fact participating in its return to Kansas, where it was to again enter the stream of incoming cars used in further transportation. This westward movement was merely a completion of the circuit it was making in the transportation of the country commerce. On its return empty from the switch of its consignee, its passage through Dodson to the west was accomplished in the same way it went through Dodson east to its consignee. Dodson was no more its final destination in the one case than in the other. The fact that the defendant took no interest in where the car was going the moment it reached Dodson, nor made any inquiry in regard thereto, ought not to make any difference in the real nature of the service then being rendered. It was then performing a service in the interstate commerce of the country. And in view of the fact that Dodson was so near the Kansas line with only one small station between it and that state, it is difficult to believe that defendant was wholly ignorant of the fact that it was helping in the interstate movement of such cars, even though its officers were careful to avoid ascertaining to what particular point in Kansas the cars were being sent. It is not the intent with which the carrier performs its work that affects the nature of the carriage; it is the service that is actually rendered. This is what determines whether it is inter or intra state. The empty car, having brought its load from Kansas into Missouri had entered upon its return to that state, there to be again loaded. It was an instrumentality of interstate commerce, made so by the federal statute, which defines transportation to include—

"cars and other vehicles and all instrumentalities and facilities of shipment or carriage irrespective of ownership or of any contract express or implied for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit * * * and handling of property transported."

The hauling of empty cars from one state to another is interstate commerce within the meaning of the act. *North Carolina R. Co. v. Zachary*, Adm'r, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159. In *Pennsylvania R. Co. v. Knox*, 218 Fed. 748, 134 C. C. A. 426, empty cars belonging to the Pennsylvania Railroad were delivered to it in New York. In railroad parlance whenever cars belonging to a road were delivered to it at any point on its line, the cars were "at home." These cars were transported from New York into Pennsylvania. The court said the movement of empty cars was an operation of commerce, and that, where the movement was interstate, the act of Congress now in question would apply. The court also held that if the cars had been sent from New York to any particular point in Pennsylvania, their interstate journey would not cease until that point was reached, and had the injury there complained of (which occurred in switching the cars after they had reached points in Pennsylvania, where they had waited and were available for use by their owner) occurred before that particular point had been reached, the switching would have been a part of interstate commerce. The cars were not billed at all, and therefore the court looked into their actual movement and ascertained what was in fact done with them to determine the nature of that movement. The court said, if the end of the journey is not in fact expressly determined, "the law must determine it in accordance with what is reasonable and just," and, in commenting on the *Zachary* Case, said that the court in that case—

"found it to be a reasonable inference that the cars then in question were in the process of being 'carried forward as a part of a through movement of interstate commerce.'"

The same method is applicable to the case at bar. The car in question came in from Kansas loaded with brick billed to Dodson, but in fact went on through to its consignee at a point on defendant's line near Westport avenue, the defendant participating in that carriage by taking the car from Dodson to the consignee and returning it empty to Dodson, where the Missouri Pacific again took it back to its point of distribution in Kansas. There was no billing of the car either way. But an examination into what was actually done shows that the car was making a complete circuit between the two states in the carrying of commerce, and that defendant's part of the carriage was in transporting and handling of that car at the eastern end of that loop. In the case of *Baer Bros. v. Denver & Rio Grande R. Co.*, 233 U. S. 479, 34 Sup. Ct. 641, 58 L. Ed. 1055, shipments of beer were made from St. Louis Mo., to the plaintiff in Leadville, Colo., but the shipments were billed from St. Louis to Pueblo, where they were there taken by the *Denver & Rio Grande*, as an independent

shipment originating at Pueblo, and forwarded by it on a local waybill. The Denver & Rio Grande, therefore, claimed that its part of the transaction was intrastate. The court refused to recognize this view, and looked into what was the actual nature of the transaction in order to determine whether defendant's part of the carriage was intrastate or interstate, and held that:

"While there was no through rate and no through route, there was in fact a through shipment from St. Louis, Mo., to Leadville, Colo. Its interstate character could not be destroyed by ignoring the points of origin and destination, separating the rate into its component parts, and by charging local rates and issuing local waybills, attempting to convert an interstate shipment into intrastate transportation."

In view of all the circumstances under which the car in the case at bar was moved, therefore we are of the opinion that plaintiff was engaged in interstate commerce at the very moment of his injury.

This brings us to the facts concerning the happening of the injury itself. The switching was done with an electric engine both ends of which were alike, the engineer's cab being in the middle, so that either end could be used as the front of the engine as occasion required. Across each end of said engine was a footboard about 10 inches in width, and above this footboard at the proper height was a rod for a handhold for the person standing on said footboard. The car in question was on a side track west of and next to defendant's main line, and access to this track was by means of a switch at the north end. North of the car in question and about 15 feet from it were three loaded cars on this side track. The plaintiff opened the switch and let the engine in onto the side track, and walked down to the loaded cars and coupled the engine to them, and then these loaded cars were pushed down and coupled to the empty car sought to be obtained. This coupling was made by another employé, and plaintiff says there was some difficulty in making it. The empty and the loaded cars were then taken north over the switch to the main line, where the empty car in question was run down the main line past the switch, and the loaded cars were again placed on the side track. Plaintiff then opened the switch to let the engine onto the main line and, as it came south thereon, got on the front footboard and rode down to the car. In this position he was in front of the engine, and of course when it and the car would come together he would be between the two. Both the engine and the car were equipped with automatic couplers which the federal Safety Appliance Act requires shall couple automatically by impact. When the engine was about 12 feet from the car plaintiff noticed that the drawbar and coupler on the car was over to one side, so much so that it would not meet the one on the engine. Thereupon he gave the engineer the signal to stop in order that the car coupler

could be adjusted, but this was not obeyed. Plaintiff continued to signal, but as the engine continued on its way unchecked, plaintiff, fearing that the drawheads would pass each other and he would be crushed, kicked the drawhead on the engine to the west to enable it to meet the one on the car. In doing so his foot slipped, and the fleshy part of the ball of his foot was crushed. Plaintiff's kick succeeded in getting the two couplers so they would not pass, but they did not couple, whether because of the interposition of plaintiff's foot or because they were not sufficiently in line does not appear. The engine was moving at the rate of three or four miles per hour, and, according to the evidence, could have been stopped in from 2 to 5 feet. The engineer admits he got a signal to stop, but says it was when the engine was within 2 feet of the car, while plaintiff says it was 12 feet away. Plaintiff says he did not get off the engine because of the presence of cars on a side track east of and next to the main track, which made it dangerous for him to do so.

[3] According to plaintiff's evidence the bolt on the side of the coupler on the car was broken and the sill bursted, so that the coupler was pushed to one side and would not articulate with the one on the engine. However, the negligence alleged in the petition, as the basic cause of the injury, was not the maintenance of a defective coupler, that is, a coupler defective in itself, but the negligence of the engineer in failing to observe that the couplers would not meet and in failing to observe and obey the plaintiff's signal to stop, although there was time enough for him to have stopped the engine had he been observant and in the exercise of ordinary care. While the petition refers to the "condition of the couplers" and to the fact that they would not meet unless the engine was stopped and the couplers properly adjusted, yet no allegation is made that the couplers, or either of them, were inherently defective. The fact that they would not meet might perhaps have shown that they were defective, but for the peculiar language of the petition, which seems to place the cause of their failure to meet upon the fact that the roadbed was not ballasted, the rails were not level, and the rail joints were uneven and would sink when the engine passed over them, giving to the engine a rolling motion, thus allowing the couplers to pass each other. Hence the cause of action stated in the petition does not seem to be one based upon a violation of the Safety Appliance Act. If it were, then, since clearly the car was used "on a railroad engaged in interstate commerce" as provided in the amendment of March 2, 1903, to the Safety Appliance Act, it would not matter whether plaintiff was or was not engaged in interstate commerce at the very moment of his injury. Roberts on Injuries to Interstate Employés, § 50, p. 119.

Taken as a whole, and fairly construed, the petition shows that the cause of action really stated is under the federal Employers' Liability Act, and is based solely upon the engineer's negligence in the operation of his engine, with the fact of the coupler being over to one side alleged merely as a circumstance suddenly calling for the stopping of the engine and the consequent exercise of care on the part of the engineer. And this was the question submitted in the instructions. Nothing was said therein about the defendant being liable on account of the coupler failing to couple automatically. And the evidence of plaintiff as to the bolts on the side of the coupler being broken was not testified to as a ground of liability, but only in explanation of why the coupler was on one side. The petition clearly alleged that they would not meet, and it was not error, therefore, for plaintiff to give all the reasons why they would not, including the fact that it was broken, even if the petition did not state a violation of the Safety Appliance Act, because no allegation was made of any defect inherent in the coupler itself.

[4] Upon the question whether there was sufficient evidence of the engineer's negligence to take the case to the jury, we think there was, and that there was not a failure of proof as claimed by defendant. The plaintiff did undoubtedly kick the coupler when he finally realized that the engineer was not going to obey the signal to stop. The engineer admits he got a signal, but says it was not until the engine was within 2 feet of the car, and therefore too late for him to stop. There is substantial evidence that the signal was given when the engine was far enough away to have enabled the engineer to stop had he been observing the signals; also that the couplers would not have met had not plaintiff kicked one of them, and that, even then they did not fully meet, but only partially so, and failed to couple.

[5] We cannot agree with defendant that the plaintiff is conclusively shown to have been so guilty of contributory negligence as to bar his recovery as a matter of law. Neither assumption of risk nor contributory negligence were raised as a defense, the answer being a general denial, but upon the theory that plaintiff's own evidence discloses these matters, it may be that defendant can make use of them, if found available, regardless of the failure of the answer to raise them. However, under the third section of the federal act, contributory negligence is no longer a complete defense, but operates to reduce the damages. Said act also provides that neither contributory negligence nor assumption of risk shall be available where the injury was caused or contributed to by the violation by the carrier of any federal statute enacted for the safety of employes. It is not necessary to pass on the question whether

the failure to plead a defective coupler in this case forbids the operation of these provisions, notwithstanding the evidence shows the coupler was defective, because in plaintiff's instructions he did not seek the benefit thereof, but submitted the question of plaintiff's contributory negligence to the jury, directing them that if they found plaintiff guilty of contributory negligence, then such was not a bar to a recovery, but would reduce the damages, if any—

"in proportion to the rates his negligence bears to the combined negligence of plaintiff and defendant, if any."

As plaintiff's injury arose from his kicking the coupler in an emergency rather than in taking some other precaution for his safety, it would seem that his act should be classed as contributory negligence rather than as assumption of risk, if either, since the former term, "involves the notion of some fault or breach of duty on the part of the employé," or is "a failure to use such care for his safety as ordinarily prudent employes in similar circumstances would use," while assumption of risk "may be free from any suggestion of fault or negligence on the part of the employé." *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, loc. cit. 503, 504, 34 Sup. Ct. 635, 640 (58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475). The Supreme Court of the United States here says that this is the distinction between contributory negligence and assumption of risk, and that Congress evidently recognized that distinction in the wording of the act. It is only when the injury is due solely to the negligence of the employé that such fault on his part will preclude a recovery. *Grand Trunk, etc., R. Co. v. Lindsay*, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168; *Pankey v. Atchison, etc., R. Co.*, 180 Mo. App. 185, 168 S. W. 274. Clearly it cannot be said that plaintiff's act in kicking the coupler was the sole cause of the injury. The necessity for the kick arose through the failure of the engineer to stop after receiving a signal to do so when there was yet time for that to be done.

It is urged that the petition did not sufficiently allege that the parties were engaged in interstate commerce, but this contention is without merit.

[6] So also is the point that the court erred in admitting the records of the Missouri Pacific kept at Martin City to show that the empty car in question was not stopped there when it started west from Dodson on July 9th. This was to show that the car did not stop in Missouri, but continued on its return in the interstate circuit it was making. The records admitted were shown to be correct by the testimony of the agent who kept them, and it also was shown that they were made in the due course of business. The fact that the Missouri Pacific agent at Dodson was on the stand at the time the record was intro-

duced made no difference. He was not identifying the records, but was merely explaining them. Their identity and correctness had been properly attested by the Martin City agent the day before.

The judgment is affirmed. All concur.

MORRIS v. Z. T. BRIGGS PHOTOGRAPHIC SUPPLY CO. (No. 11619.)

(Kansas City Court of Appeals. Missouri.
June 14, 1915. Rehearing Denied
Oct. 4, 1915.)

1. MASTER AND SERVANT ⇨80—EMPLOYMENT CONTRACT—COMMISSIONS—INSTRUCTION—PROPERTY.

In an action to recover commissions due under a contract of employment, it appeared that defendant employed plaintiff as assistant photographer under a contract for a salary of \$110 per month during the years 1906 and 1907, with certain commissions on the total volume of business for the year 1907, evidenced by the memorandum "\$1.00 per month for each \$1,000 over \$60,000 added for year 1907, \$110 per month for 1906"; that the salary and commission for 1907 were duly paid; that defendant voluntarily raised plaintiff's salary to \$120 for the year 1908; that at the end of 1908 plaintiff demanded commissions for that year, which were refused by defendant on the ground that the raise in salary was a new contract abrogating the previous agreement, while plaintiff insisted upon the continued existence of the first contract so far as commissions were concerned; that according to plaintiff's testimony the dispute ended with defendant's silence upon plaintiff's unqualified assertion of the right to commissions for 1908 and subsequently, while defendant testified that upon plaintiff threatening to leave, if commissions were not paid him, defendant replied that plaintiff might leave if he wished; that thereafter plaintiff remained in the employment for three years with nothing further done or said about commissions; that after quitting the employment plaintiff requested payment of all due thereunder, to which defendant replied by giving plaintiff a salary check notated as being in full of salary due, which check plaintiff cashed without remonstrance and afterwards brought this suit for commissions covering the period from 1907 to 1913. *Held*, that it was error to instruct that, if there was no contract between the parties for the year 1908 or thereafter, the plaintiff could not recover, since plaintiff's right to commissions after 1908 depended on whether defendant silently suffered him to remain in the employment under an assertion of such right.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107-127; Dec. Dig. ⇨80.]

2. MASTER AND SERVANT ⇨80—ACTION FOR SERVANT'S COMPENSATION—COMPLAINT—EXPRESS CONTRACT—PROOF.

Plaintiff's cause of action as pleaded being founded on an express contract for hire for the year subsequent to 1907, he can recover only upon proof of an express, and not of an implied, contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107-127; Dec. Dig. ⇨80.]

3. MASTER AND SERVANT ⇨9—EMPLOYMENT CONTRACT—EXPIRATION—CONTINUATION IN EMPLOYMENT—PRESUMPTION.

The continuation of plaintiff's employment after the year 1907 at an increased salary, but without any new agreement, extended the operation of the express contract covering the period

ending with that year, and did not raise a new implied contract; the rule being that a silent continuation of the employment after the expiration of the contract continues the original contract in force by reason of the presumption of an intention so to do which arises from the conduct of the parties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 11; Dec. Dig. ⇨9.]

4. MASTER AND SERVANT ⇨70—CONTRACT OF EMPLOYMENT—SEPARABLE COVENANT—INCREASED SALARY—EFFECT.

The contract of employment for the year subsequent to 1907 being express, and the provisions for salary and commissions being divisible and in the nature of independent covenants, the voluntary increase of salary by defendant for the year 1908 did not affect plaintiff's right to commissions for that year.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 82-86; Dec. Dig. ⇨70.]

5. MASTER AND SERVANT ⇨79—EMPLOYMENT CONTRACT—SEPARABLE COVENANT—COMMISSIONS.

Where plaintiff was employed on a salary and commissions, his acceptance of his employer's check, which was stated to be in full of "all salary to date," had no effect on plaintiff's right to commissions under an independent covenant therefor in the contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 104; Dec. Dig. ⇨79.]

Appeal from Circuit Court, Jackson County; Joseph A. Guthrie, Judge.

Action by William S. Morris against the Z. T. Briggs Photographic Supply Company. From a judgment for defendant, plaintiff appeals. Reversed.

M. J. Kilroy and Gilmore & Brown, all of Kansas City, for appellant. Moore & Creel, of Kansas City, for respondent.

JOHNSON, J. [1] This is an action upon a contract of employment for the recovery of certain commissions plaintiff alleges he earned in the years 1908, 1909, 1910, and 1911, and which defendant agreed to pay in addition to the salary paid to plaintiff. The answer contains a general denial and affirmative defenses the nature of which will appear in our discussion of the case. A trial of the issues resulted in a verdict and judgment for defendant, and plaintiff appealed.

At the beginning of the year 1906, Z. T. Briggs, a dealer in photographic supplies at Atchison, Kan., removed his business to Kansas City and continued it under the trade-name of Z. T. Briggs & Co., until April, 1908, when he organized the defendant corporation which succeeded him and assumed his business obligations. Shortly before his removal from Atchison, Briggs employed plaintiff, who had been for many years in the service of another dealer in Kansas City, to assist him in conducting the new business, and agreed to pay plaintiff a salary of \$1,320 a year in monthly installments of \$110 each, and further agreed that for the second year of the service he would allow plaintiff, in addition to such salary, a commission of \$1 per month for each \$1,000 the volume of

business for that year might exceed \$80,000. It was agreed that a formal written contract would be entered into, but this was not done. A written memorandum of some of the features of the oral agreement was drawn and signed by plaintiff. That memorandum was as follows: "\$1.00 per month for each \$1,000 over \$80,000.00 added for year 1907, \$110 per month for 1908." Pursuant to this agreement, plaintiff entered the employment about January 1, 1906, and continued until April 23, 1912, and was paid the agreed salary, which defendant voluntarily increased to \$120 per month some time in the year 1908. After the close of the year 1907, defendant paid commissions to plaintiff earned under the agreement during that year. No further agreement was made relating to the terms of the employment, and nothing was said about commissions until 1909, when plaintiff requested payment of commissions earned during the year 1908.

According to the testimony of both parties, this request provoked an angry dispute. Plaintiff insisted, and defendant denied, that the contract provided for the payment of commissions after 1907. Defendant produced the written memorandum, but plaintiff was not convinced that defendant's position was right and, so he states, ended the dispute with the assertion, "Do not be alarmed, I will get my commissions as long as I am here." The next morning plaintiff reported for duty, was graciously received by defendant, and the subject of commissions was not mentioned again.

Defendant agrees with plaintiff that the only reference to commissions was on the occasion of the controversy in 1909, but denies that plaintiff said he would have commissions as long as the employment continued, and states that, instead, plaintiff said, "If these commissions are not paid, I will quit," to which defendant replied, "That is up to you, Mr. Morris." When the employment was terminated in April, 1912, plaintiff requested defendant to mail him a check for all that defendant owed him. Afterward defendant drew a check for the amount due on salary, wrote on the check that it was in full payment of salary, and mailed it to plaintiff, who received and cashed it. Plaintiff then brought this suit to recover the commissions he claims his contract entitled him to receive for the years 1908, 1909, 1910, and 1911.

At the request of plaintiff, the court instructed the jury that:

If they believed from the evidence "that no change in plaintiff's compensation so far as it was affected by commissions was agreed upon between plaintiff and defendant at the time of the incorporation of defendant, or at any time thereafter, prior to January 1, 1912, and that during said period no notice was given by either party to the other that the compensation for services thereafter to be rendered so far as the same was affected by commissions would be changed, then plaintiff is entitled to recover in this action for each of said years an amount equal to \$12 for

each \$1,000 of sales made by the defendant in that year in excess of \$80,000."

The following instructions were given at the instance of defendant:

"The jury is instructed that if you find and believe from the evidence in this case that plaintiff and Z. T. Briggs mentioned in evidence, in about the year 1906, agreed that plaintiff should receive for services to be rendered by him \$110 per month during the year 1906, and for the year 1907, in addition to the sum of \$110 per month, \$1 per month for each \$1,000 over \$80,000 in sales made by defendant during said year, and that plaintiff and Z. T. Briggs or the defendant had no contract for the year 1908, or thereafter, then the plaintiff cannot recover therefor in this action, and your verdict must be for the defendant.

"If the jury find and believe from the evidence that on or about April 23, 1912, defendant gave plaintiff a check in full payment of all salary to date, and that in accepting such check it was understood by plaintiff and defendant to be in full compensation to plaintiff for all services rendered defendant, your verdict must be for defendant."

And on its own motion the court instructed the jury that:

"If you find and believe from the evidence that in the year 1909 plaintiff made demand of defendant for commissions for the year 1908, and that the defendant, acting through its president, Z. T. Briggs, then denied owing any such commissions to plaintiff, and the plaintiff thereupon stated in substance that if his commissions were not paid he would quit the defendant's employ, and the said Z. T. Briggs replied thereto in substance that if plaintiff was so disposed he might quit, and if you find and believe from the evidence that from such conversation and all the facts and circumstances in evidence the plaintiff understood that he was to receive no commissions for the year 1908, and thereafter, but nevertheless continued in the employ of the defendant thereafter, then you are instructed that this would constitute a change or modification of the contract, if any, theretofore existing between the parties, and in such event there can, in this case, be no recovery by the plaintiff for commissions for the year 1908, or for any year thereafter."

Counsel for plaintiff argue that the instructions given at the request of defendant express erroneous and prejudicial views of the law of the case. The second instruction precludes a recovery if the jury should find as a fact from the evidence that the parties "had no contract for the year 1908 or thereafter."

[2] Plaintiff testified that when he signed the written memorandum it contained the words "and thereafter." The memorandum now fails to show those words, and the inference from plaintiff's testimony is that they were erased after he signed the paper. This, of course, is denied by defendant, who states that the memorandum is now as it was when signed, and expresses the oral agreement which contemplated, and applied only to, an employment for the years 1906 and 1907 and provided only for the payment of a commission on the business of the latter year. The cause of action pleaded is founded upon an express contract of hiring for the years subsequent to 1907, and plaintiff must recover, if at all, upon proof of an express contract of employment for the years in

controversy. He cannot plead an express contract and be allowed to recover on proof of an implied contract. Taking defendant in its own evidentiary position, there can be no question that the employment of plaintiff was under an express contract for the definite term of the years 1906 and 1907 with plaintiff's compensation fixed at a salary of \$1,320 per year and commissions on the business done in the second year in excess of \$60,000.

[3] The effect of the continuation of the employment after the termination of the definite period, without any new agreement, was to raise the presumption of a renewal of the contract for the following year. It is said in *Bell v. Warehouse Co.*, 205 Mo. loc. cit. 489, 103 S. W. 1017:

"While an employe's salary is fixed by contract at a certain sum per year or month, and he continues to render services after the expiration of such period, without any new agreement, the law presumes, there being no evidence to the contrary, that the continued services were rendered upon the same terms. *Ewing v. Janson*, 57 Ark. 240 [21 S. W. 430]; *Standard Oil Co. v. Gilbert*, 84 Ga. 717 [11 S. E. 491, 8 L. R. A. 410]; *Crane Bros. Mfg. Co. v. Adams*, 142 Ill. 125 [30 N. E. 1030]; *Ingalls v. Allen*, 132 Ill. 170 [23 N. E. 1028]; *Tatterson v. Suffolk Mfg. Co.*, 108 Mass. 56; *Adams v. Fitzpatrick*, 125 N. Y. 124 [26 N. E. 143]; *Ranck v. Albright*, 36 Pa. 367; *Wood on Master and Servant*, § 96; *Home Fire Ins. Co. v. Barber*, 67 Neb. 644 [93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. Rep. 716]; *Rose v. Carbonating Co.*, 60 Mo. App. 23."

The rule thus is stated in *Kellogg v. Insurance Co.*, 94 Wis. loc. cit. 557, 69 N. W. 862:

"When one serves another under a contract for a year's service, and holds over, continuing in the service after the expiration of the year, there is a presumption, analogous to the presumption in the case of a yearly lease, that the parties consent to the continuance through another year of the contract of service."

See, also, 1 *Labatt on Master and Servant*, pp. 230, 231; 26 *Cyc.* 976; 20 *Am. & Eng. Encyc. of Law*, 16.

[4] The presumption, called by *Labatt* "a presumption of fact," does not alter, but continues, the terms of the original contract, and therefore does not have the effect of converting an express into an implied contract. It merely raises an inference as one of fact that the parties agreed to extend the operation of the old contract for another year. This view is consistent with the distinction observed by *Norton*, J., between express and implied contracts in *Welnsberg v. Cordage Co.*, 135 Mo. App. 553, 118 S. W. 461; *Stone v. Trust Co.*, 150 Mo. App. 331, 130 S. W. 825; and *Wagner v. Illuminating Co.*, 141 Mo. App. 51, 121 S. W. 329.

Since defendant concedes that the subject of the terms of the employment was not mentioned until it arose in the dispute in the summer of 1909 over the commissions claimed by plaintiff for 1908, it follows from what we have said that the employment for 1908

and 1909 was under the terms of an express contract which provided for the payment of commissions in addition to the agreed salary, and, since the agreement to pay a salary and a commission upon a stated contingency were divisible and in the nature of independent covenants (*Marks v. Davis*, 72 Mo. App. 557), the voluntary increase of the salary by defendant in the year 1908 was without effect upon the agreement respecting the commissions. If plaintiff had asked it, he would have been entitled to a peremptory instruction to the jury to allow commissions for the years 1908 and 1909. As to the remaining years of 1910 and 1911, the proof of defendant tends to show that, as a result of the dispute in 1909 between the parties over the question of defendant's liability for commissions, plaintiff acquiesced in the contention of his adversary that commissions would not be allowed. Such conduct did not affect his right to claim such compensation for the current year of 1909, but, if it occurred, did have the effect of altering the terms of the contract for the succeeding two years to exclude commissions.

The only issue of fact which should have been submitted to the jury was whether defendant, in 1909, suffered the employment to continue with knowledge that plaintiff was standing on the agreement for commissions, or whether plaintiff continued in defendant's service after the expiration of that year in the face of defendant's positive declaration that he would not allow commissions. For the reasons stated, defendant's second instruction should not have been given.

[5] The third, also, was erroneous. The check was tendered and accepted in full satisfaction of "all salary to date," and not as "full compensation for all services rendered by plaintiff to defendant." Its acceptance had no effect upon plaintiff's right to commissions derived from an independent covenant in the contract.

The judgment is reversed, and the cause remanded. All concur.

PARKER-GORDON CIGAR CO. v. CHICAGO, R. I. & P. RY. CO. (No. 11272.)
(Kansas City Court of Appeals. Missouri.
Nov. 1, 1915.)

CARRIERS \Leftrightarrow 83—DELIVERY OF GOODS—SUFFICIENCY—CONSIDERATION BY TEAMSTER.

Where it was the practice of a railroad company to deliver goods only to those teamsters of a transfer company who had a freight sheet signed by certain officers of the transfer company, whose signatures were kept by the railroad company for comparison, the railroad company was not liable for goods delivered to a teamster who converted them, where he was in fact authorized to receive them, though his freight sheet was not properly signed.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 308-315; Dec. Dig. \Leftrightarrow 83.]

Johnson, J., dissenting.

Appeal from Circuit Court, Buchanan County; William H. Haynes, Judge.

Action by the Parker-Gordon Cigar Company against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Spencer & Landis, of St. Joseph, for appellant. J. E. Dolman and O. E. Shultz, both of St. Joseph, for respondent.

ELLISON, P. J. This is an action to recover the value of goods received at Chicago by defendant, a common carrier, for transportation to Kansas City and for delivery there to plaintiff, the consignee and owner. The petition states:

"There was delivered to defendant for plaintiff * * * four cases of cigars, containing 22,500 cigars, which said cigars the defendant agreed, in consideration of certain freight charges paid it, well and safely to carry from Chicago, Ill., to Kansas City, Mo., and at the latter place to deliver the same to plaintiff, or its agent, but * * * defendant, in violation of its said agreement and in total disregard of its duty as a common carrier for hire failed and neglected to deliver said cigars * * * to plaintiff, or to any one for plaintiff, and that the same have been wholly lost to plaintiff."

The prayer is for judgment for \$1,575, the alleged value of the goods. The answer admits that defendant received the cigars for transportation and delivery to plaintiff at Kansas City, and alleges delivery to an authorized agent of plaintiff.

The sole issue in the case is whether there was a delivery of the goods to plaintiff, their consignee and owner. The trial of that issue in the circuit court resulted in a verdict and judgment for plaintiff. Defendant appealed. It is conceded defendant delivered the goods at its depot in Kansas City to a negro teamster employed by the Kansas City Transfer Company, which had general authority from plaintiff, a wholesale grocer, to receive all shipments of goods arriving at Kansas City for plaintiff. The teamster loaded the goods in the wagon of his employer of which he was the driver, but, instead of delivering them to plaintiff, he sold them for \$100, returned the team and wagon to the barn of the Transfer Company, and then absconded.

The mode of doing business between the railroad companies, including defendant, and the transfer company as agent for a large number of merchants receiving shipments was this: To protect the railroad companies from imposition by persons pretending to be sent after freight by the transfer company, it was agreed between them that none of the railroad companies would deliver freight to a teamster unless there was found signed or indorsed on his "freight sheet" the name of either of four named officers of the transfer company, viz., the president, the bookkeeper, the superintendent, or the dock foreman. This sheet was perhaps 18 inches long, so as to accommodate items of freight, and it is variously designated by the witnesses—some

called it a card, some a freight card, some a sheet and others an identification sheet, or card. A copy of one is in the record, and we find that it is really a blank receipt, to be signed by the consignee. It is gotten up by the transfer company and carried by its teamsters; each sheet having a blank space for the teamster's name, following the word "Teamster" at the top. Then came the words, "Received from the Kansas City Transfer Company the following articles in good order and condition." Then followed blank columns for name of railroad, consignee, articles of freight, weight, and charges. This sheet, or card, was carried by the teamster to the railroad office where, if not already done, it would be filled out with items of freight, the freight loaded by the teamster and taken to the consignee, who would verify, sign, and hand back to the teamster, who would return it to the transfer company. Now it was this sheet receipt that one of the officers above named would indorse with his name, generally in one corner, before it was handed to a teamster by the dock foreman, or his assistant when directing him to go after freight. The railroad delivery official had the signatures of these officers in his desk for comparison if he thought it necessary.

On the day when the freight in controversy was delivered by defendant, the transfer company's assistant dock foreman handed one of these sheets to one of the transfer company's teamsters, with the latter's name written in at the proper place, but, seeing that it had not the indorsement of either of these officers, he, as he had sometimes done before, mistakenly thinking he had authority, wrote the name of the transfer company's cashier on the sheet. The teamster took it to defendant's freight office, and there the proper railroad officer, without attempting to verify the transfer officer's signature, ordered plaintiff's goods delivered to the teamster, who, as we have said, sold them and never delivered to plaintiff.

From the foregoing it will be seen that defendant delivered the goods to the transfer company's teamster whom that company had sent after them. The only irregularity, if it may be called such, was in delivering to a teamster who was not identified. But we think plaintiff has received a service out of this to which it was not entitled. Of course it was the duty of this defendant, as a carrier, to safely deliver at destination to the consignee (*Bartlett v. Steamboat*, 32 Mo. 256; *Buddy v. Railroad*, 20 Mo. App. 220; *Express Co. v. Milk*, 73 Ill. 224; *Powell v. Myers*, 28 Wend. [N. Y.] 591), but the object of the railway company, as applied to this case, was to protect itself against an impostor getting the goods and thereby rendering it liable for delivering to the wrong party. The railway's position may be likened, by way of illustration, to a bank in paying a draft or

check. The bank must pay, at its peril, to the proper person. Prudence suggests that it do not pay until it has required the party presenting the check to identify himself. But though the bank is imprudent enough not to require identification, yet if the party is the right person, no harm has resulted to the bank from its incautious act. In *National Bank v. Schley*, 58 Ga. 370, it is said that:

"If a person withdraw from a bank a special deposit, in pursuance of authority conferred upon him by the depositor, the bank is discharged, though the authority be unknown, at the time, to the corporation or to the officer representing it in the transaction."

And in *Doble on Bailments and Carriers*, § 19, it is stated that:

"Of course the bailee is not liable when he delivers goods to the right person, though the delivery is made on insufficient, or even false evidence."

Here the face of the record shows, as we have stated, that the negro was the transfer company's teamster who was directed to go to defendant's freight office for the goods. In obedience to that direction he went. As he was the right man, he did not need identification. Identification would not have prevented him from stealing the goods just as he did steal them. Plaintiff is making use of this identification card just as it would had some impostor gone to defendant and falsely represented that he was the transfer company's teamster sent after the goods. The matter of identification was for the protection of the railroad companies. The transfer company's president testified that:

"The railroad companies, for their own protection, had the transfer companies to meet with the local freight agents and made an agreement by which they could be protected, and not make wrong deliveries."

And that agreement was that no deliveries would be made without the signature of some official on the "teamster's sheet." But it would make no difference if we concede that the agreement had also for its object the protection of the transfer company, for the reason that it might have had some teamsters in its employ whom it did not wish to trust with hauling freight to consignees, and that on that account, it wanted freight delivered only to such teamsters as carried a freight sheet indorsed by one of its officers. For here the teamster was a freight teamster, employed to haul and deliver freight to consignees, and who, in this instance, was sent by the transfer company after the freight in controversy. No other conclusion can be reached than that he was sent by the dock foreman and his assistant, and that was the act of the company. Suppose the president of the transfer company had given the teamster this sheet, even without a pretense of being indorsed, and sent him for plaintiff's goods, it would seem folly to suggest that he should have been identified by defendant's freight agent. The act of the dock foreman was just as complete-

ly the act of the company as would have been the act of the president. Plaintiff's whole case is based upon a failure to identify a man as being the transfer company's teamster, when in fact it is admitted he was such teamster.

We think the judgment should be reversed.

TRIMBLE, J., concurs. JOHNSON, J., dissents.

PAUL v. METROPOLITAN ST. RY. CO.
et al. (No. 11601.)

(Kansas City Court of Appeals, Missouri.
June 14, 1915. On Motion for Rehearing, Oct. 4, 1915.)

1. CARRIERS—§321—INJURY TO PASSENGER—INSTRUCTIONS—CONFORMITY TO ISSUES.

In an action for personal injuries by a passenger, received through the alleged negligence of a street car company in starting its car while plaintiff was alighting at a regular stopping place where the car had stopped to take on and let off passengers, the defense being that plaintiff fell because some one stepped on her dress, and that the car did not start until the conductor had picked her up, an instruction was not objectionable for ignoring the element of whether defendant's servants knew, or in the exercise of ordinary care could have known, that plaintiff was alighting when the car was started, since the conductor's knowledge was not in issue in the case.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. §321.]

On Motion for Rehearing.

2. CARRIERS—§303—ALIGHTING PASSENGERS—CARE REQUIRED—STREET RAILROADS.

The rule that after a steam railroad train, running through the country, has stopped a reasonable time at stations for passengers to board and alight, the conductor may start the train upon the assumption that all passengers are safe, does not apply to the operation of street cars in cities.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1216, 1218, 1224, 1226-1232, 1234-1240, 1243; Dec. Dig. §303.]

3. CARRIERS—§303—ALIGHTING PASSENGERS—CARE REQUIRED.

Under his duty to use the highest degree of care for the safety of his passengers, a street car conductor before starting the car must know that no passenger is alighting or is otherwise in a position of danger, and his failure to perform such duty is negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1216, 1218, 1224, 1226-1232, 1234-1240, 1243; Dec. Dig. §303.]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"Not to be officially reported."

Action by Laura E. Paul against the Metropolitan Street Railway Company and others for personal injuries. From a judgment for plaintiff, defendants appeal. Affirmed.

John H. Lucas and Bruce Barnett, both of Kansas City, for appellants. Claude T. Goble, of Kansas City, for respondent.

JOHNSON, J. In alighting from a street car operated by defendants on the Brooklyn

line in Kansas City, plaintiff was thrown to the pavement and injured. She sued to recover her damages on the ground that her injury was caused by negligence of defendants in prematurely starting the car while she was in the act of alighting from it at a regular stopping place where it had stopped to receive and discharge passengers. The answer is a general denial. Verdict and judgment were for plaintiff in the circuit court, and defendants appealed.

The evidence of plaintiff tends to show that the car on which she was a passenger stopped at Tenth street and Forest avenue to take on and let off passengers; that plaintiff proceeded as expeditiously as possible to the rear vestibule, and was in the act of stepping to the street from the last step, when the car was suddenly started, in obedience to a signal from the conductor, and plaintiff was thrown to the pavement and injured.

The evidence of defendants is to the effect that some one in the vestibule accidentally stepped on plaintiff's skirt when she was stepping from the platform of the vestibule and caused her to fall, and that the car did not start until the conductor had helped her to her feet and she proceeded on her way home.

[1] Defendants do not contend that plaintiff's evidence is insufficient to sustain the pleaded cause of action, and the only points they present for our determination are directed against the first instruction, given at the request of plaintiff. The principal objection to the instruction is that:

"It ignores the element as to whether defendants' servants knew, or by the exercise of proper care could have known, that plaintiff was alighting from the car at the time the car started forward."

We said of this precise objection to a similar instruction which was urged in *Alten v. Railway*, 133 Mo. App. loc. cit. 430, 113 S. W. 691:

"It would sufficiently answer the objection to say that, since all of the evidence of defendant is to the effect that the conductor did observe plaintiff while she was in the act of alighting, the question omitted from the instruction was not a debatable issue, and there is neither rule nor reason for requiring the submission to the jury of admitted facts, however material they may be. But defendant's conclusion is unsound for another reason. The witnesses for both parties agree that the car had stopped at the regular stopping place and passengers were getting on and off. In such situation, it was the duty of the conductor, before giving the signal to start, to know whether or not a passenger was alighting. If plaintiff was in the act of stepping from the platform, it would be no excuse for the conductor to say that he did not know that fact. In the exercise of reasonable care, he was bound to know it. *Green v. Railway*, 122 Mo. App. 647 [99 S. W. 28]; *Nelson v. Railway*, 113 Mo. App. 702 [88 S. W. 1119]; *Hurley v. Railway*, 120 Mo. App. 262 [96 S. W. 714]. The question under discussion was not

material to the cause of action and it was not essential that the jury should consider it."

We see no reason for changing the views thus expressed, which we find sufficiently answers all of defendants' criticisms of the instruction. There is no error in the case, and the judgment is affirmed. All concur.

On Motion for Rehearing.

[2] Counsel for defendants argue in their motion for a rehearing that the rule, stated in the opinion, which holds a conductor of a street car negligent in giving a signal to start while a passenger is in the act of alighting at a place where the car has stopped to take on and discharge passengers, is in conflict with the decision of the Supreme Court in *Clotworthy v. Railroad*, 80 Mo. 220. That case announces the well-known and generally recognized rule applicable to the operation of trains on steam railroads running through the country that where such train stops long enough at a station for a passenger conveniently to alight and without fault of the company's servants he fails to do so, and the conductor, not knowing and having no reason to suspect that he is in the act of alighting, causes the train to start while he is so alighting, the company will not be held liable. That rule does not apply to the operation of street cars in cities for reasons given in recent opinions of this court and the St. Louis Court of Appeals. *Nelson v. Railway*, 113 Mo. App. loc. cit. 709, 88 S. W. 1119; *Green v. Railway*, 122 Mo. App. 647, 99 S. W. 28; *Hurley v. Railway*, 120 Mo. App. 262, 96 S. W. 714; *Zeller v. Railway*, 153 Mo. App. 613, 134 S. W. 1067; *Jerome v. United Railways Co.*, 155 Mo. App. 202, 134 S. W. 107; *Elliott v. Railway*, 157 Mo. App. 517, 138 S. W. 663.

[3] In the exercise of the highest degree of care towards his passengers, the conductor of a street car, in any event, should see and know that no passenger is in the act of alighting or otherwise is in a position which would be rendered perilous by the motion of the car when it is again put in motion, and a failure to perform that duty is held by the great weight of authority to be negligence. *Booth on Street Railways*, § 319; *Nellis on Street Railroad Accident Law*, 92; *Railway v. Smith*, 90 Ala. 60, 8 South. 86, 24 Am. St. Rep. 761; *Anderson v. Railway*, 12 Ind. App. 194, 38 N. E. 1109; *Patterson v. Railway*, 90 Iowa, 247, 57 N. W. 890. See, also, note 11 L. R. A. (N. S.) 140 et seq.

The rule criticized in the motion is not in conflict with that applied in the *Clotworthy* Case and is so just and well sustained by reason and authority that it should not be discarded from the negligence law of this state pertaining to the relation of carrier and passenger.

The motion for rehearing is overruled. All concur.

**JENNINGS et al. v. NATIONAL AMERICAN
LOAN. (No. 11603.)**

(Kansas City Court of Appeals. Missouri.
July 2, 1915. Rehearing Denied
Oct. 4, 1915.)

1. INSURANCE — 310 — LIFE INSURANCE — FORFEITURE OF POLICY — "LIABLE TO FORFEITURE" — "LIABILITY."

Where a policy of insurance, providing that it was issued subject to the statements in the application, that said statements were warranted to be true and made a part of the insurance contract, together with the by-laws of the company, and that the policy should be "liable to forfeiture" if such statements were not true, under the company's by-laws, the making of false statements being an offense upon which, before any effect was produced upon the insurance, a proceeding must be had by the company "under such rules as may from time to time be formulated by the board of directors," in the absence of proceeding to declare a forfeiture, the policy was not avoided by misstatements of the insured in the application, since "liable to forfeiture" means exposed or subject to forfeiture, contingently subject to forfeiture, "liability" being something that must be enforced, while, if a contract provides that a forfeiture may be declared in a certain contingency, then such forfeiture cannot come into existence until it has been declared.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 703, 761, 780, 826, 840, 904; Dec. Dig. — 310.]

For other definitions, see Words and Phrases, First and Second Series, Liability.]

2. INSURANCE — 645 — ACTION ON POLICY — PLEADING AND PROOF.

In an action on a policy of life insurance, where the defense of forfeiture was not properly pleaded, the exclusion of evidence to substantiate it was proper.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. — 645.]

3. INSURANCE — 645 — LIFE INSURANCE — ACTION — EVIDENCE.

In an action on a policy of life insurance providing that the application should be taken as part of the contract, the plaintiff was not required to introduce the application in evidence together with the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. — 645.]

4. INSURANCE — 687 — LIFE INSURANCE — CHARACTER OF COMPANY.

Whether an insurance company did an old-line or fraternal insurance business was determined, not by what it called itself or its business, but by the character of the policy, in suit and the manner in which the defendant conducted its business.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1824; Dec. Dig. — 687.]

5. INSURANCE — 645 — LIFE INSURANCE — BREACH OF WARRANTY — STATUTE.

Under Rev. St. 1909, § 7024, providing that the warranty of any fact in an application for insurance shall, if not material to the risk insured against, be deemed a representation only, where, in an action on a life policy, there was neither pleading nor evidence that alleged misstatements in the application were material to the risk, evidence tending to show such falsity could not defeat plaintiff's recovery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. — 645.]

6. PLEADING — 236 — AMENDMENT — ALLOWANCE.

Where, in an action on a policy of life insurance, after both sides had rested and the instructions been passed upon by the judge, the day after the closing of evidence, when arguments were to be made and the case submitted to the jury, the insurer asked leave to amend the answer to set up a provision of its by-laws that a reduction could be made from the amount specified in the policy of any premiums due for the first ten years remaining unearned between that time and the prior death of the insured, and also asked leave to introduce evidence to show the amount of the unearned premiums which it could have collected between the death of the deceased and the expiration of ten years from the date of the policy, had decedent lived so long, which, under the by-law, could be deducted from the face of the policy in suit thereon, the action of the court in refusing the requested leave, resulting in plaintiff's recovery of the face of the policy, was not an abuse of discretion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. — 236.]

7. APPEAL AND ERROR — 959 — REVIEW — ALLOWANCE OF AMENDMENTS — DISCRETION OF COURT.

The allowance of amendments to pleadings is a matter not entirely within the discretion of the trial court; its action being reviewable in case of manifest abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3831; Dec. Dig. — 959.]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"Not to be officially published."

Action by Allie Jennings and Albert P. Jennings against the National American. Judgment for plaintiffs, and defendant appeals. Affirmed.

D. C. Finley, of Kansas City, for appellant. G. W. Duvall and Fyke & Snider, all of Kansas City, for respondents.

TRIMBLE, J. This is a suit upon a policy of insurance issued upon the life of W. R. Jennings. The beneficiaries recovered in the trial court, and the company appealed.

The answer admitted that the policy was issued, that plaintiffs are the beneficiaries, and that the insured died. Unless, therefore, the answer contained allegations legally sufficient to constitute a defense, plaintiffs were entitled to recover.

No doubt, the answer sought to set up the defense of forfeiture because of certain alleged misstatements in the application. If, however, the answer failed to plead a forfeiture so as to enable the alleged misstatements to relieve defendant of liability, there was no error committed by the trial court in refusing to hold that the insurance was forfeited, nor in excluding evidence of facts sought to be introduced by defendant to prove that forfeiture.

[1] The policy provides that it is issued subject to the statements made in the application, and that said statements are warranted to be true, and are made a part of the insurance contract, together with the

by-laws of the company then or thereafter in force, whether by amendment or adoption. The policy then provided that it should be "liable to forfeiture" if said statements were not true. Now, while the by-laws provide that, upon the happening of certain things and the commission of certain offenses against the society, the policy should be "void ab initio" and should become "null and void," yet the making of misstatements in the application is not one of them. The making of false statements in the application appears in a list of offenses upon which, before any effect is produced upon the insurance, a proceeding must be had by the company "under such rules as may from time to time be formulated by the board of directors." So that there is nothing in the contract of insurance providing that misstatements in the application shall automatically work a forfeiture, but only that the insurance was liable to forfeiture therefor. Black's Law Dictionary, p. 713, gives the second definition of the word "liable" as "exposed or subject to a given contingency, risk, or casualty, which is more or less probable." And the provision in section 81 of the company's by-laws for a proceeding and action on the part of the company as to the offense of which the one in question forms a part shows that the word "liable" is used in this very sense. The New Standard Dictionary defines the word as meaning "exposed, or contingently subject to." And both Anderson's and Bouvier's Law Dictionaries define "liability" as something which must "be enforced by action."

In the case of *The Kate Heron*, 14 Fed. Cas. 139, the words "liable to forfeiture" were held not to effect a present absolute forfeiture, but only gave a right to have a forfeiture thereafter declared. The same idea of liability is expressed in *Haywood v. Shreve*, 44 N. J. Law, 94, loc. cit. 104. In *Lobee v. Standard Ins. Co.*, 12 Misc. Rep. 499, 33 N. Y. Supp. 657, it was held that, where the insurance contract provided that misrepresenting and mortgaging the insured property "shall cause a forfeiture of the certificate," those acts did not ipso facto annul it, but merely authorized the company to elect to declare it void.

In *Beasley v. Linehan Transfer Co.*, 148 Mo. 413, loc. cit. 421, 50 S. W. 87, the discussion as to the word "liable" shows that the court regards it as meaning that the result or consequence following the act is something which may happen but is not certain to happen.

Now, the rule of law is strict as to forfeitures. If the contract provides that in a certain contingency a forfeiture may be declared, then such forfeiture cannot come into existence until it is declared. *Keeton v. National Union*, 178 Mo. App. 301, loc. cit. 307, 165 S. W. 1107. In *Dixie Fire Ins. Co. v. American Bonding Co.*, 162 N. C. 384, 78 S. E. 430, a failure to comply with some of

its regulations rendered the bond void, but the failure complained of was not among them. It was held that, as the omission was not expressly made a ground of forfeiture, the same could not be declared nor relied upon.

In *Selby v. Mutual Life Ins. Co. (C. C.)* 67 Fed. 490, it is held that, if the contract does not provide that the act complained of shall ipso facto avoid the insurance, such act merely renders the policy voidable, and the insurer is not entitled to defeat recovery thereon unless it has seasonably taken action thereon and has taken such steps as will call the forfeiture into existence.

Now, the answer in this case does not show that the company took any steps necessary to enforce the forfeiture. The amendment to the answer, sought at the close of the case, whether asked before defendant had rested or afterwards (as to which defendant and the trial court did not agree), stated a mere conclusion as to a forfeiture. No facts were pleaded stating a declaration of forfeiture, or upon which a forfeiture could be said to have come into existence.

[2, 3] As the defense of forfeiture was not pleaded, no error can be charged against the trial court for excluding the application when offered by defendant; since the only purpose of having it in evidence was to lay the foundation for that defense. It is true the application is deemed to be legally "a part of the contract" when it is expressly stated to be such, but plaintiff was not therefore required to introduce the application along with the policy. The execution of the policy was admitted, and this established plaintiffs' cause of action, and it could only be defeated thereafter by pleading and proving a forfeiture.

[4, 5] The admission of the proofs of death were not necessary to the establishment of plaintiff's cause of action; and the only reason defendant desired them introduced was to show the discrepancies between the facts therein stated and the facts stated in the application; i. e., to prove that misstatements were made in the latter. But this fact was irrelevant unless the answer contained a defense. It did not, so far as forfeiture was concerned. If it be contended that the policy, with the application and the proofs, showed on their face, as matter of law, that the insured had breached certain warranties which rendered the policy void, the answer to such contention is that no defense of that kind was raised. And here, it would seem, is where the question whether defendant is doing an old-line or fraternal insurance business may have some bearing. The answer to this last question is determined, not by what the defendant calls itself or its business, but by the character of the contract involved and the manner in which defendant conducts its business. *Hertzberg v. Modern Brotherhood*, 110 Mo. App. 328, 85 S. W. 986; *McDonald v. Bankers'*

Life Ass'n, 154 Mo. 618, 55 S. W. 999. According to the evidence on this point preserved in the record, it would seem that the defendant should be considered as engaged in old-line insurance, since the facts are the same as are held, in *Trenton v. Humel*, 134 Mo. App. 595, loc. cit. 599, 114 S. W. 1131, to make the business of this same company that of ordinary life, and not fraternal, insurance. This being true, the above-named documents, namely, the policy, the application, and the proofs of death, could not defeat plaintiffs' cause of action on the ground of breached warranties; since there is neither pleading nor evidence to the effect that they were "material to the risk," as required by section 7024, R. S. Mo. 1909, to make them effective.

[8, 7] As to the claim that the verdict is greater than the amount provided in the insurance contract, it is clear that this does not appear from the policy. It promised to pay the maximum amount of \$1,000. The answer admitted the facts necessary to a recovery, and set up no claim that under any by-law a reduction could be made from the amount specified in the policy of any premiums due for the first ten years remaining unearned between that time and the prior death of the insured. No claim was made that, if defendant was liable, the amount to be recovered was less than the amount demanded. The record clearly shows that after both sides had rested, and the instructions had been passed on by the judge, defendant asked leave to amend the answer, setting up the above provision of the by-laws, and also asked leave to introduce evidence showing the amount of the unearned premiums which defendant could have collected between the death of deceased and the expiration of ten years from the date of the policy, had deceased lived that long, and which, under said by-law, could be deducted from the amount promised in the policy. The court refused to permit the amendment or to reopen the case. Section 1848, R. S. Mo. 1909, says the court *may* amend any pleading by inserting other allegations material to the case, but this doubtless has reference to the case as made by the evidence, and certainly does not *require* the court, after a trial is over and closed, to permit a litigant to bring in a new claim or defense upon which it is necessary to offer additional testimony. It is true that amendments are not entirely within the discretion of the trial court. *Joyce v. Growney*, 154 Mo. 253, 55 S. W. 466. But they are largely so, and that discretion will not be interfered with on appeal unless it is manifest that it has been abused. *Carr v. Moss*, 87 Mo. 447. There is no showing of abuse in this case. The hearing of evidence closed late in the evening of one day, and both sides rested, and the instructions were passed upon. Court then adjourned until the next morning, when

the case was to be argued and submitted to the jury. It was the next morning when the requests for permission to amend and to introduce evidence in support of the new claim were made. This was at a time presumptively after the witnesses had separated and had gone their several ways, especially as the statement was made the night before that no more evidence would be introduced. There was nothing to show how much the additional evidence would further prolong the case, nor was there any reason or excuse for the failure to set up the additional claim at the start. Under all these circumstances, to convict the trial court of an abuse of discretion would allow a litigant to plead and present a portion of his case, and then, at the close thereof, when it is seen that such part is about to fail, to further prolong the case by bringing in new and additional matter and submit evidence in behalf of it, although perhaps the witnesses for the opposing litigant may have been discharged under the statement from both sides that the evidence had closed, and no more would be introduced. The answer to the question whether the court abused its discretion under such circumstances is obvious.

The judgment must be, and is, affirmed. All concur.

UNITED STATES FIDELITY & GUARANTY CO. v. RIDGE. (No. 11612.)

(Kansas City Court of Appeals. Missouri.
Oct. 4, 1915. Rehearing Denied
Nov. 1, 1915.)

1. INSURANCE — 74, 79—EMPLOYMENT OF INSURANCE AGENT—JOINT AND SEVERAL CONTRACT—TERMINATION.

A contract between an insurance company, its general agent, and the manager of its surety and burglary departments, whereby the two agents were obligated to perform services not identical although similar in kind, the general agent having supervisory control of all departments, including that of the general manager of the surety and burglary departments, with the authority to employ solicitors in the interest of himself and the company, for the salaries of which he was liable in part, and having also the power to extend credit, the general manager having no such power and being a mere salaried employe, with no general powers or authority, and having no obligation to pay any expenses of the business, is several and not joint, and was not terminated as to the general agent by the retirement of the general manager of the surety and burglary departments.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 99, 100, 104; Dec. Dig. —74, 79.]

2. INSURANCE — 74 — EMPLOYMENT OF INSURANCE AGENT—JOINT AND SEVERAL CONTRACT.

Whether a contract between an insurance company and its agent creates a joint or several agency does not depend upon the number of agents contracted with nor on the form of the agreement, since a contract cannot be construed to be several if the express terms and purpose thereof show it is joint.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 99, 100; Dec. Dig. —74.]

3. DAMAGES ~~40~~ — CONTRACT OF EMPLOYMENT—EXPECTED PROFITS.

In an action for damages for the termination of an insurance agency, expected profits may be recovered, where there is actual data upon which a reasonable estimate thereof may be based.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72-88; Dec. Dig. ~~40~~.]

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

"Not to be officially published."

Action by the United States Fidelity & Guaranty Company against Thomas S. Ridge. Judgment for defendant, and plaintiff appeals. Affirmed.

Ball & Ryland, of Kansas City, for appellant; Sebree, Conrad & Wendorf, of Kansas City, for respondent.

TRIMBLE, J. Defendant, under a contract with plaintiff, was its general agent in Kansas City and vicinity. Plaintiff terminated the contract on April 23, 1910. Defendant had in his hands money collected by him during the months of February, March, and April, 1910, as premiums on insurance written through his agency, and, deeming himself damaged by the termination of the contract to an amount in excess of the sum in his hands, refused to pay it over. Plaintiff thereupon brought suit to recover it from him. Defendant set up a counterclaim, asking \$6,000 damages for breach of his agency contract. The jury found for plaintiff on its petition in the sum sued for, to wit, \$4,262.52, and for defendant on his counterclaim in the sum of \$4,580. The court thereupon rendered judgment in defendant's favor for \$317.48. Plaintiff appealed.

It seems that on June 20, 1907, plaintiff entered into a written contract wherein plaintiff was denominated the party of the first part, the defendant was termed the party of the second part, and one George O. Bacon was called the party of the third part. The subject of the contract was the transaction and management of plaintiff's business in Kansas City and in various contiguous counties in Missouri and Kansas. The contract provided that it was to terminate on the 25th day of March, 1908, but was to be renewed and continued from year to year, unless notice of a contrary intention was given in writing "by either party" 30 days before the 25th of March of any year for which the contract had been continued. The contract continued without interruption down to the 23d day of April, 1910, when plaintiff canceled it and revoked defendant's authority. There is no dispute over the fact that defendant owed plaintiff the amount found due it on the petition. The sole controversy is over the right of defendant to recover damages for the alleged breach of the contract by plaintiff in terminating it without giving notice 30 days be-

fore the 25th of March, or, to state it another way, the contest is over the right of plaintiff to terminate the contract without giving notice 30 days before March 25th. No such notice was given, and, unless plaintiff had the right to terminate upon other grounds, defendant is entitled to recover damages therefor.

The contested issue arises upon the counterclaim set up by defendant and the reply thereto filed by plaintiff. The counterclaim declared upon the written contract, and the reply admitted the execution thereof, and that it had been terminated, but set up certain grounds upon which its right to terminate were based. Consequently the question as to the right of plaintiff to terminate narrows down to the specific things alleged in the reply as the grounds upon which plaintiff bases its right to terminate. That pleading is the statement of its defense just as much as a petition is the statement of a plaintiff's cause of action. And, so far as the question now before us is concerned, we can no more consider grounds outside of those alleged in the reply than we could consider facts outside of a petition as constituting a cause of action. Of course, we could consider any fact appearing in defendant's counterclaim which would operate as a defense to plaintiff, but in such case it would afford plaintiff grounds for demurring to said counterclaim. There is nothing of this kind in the case, however, so that plaintiff's right to terminate the contract might perhaps be limited to the specific grounds it has chosen to rest that right upon in its pleaded defense to the counterclaim. Those grounds are: (1) That more than 30 days prior to the 25th of March, 1910, Bacon, the party of the third part in said contract, gave plaintiff notice in writing that he intended to terminate the contract and accept employment with another company; (2) that defendant, Ridge, did not comply with the contract, in that he failed to make monthly reports and settlements, on or before the 30th of each month, of all moneys due plaintiff; (3) that defendant, Ridge, negotiated for the sale of the agency to other parties prior to the termination thereof by plaintiff.

There is no evidence that Bacon gave plaintiff 30 days' notice prior to March 25th that he intended to terminate the contract, or that he ever gave any such notice, so that, upon a strict and technical construction of the reply, it could be said that plaintiff had failed to establish the first statement alleged as a ground of defense. Strictly speaking, the allegation that one of the parties terminated the entire contract in accordance with a right or power plaintiff claims the contract gave him is not an allegation that the contract was for the joint services of defendant and Bacon, whereby the quitting of the service by Bacon, ipso facto terminated the con-

tract as to Ridge also. Nor is there an allegation in the reply to the effect that such is the nature of the contract. However, Bacon did, on the 12th of March, 1910, enter into a contract with another company to act as its agent, and about the 1st of April, 1910, he did quit the service of plaintiff. And, perhaps, if Bacon could terminate the entire contract, not only as to himself, but also as to Ridge, by giving 30 days' notice prior to March 25th, then it might be he could terminate it by ceasing to work thereunder without giving notice. In the one case his act of termination would be in accordance with the contract, while in the other his act would be a violation thereof. However, his wrongful termination of the contract might not affect Ridge's right to continue working thereunder unless it could be said that the contract necessarily or impliedly called for the joint services of the two men, whereby the ceasing to work on the part of one terminated the contract as to the other. So that, finally, the question narrows down to whether or not the contract is or is not one calling for the joint services of the two men. For this reason it may not be out of place to put a gracious and liberal construction upon the reply as a pleading and treat it as though it, in effect, contained such ground as a defense to the counterclaim.

[1] What then is the nature of the contract? Was it for the joint services of Bacon and Ridge? If so, then, by the voluntary retirement of Bacon, the contract with Ridge was also at an end. 1 Mechem on Agency (2d Ed.) § 198.

In the first place, it may be observed that the contract nowhere expressly says the services are to be joint. Nor were the two agents required to perform the same services. Bacon was to be the general manager of the surety and burglary departments, but he was to actively engage in the solicitation of business. Ridge had supervisory control of all departments. Bacon's duties were specified and restricted and his authority limited, while Ridge's duties were those of a general agent. Bacon was on a fixed salary of \$2,000 per year, of which plaintiff was to pay \$1,200 and defendant \$800. Ridge was to receive as his compensation 25 per cent. commission on all business written by the agency, including that in Bacon's department. Ridge had authority to employ an active solicitor to be kept in the field, in the interest of himself and plaintiff, and he was obligated to pay one half of this solicitor's salary and plaintiff the other half. Ridge was to furnish office accommodations for the agency and telephone service and pay one half of the cost of all telegrams to the home office of the company, and it was to pay the other half. Ridge had authority to extend credit; Bacon had no such authority, unless permission in each instance was first obtained from Ridge, and if he extended credit without such authority, he alone was to be held re-

sponsible. Plaintiff agreed to pay \$100 on the salary of Bacon's stenographer. Ridge was not obligated to pay anything thereon. Ridge kept the books, maintained all the correspondence, and was obligated to bear the expenses provided and called for in the contract. Bacon was a mere salaried employé, having specific and limited duties, with no general powers or authority, and having no obligation whatever to pay any of the expenses of the business, and carrying no joint obligations whatever with defendant. It is true he owed duties to the plaintiff similar to those Ridge owed, such as to be zealous, attentive, watchful, careful in the business, and to be in every way helpful when called upon by plaintiff. But these did not pertain to joint services. There were obligations resting on Bacon to the company and other obligations resting on Ridge to the company, but these obligations, although a few of them were similar in kind, were several and not joint.

[2] Whether a contract creates a joint or several agency does not necessarily depend upon the number of agents contracted with, nor upon the mere form of the agreement. Of course, a contract cannot be construed to be several if the express terms and purpose thereof show it is joint. But although more than one agent is appointed in a contract, this does not necessarily mean that their authority is joint. 1 Mechem on Agency (2d Ed.) p. 143, note; United States Fidelity, etc., Co. v. Ettenheimer, 70 Neb. 144, 97 N. W. 227, 113 Am. St. Rep. 783, loc. cit. 787. As said in Atlanta, etc., R. Co. v. Thomas, 60 Fla. 412, loc. cit. 422, 53 South. 510, 518:

"Even though a contract be in form joint in its obligations, if the real rights and interests of the obligees among themselves be several and not joint, actions may be maintained severally by the obligees as their rights and interests appear, when the express terms and purpose of the contract are not in substance thereby violated or disregarded. In ascertaining the intention of the parties and in determining whether the rights and interests of covenantees are in reality joint or several, the subject-matter of the contract, the language used, the purpose designed, the consideration furnished, and the circumstances that induced the making of the contract may be considered."

In Davis v. Hendrix, 59 Mo. App. 444, loc. cit. 448, it is said:

"In construing contracts, isolated phrases or sentences should not be allowed to govern or subvert the evident intention of the parties as shown by the contract as a whole. If the whole contract discloses that as to any part of it there is imposed upon the obligors distinct and several duties, 'words of plurality, such as, We bind ourselves, will not make the contract joint.' 1 Addison, Cont., 86. 'In the construction of contracts, the court will look at all the circumstances of the case, the nature of the property, the occupation and relation of the parties, the usages of the place and of the business to which the contract relates, and ascertain, by reasonable inference, what the parties must have understood and mutually expected at the time of the making of the contract, and then adopt that construction which will best and most nearly carry the contract into effect as they intended and

understood it." See, also, *Riffe v. Proctor*, 99 Mo. App. 601, loc. cit. 612, 74 S. W. 409.

In *Cross v. Williams*, 72 Mo. 577, loc. cit. 581, it is said:

"That where the interest in the subject-matter secured by a covenant is several, although the terms will naturally bear a joint interpretation, yet if they do not exclude the inference of being intended to be several, they shall be so taken; they shall have a several construction put upon them. * * * Especially the entireness of the consideration is of great importance in determining whether the promise be joint or several; for if it moves from many persons jointly, the promise of repayment is joint, but if from many persons, but from each severally, then it is several."

See, also, *Bowman v. Branson*, 111 Mo. 343, 19 S. W. 634.

In *Sharp v. Conkling*, 16 Vt. 355, loc. cit. 359, it is said:

"Where the interest in the subject-matter secured by covenant is several, although the terms of the covenant will more naturally bear a joint interpretation, yet if they do not exclude the inference of being intended to be several, they shall be so taken; they shall have a several construction put upon them. This is just and sensible, and a rule by which this court are willing to abide."

See, also, *Shipman v. Straltsville, etc., Co.*, 158 U. S. 356, 15 Sup. Ct. 886, 39 L. Ed. 1015; *Wills v. Cutler*, 61 N. H. 405; *Albers Com. Co. v. Spencer*, 236 Mo. 608, loc. cit. 642, 139 S. W. 321, -Ann. Cas. 1912D, 705.

It would seem, therefore, that although the contract in question is tripartite in form, yet when its provisions are all considered it created two agents, but they were not joint agents, rendering joint services, but their duties, interests, responsibilities, and obligations were separate and distinct. There is only one place in the contract where Ridge is required to suffer for the acts of Bacon, and that is when Bacon extends credit by authority of Ridge. In other words, in the one instance where Ridge's rights are affected by Bacon's act, it is expressly stipulated that such act must be one that Ridge sanctioned and approved. It would seem that his express stipulation would exclude by implication the idea that Ridge's rights could be destroyed by a wrongful act of Bacon not participated in nor consented to by Ridge. This construction of the contract is supported when the construction placed upon it by the parties themselves is examined. When Bacon made his contract with the other company, Ridge on March 12, 1910, wrote plaintiff, telling the company of it and expressing his vexation thereat, but saying he could not see Bacon's services would be worth "any such money to us" as the salary the other company was going to pay him. Ridge also stated in this letter that he had made arrangements with another man to take his place on a salary of \$1,000 per year if it met with the company's approval. He also said in this letter he had in view the engagement of another man, and that if he could get two men for the same money they had theretofore been paying one, they would do more

business than with only one. He closed by asking the company its approval of what he proposed to do, as he did not want to obligate himself to these new men without the company's approval. To this the company answered, giving its entire approval. Nothing whatever was said about the agency being joint, or that the withdrawal of Bacon terminated the contract as to Ridge, but, on the contrary, the contract was treated just as defendant insists it should be considered, a contract with him for a general agency, with an agreement therein for the employment of a salaried employé under him, the expense of which was to be borne by plaintiff and defendant.

The evidence of what took place thereafter bears out this view of the contract. Ridge thereupon employed the new man pursuant to the approval of the company, and the business continued as usual until an agent of the company appeared in Kansas City and attempted to terminate the agency on the ground that Ridge was trying to sell the agency, and was intending to give up the agency and go to Europe. Ridge was much surprised, and assured him there was nothing to it, to which the agent replied he thought defendant was right about that, but to telegraph the president of the company and explain it to him. Ridge did so on April 5, 1910, and received a telegram from the president, insisting that Ridge had tried to sell the agency, and that if he contemplated going to Europe and be away from the office during the summer, "you should relieve us of any embarrassment and resign the agency." Two days later the special agent returned to Ridge's office and renewed his demand that Ridge surrender the agency, and told Ridge that the company was going to establish a department in Kansas City; that is, a branch of the company co-ordinate with the home office. Ridge refused to surrender the agency or terminate it unless he was compensated in some way for the loss he would sustain, and evidently so informed the president of the company, for on April 8th the latter, relying to a telegram of Ridge's dated the 6th, told him the company could not consider paying him anything, as the contract "was terminated March 25th by the retirement of George O. Bacon." This, notwithstanding the fact that the president had, on April 5th, requested him to resign the agency. Again on April 16, 1910, plaintiff wrote defendant:

"We propose to open our own office in Kansas City through which we intend to handle our own business."

And on April 23, 1910, plaintiff formally canceled the agency. There is no dispute over the foregoing facts. We are therefore of the opinion that the contract was several and not joint, and that the retirement of Bacon did not terminate Ridge's contract. Hence this fact cannot be relied upon as a defense to its cancellation, even if such

ground can be considered as pleaded in the reply. As held in *Meyer v. Christopher*, 176 Mo. 580, 75 S. W. 750:

"If there is any room for doubt as to the meaning of a contract, the construction the parties themselves put upon it will remove the doubt."

The remaining defenses, namely, that Ridge failed to make reports by the 30th of each month, and that he tried to sell the agency, likewise failed of establishment. The requirement of monthly reports was waived by the method of doing the business, and there was no evidence of an attempt to peddle or hawk the agency about to others.

[3] If plaintiff wrongfully terminated the defendant's agency, then the latter could recover damages on his counterclaim. The damages claimed were not too remote, since there were actual data upon which a reasonable estimate could be based. When this is the case expected profits may be recovered. *Morrow v. Missouri Pacific R. Co.*, 140 Mo. App. 200, loc. cit. 213-217, 123 S. W. 1034; *Thayer-Moore Brokerage Co. v. Campbell*, 164 Mo. App. 8, loc. cit. 20, 147 S. W. 545; *Hicks v. National Surety Co.*, 169 Mo. App. 479, loc. cit. 491, 155 S. W. 71; *Muel-ler, Adm'x, v. Bethesda Mineral Spring Co.*, 88 Mich. 390, 50 N. W. 319.

Other matters of complaint are urged, but they are not deemed of sufficient moment to require separate elucidation. The foregoing disposes of the real meat of this controversy.

Finding no substantial error in the case, the judgment is affirmed. All concur.

CLARK v. DUNHAM et al. (No. 11634.)

(Kansas City Court of Appeals. Missouri.
June 14, 1915. Rehearing Denied
Oct. 4, 1915.)

1. CARRIERS ⇨321—PERSONAL INJURY—INSTRUCTIONS—KNOWLEDGE OF PASSENGER'S MOVEMENTS.

In an action for personal injury from defendants' alleged negligence in starting their car without giving plaintiff sufficient time to alight, where the evidence of both parties shows that the conductor knew plaintiff was alighting, the only issue was whether the car started while plaintiff was alighting; and an instruction not requiring the jury to find that the conductor knew that plaintiff had not safely alighted when he started the car was not objectionable.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. ⇨321.]

2. CARRIERS ⇨321—PERSONAL INJURY—INSTRUCTIONS—NEGLECTANCE.

Where the facts hypostatized in an instruction, if true, constituted negligence in law, it was not necessary for plaintiff's recovery to require the jury to find that the conductor's act in suddenly starting the car, while he was alighting, with full knowledge thereof, was negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. ⇨321.]

3. DAMAGES ⇨24—PERSONAL INJURY—FUTURE SUFFERING.

In a passenger's action for injury, where the evidence tended to show that his ankle was weak, and might reasonably be expected to cause him some future pain and inconvenience, the jury might consider such future pain of body and mind, if any, as in all reasonable probability he would suffer as a direct result of his injury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 65-67; Dec. Dig. ⇨24.]

4. DAMAGES ⇨159 — PERSONAL INJURY — PLEADINGS AND ISSUES—"EMPLOYMENT."

Under a petition in an action for damages, alleging that plaintiff had been and would be compelled to lose valuable time and money by reason of being unable to perform the duties incident to his employment, referring to the practice of dentistry, without specifying whether he was practicing independently or as a paid assistant, he was entitled to show the different sources and receipts from the practice of dentistry, which was his "employment"; that term not necessarily importing an engagement for rendering services for another, but referring either to such service or to a profession practiced independently.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 429-438, 440-444, 447, 449-453; Dec. Dig. ⇨159.

For other definitions, see *Words and Phrases*, First and Second Series, *Employment*.]

Appeal from Circuit Court, Jackson County; A. C. Southern, Judge.

"Not to be officially published."

Action by James P. Clark against Robert J. Dunham and another, receivers of the Metropolitan Street Railway Company. Judgment for plaintiff, and defendants appeal. Affirmed.

John H. Lucas and Bruce Barnett, both of Kansas City, for appellants. Calvin & Rea, of Kansas City, for respondent.

JOHNSON, J. This is an action against the receivers of the Metropolitan Street Railway Company to recover damages for personal injuries plaintiff alleges were caused by negligence of defendants in the operation of an electric street car on which he was a passenger. The petition alleges that the car was stopped to receive and discharge passengers, and plaintiff "was in the act of descending the steps of said car to the pavement," when the car was suddenly started forward, "before he had had sufficient time and opportunity to alight from said car, and before he had fully done so," and he was thrown to the pavement and injured. The answer is a general denial. A trial to a jury resulted in a verdict and judgment for plaintiff for \$800, and defendants appealed.

The injury occurred at 7 o'clock p. m. February 5, 1913, at the corner of Eighth and Charlotte streets, in Kansas City. Plaintiff was a passenger on an east-bound car which stopped at the regular stopping place at the corner to receive and discharge passengers. Another passenger alighted before plaintiff, who was stepping down from the platform of the rear vestibule, when the car started

forward with a jerk and threw him to the pavement. Plaintiff testified:

"Q. Was the car then standing still? A. The car was standing still, because a party got off prior to me. Q. You followed close behind that party? A. I was right behind that party. Q. What occurred after that? A. The car moved suddenly, as I put this foot down on the step after the other party had alighted from the car, and it threw me right off. This foot was still on the top platform, and this foot was on the step, something similar to that (showing). Then the car started with a jerk forward, and I lost my balance. Q. I understand you were standing with one foot on one step and the other on another? A. Yes; getting off, naturally. Q. And you were facing which way? A. I was facing east."

There is other testimony introduced by plaintiff which tends to show that the conductor gave the signal to start the car while plaintiff was stepping from the vestibule, and before he had been given a reasonable opportunity to alight in safety. His right ankle was fractured, his face cut and scratched, and he received some other minor injuries. He was confined to his bed ten weeks, and during that time was under the care of his physician. At the time of the trial he had fully recovered with the exception of having a weak ankle. He was a practicing dentist, employed at a salary of \$35 per week, with the privilege of practicing on his own account, and his total earnings amounted to \$50 per week. In substance, he states that during the ten weeks he was bedfast he was deprived of this income.

The conductor, introduced as a witness by defendants, testified that plaintiff was under the influence of liquor, and when he boarded the car told the witness that he desired to alight at Eighth and Charlotte streets. When that place was reached the car came to a full stop, and the witness called "This is Charlotte." Plaintiff replied, "All right," arose from his seat, and proceeded to the rear exit. The witness states:

"I opened the door, and I saw he wasn't making very good at getting off. It was so slick I was afraid he would fall, and I stepped back and looked out and saw him off in safety. I was afraid he would get behind the back end of the car and across on the other track and a car would run over him. He started towards the sidewalk like this was the car; stopped here. He went this way (indicating)—angling—towards the sidewalk. After he was at least eight or ten feet from the car, walking towards the sidewalk, I gave the motorman the bell to go ahead and closed the door, and we went on."

Counsel for defendants do not contend that the evidence of plaintiff was insufficient to support the pleaded cause of action, but complain of the instructions given at the request of plaintiff. The principal objections relate to the first instruction, which is as follows:

"The court instructs the jury that, if you should find and believe from the evidence that on February 5, 1913, at about the hour of 7 p. m., plaintiff was a passenger upon an Independence avenue car, controlled and operated by the defendants herein, running eastward over and upon Eighth street, in Kansas City, Mo., and that, before said car had reached

Charlotte street, a signal was given by the plaintiff, or some other passenger thereon, to stop said car at Charlotte street for the purpose of allowing passengers to alight therefrom, and that said car was thereafter stopped at or near the intersection of said Charlotte street with Eighth street, and at the usual and customary place where said east-bound cars were accustomed to stop for the purpose of discharging or receiving passengers, and if you should further find and believe from the evidence that plaintiff, at said time and place, attempted to alight therefrom by the way of the rear vestibule thereof, and that, while he was attempting so to do (if you find he was so attempting), and while said car was standing (if you find that the same was standing at said time), employees of the defendants in charge of and operating said car, at said time and place, carelessly and negligently, and without warning to plaintiff, caused or permitted said car to be started suddenly forward, and before the plaintiff had alighted therefrom, or had reasonable time so to do, and, that, by reason of said car being so started (if you find it was), the plaintiff was thrown therefrom to and upon the street, and injured, and if you should further find and believe from the evidence that the agents, servants, and employees of the defendants in charge of and operating said car, by the exercise of the highest degree of care which would have been used by careful and skillful street railroad employees, under like circumstances, could have prevented such movement of said car at said time, and thereby have averted the injury to the plaintiff, and failed so to do, and if you further find and believe from the evidence that plaintiff, while in his attempt to alight from said car, was exercising ordinary care for his own safety in doing so, under the circumstances as shown you in the evidence, then the plaintiff is entitled to recover in this action, and you will assess his damages in accordance with another instruction given you herein."

[1] The first objection to this instruction is:

"That it did not require the jury to find from the evidence that defendants' servant [the motorman] knew or by care could have known that plaintiff had not safely alighted or was in the act of alighting from the car at the time the car was started forward."

The witnesses for both parties agree that the conductor was looking at plaintiff while he was proceeding to alight, and the conductor asserts that he took special pains on account of plaintiff's intoxication to see that he reached the pavement in safety. Plaintiff denies that he was intoxicated, and states facts which show that he was alighting with reasonable care and expedition when the conductor, with actual knowledge of the situation, negligently gave a premature signal to start. In such state of evidence there was no issue to submit to the jury relating to the conductor's knowledge of the passenger's movements and disclosed purposes, and the only issue of fact was whether or not the car started while plaintiff was in the act of alighting. *Alten v. Railway*, 133 Mo. App. 425, 113 S. W. 691; *Green v. Railway*, 122 Mo. App. 647, 99 S. W. 28; *Nelson v. Railway*, 113 Mo. App. 702, 88 S. W. 1119; *Hurley v. Railway*, 120 Mo. App. 262, 96 S. W. 714. The function of the jury is to determine pertinent issues of fact, and where a constitutive fact is conceded, it is not in issue, and needs not be mentioned in the in-

structions. This point must be ruled against defendants.

[2] Next it is argued that it was error to employ the term "carelessly and negligently" without defining its meaning. In *Magrane v. Railway*, 183 Mo. loc. cit. 132, 81 S. W. 1161, the Supreme Court say of a similar objection:

"Where, as in this case, there is no instruction defining 'negligence,' the question submitted to the jury should be, not whether the act was done negligently, but whether in doing it the defendant observed the degree of care required, and that degree should be stated in the instruction. If, however, the term 'negligence' is defined in any of the instructions, the question of whether the defendant did the act complained of negligently may be put in that form to the jury. But for the same reason above given in regard to the other instructions the errors in them do not affect the merits of the case."

It is enough to say of the omission to define the words that the facts hypostatized in the instruction, if true, constituted negligence in law, and for plaintiff to be entitled to recover it was not necessary to require the jury to find that the act of suddenly starting the car while he was alighting therefrom, with full knowledge of the conductor, was negligence. The instruction properly submitted the issues of fact presented by the pleadings and evidence.

[3] The objections to plaintiff's instruction on the measure of damages are not well grounded. It was not error to authorize the jury to take into account "such pain of body and mind, if any, as in all reasonable probability he will suffer in the future and as a direct result of his said injuries, if any," in view of evidence which tended to show that his ankle was weak and might reasonably be expected to cause him some future pain and inconvenience.

[4] The evidence of loss of earnings was not as explicit as it might have been, but we think plaintiff is to be understood as saying that he had lost his earnings during the period he was confined to his bed. An objection was offered to the testimony of plaintiff that he was receiving a salary of \$35 per week. The ground of the objection, which was overruled, was that such employment was not alleged in the petition. The pertinent allegation is that:

"Plaintiff has been and will be compelled to lose much valuable time and money by reason of his being unable to perform the duties necessary and incident to his profession and employment."

The term "employment" does not necessarily import an engagement or rendering service for another," but may refer either to such service, or to a vocation, business, or profession followed or practiced independently. *State v. Canton*, 43 Mo. 48. As used in the petition, it referred to the practice of the profession of dentistry, which was plaintiff's vocation, and, since the petition did not specify either that he was practicing independ-

ently or as the paid assistant of another dentist, we think plaintiff was entitled to show the different sources and receipts from the practice of his profession which was his "employment." The objection was properly overruled.

The judgment is affirmed. All concur.

DANCIGER et al. v. AMERICAN EXPRESS CO. (No. 11674.)

(Kansas City Court of Appeals. Missouri.
Oct. 4, 1915. Rehearing Denied
Nov. 1, 1915.)

1. CARRIERS \Leftrightarrow 90—EXPRESS COMPANY—"C. O. D."

A shipment of liquor by an express company "C. O. D." means that the purchase price of liquor shall be collected by the company from the consignee upon delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 331-337; Dec. Dig. \Leftrightarrow 90.]

For other definitions, see Words and Phrases, First and Second Series, C. O. D.]

2. CARRIERS \Leftrightarrow 90—EXPRESS COMPANY—DELIVERY C. O. D.

An express company is not required by its common law duty to receive, transport, and deliver packages C. O. D., as the duty of making such delivery arises solely by private contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 331-337; Dec. Dig. \Leftrightarrow 90.]

3. CARRIERS \Leftrightarrow 90—EXPRESS COMPANY—DELIVERY C. O. D.—EXCUSE—POLICE REGULATION.

An express company which by temporary order of the United States Circuit Court had been compelled by plaintiffs to accept their shipments of liquor C. O. D., which delivery was subsequently declared unlawful without license taxes, liability to penalties, etc., by a valid statutory regulation, was thereby excused from refusing to deliver on C. O. D. terms, as in such case the executory feature of its contract was annulled.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 331-337; Dec. Dig. \Leftrightarrow 90.]

4. INJUNCTION \Leftrightarrow 164—TEMPORARY ORDER—VACATION.

The United States Circuit Court entering a temporary order requiring an express company to make C. O. D. deliveries of intoxicating liquor to consignees, in force only "until the further order of the court," had inherent power at any time to vacate or set aside the order.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 349, 350; Dec. Dig. \Leftrightarrow 164.]

5. CARRIERS \Leftrightarrow 45—EXPRESS COMPANY—C. O. D. DELIVERY OF LIQUORS—INJUNCTION.

A shipper of intoxicating liquors was not entitled to an order of the United States Circuit Court requiring a C. O. D. delivery or to any rights thereunder, since it was a compelling of the express company to contract against its will in regard to matters having nothing to do with its duty as a common carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 120, 123-128; Dec. Dig. \Leftrightarrow 45.]

6. CARRIERS \Leftrightarrow 90—EXPRESS COMPANY—VIOLATION OF INJUNCTION.

An express company which had received packages of intoxicating liquor for C. O. D. delivery under the compulsion of an injunction order issued out of the United States Circuit Court, on the subsequent enactment of a law making C. O. D. deliveries unlawful without license taxes, etc., might call the court's atten-

tion to that fact, and was not required to complete its executory contract by a violation of the law and to trust to the preliminary order or to the shipper's bond or supposed personal solvency to indemnify it from loss by reason of violating the law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 331-337; Dec. Dig. § 90.]

7. CARRIERS § 90—EXPRESS COMPANY—INJUNCTION—RIGHTS OF SHIPPER.

A shipper of intoxicating liquors for delivery C. O. D. by an express company compelled to make such delivery under a temporary order of mandatory injunction from a United States Circuit Court acquired no vested rights under the order, as the right to have the express company collect was a right arising solely through private contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 331-337; Dec. Dig. § 90.]

8. INTOXICATING LIQUORS § 6—REGULATION—POLICE POWER.

The traffic in intoxicating liquors does not stand upon the same basis as other commercial occupations, but derives its authority, not from natural right, but only from statute, and a shipper's right to an express company's provisions of its contract to deliver intoxicating liquors C. O. D. is always subject to the police power of the state by regulation, restriction, or prohibition.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4; Dec. Dig. § 6.]

Appeal from Circuit Court, Jackson County; William O. Thomas, Judge.

Action by M. O. Danciger and another, partners doing business under the firm name and style of the Harvest King Distilling Company of Dallas, Tex., against the American Express Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

See, also, 179 S. W. 800.

I. J. Ringolsky and Harry L. Jacobs, both of Kansas City, for appellants. Ashley & Gilbert, of Kansas City, for respondent.

TRIMBLE, J. [1] Plaintiffs, as partners, were engaged in the mail order liquor business in the city of Dallas, Tex., under the name of the Harvest King Distilling Company. Their method of business was that, upon receipt through the mail of orders from individuals throughout the state of Texas, plaintiffs would ship the liquor C. O. D., which means, of course, that the purchase price of the liquor should be collected by the carrier from the consignee upon delivery.

Influenced by certain legislation of the state of Texas, enacted for the purpose of regulating and restricting the shipment of intoxicating liquor into local option districts, the express company adopted a rule refusing to receive at any point in Texas C. O. D. shipments of intoxicating liquors destined to local option points in said state, by whomsoever tendered, on the ground that it was no part of its public duty as a common carrier to collect from the consignee, and remit to the consignor, the purchase price of the goods carried. Thereupon suit was instituted in the United States Circuit Court for the Northern District of Texas against the

express company for an injunction against said rule, and a temporary writ was issued commanding the company "to accept, receive, and transport to any point or points within the state of Texas" where an express office was maintained any and all C. O. D. packages of intoxicating liquors tendered to it "until the further order of the court." In obedience to this temporary order, and solely because of it, the express company abandoned its rule, and received of plaintiffs 615 packages of intoxicating liquor consigned from Dallas, Tex., to various individuals throughout that state, on C. O. D. terms. Under the contract of carriage defendant was thus compelled to enter into, it agreed to carry the packages to destination, hold the same for 30 days for delivery to the consignees, and, upon delivery, to collect the purchase price, and remit to plaintiffs less a small charge for said service of collection and remittance. The contract further provided that:

"This company is not to be held liable for any loss or damage except as forwarders only, nor for any loss, damage, or delay by * * * the restraints of government."

"If any sum of money besides the charges for transportation is to be collected from the consignee on delivery of the above-described property, and the same is not paid for, or if in any case the consignee cannot be found, or for any other reason it cannot be delivered, the shipper agrees that this company may return said property to him subject to the conditions of this receipt, and that he will pay all charges for transportation," etc.

The express company carried said packages to the various points of destination, but, before delivery could be effected, the Legislature of Texas enacted a statute, and put it into immediate effect, imposing on all persons and corporations carrying liquors C. O. D. an occupation tax of \$5,000 a year on each C. O. D. office maintained therein, and granting to the county and city in which the office was located the right to levy an additional \$2,500 a year each, making a total tax of \$10,000 on every office where liquors were delivered C. O. D., and providing enormous penalties for failure to comply therewith. Under this act, for the company to engage in the C. O. D. transportation of intoxicating liquors, it would have been required to pay an occupation tax of \$1,330,000 yearly—a sum far in excess of its entire revenue from all sources in the state.

The day said law went into effect the United States Court, in the injunction suit which was still pending therein, on motion of defendant, suspended its temporary order requiring the express company to "accept, receive, and transport" C. O. D. liquor shipments, and dissolved the temporary injunction issued in the case; and later, upon a hearing duly had, said court refused to restate said temporary order or to issue an injunction commanding the company to "receive, convey, and deliver" C. O. D. shipments of liquor, and thereupon dismissed said suit.

When the United States court abrogated the temporary order under which the express company had been compelled by plaintiffs to accept their C. O. D. shipments, the express company notified plaintiffs that it could no longer make delivery of C. O. D. shipments, and sought to obtain permission of plaintiffs to deliver without collecting the purchase price, but plaintiffs refused to grant this permission. The express company then transported the packages back to Dallas, and turned them over to plaintiffs after collecting return charges thereon.

This suit is to recover damages for refusing to deliver on C. O. D. terms the 615 packages of liquor. The trial court rendered judgment for defendant, and plaintiffs have appealed.

[2] It must be kept constantly in mind that the defendant did not refuse to perform its common-law duty to receive, transport, and deliver the packages. It only refused to deliver upon C. O. D. terms, which required the company to collect the purchase price and remit to plaintiffs. The duty to do this was not imposed by law, but arose solely by virtue of private contract. *Rosenberger v. Pacific Express Co.*, 258 Mo. 97, 167 S. W. 429.

[3] The Texas law above referred to rendered a delivery of intoxicating liquor on C. O. D. terms unlawful, and excused the express company from performing that feature of its contract. *Craddock v. Wells Fargo Co.* (Tex. Civ. App.) 125 S. W. 59. It was a police regulation, and excused the defendant's refusal to so deliver. *Rosenberger v. Pacific Express Co.*, supra, 258 Mo. loc. cit. 111, 167 S. W. 429. So far as the particular breach of contract relied on herein is concerned, the case is precisely in the same situation as where one contracts to do an act lawful at the time the contract is entered into, but before the act is performed the law declares that act illegal. In such case the executory features of the contract are thereby annulled. *Church v. New York*, 5 Cow. (N. Y.) 538; *Cordes v. Miller*, 39 Mich. 581, 33 Am. Rep. 430; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079.

But plaintiff says the passage of the Texas act did not excuse delivery of the shipments on C. O. D. terms, because the Legislature has no power to interfere with the courts. We have no desire to question the well-established rule that, where rights have become vested and established by the final judgment of a court having jurisdiction to act, those rights are beyond the power of the Legislature to annul or destroy. But that principle is not involved here, and neither is the freedom of the judiciary from encroachment on the part of the legislative branch of government.

[4-6] The order made by the United States court was not a final judgment adjudicating or fixing the rights of the parties. It was a mere temporary order in force only "until the further order of the court." 10 Ency. of

Pl. & Pr. 1011. The court had inherent power at any time to vacate or set aside its temporary order, and whatever rights plaintiff obtained under said order were subject to that inherent right. In fact, plaintiff was not entitled to have the order made or to any rights thereunder, since it was a compelling of the express company to contract against its will in regard to matters having nothing to do with its duty as a common carrier. *Danciger v. Wells Fargo & Co.* (C. C.) 154 Fed. 379; *H. Clark & Sons, Inc., v. Southern Express Co.* (D. C.) 203 Fed. 588. Hence the court very properly rescinded it. And, as the express company had been compelled to enter into contracts it did not wish to enter into, and which it was not required as a common carrier to enter into, it had the right to contest the matter at every stage of the proceeding. And the moment the Texas Legislature enacted a law making the enforced executory contract unlawful, the express company had the right to call the court's attention to this fact. It did not have to violate the law and trust to the shield of the court's preliminary order, or to the little bond of \$2,000 given by plaintiffs when the preliminary order was obtained, or to plaintiffs' supposed personal solvency, however large that may be, to indemnify it from loss by reason of violating the law. If performance subsequently became unlawful without the carrier's fault, it is not required to violate the law in order to comply with its contract. *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579. Nor was there any clash between the United States court and the Texas Legislature. Before the passage of the act the court, at plaintiffs' instance, compelled the express company to accept C. O. D. liquor shipments until further orders. But the moment the Texas act was passed the court abrogated its order, and rightly did so, since it was one plaintiff was never entitled to have, and, in its nature, was merely temporary and provisional. The many cases cited by plaintiff where legislative acts have not been allowed to interfere with the orders of courts made prior to the enactment of the legislation were cases in which final judgments had been rendered under laws then in force and rights thereunder had become fully vested.

[7, 8] But no vested rights were acquired by plaintiffs under the order of court in the case at bar. In the first place, the right to have the express company collect the purchase price of intoxicating liquors delivered within the state of Texas was a right arising solely through private contract. The right to have performance of such a contract was at all times subject to the police power of the state government to regulate, restrict, and forbid, since the traffic in intoxicating liquors does not stand upon the same basis as other commercial occupations, but derives its authority, not from natural right, but

only from statutory authority. *State v. Parker Distilling Co.*, 236 Mo. 219, loc. cit. 253, 139 S. W. 453; *Rosenberger v. Pacific Express Co.*, 258 Mo. 97, loc. cit. 109, 167 S. W. 429. Hence, when plaintiff contracted in Texas with defendant to have it deliver intoxicating liquor in Texas and collect the purchase price, it made such contract subject to the right of the state to pass laws forbidding the performance thereof. And if, at any time before the fulfillment of such contract, and while it yet remained executory as to any feature of it, the state forbids the doing of the unperformed act, the contract therefor is annulled. And the parties, in making their contract, seemed to have had in mind the possibility of such a contingency; for they stipulated therein that the express company was "not to be held liable for any loss or damage, except as forwarders only, nor for any loss of damage * * * by the restraints of government," etc. In view of all of which, it is difficult to see how plaintiffs can lay claim to any vested rights by reason of the contract it succeeded, though without right, in forcing upon defendant.

In the case of *Rosenberger v. Pacific Express Co.*, supra, the defendant voluntarily entered into the contract, and yet the Supreme Court held the contract was annulled. We cannot see how plaintiffs can occupy any better position by reason of having forced a contract upon defendant against its will.

The locus of the contract herein, as well as the place of its performance, were all in the state of Texas. The cause of action arose there. The suit, if brought there, would have failed under the ruling in *Craddock v. Wells Fargo Express Co.* (Tex. Civ. App.) 125 S. W. 59, and our own Supreme Court has followed this case, and, if possible, has extended its scope and effect.

The judgment is affirmed. All concur.

DANIGER et al. v. ATCHISON, T. & S. F. RY. CO. (No. 11677.)

(Kansas City Court of Appeals. Missouri.
Oct. 4, 1915. Rehearing Denied
Nov. 1, 1915.)

1. CARRIERS \Leftrightarrow 140—CARRIER AS WAREHOUSEMAN—CHANGE IN NATURE OF LIABILITY.

When a shipment arrives on time, and the transit is ended, and the carrier puts the goods in its warehouse to await delivery to the consignee, its liability as carrier ceases, although no notice is given to the consignee, and it is thereafter liable only as a warehouseman; but the liability of a carrier does not cease immediately upon the prompt arrival of goods at its destination, but only after the lapse of a reasonable time for their removal by the consignee, and the time when the liability as carrier ceases may depend upon special contracts or local custom.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 609, 609½, 611-616; Dec. Dig. \Leftrightarrow 140.]

2. CARRIERS \Leftrightarrow 92—CARRIAGE OF GOODS—LIABILITY AS WAREHOUSEMAN—TIME FOR REMOVAL.

Where the consignees of shipments of intoxicating liquor which arrived at defendant's station at C. on August 21st and 22d did not live at C., the reasonable time allowed the consignees before liability as carrier ceased had not elapsed when a federal officer seized the liquor on August 22d and 23d.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 343, 364-366; Dec. Dig. \Leftrightarrow 92.]

3. CARRIERS \Leftrightarrow 92—DELIVERY OF GOODS—EXCUSE—PROCESS OF LAW.

The strict rule of the common law whereby a carrier could not escape liability for failure to deliver goods received for carriage, except by showing that such failure was caused by the act of God or the public enemy, has been modified so as to excuse the carrier from liability where the goods have been taken from his possession by process of law, without any fraud, collusion, or consent on its part, by an officer of the law acting under authority apparently valid on its face, and when it notifies the consignor of such seizure.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 343, 364-366; Dec. Dig. \Leftrightarrow 92.]

4. CARRIERS \Leftrightarrow 92—FAILURE TO DELIVER GOODS—TAKING UNDER PROCESS OF LAW—NOTICE TO CONSIGNOR.

The notice which a carrier is required to give to the consignor of goods which have been taken from its possession by process of law is to enable the consignor to protect his interest, and was satisfied by a notice given shortly after the property was taken, when, under the circumstances, no notice could possibly have given the consignor an opportunity to protect himself.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 343, 364-366; Dec. Dig. \Leftrightarrow 92.]

5. CARRIERS \Leftrightarrow 92—CARRIAGE OF GOODS—TAKING UNDER PROCESS OF LAW—LIABILITY FOR DESTRUCTION.

Where an officer of the United States Indian Service engaged in the suppression of the liquor traffic took intoxicating liquors from defendant's possession at its station in Kansas, near the "Indian country" in Oklahoma, the carrier could not be held liable to the shipper for its loss, where the officer had authority to seize the goods, even though he thereafter destroyed them, since his act in destroying them was his own act, with which the carrier had nothing to do.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 343, 364-366; Dec. Dig. \Leftrightarrow 92.]

6. INDIANS \Leftrightarrow 35—INTRODUCING LIQUORS INTO INDIAN COUNTRY—RIGHT TO SEIZE—STATUTE.

Under Act Cong. March 1, 1907, c. 2285, 34 Stat. 1017 (U. S. Comp. St. 1913, § 4142), giving the special agent of the Indian Bureau for the suppression of liquor traffic among Indians and in the Indian country, and his deputies, the powers conferred on Indian agents and the commanding officers of military posts by Rev. St. U. S. § 2140 (U. S. Comp. St. 1913, § 4141), providing that, if an Indian agent has reason to suspect or is informed that any white person, etc., is about to introduce any spirituous liquor into the Indian country in violation of law, he may search such person's place of deposit, and shall seize any liquor found and deliver it to the proper officer, to be proceeded against by libel and forfeited, an Indian officer who suspected that intoxicating liquor in the wareroom of a carrier's station in Kansas, about half a mile from the "Indian country" in Oklahoma, was consigned to parties in the Indian

country, had a right to seize it and take it from the carrier's possession.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 61, 62; Dec. Dig. ¶35.]

7. CARRIERS ¶92—TRANSPORTATION OF LIQUOR—SEIZURE — DUTY OF CARRIER — CONSTRUCTION OF LAW.

Where an officer of the United States Indian Service, under the statute and his commission, had apparent authority to take from a carrier's possession liquors which he suspected were to be introduced into the Indian territory, the carrier, as against the consignor suing for their loss, was not bound to construe the statute, nor foresee a subsequent ruling that the officer had no real authority to act outside his territory.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 343, 364-366; Dec. Dig. ¶92.]

8. CARRIERS ¶92 — CARRIAGE OF GOODS — SEIZURE UNDER PROCESS OF LAW—RESISTANCE.

In such case the carrier's agent was not required to resist the officer's taking and attempt to decide the question of law himself, since the officer's apparent authority to take the liquor was the highest form of vis major; and, at any rate, his failure to resist could not be taken a consent to the taking.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 343, 364-366; Dec. Dig. ¶92.]

9. COURTS ¶231 — MISSOURI APPELLATE COURT—CERTIFICATE TO SUPREME COURT.

Where a former decision of the Springfield Court of Appeals held that an Indian officer had no authority to act outside of the Indian country, the Kansas City Court of Appeals, holding that such officer might act outside the Indian country in taking liquor about to be introduced therein, was required to certify the case to the Supreme Court for final adjudication.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. ¶231; Appeal and Error, Cent. Dig. § 1773.]

Appeal from Circuit Court, Jackson County; Wm. Q. Thomas, Judge.

"Not to be officially published."

Action by Joseph Danciger and others against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed, and cause certified to the Supreme Court.

See, also, 179 S. W. 797.

Thomas R. Morrow, George J. Mersereau, and John H. Lathrop, all of Kansas City, for appellant. I. J. Ringolsky and Harry L. Jacobs, both of Kansas City, for respondents.

TRIMBLE, J. Plaintiffs, a partnership, under the name of Danciger Bros., carry on a mail order liquor business in Kansas City, Mo. They sue for the loss of six shipments of intoxicating liquor over defendant's railroad from Kansas City, Mo., to Caney, Kan. The suit began in a justice court, and is in six counts, one for each shipment, all being made under separate shipping contracts. Those in counts 1 and 2 provided that the goods were shipped to the order of Danciger Bros., with a provision in the first that the carrier should "notify Raymond Edwards," and in the second that it should "notify Tom

Brown." In the other four contracts the goods were consigned directly to the respective persons named therein, with no provision requiring the carrier to notify any one. All of the contracts provided that the carrier should hold the goods a certain number of days after arrival at destination, and, if not accepted in that time, they were to be returned to shipper. In the first three contracts this period was 10 days, and in the last three it was 15 days. In the first two, those in which the goods were sent to shipper's order, the surrender of the original bill of lading, properly indorsed, was required before delivery. The conditions on the back of all of them provided that the carrier should be liable for any loss of the goods, except that "caused by the act of God, the public enemy, quarantine, the authority of law," etc. The shipments in counts 1, 4, 5, and 6 were made August 20, 1912, and arrived at Caney, Kan., August 21, 1912. The one in count 2 was made August 21st and arrived August 22d, while the one in the third count was made August 8th, and arrived August 9th. So that all the shipments were transported without delay, and reached Caney the next day after they were shipped.

Caney, Kan., is located within a half or three-quarters of a mile of the "Indian country" in Oklahoma. The United States laws for the suppression of the liquor traffic among Indians and in the Indian country were very stringent, and the government was actively engaged in the enforcement thereof. On the evening of August 22, 1912, a deputy special officer of the United States Indian Service, engaged in the suppression of the liquor traffic, discovered the liquor covered by the shipments in question, together with a large number of other liquor shipments, in the wareroom of defendant's station at Caney. He informed the station agent that he was a United States officer, told him the business he was engaged in, and asked the agent if he knew the consignees of the liquor, where it was destined, and whether or not it was going into prohibition country in Oklahoma. The agent, not knowing any of the consignees or persons to be notified nor where they lived, told the officer he did not know where the liquor was going. Thereupon the officer demanded that he hold the liquor until investigation could be made as to its intended introduction. The agent asked for his credentials, and the officer showed him his appointment and commission, and served written notice on him directing the agent to hold all liquors in his possession until further notice from the officer. Thereupon the agent wired his superintendent that he had been served with notice from the deputy special officer of the United States (giving his name and the number, date, and signature on his commission) to hold all intoxicating liquor until further notice, and asked

for advice quick. At 8:55 the next morning the agent received a telegram from the superintendent which asked if the order applied to all liquor on hand, regardless of territory into which the same was going, and closed by saying: "Handle as per officer's orders until advised." Shortly thereafter, on the same morning, to wit, the 23d of August, the United States officer appeared at the station in company with the sheriff of Montgomery county, in which Caney is located, and the two officials went into the wareroom and looked over the various liquor shipments that were there, package by package. They took the numbers, and went over the names of the consignees or persons to whom notification was required, with particular reference to whether the parties to whom the liquor was sent lived in the Indian country of Oklahoma or in Kansas; and all packages of liquor the officers found destined for the Indian country were checked and separated from the liquor intended for parties living in Kansas. Then the United States officer got two wagons and hauled away the liquor destined for the Indian country. The liquor going to those residing in Kansas was not molested. After the officer had taken the liquor out of the depot and away from defendant's premises, he destroyed it.

The suit is bottomed upon the common-law liability of the carrier as an insurer. Each count in the petition alleges that defendant is a common carrier for hire, and that the goods therein mentioned were delivered to it for transportation, and that it neither delivered the goods to the consignee nor returned them to the shippers. The contracts all provide, as hereinbefore stated, for a holding of the liquor a certain number of days, and from this defendant argues that its liability, if any exists at all, is that of a warehouseman, and not that of a carrier. The question would then arise: Did the relation of carrier cease and that of warehouseman begin? If so, when? In the last four counts there is no provision in the contracts requiring the carrier to notify the consignee; while in the first two there is such a provision. There was no delay in the carriage of the goods. They all arrived promptly.

[1] Missouri seems to have adopted the Massachusetts rule (slightly modified) as to the time when a carrier's liability changes to that of a warehouseman; namely, that when the shipment arrives on time, and the transit is ended, and the carrier has put the goods in its warehouse to await delivery to the consignee, its liability as carrier ceases, although no notice is given to the consignee, and the carrier is thereafter liable as warehouseman only. *Gashweiler v. Wabash, etc.*, R. Co., 83 Mo. 112, 53 Am. Rep. 558; *Standard Milling Co. v. White Line, etc.*, Transit Co., 122 Mo. 258, 26 S. W. 704; *Rankin v. Pacific Railroad*, 55 Mo. 167; *Cramer v. American Merchants', etc.*, Express Co., 58

Mo. 524; *Holtzclaw v. Duff*, 27 Mo. 395. Our authorities also hold that the time when the liability as carrier will cease may depend upon special contract or a local custom. *Gashweiler v. Wabash, etc.*, R. Co., supra, 83 Mo. loc. cit. 120, 53 Am. Rep. 558; *Frank v. Grand Tower, etc.*, R. Co., 57 Mo. App. 181. Consequently, as to the first two counts, the provision for notification might require notice to be given before the liability as carrier would cease. Again, so far as they, as well as the last four counts, are concerned, our courts hold that the liability of carrier does not cease immediately upon the prompt arrival of goods at their destination, but only after the lapse of a reasonable time for its removal by the consignee. *Scott County Milling Co. v. St. Louis, Iron Mountain, etc.*, R. Co., 127 Mo. App. 80, loc. cit. 92, 104 S. W. 924; *Pindell v. St. Louis, etc.*, R. Co., 34 Mo. App. 675; *Bell v. St. Louis & Iron Mountain R. Co.*, 6 Mo. App. 363.

[2] The evidence seems to show that the consignees did not live in Caney, and hence, except as to the shipment in the third count, the reasonable time allowed the consignees before liability as carrier would cease had not elapsed at the time the officer seized the goods. As to the third count, the defendant had held it more than the ten days required, but, if the agreement to return the goods to shipper at the expiration of the ten days had the effect to reinstate the status of carrier, then defendant cannot claim it was a warehouseman as to it. We do not say that it did reinstate such status, but merely that, if it did so, then even the third count cannot be dealt with on the theory that defendant was merely a warehouseman. We shall, therefore, treat the entire case upon the theory that defendant's relation to all of the shipments was that of carrier, and not warehouseman.

[3] By the strict rule of the common law a carrier could escape liability for failure to deliver goods received by him for carriage only by showing that such failure was caused by act of God or the public enemy. But "this stringent rule has been modified so as to excuse the carrier from liability where the goods have been taken from his possession by process of law, provided the carrier gives prompt notice of such seizure to his bailor." *Kohn v. Richmond, etc.*, R. Co., 37 S. C. 1, 16 S. E. 376, 24 L. R. A. 100, 34 Am. St. Rep. 726. In *Stiles v. Davis*, 1 Black, 101, loc. cit. 106, 17 L. Ed. 33, the Supreme Court of the United States say:

"It is true that these goods had been delivered to the defendant, as carriers, by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs."

In *Pingree v. Detroit, etc., R. Co.*, 66 Mich. 143, loc. cit. 145, 33 N. W. 298, 299 (11 Am. St. Rep. 479), it is said that, if a carrier "is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority." In *Railroad Co. v. O'Donnell*, 49 Ohio St. 489, loc. cit. 500, 32 N. E. 476, 479, it is said:

"The rule seems to be now established that a common carrier is not liable, if the goods be taken from his possession by legal process against the owner, or if, without his fault, they become obnoxious to the requirements of the police power of the state, and are injured or destroyed by its authority; as where they are infected with contagious disease, or are intoxicating liquors intended for use or sale in violation of the laws of the state, which require their seizure and destruction."

In *McAllister v. Chicago, etc., R. Co.*, 74 Mo. 363, it was held that the carrier was not bound to know whether a statute under which cattle carried by it were seized was constitutional or not, and if the process was not void on its face, the carrier was not liable.

In *Ohio, etc., R. Co. v. Yohe*, 51 Ind. 181, loc. cit. 184 (19 Am. Rep. 727), it is said:

"The carrier is deprived of the possession of the property by a superior power, the power of the state—the vis major of the civil law—and in all things as potent and overpowering, as far as the carrier is concerned, as if it were the 'act of God or the public enemy.' In fact, it amounts to the same thing; the carrier is equally powerless in the grasp of either."

See, also, *Southern Express Co. v. Sottile Bros.*, 134 Ga. 40, 87 S. E. 414; *Robinson v. Memphis, etc., R. Co. (C. C.)* 16 Fed. 57.

In *Southern R. Co. v. Heymann*, 118 Ga. 616, loc. cit. 622, 45 S. E. 491, 493, it is said:

"Like every other person, the carrier is bound, both by duty and necessity, to respect and yield to the paramount public authority in power at the place where his undertaking is to be performed. * * * If the goods, without his fault, are or become obnoxious to the requirements of the police power of the state, and are injured or destroyed by its authority, as in the case of * * * intoxicating liquors intended for use or sale in violation of law, the carrier cannot be held liable." *Hutch: Car. (2d Ed.)* §§ 210b, 210c. The reason for such a rule is at once apparent; for to hold that a railroad company is bound to resist the lawful authority in protecting the goods of a shipper would be to lay down a doctrine dangerously approaching anarchy. In the present case it was in evidence that the whisky was seized by duly appointed officers of law of the state of South Carolina, and that they were acting within the authority of a statute of that state. We are not prepared to hold that the railroad company was bound to test the validity of the statute under which the goods were seized, by resisting the seizure; for to do so would be to entirely change the contract of carriage and impose upon the carrier a burden greater than it undertook, or in reason and common sense ought to bear."

While this case was reversed by the Supreme Court of the United States in 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178, 7 Ann. Cas. 1130, yet it was upon other grounds. So that the old common-law rule that nothing save an act of God or the public enemy can

excuse a carrier for failure to deliver goods intrusted to it for carriage, is not without exception. And that rule has been modified, at least to this extent, that when goods in a carrier's possession have been seized, the carrier will not be liable where: First, there has been no fraud, collusion, consent, or connivance on the part of the carrier; second, where the seizure was made by an officer of the law acting under authority apparently valid on its face; third, that the carrier gave notice to the consignor—this last being for the purpose of enabling him to protect his own interest. Do the facts in the case at bar bring the case within the above exception?

There was no fraud, consent, collusion, or connivance on the part of the agent of the carrier or of the carrier itself. Plaintiff endeavored to get both the agent and the officer to say that the former turned the property over to the latter, but both deny it, and the officer testified that the goods were not released, but that "they were really taken from him," referring to the agent.

[4] As to the notice which the agent was required to give the consignors, the purpose of such requirement is to enable the latter to protect their interests. The notice was given shortly after the property was taken, but, under the circumstances shown in evidence, no notice could possibly have given plaintiffs an opportunity to protect themselves. The liquors were destroyed within a few moments after they were seized and taken away, and, had the agent telegraphed plaintiffs the moment they were seized, it would have availed them nothing, because by the time or before a telegram could have been delivered, the property was no longer in existence. So that, even if the agent had telegraphed the consignors the instant the officer notified him to hold the shipments, it would not have enabled plaintiffs to protect themselves.

[5] Hence the question comes down to the authority of the officer to *take* the goods from the depot. We think the distinction between the officer's right to *take* the goods and his right to *destroy* them upon his own responsibility without waiting for a judgment of condemnation should be carefully preserved. His act of *destroying* the goods was his own act, with which the agent had nothing to do. It was accomplished after he had taken the goods from the agent's possession. So that, if he had authority to *seize* the goods, the defendant should not be held liable, even though the officer had no authority to thereafter *destroy* them.

[6] Chapter 2285, Act March 1, 1907, 34 Stats. at Large, 1017 (U. S. Comp. St. 1913, § 4142), gave the "special agent of the Indian Bureau for the suppression of the liquor traffic among Indians and in the Indian country and duly authorized deputies working under his supervision" the same

powers conferred by section 2140 of the Revised Statutes of the United States (U. S. Comp. St. 1913, § 4141) upon "Indian agents and subagents and commanding officers of military posts."

Section 2140 provides that:

"If any superintendent of Indian affairs, Indian agent, or subagent, or commanding officer of a military post, has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian country in violation of law, such superintendent, agent, subagent, or commanding officer, may cause the boats, stores, packages, wagons, sleds and places of deposit of such person to be searched; and if any such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such person, shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one half to the informer and the other half to the use of the United States; and if such person be a trader, his license shall be revoked and his bond put in suit. It shall moreover be the duty of any person in the service of the United States, or of any Indian, to take and destroy any ardent spirits or wine found in the Indian country, except such as may be introduced therein by the War Department."

Now, the officer who seized the liquor had a proper and legal commission as a deputy special agent, and was, in fact, such officer. And, under the two statutes above mentioned, if he had "reason to suspect" that any person is "about to introduce" any liquor into the Indian country in violation of law, he could cause the store or place of deposit to be searched, and if liquor was found therein, the same could be seized, etc. This he could do summarily and without warrant or process. He was not required to obtain a writ to authorize him to do so. In *Wells v. Maine Steamship Co.*, 29 Fed. Cas. 669, No. 17,401, the seizure was without process by an officer that should have had it, but the carrier was held not liable.

But plaintiffs say the station was outside of the Indian country, and therefore the officer had no authority to seize the liquor, except in such territory, and that, as he had no authority to act outside of his territory, he was a mere trespasser like any other, and the defendant is liable the same as if it had permitted an ordinary trespasser to take it, and a number of cases are cited in support of the contention that he had no such authority outside of Indian country. In our opinion, they do not decide the precise question here presented. In *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471, the plaintiffs had liquor for sale in their store, and the defendants, a captain and lieutenant in the United States army, seized it. They were sued by the merchants, and defended, not upon the ground that the liquor was about to be introduced into Indian country, but on the ground that the place where they found and seized it was Indian country; i. e., that it had already been introduced, and that they had a right to seize it. But the court

held that the place was not Indian country; consequently the plaintiffs had not introduced any liquor. They were not charged with attempting or being about to introduce liquor into forbidden territory. And, since the store where the liquor was kept for sale was not in Indian country, there could have been no foundation for any claim that they were about to introduce it. The court, at page 209 of 95 U. S. (24 L. Ed. 471), says:

"The plaintiffs below violated no law in having the whisky for sale at the place where it was seized."

The case of *Clairmont v. United States*, 225 U. S. 551, 32 Sup. Ct. 787, 56 L. Ed. 1201, was upon an indictment for introducing liquor into Indian country. Of course, if the place where the liquor was seized was not forbidden territory, then the defendant could not be convicted, since he had not introduced it. The court in that case preserves the distinction we are here dealing with, since it says on page 555 of 225 U. S., on page 787 of 32 Sup. Ct. (56 L. Ed. 1201):

"The indictment charged that the plaintiff in error 'did then and there wrongfully and unlawfully introduce' a quantity of intoxicating liquor into, etc. * * * The offense alleged was the introduction of the liquor into the reservation, and not 'attempting to introduce.'"

Again, at page 560 of 225 U. S., on page 790 of 32 Sup. Ct. (56 L. Ed. 1201), the court say:

"To repeat, the plaintiff in error was not charged with 'attempting to introduce' the liquor into Indian country, but with the actual introduction. If having the liquor in his possession on the train on this right of way did not constitute such introduction, it is immaterial, so far as the charge is concerned, whether or not he intended to take it elsewhere."

In *Evans v. Victor*, 204 Fed. 361, 122 C. C. A. 531, defendants, who were government officers, searched plaintiff's drug store in Muskogee, and plaintiff brought injunction to prevent further searches. The defense was that Muskogee was in Indian country, and that defendants had reasonable grounds to believe that plaintiff kept liquors in his store, and that they had a right to search for them. Here again there was no claim that the storekeeper was about to introduce liquor into Indian country, but that his keeping it in his store constituted an introduction already effected. The court held that, as Muskogee was not in Indian country, of course, the keeping of liquors for sale in a store in that city was not the introduction of them into such forbidden territory. The opinion is dealing only with the facts before it, and as the opinion itself says, on page 367 of 204 Fed., on page 537 of 122 C. C. A., quoting from Chief Justice Marshall:

"An opinion in a particular case, founded on its special circumstances, is not applicable to cases * * * essentially different."

The court, in the remarks made in the *Victor Case*, had in mind only the facts before it. With reference to those facts, the

court could rightfully say that the officers were without authority to act outside of the Indian country. That was true when applied to the facts of that case, and, besides, was conceded to be so by the defendants. 204 Fed. 364, 122 C. C. A. 531. So that we have been cited to no case holding that, where the liquor is stored near the line of forbidden territory, consigned to persons who live and operate therein, as the officer testified they did, and by reason of his experience with them before and his knowledge of their operations, he had reason to suspect that the liquor was about to be introduced into the forbidden district, he has no authority to seize, but is powerless to move until after the intending lawbreaker, under cover of the night or some other favorable opportunity, has succeeded in getting it into the district and scattering it among his thirsty patrons. If the statute means that the officer cannot seize until after it is in forbidden territory, then what is the use or meaning of the words "is about to introduce" in the statute? If he can only act within the forbidden territory, then he can never seize any liquor that is "about to be introduced," since then it has already been introduced. The officer in this case was not appointed with authority limited to a particular district, like a constable to a township or a sheriff to a county. He was appointed under the laws of the United States, the government of which extends over all the states as to matters within its jurisdiction. We do not mean to say that an officer could go anywhere in the United States and search for and seize liquor upon the pretext that it was about to be introduced into Indian country, but certainly, where a large consignment of it is sent to a point on the edge of a forbidden district, consigned to parties living and operating therein, then either the officer has a right to seize it if he suspects it is "about to be introduced," or else these words in the statute mean nothing whatever.

The officer says he did suspect it, and the evidence was ample that that was just what was intended to be done with it. Not only did he suspect it, but he carefully checked over the large number of liquor shipments found, and seized only those he thought were going into the Indian country. It is true the statute authorizes the officer to destroy liquor only when it is found in the Indian country, but that does not affect the right given in the first part of the section to seize and take before the proper tribunal, to be proceeded against by libel, any liquor he rightfully suspects is about to be introduced. And, as we have stated, the carrier ought not to be held liable for the officer's misconception of his duty after the goods have been seized and taken away from the possession of the carrier. The carrier had nothing to do with the destruction of the goods; that was an act of the officer only. The act of

the officer affecting the carrier was the seizure.

[7] Under the statute and his commission, he had apparent authority to take it, even if the *Evans v. Victor Case*, when correctly interpreted, means that he had no real authority to act outside the territory. But that case was not decided until April, 1913, and under the ruling in *McAllister v. Chicago, etc., R. Co.*, 74 Mo. 351, the carrier was not bound to construe the statute nor foresee the ruling in the *Victor Case*.

[8] Neither was the agent required to resist the officer and attempt to himself decide the question of law presented. When the officer of the law appeared and showed his authority, his power to take the liquor was more formidable than if the "public enemy" had appropriated it, since he represented the majesty of government, to respect and obey which is the duty of all good citizens. The subject of the shipments was intoxicating liquor, an article subject to the police power of government, and, if about to be introduced into forbidden territory, was contraband. The power of the United States officer, and his determination to take the liquor under authority vested in him by government, was, under such circumstances, the highest form of vis major, and, unless it was the agent's duty to resist the officer, the defendant should not be held liable. In many analogous cases it is held that, even where the officer has apparent authority, he should not be resisted, and this seems to be consonant with law and order and with established forms of government. *Savannah, etc., R. Co. v. Wilcox*, 48 Ga. 432; *Western, etc., R. Co. v. Thomas*, 60 Ga. 314, 27 Am. Rep. 411; *Western, etc., R. Co. v. Thornton*, 60 Ga. 312. In the case of a carrier of passengers it is held that, if the officer is acting within his apparent authority, it is not the duty of the carrier to resist the officer, even though the arrest prove afterwards to be wrongful. *Thompkins v. Missouri, etc., R. Co.*, 211 Fed. 391; *Brunswick R. Co. v. Ponder*, 117 Ga. 63, 43 S. E. 430, 60 L. R. A. 713, 97 Am. St. Rep. 152; *Bowden v. Atlantic, etc., R. Co.*, 144 N. C. 28, 56 S. E. 558, 12 Ann. Cas. 783. In these last cases the liability of the carrier was not that of an insurer, it is true, but the degree of care required was of the highest, and the duty of the carrier not to violate the law by resisting an officer would seem to be the same in both cases. At any rate, his failure to resist cannot be deemed a consent to the taking. However, if we are right in holding that the officer could investigate and seize the liquor, then the failure to resist the officer could have no place in the case. We do not think the officer can be denied that power, under the circumstances disclosed here, without striking out of the statute words which certainly have some meaning and were placed there for a purpose.

[9] However, in *Fehrenback Wine Co. v.*

Atchison, Topeka & Santa Fé Ry., 182 Mo. App. 1, 167 S. W. 631, the Springfield Court of Appeals held that the officer had no authority to act outside of Indian country, following the case of *Evans v. Victor*, supra, without discussing the feature of the statute we have mentioned covering the officer's right to seize liquor when about to be introduced into Indian country. This requires us to certify the case to the Supreme Court for final adjudication.

The judgment is therefore reversed, but the cause is certified to the Supreme Court. All concur.

DANCIGER et al. v. AMERICAN EXPRESS CO. (No. 11679.)

(Kansas City Court of Appeals. Missouri.
July 2, 1915. Rehearing Denied
Oct. 4, 1915.)

1. JUDGMENT \Leftrightarrow 540—CONCLUSIVENESS—IN GENERAL.

Where two actions present the same parties or their privies, the same subject-matter, and the same claim or demand, a judgment in the first action, if rendered on the merits, constitutes an absolute bar to a second action, whether the action be *ex contractu* or *ex delicto*; for the reasons that no one should be twice vexed for the same cause, and that a judgment on the merits destroys a cause of action, which necessarily destroys all its component parts.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1079; Dec. Dig. \Leftrightarrow 540.]

2. JUDGMENT \Leftrightarrow 592—SPLITTING CAUSES OF ACTION—INDEPENDENT CONTRACTS.

Where a demand arises out of separate and distinct causes of action, the rule against splitting causes of action obviously does not apply; and, where the respective demands grow out of independent acts, contracts, or transactions, they cannot be treated as parts of a single cause.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1107; Dec. Dig. \Leftrightarrow 592.]

3. CARRIERS \Leftrightarrow 91—EXPRESS COMPANIES—REDELIVERY—CONVERSION.

An express company receiving shipments of intoxicating liquors to consignees in another state, and which refused to deliver them there because of its laws regulating the delivery of intoxicating liquors, was bound to return the packages to the shipper, and its failure to do so was a breach of contract, giving the shipper the right to sue for a conversion.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 338-355; Dec. Dig. \Leftrightarrow 91.]

4. JUDGMENT \Leftrightarrow 597—CONCLUSIVENESS—SUBJECT-MATTER.

Where plaintiff partnership made a large number of shipments of intoxicating liquors by defendant express company by separate contracts for each shipment, plaintiff's recovery in an action for the conversion of part of the shipments was no bar to a subsequent action for the conversion of the other shipments, because of a lack of identity and of subject-matter and demand in the two actions.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062-1065, 1112; Dec. Dig. \Leftrightarrow 597.]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

Action by Dan Danciger and others, part-

ners doing business under the firm name and style of the Harvest King Distilling Company, against the American Express Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

See, also, 179 S. W. 797, 800.

Ashley & Gilbert, of Kansas City, for appellant. I. J. Ringolsky, of Kansas City, for respondents.

JOHNSON, J. Plaintiffs, who are partners doing business at Kansas City under the firm name of the Harvest King Distilling Company, brought this suit in the circuit court of Jackson county December 30, 1907, for the alleged conversion by defendant of 367 packages of intoxicating liquors of the value of \$1,391.80, which defendant had received as a common carrier for transportation and delivery to various consignees at different points in the state of Mississippi. The petition, which is in one count, contains an itemized list of shipments showing the dates of the respective consignments, the quantity and value of each, the respective destinations, that each was a C. O. D. consignment, and alleges:

"That on or about the 10th day of May, 1906, while said goods [referring to the liquors in all of the shipments], which were then valued at \$1,391.80, were the property of plaintiffs, and while plaintiffs had the right of possession to same, defendant, then being in the possession of said goods, willfully, wantonly, and wrongfully converted the same goods to its own use, and disposed of them to plaintiffs' damage in the sum of \$1,391.80."

The prayer of the petition is for the recovery of such damages and of exemplary damages in the sum of \$400.

The suit was docketed as number 35638, and on the same date plaintiffs filed another suit against defendant in the same court for the conversion of 450 packages of liquors of the total value of \$1,670.45, which the petition alleged plaintiffs delivered to defendant at Kansas City between the dates of April 1 and May 10, 1906, for transportation and delivery to various consignees in the state of Mississippi, and that on or about May 10, 1906, defendant converted the liquors contained in all such packages to its own use. That case, which was docketed as number 35637, was tried without the aid of a jury on an agreed statement of facts, and resulted in a judgment for plaintiffs. An appeal was allowed defendant to the Supreme Court, on the ground that the cause presented a constitutional question, but the Supreme Court held there was no such question in the case, and transferred it to this court. 247 Mo. 209, 152 S. W. 802.

It appeared in that case, as it does in this, that the refusal of defendant to deliver the packages was prompted by the enactment of a law in Mississippi which required "every person or corporation that shall maintain or

operate any office or place of business in this state at which intoxicating liquors legally deliverable, are delivered, upon the payment of purchase money therefor, shall pay annually, for each said office or offices, or place or places of business, the sum of \$5,000.00." The position of defendant was that its refusal to deliver the shipments in the state of Mississippi was compelled by law, and, taking defendant in this position of its own selection, we held that it became its duty to return the different shipments to plaintiffs at their cost for the return carriage, and that defendant had not performed this duty, for the reason that after returning the goods to Kansas City it had tendered them to plaintiffs upon the condition that they "would release defendant from all liability or claim of damages on account of the non-delivery of said packages to consignees." We recognized the rule that a party to a contract must perform or tender performance of the duties it puts upon him without protest, without imposing terms or conditions, and without attempting to force the other party to agree in advance that his proffered performance shall be treated, if accepted, as a full discharge of his liability, and we affirmed the judgment because defendant had not made such unconditional offer to return the goods. *Distilling Co. v. Express Co.*, 172 Mo. App. 391, 158 S. W. 466.

An amended answer filed by defendant in the instant case April 20, 1910, alleged that:

Both suits (Nos. 35637 and 35638) "were for the alleged conversion by defendant of personal property belonging to plaintiffs on or about May 10, 1906, as will more fully appear from an inspection of the pleadings and records of said two suits," and "that the conversion on or about May 10, 1906, if any, was but one transaction, had at the same time and place between the same parties, and that the matter now in controversy was actually determined in the former suit, or might have been litigated under the issues then joined, and the said plaintiffs, having made their election as to the manner and object of their suing, are now barred from suing again for the same transaction; and this defendant says said former suit operates as res adjudicata as to matters and things herein set forth, and this the said defendant is ready to make appear."

The reply filed by plaintiffs met this charge of splitting a single cause of action into two suits with the averment that:

The suit which had proceeded to judgment "was brought to recover damages for conversion of 450 separate packages of liquor, each delivered to defendant for shipment under a separate and distinct contract, and the express charges paid separately by plaintiffs for each of said shipments; that the petition in said case No. 35637 really united in one count 450 causes of action, and should properly have been pleaded in 450 different counts; that the claims were thus charged in one count, by virtue of an understanding and agreement with defendant and its attorneys to avoid a constant repetition of the same cause of action in 450 counts and to prevent a useless and needless incumbering of the record of this court; that defendant waived all objections to plaintiffs' petition on account of same charging and uniting in one count 450 causes of action; * * * and that

in their petition in the cause at bar they have united in one count 367 causes of action, and that defendant and its counsel have waived all objections to the manner and form of plaintiffs uniting in one count said 367 causes of action."

The present suit was submitted to the court September 25, 1911, "upon the evidence of another suit pending as a bar and upon the merits of this cause and an agreed statement of facts," and was kept under advisement until October 3, 1914, when the court rendered judgment for plaintiffs for the full amount of their demand for actual damages, with interest, and defendant appealed.

The facts of the case which bear upon the question presented by defendant for our determination may be condensed into the following statement: At various dates between March 1, and May 10, 1906, plaintiffs, liquor merchants at Kansas City, delivered to defendant 817 different packages of intoxicating liquors on C. O. D. consignments to various customers in the state of Mississippi. Each package was the subject of an independent purchase and of a separate shipping contract. Defendant carried each to its destination in Mississippi, but did not deliver it, on account of the enactment of the statute which imposed such onerous burdens upon express companies engaging in the C. O. D. liquor traffic as to render the further transaction of such business impracticable, if not impossible. Defendant returned all these packages to Kansas City, and conditionally tendered them to plaintiffs, who refused the tender, and, treating it as a constructive conversion of the packages, plaintiffs brought two suits at the same time, in one of which they made the conversion of 450 of the packages the subject of the action, and in the other the conversion of the remaining 367 packages. The judgment recovered by plaintiffs in the first suit is pleaded by defendant as a bar to a recovery in the second, on the theory that the conversion of the entire 817 packages was a single wrong, from which only a single cause of action arose, and that the instant suit must fail under the rule which forbids splitting a cause of action.

[1] The rule in such cases is that, where the two actions present the same parties (or their privies), the same subject-matter, and the same claim or demand, a judgment in the first action, if rendered on the merits, constitutes an absolute bar to the second action. One reason commonly given for the rule lies in the common-law maxim that no one should be twice vexed for the same cause; but, as we observed in *Paving Co. v. Field*, 132 Mo. App. loc. cit. 638, 97 S. W. 179, another reason equally strong is that a judgment on the merits destroys by absorption the cause of action, and the passing of the cause necessarily involves the destruction of all of its component parts. When the body dies, the limbs die also. *Railroad v. Traube*, 50 Mo. 355; *Skeen v. Thresher Co.*, 42 Mo. App. 158; *Bank v. Tracey*, 141 Mo. 252. 42

S. W. 946; *Moran v. Plankinton*, 64 Mo. 337; *Donnell v. Wright*, 147 Mo. 639, 49 S. W. 874; *Paving Co. v. Field*, supra. And it is immaterial whether the action be *ex contractu* or *ex delicto*. If there is identity of parties (or privies), subject-matter, and claim, or demand, in the two actions, a judgment recovered on the merits in one will be a bar to the maintenance of the other. But in instances where the identity of the two actions fails in any one or more of the particulars just stated, a recovery of judgment in one will not avail to bar the prosecution of the other.

[2] Where the demand arises out of separate and distinct causes of action, the rule against splitting causes obviously could not be applied. *Railroad v. Traube*, supra. And where the respective demands grow out of independent acts, contracts or transactions, they cannot be treated as parts of a single cause. *Ruddle v. Horine*, 34 Mo. App. 616; *Union, etc., Loan Co. v. Farbstein*, 148 Mo. App. 216, 127 S. W. 656; *Corby, Adm'r, v. Taylor*, 35 Mo. 447; *Garland v. Smith*, 164 Mo. 1, 64 S. W. 188.

[3, 4] The relationship between the parties in the instant case was purely contractual. Defendant, as the bailee of plaintiffs, became charged in each of the 817 separate and distinct transactions with the duty of returning the package to plaintiffs, the bailors. The failure to discharge this duty was a breach of the contract which gave plaintiffs the right to sue as for a conversion of the package and its contents. The breach, in such instance, created a separate and distinct cause of action, and the fact that they all occurred during a given period of time, or even on the same day, did not and could not have the effect of welding them into a single cause of action. By a single act defendant may have breached 817 separate and distinct contracts, but that would not impart to them identity of subject-matter, nor merge the respective claims or demands into a single demand.

Because of a lack of identity of subject-matter and demand in the two actions, the judgment on the merits recovered in the first was no bar to the prosecution of the second.

The judgment is affirmed. All concur.

CITY OF CHATTANOOGA v. POWELL.

(Supreme Court of Tennessee. Oct. 23, 1915.)

1. MASTER AND SERVANT §190—INJURY TO SERVANT—DANGER—ASSURANCES OF FOREMAN—CONTRIBUTORY NEGLIGENCE.

A foreman, a man of large experience in the construction of ditches, had his attention called to the danger of working in a certain ditch about 10 feet deep by a person laboring therein who had little such experience, and the foreman pronounced the ditch safe and the earth of the walls was not of such character as to give warning of imminent danger. Held, that the laborer was not negligent in accepting the as-

surances of the foreman and continuing work there.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 675-677; Dec. Dig. § 231.]

2. MASTER AND SERVANT §190—INJURY TO SERVANT—FOREMAN—AUTHORITY—ASSURANCES OF SAFETY.

Where a foreman has authority to decide whether a ditch needs bracing, has charge of the work, and has been given directions how and when the work shall be done, and has charge of the servants, he is authorized to give to the servants assurances of the safety of the ditch which will bind his employer in a suit by a servant for personal injuries by a cave in.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.]

Certiorari to Court of Civil Appeals.

Action by Will Powell against the City of Chattanooga. Judgment for plaintiff was affirmed by the Court of Civil Appeals, and defendant brings certiorari. Affirmed.

Carden & Snyder, of Chattanooga, for plaintiff. Tatum, Thach & Lynch, of Chattanooga, for defendant.

NEIL, C. J. Defendant in error was one of a number of colored men engaged in digging a ditch for sewerage purposes in the city of Chattanooga, under the direction of plaintiff in error's foreman. The ditch was a long one, extending the length of a city block. The part of it where defendant in error was at work had been excavated to the depth of 10 feet and 8 inches. Defendant in error became apprehensive on account of the depth, and called the foreman's attention to the fact, and expressed some concern for his safety. The foreman assured him that the wall was safe, and commanded him to proceed with the work. Defendant in error continued for a time, and again became apprehensive, having observed the fall of some pebbles from the top of the wall, and a second time called upon the foreman of the plaintiff in error, and asked that the wall should be braced. The foreman replied that the wall was perfectly safe, and commanded the defendant in error to continue his work. The latter, relying on the superior knowledge of the foreman, did as he was bidden. Soon thereafter the wall caved in upon him and injured him seriously. The foreman was a man of large experience in the construction of ditches, and the defendant in error had but little experience in this work, his general occupation lying in another line of labor. The earth composing the wall of the ditch was not of such a character as to warn any one of imminent danger, since it appeared to be firm. The apprehension felt by the defendant in error was based wholly on the depth of the ditch. It was the custom of the business in which the foreman was engaged to "shore up" deep walls when he deemed them dangerous. It was on this

account that the defendant in error asked that the wall extending above him be protected in the manner indicated.

The defendant in error sued the city, and recovered a judgment for \$350. The case was appealed to the Court of Civil Appeals, and there the judgment was affirmed. The case was then brought to this court by the writ of certiorari.

[1] The only question we deem necessary to consider in this opinion is whether the trial judge committed error in refusing to peremptorily instruct the jury to render a verdict in favor of the city. We are of the opinion there was no error in refusing this instruction. Defendant in error, under the facts stated, was justified in relying upon the assurance of safety given to him by the foreman, and in obeying the latter's orders to continue his work. Under these facts the city drew to itself the risk, it not appearing that the danger was so glaring that a man of ordinary prudence would not have continued to work. This principle is well settled. *Mergenthaler-Horton Basket Mach. Co. v. Lyon*, 28 Ky. Law Rep. 471, 89 S. W. 522; *Central Coal & Iron Co. v. Thompson*, 31 Ky. Law Rep. 276, 102 S. W. 272; *Burkard v. A. Leschen & Sons Rope Co.*, 217 Mo. 466, 117 S. W. 35; *McKee v. Tourtellotte*, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542; *Swearingen v. Consolidated Troup Min. Co.*, 212 Mo. 524, 111 S. W. 545; *Allen v. Gilman (C. C.)* 127 Fed. 609; *Consolidated Coal Co. v. Shepherd*, 220 Ill. 123, 77 N. E. 133; *Bacelli v. New England Brick Co.*, 138 App. Div. 656, 122 N. Y. Supp. 856.

The exception just noted as to glaring dangers is a sufficient protection to the master. The latter should not be permitted in other cases to say that the servant assumed the risk in the face of an assurance of safety and a command to proceed. The assurance, in such a case, is equivalent to a statement to the servant that the master has a knowledge of the matter superior to

that of the servant, and that the latter can rely upon the information given. To permit the master, under such circumstances, to throw the responsibility on the servant would be equivalent to conferring on him the right to practice a fraud. It would be tantamount to permitting him to say to the servant:

"You should not have trusted me. I invited your confidence, but you should have known it was misplaced."

No court should sanction such treachery.

[2] It is insisted, however, that the foreman had no authority to give the assurance. It was his duty to decide when the wall needed bracing; hence to judge of the danger. He was in the position of the master; he had charge of the work, and was giving directions as to how it should be done, and when it should be done. It was within his line of duty to control the servants, and it necessarily followed that he had the right to make such assurances in good faith, in order to secure a continuance of the work, and these would be binding on the master in the absence of knowledge on the part of the servant of an express withholding of the power.

We are referred to the case of *Brown v. Electric Co.*, 101 Tenn. 252, 47 S. W. 415, 70 Am. St. Rep. 666.

That case is not in point. The nature of the earth, as described in the opinion of the court, was such as to furnish a direct warning to the servant of the imminence of his danger. It was made earth—

"principally filled in with cinders, which was loose stuff, and the person who was digging could tell this better than any one else."

It appears that the servant knew the danger he was incurring, yet made no complaint, nor did he receive any assurance of safety, if indeed such assurance would have amounted to anything under the facts of that case.

Let the judgment of the Court of Civil Appeals be affirmed.

SWIFT v. FIRST NAT. BANK OF LEWISVILLE. (No. 195.)

(Supreme Court of Arkansas. Oct. 25, 1915.)

1. APPEAL AND ERROR \hookrightarrow 866—**MATTERS REVIEWABLE—PEREMPTORY INSTRUCTION.**

Where both sides request a directed verdict, and neither requests any other instruction, the court on appeal must treat the cause, after verdict in accordance with request of one party, as if it were before the court on the question of the sufficiency of the evidence to sustain the jury's verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467-3475; Dec. Dig. \hookrightarrow 866.]

2. BANKS AND BANKING \hookrightarrow 154—**ACTIONS—CONVERSION OF DEPOSIT—EVIDENCE.**

Evidence in an action by a depositor against a bank to recover the amount deposited, which the bank turned over to a third person, held sufficient to support a directed verdict for the defendant.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 502-512, 515, 516, 518-533; Dec. Dig. \hookrightarrow 154.]

3. BANKS AND BANKING \hookrightarrow 154—**ACTIONS—CONVERSION OF DEPOSIT—EVIDENCE—ADMISSIBILITY.**

Where plaintiff depositor sues a bank for conversion of funds which the bank paid to a third person under apparent authority of the depositor, and a part of which the third person then paid on a personal debt to the vice president of the bank, evidence of the transaction between the third person and the vice president was properly excluded, where it was not claimed that the vice president knew the source of the money, or that the bank had any interest in the debt, or that the vice president was acting in his official capacity in receiving the money.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 502-512, 515, 516, 518-533; Dec. Dig. \hookrightarrow 154.]

Appeal from Circuit Court, Lafayette County; George R. Haynie, Judge.

Action by P. B. Swift against the First National Bank of Lewisville. From a judgment for defendant, plaintiff appeals. Affirmed.

Chas. S. Todd, of Texarkana, Tex., for appellant. Searcy & Parks, of Lewisville, for appellee.

SMITH, J. On the 15th of October, 1910, appellant had on general deposit with the First National Bank of Lewisville, subject to his check, a sum of money exceeding \$500. On that day he entered into a contract with A. H. Hamiter, acting as and representing himself to be the duly authorized agent of one J. E. Erwin, for the purchase of 5,000 acres of land for the sum of \$25,000, by the terms of which contract appellant was to advance or deposit \$500 as part of the purchase price, and upon the execution of a deed to said lands by Erwin within the time limited appellant was to pay \$4,500 in addition in cash, and was to execute notes for \$20,000. On the same day appellant went to the bank and drew out \$500, with which he purchased from said bank a certificate of deposit of

\$500, which was issued and signed by D. W. Gladney, the cashier of the bank, and delivered to appellant. On the face of this certificate the following statement was written:

"To be paid upon delivery of an option deed executed by J. E. Erwin to P. B. Swift to certain lands in Miller county, Arkansas (5,000 acres); said option good for 90 days."

Afterwards, on the same day, this certificate was, by agreement with the cashier, taken up and canceled, and in lieu thereof Swift gave his check payable to A. H. Hamiter, agent for J. E. Erwin. This check was certified by the cashier and on its face, and before the signature was written the following:

"This is given as first payment of purchase money on 5,000 acres of land located in Miller county, Arkansas."

This certified check was delivered by appellant to Hamiter, to be by him sent to Erwin, who resided elsewhere. It was so sent by Hamiter to Erwin, who returned it in about nine days, and denied and repudiated Hamiter's agency and authority. Appellant determined to insist upon his contract, and went with Hamiter to the bank and exchanged this certified check for a draft signed by D. W. Gladney, cashier, drawn on a bank in St. Louis, payable to the order of J. E. Erwin. This bank exchange was likewise sent to Erwin and returned by him. Thereupon appellant instituted suit against Erwin to enforce the specific performance of this contract, but this suit was finally decided adversely to him. See *Swift v. Erwin*, 104 Ark. 459, 148 S. W. 267, Ann. Cas. 1914C, 363.

The money remained in the bank in this condition until June 15, 1911, at which date the bank of Lewisville delivered to Hamiter another bill of exchange signed by Gladney, cashier, and drawn on a bank in St. Louis, for \$500, and payable to the order of A. H. Hamiter, agent for J. E. Erwin, and Hamiter surrendered to the bank the former bill of exchange payable to the order of Erwin, and on the same day, and immediately thereafter, Hamiter indorsed the last-named bill of exchange as agent for Erwin and presented it to the bank, which took it up and placed the sum of \$500 in its books to the credit of A. H. Hamiter, agent for J. E. Erwin. Thereafter Hamiter withdrew this money from the bank by checks payable to himself. Appellant testified that he knew nothing of the transactions after the issuance of the bill of exchange October 26, 1910, payable to the order of J. E. Erwin, and that the cashier of the bank knew of the circumstances under which this deposit was made and the use to which it was to be applied. These facts are set out in the complaint which appellant filed against the bank and Hamiter, in which judgment was prayed for the conversion of the \$500 deposit, and appellant testified in support of these allegations.

Separate answers were filed by the bank

and by Hamiter. In his answer Hamiter admitted his indebtedness, but alleged the fact to be that appellant had authorized him to use said money, and that he had done so pursuant to this permission. The answer of the bank contained a general denial of all the material allegations of the complaint.

Judgment was rendered against Hamiter by confession, and the cause went to trial upon the issue of the bank's liability arising out of its action in permitting Hamiter to withdraw the deposit on checks payable to his own order.

Hamiter became a witness, and testified that he requested appellant to permit him to use the deposit pending the litigation over the lands, and that appellant consented for him to do so upon his agreement to make the deposit good upon the termination of the litigation, and that he had intended to do this but had been unable to do so.

Mr. Gladney, the cashier of the bank, testified that after the money had been on deposit for some time he called on appellant and asked him if he had any interest in this deposit, and appellant told him that he did not have any interest in it. This witness further testified that Hamiter told him that the money was his to use, and that he had no information to the contrary, and did not know what use Hamiter intended to make or had made of the money, but that he did know that the bank was not concerned in the disposition made of it and had derived no profit or advantage from this use.

Appellant offered to prove that one of the checks so drawn by Hamiter was for the sum of \$200, and that with this money Hamiter paid a private debt due by him to a Mr. Du Bose, who was at the time vice president of the bank. No attempt was made, however, to show that Du Bose had any knowledge of the transaction or knew the source from whence the money was derived, nor was it contended that the bank had any interest in the deposit so paid Du Bose, who was dead at the time of the trial in the court below.

At the conclusion of all the evidence, both sides asked a directed verdict, and neither asked any other instruction, whereupon the court directed the jury to return a verdict for the bank, which was accordingly done, and this appeal has been prosecuted from the judgment pronounced upon that verdict.

It is urged that the pleadings did not raise the issue of Hamiter's authority to check against the deposit, and that the bank had set up no such defense. But this was the only answer made by Hamiter, and, as that answer did not constitute a defense so far as he was personally concerned, judgment was rendered against him by default. Thereupon the cause was submitted on the question of the bank's liability, and, even if it be true that the allegations of Hamiter's answer did not inure to the benefit of the

bank, the fact remains that the cause was submitted without objection on this issue, and the pleadings will be treated as amended to conform to that point.

[1] We have here a verdict directed by the court in a case where both sides asked a directed verdict, and neither side requested any other instruction. Under these circumstances the case stands here upon the question of the sufficiency of the evidence to sustain the verdict, the case being treated by us as if the jury, under proper instructions, had returned a verdict in appellee's favor. *Gee v. Hatley*, 170 S. W. 72; *Sims v. Everett*, 113 Ark. 198, 168 S. W. 559; *Home Fire Ins. Co. v. Wilson*, 109 Ark. 324, 159 S. W. 1113; *Belding v. Vaughan*, 108 Ark. 69, 157 S. W. 400; *St. L. I. M. & S. R. Co. v. McMillan*, 105 Ark. 25, 150 S. W. 112; *St. L. S. W. Ry. Co. v. Mulkey*, 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913C, 1339.

[2] When the evidence is so considered, it cannot be said that it is insufficient to support the verdict of the jury. The cashier of the bank testified that appellant disclaimed ownership of the deposit, and that he permitted Hamiter to check against the deposit without knowing that this action was unauthorized, and that the bank derived no profit or advantage from Hamiter's withdrawal of the deposit. Hamiter testified that he was authorized to deposit and to redeposit the fund in the manner which he had done, and thereafter to check against it in the name in which the deposit was made. These facts being true, the bank was not liable to appellant, and the court properly so directed the jury.

[3] We think no error was committed in excluding the evidence of the payment of the debt due Du Bose, as no attempt was made to show that Du Bose knew the source of the money, or that the bank had any interest in the debt so paid, or that Du Bose was acting in his capacity of vice president of the bank in so receiving said money.

The judgment of the court below is therefore affirmed.

HOLMAN v. NUTT et al. (No. 182.)

(Supreme Court of Arkansas. Oct. 25, 1915.)

1. TRIAL \Leftrightarrow 143—EVIDENCE—QUESTIONS FOR JURY.

Where there is a material conflict in the evidence, the issue is for the jury, and a peremptory instruction is error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. \Leftrightarrow 143.]

2. SALES \Leftrightarrow 312—SELLER'S LIEN FOR PRICE—PRIORITY.

Under Kirby's Dig. § 4967, providing that, in actions to recover money contracted to be paid for property in the possession of the vendee, the court shall issue an order directing the sheriff or other officer to take the property described in the petition and hold it subject to orders of the court, the vendor of the personal property is not entitled to seize property sold

wherever it may be found, but his remedy under this section is applicable only where the property is found in the possession of the vendee.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 871, 876, 877; Dec. Dig. § 812.]

Appeal from Circuit Court, Howard County; W. C. Rodgers, Special Judge.

Action by L. O. Holman against Samuel L. Nutt and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

H. P. Epperson, of Muddy Fork, and W. P. Feazel, of Nashville, for appellant. D. B. Sain, of Nashville, and T. D. Crawford, of Little Rock, for appellees.

McCULLOCH, O. J. The plaintiff, L. O. Holman, instituted this action against Reese Dyer, a constable in Howard county, to recover possession of three horses which said constable had taken from plaintiff's possession under process issued in two suits previously instituted before a justice of the peace in that county, one by Charles Kennedy, and the other by S. L. Nutt, against one Mack Craig. Kennedy sold two of the horses in controversy to Craig, and Nutt sold the other one to Craig, and each of said actions against Craig was to recover the respective prices of the horses sold. Each of those parties caused to be issued, at the commencement of his action, an order issued pursuant to Kirby's Digest, § 4967, directing the constable to take from Craig, the defendant in those actions, the property sold to him, which was described in the complaints, and to hold said property subject to the orders of the court in those actions. The writs came to the hands of the constable, and he took the horses from the possession of the plaintiff, and, as before stated, the plaintiff instituted this action against the constable to regain possession of the horses. Nutt and Kennedy were allowed to intervene and make themselves defendants to this action.

Plaintiff asserts ownership to the horses, and he came in possession thereof under circumstances which he relates as follows: Plaintiff sold to Will Kennedy four mules and some cattle for prices aggregating the sum of \$600, and took the note of his vendee for the purchase price, reciting that the title was retained by the vendor until the price should be paid in full. Without having paid any of said purchase price, Kennedy shipped the mules purchased from the plaintiff to Kansas City, and also shipped the three horses in controversy, and two others, making five in all. After Kennedy had gotten away with the shipment of stock, plaintiff received information of it, and telegraphed to Kansas City and had Kennedy arrested, and the car load of stock stopped in the hands of the carrier. Plaintiff followed Kennedy to Kansas City, and, according to his testimony, made a trade with him whereby the latter

sold and delivered the five head of horses to plaintiff to compensate him for his damages and expenses of going to Kansas City and recovering his mules, and in payment of the freight on the whole shipment from Arkansas to Kansas City and back. Plaintiff testified that he paid out about \$260 in that way. Kennedy gave plaintiff a written order for the delivery of the horses, and plaintiff shipped them back to Deirks, Ark., and they remained in his possession until the commencement of this suit. Plaintiff testified positively that Kennedy sold him the stock for the consideration named, and that pursuant thereto he took possession of it and shipped it back to Deirks, paying the freight both ways. He admitted, on cross-examination, that after he had returned to Kennedy he offered to sell the stock back to Kennedy for the price he had received—that is to say, for the amounts he had paid out—but his testimony was to the effect that it was a purchase of the horses from Will Kennedy in Kansas City, and not an acceptance of possession of the same as a pledge to hold until the freight was paid.

Kennedy testified that Craig turned the horses over to him to ship to Kansas City and to sell, and that he (Kennedy) turned over to Craig a lot of other stock to take to St. Louis to sell. Craig did not appear in the controversy either as litigant or as a witness. Kennedy testified that he did not sell the horses to plaintiff, but merely turned them over to him to hold until he collected the amount paid out on freight, and there is other testimony in the case to the effect that plaintiff turned the stock back to Craig. The court gave a peremptory instruction in favor of the defendants, and judgment was rendered accordingly, from which the plaintiff has appealed.

[1] We are of the opinion that the court erred in giving a peremptory instruction. The case should have been submitted to the jury upon the testimony. According to the testimony of the plaintiff, he was in possession of the horses under his purchase from Will Kennedy, whose testimony establishes the fact that he had authority from Mack Craig to sell the horses. It is true there was shown no authority on the part of Kennedy to sell for anything but money, or to sell in discharge of his own obligation, but Craig is not repudiating the sale made by his agent, and the defendants are not in a position in this action to call into question Kennedy's authority.

[2] The defendants have no lien on the property and did not retain the title as security for the purchase money of the horses when sold. The statute under which they were proceeding for the enforcement of their debts only authorizes the sequestration of property when found in the possession or the

control of the vendee. That statute was construed in the case of *Bridgeford & Co. v. Adams*, 45 Ark. 136, where it was held that:

The statute "does not give to the vendor a continuous subsisting lien on the property for the purchase price, but only provides that the property shall not be exempt from the vendor's execution for the debt, and enables the plaintiff in a suit for the purchase money to seize it at once if in the control or possession of the vendee, without alleging the ordinary grounds for an attachment."

In that case it was held that the remedy could not be asserted against a trustee under a deed of assignment from the vendee. The same principle has been subsequently announced in numerous cases decided by this court; it being held that the remedy could not be invoked as against property in the hands of the personal representative of the vendee after the latter's death (*Blass v. Hood*, 57 Ark. 13, 20 S. W. 544), or against subsequent attaching creditors (*Fox v. Arkansas Industrial Co.*, 52 Ark. 450, 12 S. W. 875), or against a receiver for an insolvent corporation (*Clements v. Hamilton-Brown Shoe Co.*, 99 Ark. 335, 138 S. W. 971). If plaintiff held the property under a fraudulent transfer of the title from Craig, made for the purpose of defrauding his creditors, that might be shown in defense of the action, but there was no attempt to prove that the alleged sale to plaintiff was fraudulent. *Neal v. Cone*, 76 Ark. 273, 88 S. W. 952; *Roach v. Johnson*, 71 Ark. 344, 74 S. W. 290.

Reversed and remanded for a new trial.

WESTERN UNION TELEGRAPH CO. v. STEWART. (No. 179.)

(Supreme Court of Arkansas. Oct. 25, 1915.)

COMMERCE §8 — INTERSTATE COMMERCE — STATE INTERFERENCE — TELEGRAMS — NEGLIGENCE — ELEMENTS OF DAMAGES.

Under the statutes of Arkansas which provide that mental anguish shall be an element of damages for negligent failure to receive, transmit or deliver a telegraphic message, no recovery can be had where the message is interstate in character, and therefore subject to the federal law on interstate commerce.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 5; Dec. Dig. §8.]

Appeal from Circuit Court, Logan County; Jephtha H. Evans, Judge.

Action by W. M. Stewart against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed, and cause dismissed.

H. C. Mechem, of Ft. Smith, for appellant.

McCULLOCH, C. J. This is an action against the telegraph company to recover compensation for mental suffering alleged to have been caused by the negligence of the company in failing to promptly transmit and deliver a message to plaintiff at Booneville, Ark., from his brother in the state of Okla-

homa, concerning the illness and death of his mother.

The company defended on the ground, among other things, that the transmission and delivery of the message constituted interstate commerce, which exempted it from the operation of the statutes of this state making mental anguish an element of damages for negligent failure to receive, transmit, or deliver a telegraphic message. The case is ruled by the recent decisions of this court holding that there can be no recovery of damages under those circumstances.

Judgment reversed, and cause dismissed.

STATE ex rel. MOOS, Atty. Gen., v. WOODRUFF et al. (No. 183.)

(Supreme Court of Arkansas. Oct. 25, 1915.)

1. CRIMINAL LAW §84 — JURISDICTION OF JUSTICES OF THE PEACE — CONSTITUTIONAL PROVISIONS.

Under Const. art. 7, § 40, providing that justices of the peace shall have such jurisdiction of misdemeanors "as is now or may be prescribed by law," the Legislature may entirely abolish the jurisdiction of justices of the peace in misdemeanor cases; the Constitution being a limitation, and not a grant, of powers.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 115-124; Dec. Dig. §84.]

2. CRIMINAL LAW §84 — JURISDICTION OF COURTS—CONSTITUTIONAL PROVISIONS.

Under Const. art. 7, § 43, providing that corporation courts for towns and cities may be invested with jurisdiction concurrent with justices of the peace in civil and criminal matters, such jurisdiction as under the Constitution may be vested in justices of the peace may be vested in municipal courts, and the Constitution does not require that such jurisdiction be exercised concurrently with justices of the peace, and hence Laws 1915, p. 340, establishing municipal courts in certain cities, is not invalid, though in section 10 it gives such courts jurisdiction exclusive of justices of the peace over all misdemeanors committed within the limits of the county.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 115-124; Dec. Dig. §84.]

3. CRIMINAL LAW §206 — JURISDICTION OF COURTS—CONSTITUTIONAL PROVISIONS.

Under Const. art. 7, § 43, providing that corporation courts for towns and cities may be invested with jurisdiction concurrent with justices of the peace in civil and criminal matters, and section 40, giving justices of the peace original jurisdiction to sit as examining courts, Laws 1915, p. 340, is not unconstitutional because of the provision therein that the municipal courts thereby created shall have jurisdiction to sit as examining courts, as the Constitution does not vest exclusive jurisdiction in justices of the peace to sit in examining trials.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 411-413, 460; Dec. Dig. §206.]

4. STATUTES §64—PARTIAL INVALIDITY—EFFECT.

If Laws 1915, p. 340, creating municipal courts in certain cities, attempts to make their jurisdiction in civil matters coextensive with the limits of the county, and, if it is invalid to that extent, this does not impair the validity of the remainder of the act; there being no

reason to doubt that the Legislature would have enacted the statute with that part omitted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.]

5. CRIMINAL LAW § 84 — JURISDICTION OF COURTS—CONSTITUTIONAL PROVISIONS.

As the Constitution does not by express terms restrict the jurisdiction of justices of the peace to the territorial limits of the township in which they are elected to serve, and as article 7, § 43, provides that corporation courts for towns and cities may be invested with jurisdiction concurrent with justices of the peace in civil and criminal matters, the Legislature may vest jurisdiction in municipal courts beyond the geographical limits of the municipalities.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 115-124; Dec. Dig. § 84.]

6. STATUTES § 8½—SPECIAL BILL—NOTICE.

The constitutional provision requiring notice of a special bill is a mere direction to the Legislature itself.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 6; Dec. Dig. § 8½.]

7. STATUTES § 8½—ENACTMENT—NOTICE OF SPECIAL ACTS.

Laws 1915, p. 340, establishing municipal courts in certain cities of the first class, is not a special act within the constitutional provision requiring notice of a special bill, though it is so framed as to include only the cities of Little Rock and Argenta.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 6; Dec. Dig. § 8½.]

8. CONSTITUTIONAL LAW § 102 — CRIMINAL LAW § 87—COMPENSATION OF JUSTICE OF PEACE—STATUTORY PROVISIONS—IMPAIRMENT OF VESTED RIGHTS.

Justices of the peace have no vested rights in the fees and emoluments of their office, and the matter is subject to regulation at any time by the Legislature, and hence Laws 1915, p. 340, establishing municipal courts and restricting the jurisdiction of justices of the peace, is not void as impairing the vested rights of justices of the peace in such fees and emoluments.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 225, 356; Dec. Dig. § 102; Criminal Law, Cent. Dig. § 126; Dec. Dig. § 87.]

Kirby, J., dissenting.

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Quo warranto by the State, on relation of W. L. Moos, Attorney General, against William E. Woodruff and another. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

W. L. Moose, Atty. Gen., and Carmichael, Brooks, Powers & Rector, of Little Rock, for appellant. J. M. Moore, J. W. House, G. B. Rose, B. D. Brickhouse, C. T. Coffman, Morris M. Cohn, W. J. Terry, J. F. Loughborough, and H. M. Trieber, all of Little Rock, for appellees.

MCCULLOCH, C. J. The Attorney General instituted this action in the circuit court of Pulaski county by petition for quo warranto, challenging the validity of a statute enacted by the General Assembly of 1915 establishing municipal courts in certain cities of the first class. Acts 1915, p. 340. The

statute does not mention any city by name, but the description of the territory in which it has application is so framed as to include only the cities of Little Rock and Argenta. Respondents, who are judges of the municipal courts in Little Rock, demurred to the petition, and the circuit court sustained the demurrer and rendered judgment dismissing the petition.

It is not contended that municipal courts cannot, under the Constitution, be established, but the validity of the statute establishing the courts presided over by respondents is attacked on the following grounds set forth in the brief:

(1) The act is unconstitutional because it takes away all of the jurisdiction of justices of the peace as to misdemeanors in townships subject to the act.

(2) Because it gives municipal courts jurisdiction to sit as examining courts, commit, discharge, or recognize offenders to the court having jurisdiction for further trial, and to bind persons to keep the peace or for good behavior.

(3) Because according to its terms it exceeds and extends beyond the geographical boundaries of the cities covered by it.

(4) Because the act in its nature is special, and is an act applying only to the city of Little Rock and another city contiguous to the city of Little Rock, and not to the whole state at large, and that no notice of the intended introduction or passage of the said act was given, and because a general act could have accomplished the purpose, if it could have been accomplished at all, without the necessity for a special act.

(5) Because the act attempts to take away the rights and powers of the justices of the peace who were elected and holding office at the time of the passage and approval of the act, and that said justice of the peace courts are constitutional courts, and their powers could not be enlarged or restricted by the acts of the Legislature.

(6) Because the Legislature has no power, under the Constitution of Arkansas, to create a new judicial department for the state, or any part thereof, and that this was attempted by giving municipal corporation courts power to hear and determine cases beyond their geographical jurisdiction.

The points of attack will be discussed in the order above set forth. Whilst the power of the Legislature to create municipal courts is not questioned, it becomes necessary for us to pass upon the several attacks made on this statute; for it can be said, with much reason, that the act must stand or fall as a whole, inasmuch as the Legislature might not have enacted it with any of its assaulted parts omitted.

The sections of the Constitution which refer to the creation of municipal courts are as follows:

"The judicial power of the state shall be vested in one Supreme Court; in circuit courts; in county and probate courts, and in justices of the peace. The General Assembly may also invest such jurisdiction as may be deemed necessary in municipal corporation courts, courts of common pleas, where established, and, when deemed expedient, may establish separate courts of chancery." Article 7, § 1.

"Corporation courts for towns and cities may be invested with jurisdiction concurrent with justices of the peace in civil and criminal matters, and the General Assembly may invest such of them as it may deem expedient with jurisdiction of any criminal offenses not punishable by death or imprisonment in the penitentiary, with or without indictment, as may be provided by law, and, until the general assembly shall otherwise provide, they shall have the jurisdiction now provided by law." Article 7, § 43.

The first contention is that the statute is void because it attempts to abolish the jurisdiction of justices of the peace as to misdemeanor cases in the township in which it applies. The section of the act which defines the jurisdiction of municipal courts reads as follows:

"Sec. 10. The municipal courts shall have original jurisdiction coextensive with the county. The jurisdiction shall be exclusive of the justices of the peace and of the circuit court over the violation of all ordinances passed by the City Council; exclusive of the justices of the peace in townships subject to this act, and concurrent with the circuit court over all misdemeanors committed in violation of the laws of the state within the limits of the county; concurrent with the justices of the peace and exclusive of the circuit court in all matters of contract where the amount in controversy does not exceed the sum of one hundred dollars (\$100.00), excluding interest; concurrent with justices of the peace and with the circuit court in matters of contract where the amount in controversy does not exceed the sum of three hundred dollars (\$300.00), exclusive of interest; in suits for recovery of personal property where the * * * amount in controversy does not exceed the sum of one hundred dollars (\$100.00). Municipal courts shall also have jurisdiction to sit as examining courts and commit, discharge or recognize offenders to the court having jurisdiction for further trial, and to bind persons to keep the peace or for good behavior."

Section 19 defines the civil jurisdiction of justices of the peace in townships subject to the act the same as is provided by the Constitution, and concludes with the following as to jurisdiction in other matters:

"Justices of the peace in townships subject to this act shall also have jurisdiction to sit as examining courts and commit, discharge or recognize offenders to the court having jurisdiction for further trial, and to bind persons to keep the peace or for good behavior, and for the purposes set out in this section they shall have power to issue all necessary process."

Section 20 fixes the compensation of justices of the peace in those townships at a salary of \$25 per annum, and in addition thereto the compensation now prescribed by statute for sitting as members of the county levying court, and also "such fees as are allowed to justices of the peace by the general laws for solemnizing marriages, taking and certifying acknowledgments, * * * attending to the duties of coroner, and for services in relation to estrays."

Another section provides for transferring to the municipal courts all misdemeanor cases pending before justices of the township at the time of the approval of the act. The right to collect fees already earned by justices of the peace in pending misdemeanor cases is preserved.

[1] Section 40, art. 7, of the Constitution, after defining the civil jurisdiction of justices of the peace, contains a subdivision which reads as follows: "Such jurisdiction of misdemeanors as is now, or may be prescribed by law." At the time of the adoption of the Constitution of 1874 justices of the peace were clothed with jurisdiction in misdemeanor cases concurrent with the circuit court. The argument now made before us is that, under a fair construction of the language of the Constitution, the Legislature may restrict or diminish the jurisdiction of justices of the peace in misdemeanor cases, but cannot take away entirely all such jurisdiction. The language is too broad, we think, to justify that construction. If that had been intended by the framers of the Constitution, they would have employed a different phrase. It does not declare any continuing jurisdiction in misdemeanors, but only such jurisdiction as was then prescribed by law or might thereafter be prescribed by law. Now, the Constitution in this particular, as well as in all others, is not a grant of powers to the lawmakers, but a limitation of powers, and when it was said that justices of the peace shall have such jurisdiction as "may be prescribed by law," it was obviously meant that the will of the lawmakers should be supreme in determining how much jurisdiction, if any, should be conferred upon justices of the peace, subject to the jurisdiction vested in the circuit courts by another section of the Constitution.

The only approach to a construction by this court of the constitutional provision now under consideration is found in the opinion in the case of *State v. Devers*, 34 Ark. 188, where it was said:

"We have above shown that by the law in force when the Constitution was adopted justices of the peace had jurisdiction of all misdemeanors, and they will continue to have such jurisdiction until otherwise prescribed by law. * * * The framers of the Constitution of 1874 simply said, in effect, by the third clause of section 40, above copied, that they might continue to exercise such jurisdiction until otherwise prescribed by law, but there is nothing in this clause, or in the section of which it is a part, or in any section of the article on the judicial department, from which it may be fairly implied that the framers of the Constitution intended to leave the Legislature at liberty to deprive the circuit courts of all jurisdiction of misdemeanors."

The language there used certainly bears out the interpretation we now place on the provision that the Legislature has the power to abolish the jurisdiction of justices of the peace in misdemeanor cases.

[2] It has been suggested that, inasmuch

as the Constitution only authorizes the Legislature to confer upon such corporation courts "jurisdiction concurrent with justices of the peace," it is necessarily implied that the criminal jurisdiction of justices of the peace cannot be entirely abolished, and at the same time the jurisdiction of the corporation courts in those matters put in force. The argument is, in other words, that because of this peculiar language of the Constitution only jurisdiction concurrent with justices of the peace can be conferred upon corporation courts, and that the attempt to abolish the jurisdiction of justices of the peace, if effectual, destroys the power to confer jurisdiction which, it is contended, cannot under the Constitution be exercised otherwise than concurrently with justices of the peace. We do not think, however, that the language just referred to meant to confine the jurisdiction of municipal courts to such jurisdiction as might always be exercised by justices of the peace, but it was meant as authority for the Legislature to confer such jurisdiction upon municipal courts as might, under the Constitution, be conferred upon justices of the peace. The jurisdiction to be vested in municipal courts is, in other words, not necessarily to be exercised concurrently with justices of the peace, but coextensive with the jurisdiction which could, under the Constitution, be vested in justices of the peace.

[3] In reply to the contention that the statute is unconstitutional in its attempt to give jurisdiction to municipal courts to sit as examining courts, it is sufficient to say that the language of the Constitution is very broad in stating that such courts "may be invested with jurisdiction concurrent with justices of the peace in civil and criminal matters." The Constitution does not, as counsel for petitioner contend, vest exclusive jurisdiction in justices of the peace to sit in examining trials. It expressly confers "original," but not exclusive, jurisdiction, and in parceling out jurisdiction in such cases the Legislature has the power to vest concurrent jurisdiction in municipal courts. The act under consideration does not attempt to abolish the jurisdiction of justices of the peace in those matters. This court decided in *Harris v. State*, 60 Ark. 209, 29 S. W. 640, that a corporation court had jurisdiction as an examining court within the city limits.

[4] The next contention is that the statute is unconstitutional because it extends the jurisdiction of the municipal courts beyond the geographical boundaries of the municipalities. The act undoubtedly attempts to confer jurisdiction of such courts coextensive with the county in criminal matters, and in civil matters coextensive with the township in which the city is situated. Whether or not the jurisdiction in civil matters is coextensive with the limits of the county, it is unimportant to decide, in determining the validity of the statute as a whole; for, if it

should be found that there is an attempt to thus extend the jurisdiction, that would not impair the validity of the remainder of the act. In other words, if we should decide that there is an attempt in the statute to thus extend the jurisdiction, and that it is invalid to that extent, that part of it could be stricken out and the remainder upheld, for there is no reason to doubt that the Legislature would have enacted the statute with that part omitted. *Oliver v. C., R. I. & P. Ry. Co.*, 89 Ark. 466, 117 S. W. 238.

[5] No limitation is found in the Constitution upon the power of the Legislature to vest jurisdiction in municipal courts, when established, beyond the geographical limits of the municipalities. Nor can it be said that there exists any policy or sound reason for restricting the jurisdiction to such geographical limits. The authorities cited on the briefs of counsel do not sustain the contention that there is such an inherent limitation upon the power of municipal courts. Unless the organic law forbids, the Legislature may extend the jurisdiction beyond the territorial limits of the municipalities. The authority found in the Constitution is to vest jurisdiction in municipal courts concurrent with the jurisdiction of justices of the peace in criminal and civil matters; that is to say, concurrent with the jurisdiction which it is within the power of the Legislature to confer upon justices of the peace. The Constitution does not by its express terms restrict the jurisdiction of justices of the peace to the territorial limits of the township in which they are elected to serve; therefore the jurisdiction of municipal courts finds no such restriction in the Constitution. At the time of the adoption of the Constitution of 1874 corporation courts in cities of the first class exercised the same jurisdiction under statutes then in force as did justices of the peace (*Gantt's Digest*, § 3283), which thus extended the criminal jurisdiction to the territorial limits of the county, the same as that exercised by justices of the peace.

[6, 7] This court is thoroughly committed to the rule that the provision of the Constitution requiring notice of a special bill is a mere direction to the Legislature itself, and it is therefore unnecessary to devote any time to the discussion of the point raised in this case that this act is void because it is a special one, and that no notice was given. Moreover, the act establishing these municipal courts is not a special one within the meaning of the Constitution. *Waterman v. Hawkins*, 75 Ark. 120, 86 S. W. 844.

[8] The argument that the act is void because it attempts to impair the vested rights of justices of the peace in the fees and emoluments of the office is unsound, for the reason that such officers have no such vested rights, and the matter is subject to regulation at any time by the Legislature. *Humphry v. Sadler*, 40 Ark. 100.

The last contention of counsel for petitioner (the sixth) is disposed of by what has been already said concerning the other points of attack.

Upon the whole we are unable to discover any conflict in this statute with the Constitution of the state; that is to say, a conflict in a matter which would invalidate the whole act, and which would vitiate the title of respondents to the offices created by the statute.

The judgment of the circuit court is therefore affirmed.

KIRBY, J., dissents.

WATERS v. HANLEY. (No. 190.)

(Supreme Court of Arkansas. Oct. 25, 1915.)

1. HOMESTEAD §118—SALE—EXECUTORY CONTRACTS—VESTING OF TITLE.

Where defendant, a married man, signed an executory contract for the sale of his homestead, receiving the purchase price, but continuing to occupy the premises for a time, during which they were destroyed by fire, he cannot, by deed of himself and wife made subsequent to the fire, thrust the loss upon the vendee under the contract, since the contract was wholly executory, and, being of the homestead, was not binding upon his wife, and therefore not binding upon the vendee.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 192, 195, 208-209, 216, 217; Dec. Dig. §118.]

2. HOMESTEAD §118—RIGHTS OF WIFE—SALE.

Under Kirby's Dig. § 3901, providing that no instrument affecting the homestead of any married man, unless his wife joins in the execution, shall be valid, a deed purporting to convey a homestead of a married man is void where the wife fails to join; nor can he without her signature make a contract to convey the homestead which will be binding on her.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 192, 195, 208-209, 216, 217; Dec. Dig. §118.]

Appeal from Garland Chancery Court; Jethro P. Henderson, Chancellor.

Action by Thos. L. Hanley against W. W. Waters. From a judgment for plaintiff, defendant appeals. Affirmed.

A. J. Murphy, of Hot Springs, and Moore, Smith & Moore, of Little Rock, for appellant. T. P. Farmer and C. Floyd Huff, both of Hot Springs, for appellee.

HART, J. W. W. Waters and Thomas L. Hanley entered into an executory contract for the sale of certain property, as follows:

"Hot Springs, Ark., August 21, 1913.

"I have this day sold to Mr. Thomas Hanley, my residence and lot, with all buildings thereon, on Garden street, in the city of Hot Springs, Ark., for the sum of six thousand five hundred dollars, cash in hand, to give possession on September 15, 1913; all time after said date I am using said premises to pay \$40 per month for same; all papers to be made by the 20th of September, 1913.

W. W. Waters."

At the time of the execution of the contract Hanley paid the purchase price of the property, which was \$6,500. On the 5th day of September, 1913, while Waters was still in possession of the property, and before a deed to the same had been executed by him to Hanley, the house and improvements on the lots were burned without fault of either party. Hanley instituted this action in the circuit court against Waters to recover \$6,500, the purchase price, on the ground that the destruction of the improvements operated as a rescission of the contract. Waters answered, and admitted that he was residing on the property at the time the house and other improvements were burned, and stated that at the date of the execution of the contract he was a married man, and at that time occupying the property as his homestead, and was still occupying it as such at the time of the fire; that on the 5th day of September, 1913, all of the buildings on said lot were destroyed by fire without the fault of either party; that subsequent to the fire, and before the 20th day of September, 1913, he executed a warranty deed to Hanley to said property; and that his wife joined in the execution of said deed.

On motion of Waters the cause was transferred to the chancery court, and was tried there by the chancellor on an agreed statement of facts substantially as stated above, and therefore not necessary to be repeated here. The chancellor found the issues in favor of the plaintiff, Hanley, and the defendant, Waters, has appealed.

[1] Counsel for the defendant argue for a reversal of the decree upon the ground that, where a contract is made for the future conveyance of land and the buildings situated thereon, with no provision as to the contingency of the buildings being destroyed by fire before the time appointed for the conveyance, the loss by such fire falls wholly upon the vendee. On the other hand, it is contended by counsel for plaintiff that in such case the loss falls upon the vendor. Many authorities are cited by them in support of their respective contentions. It must be admitted that the authorities are in irreconcilable conflict on this question, but, under the facts in this case, we do not deem it necessary to spend any time upon the numerous decisions in England and in this country upon the question.

The facts are undisputed, and show that the property in question was the homestead of Waters, and that his wife was living at the time of the execution of the contract, and that Waters resided upon the property at the time the contract was made and at the time the fire occurred.

Those cases which hold, as well as the text-writers who adopt the rule, that where buildings are destroyed by fire occurring between the date of the contract and the con-

veyance, the loss falls upon the vendee, do so in the application of the maxim that equity regards that as done which ought to be done. Therefore, they say, in following this rule of equity, as soon as the contract is finally concluded, even though it is wholly executory in form, there results by its conveyance an equitable conversion of the land and the purchase money, and the purchaser then becomes the equitable owner of the land; and, this being so, they say, the conclusion can hardly be escaped that the loss must fall on the vendee. *Pomeroy's Equity Jurisprudence*, vol. 6, § 859; *Id.*, vol. 4, § 1406; *Id.*, vol. 1, §§ 363-372. See, also, *Sewell v. Underhill*, 197 N. Y. 168, 90 N. E. 430, 27 L. R. A. (N. S.) 233, 134 Am. St. Rep. 863, 18 Ann. Cas. 795, and *Hawkes v. Kehoe et al.*, 193 Mass. 419, 79 N. E. 766, 10 L. R. A. (N. S.) 125, 9 Ann. Cas. 1053.

[2] Section 3901 of Kirby's Digest provides:

"No conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity except for taxes, laborers' and mechanics' liens, and the purchase money, unless his wife joins in the execution of such instrument and acknowledges the same."

Under this statute we have always held that a deed purporting to convey the homestead of a married man is a nullity if his wife fails to join in the execution of the deed. *Pipkin v. Williams*, 57 Ark. 242, 21 S. W. 433, 38 Am. St. Rep. 241; *Stephens v. Stephens*, 108 Ark. 53, 156 S. W. 837.

It is clear that, if the husband cannot make a conveyance of the homestead without the concurrence of his wife, he cannot make a contract to convey the homestead which will be obligatory upon his wife. If he could make a contract to convey the homestead which would be obligatory upon his wife, the statute could be easily evaded, and would be of no force. *Yost v. Devault*, 9 Iowa, 60. See, also, *Lott v. Lott*, 146 Mich. 580, 109 N. W. 1126, 8 L. R. A. (N. S.) 748, where it was held that a quitclaim deed by a married woman of her interest in the homestead in connection with her husband's contract to convey could not be held to constitute a land contract enforceable in equity. Under the facts of this case, the husband did not have the ability to carry out the contract made by himself for the conveyance of his homestead, and the equitable title never vested in his vendee. It does not help the case any that the wife after the fire joined with the husband in the execution of a deed. This was her voluntary act, and was not done in compliance with the requirements of the contract. The contract of the vendor could not have been specifically enforced in equity, and the vendee never held the equitable title.

Consequently the rule contended for by counsel for the defendant does not obtain, and the decree will be affirmed.

LAWSON v. STATE. (No. 134.)

(Supreme Court of Arkansas. Sept. 27, 1915.)

1. CRIMINAL LAW — §36 — EVIDENCE — PROSECUTING WITNESS.

The rule that one in *pari delicto* with the defendant cannot recover for alleged acts of the defendant does not apply to criminal actions, since they are for the protection of the public, and hence the fact that the prosecuting witness was also a party to the crime will not prevent conviction of the defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. §36.]

2. FALSE PRETENSES — §7 — OBTAINING MONEY BY FALSE PRETENSES — NATURE OF PRETENSE.

To make out the offense of obtaining money by false pretenses, the pretense must be of a past event or of a present fact, and not of future promise.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. §§ 5-12, 25; Dec. Dig. §7.]

3. FALSE PRETENSES — §7 — ELEMENTS OF OFFENSE.

Where defendant falsely represented himself to be a revenue officer, that it was his power and duty to arrest a witness, but that he would end the matter on payment to him of \$300, which was given him, he was guilty of obtaining money by false pretenses; the pretense being of present facts as to defendant's official power and duty.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. §§ 5-12, 25; Dec. Dig. §7.]

4. FALSE PRETENSES — §38 — OBTAINING MONEY BY FALSE PRETENSES — INDICTMENT AND INFORMATION.

An indictment charging that defendant represented that he had the power to withhold information against the prosecuting witness from the federal authorities, and that he would so withhold the information on payment of \$300, is at fatal variance with evidence showing that the defendant represented himself to be a revenue officer and would end the matter on the payment of \$300, so that a conviction on such indictment and evidence cannot be sustained.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. §§ 50-53; Dec. Dig. §38.]

Appeal from Circuit Court, Clay County; J. F. Gautney, Judge.

J. E. Lawson was convicted of obtaining money by false pretenses, and he appeals. Reversed and remanded.

R. H. Dudley, of Piggott, for appellant. Wm. L. Moose, Atty. Gen., and P. Streepey, Asst. Atty. Gen., for the State.

HART, J. J. E. Lawson was indicted, tried, and convicted of the crime of obtaining money by false pretenses. From the judgment of conviction, he has duly prosecuted an appeal to this court. In order to determine the issues raised by the appeal, it is only necessary to abstract the testimony given by the prosecuting witness. His testimony tends to prove a state of facts substantially as follows: The prosecuting witness, A. C. Deakin, the defendant, J. E. Lawson, and Ed Lucas were all residents of Greene county, Ark., and were friends and neighbors. Mr. Lucas showed Deakin a bill, and said that it had been made on stolen

government plates. Deakin told him that it was bogus, and Lucas replied that it was as good as any money. Lucas asked Deakin if he had received a letter from a man named Bacon, and Deakin replied that he had not. Later he received a letter from Paul Bacon at Memphis, Tenn. The letter stated that the writer had some money that had been made from a stolen government die which could not be told from good money; that they would send out some of this money for a certain per cent. A second letter was received by Deakin which contained a sample bill. Deakin answered the second letter, and sent his reply to Paul Bacon at Memphis. He received further letters in regard to the matter, but they were sent by C. V. Mansfield, and were mailed at points in the state of Missouri. In one of these letters the writer stated that detectives had followed his men from the post office, and had taken possession of their mail; that he feared the detectives had gotten a letter written to them by Deakin, and on that account advised Deakin to lay low for a few days. The writer also stated that the boys had gotten away with the plates and had paid the detectives to turn him loose. The letter also stated that the writer did not think that the detectives would arrest his customers. Subsequently the defendant came down to the gin where Deakin was working and told him that he was never more surprised than when he got a letter from Mr. Callahan stating that Deakin had written for some counterfeit money. The defendant told Deakin that he had violated the federal laws, and Deakin replied that he had. The defendant then exhibited to Deakin the letters he had written about the money. Defendant further stated to Deakin that the only thing he could do was to pay off; that it would take \$400, but that he would let him off for less. He finally paid the defendant \$300. Deakin stated that the defendant, Lawson, represented to him that he was a revenue officer, and also stated that it was his duty and power to arrest him for violating the criminal laws of the United States, but that the defendant was not, in fact, an officer of the United States; that he paid the defendant \$300, and that the defendant did not arrest him. He first stated that the defendant told him that, if he would give him \$300, that would settle the fine and penalty against him for violating the federal laws, and that he paid the defendant \$300 in settlement of this fine and penalty. Again he stated that the defendant told him that the payment of the \$300 was an end of the matter, and that he (the defendant) would protect him; that the defendant further promised to protect him and to withhold all the information acquired by him.

[1] It is insisted that the defendant cannot be held guilty of obtaining money by false pretenses under our statute, because he could not have obtained the money of

the prosecuting witness by the alleged pretenses, if false, unless the prosecuting witness gave it in settlement of a felony, and the prosecuting witness himself being thus guilty of a crime, the law would not listen to his complaint. This doctrine was applied in *McCord v. People*, 46 N. Y. 470, where the accused falsely pretended to be an officer with a warrant to arrest the prosecuting witness, and thereby induced the witness to deliver to him certain property. The court held that the prosecutor parted with his property as an inducement to a supposed officer to violate the law and his duty, and that the indictment could not be sustained. The court said:

"Neither the law or public policy designs the protection of rogues in their dealings with each other, or to insure fair dealing and truthfulness, as between each other, in their dishonest practices. The design of the law is to protect those who, for some honest purpose, are induced, upon false and fraudulent representations, to give credit or part with their property to another, and not to protect those who, for unworthy or illegal purposes, part with their goods."

The fallacy of this reasoning is shown in the dissenting opinion by Peckham, J., where he points out that the primary object sought to be accomplished in prosecutions for crime is the suppression of crime, and the protection of the public. For this reason, the principle of civil jurisprudence that, where the injured person is a party to the crime or unlawful enterprise, he will not be heard to complain, and the law will leave the parties where it finds them, has no application to criminal proceedings. In criminal proceedings the state is the prosecutor, and the proceeding is in its name. The complainant is no party to the proceeding. The prosecution of the accused by the state is not for the benefit of the complaining party, but its purpose is to punish a public offense and to prevent wrongdoing.

It is no answer to say that the accused should not be punished because the prosecuting witness was also guilty of an offense in the same transaction. This rule was applied in the case of *Perkins v. State*, 67 Ind. 270, 33 Am. Rep. 89, where the court held that one who falsely represents himself to another as an officer having a warrant for the arrest of the other for forgery, and power to compromise the offense, and threatens to arrest him, and by means of such representation and threats obtains from him a valuable thing as a consideration for not making the arrest, is guilty of the crime of false pretenses.

In *Commonwealth v. Henry*, 22 Pa. 253, it was alleged in an indictment that the defendant, with intent to defraud the prosecutor, falsely asserted to him, and also to another person who communicated it to him, that he had a warrant, issued by competent authority, commanding the arrest of the daughter of the prosecutor, for an offense punishable by fine and imprisonment, and

that he threatened to arrest her, by means of which representations he obtained from the prosecutor effects and money of the value of \$100. It was held that this was such an obtaining of money under false pretenses and indictable under the twenty-first section of the act of the 12th of July, 1842 (P. L. 345). See, also, *Commonwealth v. O'Brien*, 172 Mass. 248, 52 N. E. 77; *Horton v. State*, 85 Ohio St. 13, 96 N. E. 797, 39 L. R. A. (N. S.) 423, Ann. Cas. 1913B, 90; and case note to 17 L. R. A. (N. S.) 276.

[2] The essence of the offense is that the false pretense should be of a past event, or a fact having a present existence, and not of something to happen in the future; as a promise to do an act in the future is not sufficient. The promise made to the prosecuting witness by the defendant that he would protect the witness and would settle the crime with the federal authorities was a reference to a future act; and, being a promise to do an act in the future, was not a pretense within our statute. Besides, the prosecuting witness was bound to know that defendant had no power to compromise a crime. However, in *Parker v. State*, 98 Ark. 575, 137 S. W. 253, the court said:

"The false pretense itself is a fraudulent representation of an existing fact or past event by one who knows that it is not true, and of such a nature as to induce the party to whom it is made to part with something of value; and the facts constituting such false pretense should be stated with due certainty. But the false pretense need not be the only inducement to cause the party defrauded to sign the instrument or part with his goods; the pretense may be combined with other motives or be partly founded upon some promise. It is sufficient if the false pretense operated either alone or with other causes. Therefore it will not invalidate an indictment to allege other facts, promises, or causes in conjunction with the false pretense which is specifically set forth, if such false pretense is sufficient."

And in *Johnson v. State*, 36 Ark. 242, the court held that it is not necessary that the false pretense should be such as is calculated to deceive a person of ordinary prudence or caution; that it was as criminal to defraud the unwary as the wary.

[3] The testimony of the prosecuting witness, when given its strongest probative force,

tended to prove that the defendant falsely represented to him that he was a revenue officer, and that he had the power and that it was his duty to arrest the witness; that, if witness would pay him \$300, that would be the end of the matter. The false pretense was that defendant had the power and that it was his duty to arrest the prosecuting witness, but the defendant stated that he would not arrest him if he would comply with the terms of the defendant. In short, there was an implied threat that defendant would arrest the prosecuting witness if he did not comply with his terms. The evidence, we think, if believed by the jury, was sufficient to warrant a conviction.

[4] It is also contended that there is a fatal variance between the indictment and the evidence as to the effect of the pretenses; and in this contention we think counsel are right. An indictment for obtaining money by false pretenses must set out the offense in such terms as will give the defendant notice of the specific criminal act with which he is charged. The indictment is quite lengthy, and we do not think any useful purpose could be served by setting it out in full. We deem it sufficient to say that it, in substance, charges the offense to have been committed by the defendant falsely representing to the prosecuting witness that he had the power to withhold from the federal authorities charged with the enforcement of the criminal laws of the United States all information against him, and that he would withhold such information for the consideration of \$300. This was an allegation essentially descriptive of the offense as charged. As we have already seen, the evidence in behalf of the state at the trial tended to prove that the defendant falsely represented that he was himself a revenue officer; that he had the power and that it was his duty to arrest the prosecuting witness; but that he would not do so if \$300 were paid him. Thus it will be seen that there was a fatal variance between the proof and allegation, and the court should have so instructed the jury.

For the error in not doing so, the judgment will be reversed, and the cause remanded for further proceedings according to law.

JOHNSON et al. v. WHITCOMB et al.
(Court of Appeal of Kentucky. Nov. 11, 1915.)

1. WILLS ⇨634—VESTED REMAINDERS—EXTINGUISHMENT.

Where a will creates a life estate in trust, with remainder over at the death of the life tenant, the devisees take a vested remainder in fee, subject to defeat by their death prior to that of the life tenant.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. ⇨634.]

2. REMAINDERS ⇨16—VESTED REMAINDERS—SALE.

Gen. St. c. 63, art. 6, § 1, providing that remainders and contingent interests in land may be sold on petition of the owner of the present or a vested interest, all persons in being interested in the land being made parties, and the purchaser under such sale shall take all title of the present and future contingent claimants to said lands, authorizes the sale and reinvestment of estates of persons taking vested remainders after a life estate created by a will.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 11; Dec. Dig. ⇨16.]

3. REMAINDERS ⇨16 — SALE BY ORDER OF COURT—TITLE PASSING.

A testator created a life estate in trust for his wife and a remainder over on her death to four of his six brothers and sisters, but made no provision for the contingency of death of all the remaindermen pending the life estate. During the life estate the life tenant, by action under Gen. St. c. 63, art. 6, providing that sales of contingent interests may be made which shall be binding upon all contingent interests in the real estate, all persons in interest made parties, in which action the remaindermen and the heirs at law of the two sisters not named in the will were parties, procured the sale of a lot of land. *Held*, that children of the remaindermen were barred from attacking the sale, although they were not parties to the action for the sale.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 11; Dec. Dig. ⇨16.]

4. REMAINDERS ⇨16 — SALE BY ORDER OF COURT—OPERATION AND EFFECT.

Where sale is made under Gen. St. c. 63, art. 6, providing for the sale of contingent interests in lands and a reinvestment of the funds, the sale and reinvestment cut off all rights of contingent takers, who must then look to the fund derived from the sale for their share.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 11; Dec. Dig. ⇨16.]

5. PLEADING ⇨8 — PLEADING JUDGMENT — CONCLUSIONS OF LAW.

In ejectment for land plaintiffs alleged the sale of the land under order of the court in an action "seeking a sale and division of the proceeds of certain property of [testator's] estate," to which the life tenant and remaindermen, and certain heirs of testator not named in the will, were parties, but failed to set out any of the record in such action, or to further allege its contents. *Held*, on demurrer to the petition, that, in view of the presumption on collateral attack in favor of the prior judgment, the allegation of the purpose of such action was a mere conclusion of the pleader and insufficient to show that the action was not brought under Gen. St. c. 63, art. 6, under which plaintiffs, who were heirs of the remaindermen, and not parties, would be bound by the sale.

[Ed. Note.—For other cases, see Pleading Cent. Dig. §§ 12-28½, 68; Dec. Dig. ⇨8.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by Charles M. Johnson and others against J. A. Whitcomb and others. From a judgment for defendant on sustaining his demurrer to the petition, plaintiffs appeal. Affirmed.

Edw. C. Wurtele and John Irick, both of Louisville, for appellants. Oscar Bader, of Louisville, for appellee Whitcomb.

HANNAH, J. In 1888 Charles M. Thruston died, domiciled in Louisville. His will contained this language:

"After the payment of the above legacies and my just debts, I devise and bequeath to my sister, Barbara F. Thruston, in trust for my dearly beloved wife, all the rest and residue of my estate of every kind and description, the income arising therefrom to be paid to my said wife during her life. After her death, to be equally divided between my brother and sisters hereinbefore named or such of them as may be living at that time."

The brother and sisters referred to were John Thruston, Emma C. Thruston, Barbara F. Thruston, and Anna B. Johnson. The testator had two other sisters, Mary T. Rogers and Eliza Snyder Hornsby. He had no children. The widow died August 19, 1913. The remaindermen mentioned in the will had all died before that date.

On May 21, 1890, an action was instituted in the Louisville chancery court, being No. 43540, and styled Leonora Thruston v. Barbara Thruston et al., to obtain a sale by the court of a lot on Fifth street, in Louisville. The parties to that action were the life tenant, the remaindermen named in the will, and the heirs at law of the other two sisters of the testator. In that proceeding the lot in question was sold; and from the purchaser it passed by mesne conveyances to J. A. Whitcomb.

After the death of the life tenant certain children of the devisee remaindermen and of Mrs. Hornsby instituted this present action against Whitcomb to recover possession of the property so sold. For the purpose of presenting at once all of the matters involved in the controversy, the plaintiffs, in addition to the usual allegations in ejectment actions, conceded in their petition the sale of the property to Whitcomb in the aforesaid action No. 43540, but did not make the record therein or a copy thereof a part of the petition so as to enable the court to determine whether the proceedings in that action were regular; plaintiffs contenting themselves in respect of the object and nature of that action and the disposition of the proceeds of the sale therein, with the allegation that such action was instituted "seeking a sale and division of the proceeds of certain property of said estate," including the property here in question.

The lower court sustained a demurrer to the petition, the plaintiffs declined to plead further, and the court dismissed the petition. Plaintiffs appeal.

[1] 1. The devisees took under the will a vested fee simple estate in remainder; but this was subject to be defeated by their deaths before that of the life tenant. *Mercantile Bank v. Ballard's Assignee*, 83 Ky. 481, 7 Ky. Law Rep. 478, 4 Am. St. Rep. 160; *Pruitt v. Holland*, 92 Ky. 641, 18 S. W. 852, 13 Ky. Law Rep. 867; *Lewis v. Shropshire*, 68 S. W. 426, 24 Ky. Law Rep. 331.

[2] 2. Under article 6 of chapter 63, General Statutes, a sale of property so held was authorized. *Sheirick v. Maxwell*, 89 S. W. 4, 28 Ky. Law Rep. 173. That statute authorizes the sale of remainder and contingent interests in real property upon the petition of any person having a present or vested interest therein, for the purpose of reinvestment of the proceeds. See *Kalfus v. Davie*, 110 S. W. 871, 33 Ky. Law Rep. 663, wherein the whole of article 6 is cited.

[3] But it seems to be contended by the appellants that, under the statute mentioned, such a sale would not take with it the rights of persons not made parties to the action; that, as the testator died intestate in respect of the disposition which should be made of the property in the event of the death of all the remaindermen prior to that of the life tenant, there was a possibility of reverter which came into being upon the death of the last remainderman and passed to the heirs at law of the testator upon the defeat of the fee; and that, as appellants were not made parties to the action in which such sale was had before the defeat of the fee, the sale could not operate to extinguish their possibility of reverter.

The statute in question provides that the sale thereunder made shall invest the purchaser with all the title of the present and future contingent claimants to the said real estate; and we think this is amply broad enough to cover the possibility of reverter in such a case as this. No sale may be had under the statute mentioned unless it be for the purpose of reinvestment of the proceeds.

[4] And, when the action is brought under this statute, and the judgment directs a reinvestment of the proceeds of the sale, the proceedings being regular, the purchaser takes an absolute title; the possibility of reverter being extinguished, so far as the property sold is concerned. Such a proceeding cannot prejudice the rights of those in whom there is a possibility of reverter in the event of the defeat of the fee; for in such event they may look to the proceeds of the sale or to the property therewith purchased.

[5] The petition herein alleged that the action No. 43540 was brought for a sale and "division of the proceeds of sale." But this is a mere conclusion of the pleader. In the absence of the record in that proceeding or a more definite averment with respect to what it contains, such allegation is insuffi-

cient to overcome the presumption of regularity that attaches to the judgment therein. The plaintiffs have chosen to attempt a collateral attack upon that judgment; and, having so chosen, it was incumbent upon them to set forth the proceedings had therein, in such manner as to enable the court to determine whether the judgment therein was void.

For these reasons, the chancellor's action in sustaining the demurrer to the petition was right.

The judgment appealed from is therefore affirmed.

GAMBILL et al. v. GRIGSBY et al.

(Court of Appeals of Kentucky. Nov. 16, 1915.)

1. VENDOR AND PURCHASER ⇄281 — BONA FIDE PURCHASERS—LIENS.

In an action on notes executed by defendant's grantor, evidence held to warrant a finding that the notes were not a lien and that the defendant purchased without knowledge of the debt, and never assumed its payment.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 792-794; Dec. Dig. ⇄281.]

2. APPEAL AND ERROR ⇄1009 — REVIEW — FINDING.

A finding of the chancellor will not be disturbed on appeal, unless against the preponderance of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. ⇄1009.]

Appeal from Circuit Court, Perry County.

Action by J. C. Gambill and others against Mat Grigsby and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

J. B. Eversole, of Hazard, for appellants.
Hogg & Johnson, of Hazard, for appellee Grigsby.

NUNN, J. In this action J. C. Gambill and Louisa Colwell sue upon two notes executed by their brother, Joe Gambill, one for \$400, payable to J. C. Gambill, and one for \$250, payable to Louisa Colwell. It is alleged that they were executed on April 27, 1902, and were due and payable one year from date. It is further alleged that the notes were appellant's shares of the consideration for a tract of land which they then sold to Joe Gambill, the same land which Joe Gambill conveyed to the appellee, Mat Grigsby, on August 28, 1902. Suit was filed in 1910 against Grigsby and Joe Gambill, wherein appellants prayed for a lien and a sale of the land to pay the notes. No questions of law are involved. The court found, as a matter of fact, that appellants had no lien on the land.

[1] It seems that in 1879, Elizabeth Gambill, the mother of Joe Gambill and appellants, owned the land in question. In February of that year she executed what purported to be a deed conveying it to Joe Gambill in consideration of \$750, \$300 of which

was paid in cash and the balance evidenced by note. Joe Gambill took possession and resided there until 1902, when he conveyed to Grigsby. Joe Gambill's deed from his mother was not properly acknowledged, and, in February, 1902, a long while after her death, he filed an action on the deed, asserting that he had paid the consideration named, and that he was the equitable owner of the land. All of the heirs of Elizabeth Gambill were made parties defendant. Although served with process, none of them answered. The suit was settled in May of that year, by all of the heirs, including the appellants, joining in a deed, whereby they conveyed the land to Joseph Gambill.

"In consideration of the sum of \$750, which was paid to the said Elizabeth Gambill during her lifetime by the said Joseph Gambill of the second part, and whereas, there was a suit instituted in the Perry circuit court for the purpose of extracting said [land] from said first parties, and the said first parties for the purpose of compromising and avoiding said suit and quieting said second party in his title to the hereinafter described tract of land, do hereby sell and convey to the party of the second part, his heirs and assigns the following described property, to wit," etc.

The thing that prompted Joe Gambill to file the suit against the heirs of his mother was his desire to clear the title to his land so that he could complete a sale of it to Grigsby, which he had already agreed to make to him for \$1,200. In February, 1902, when Grigsby was ready to carry out the trade, some question was raised about the efficacy of the deed under which Joe Gambill claimed title. Joe put Grigsby in possession under a title bond, with the understanding that the deed was to be made and the money paid when the title was cleared. After filing the suit, and securing from the heirs the deed already referred to, Joe Gambill conveyed the land to Grigsby by general warranty deed on August 28, 1902, "in consideration of the sum of \$1,200 in hand paid." The deed was recorded on the day it was executed. Appellants lived in the same neighborhood, and knew that Grigsby was in possession, claiming title, and never asserted any lien or made any attempt to collect their notes, although themselves not in the best of circumstances, and one of them a borrower of money from other people. By this action, which they filed in 1910, they claim that the draftsman of the deed, by oversight or mistake, left out of it a provision setting up their notes with reservation of a lien to secure their payment. The evidence is not at all convincing that any such notes were executed as a consideration for land. The deed from the heirs to Joe Gambill and the deed from Joe Gambill to Grigsby recited full payment of consideration, and made no mention of notes, and there was nothing in either deed to apprise Grigsby of their existence or of a claim of lien on the land to secure their payment.

Appellants attempt to prove that some time after Grigsby took possession, but before Joe Gambill executed the deed to him, that Joe Gambill told Grigsby of the notes, and Grigsby agreed to pay them. It is not necessary to undertake an analysis of this evidence. The lower court found, and we are of the opinion that the evidence abundantly sustained his finding, that Mat Grigsby had no notice of appellants' demands or of their claim of lien against the land, if any they had, and never assumed their payment.

[2] It is a well-settled rule that the chancellor's finding will not be disturbed on appeal unless against the preponderance of the evidence. In this case the evidence preponderates in favor of the judgment. *Quigley v. Beam's Adm'r*, 137 Ky. 325, 125 S. W. 727; *O. F. L. Beckett & Co. v. Goodman*, 140 Ky. 399, 131 S. W. 185; *Collins v. Lawson's Committee*, 140 Ky. 510, 131 S. W. 262; *Paine v. Levy*, 142 Ky. 619, 134 S. W. 1160.

Judgment affirmed.

PATCHEN-WILKES STOCK FARM CO. v. WALTON.

(Court of Appeals of Kentucky. Nov. 16, 1915.)

ANIMALS §26—AGISTER'S LIEN—"LEASE"—"AGISTMENT."

Under Ky. St. § 2500, providing that all persons feeding and grazing cattle for compensation shall have a lien upon the cattle for their reasonable charges, where plaintiff leased lands for grazing purposes, and his lessee pastured certain mares thereon for defendant, plaintiff had no lien upon such mares covering a charge for grazing them; since a "lease" is a conveyance of real property divesting the owner for a time of his estate, leaving him only the reversion, while "agistment" is a species of bailment, and cannot arise where the animals are not delivered into the possession of the person asserting an agister's lien. Plaintiff's lessee was in possession of the premises; consequently plaintiff was not in possession of the mares.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 54-69; Dec. Dig. §26.

For other definitions, see *Words and Phrases*, First and Second Series, *Agistment*; *Lease*.]

Appeal from Circuit Court, Fayette County.

Action by J. F. Walton against the Patchen-Wilkes Stock Farm Company and another. Judgment for plaintiff, and defendant named appeals. Reversed, with directions to enter judgment dismissing the petition.

Harry B. Miller and H. E. Ross, both of Lexington, for appellant. Matt. S. Walton and Rives & Shannon, all of Lexington, for appellee.

HANNAH, J. J. F. Walton leased to W. E. Bean certain lands in Fayette county for grazing purposes, the term to begin March 15, 1913, and to continue for one year, the rental being \$200 per month, payable on the 15th days of April, May, June, July, August, September, October, and November, and \$300 per month thereafter for the remaining four months.

Bean leased this land from Walton for the purpose of grazing thereon certain brood mares, the property of the Patchen-Wilkes Stock Farm Company, with which corporation he had a contract of agistment. The mares were grazed on the premises so leased from March 15, 1913, to October 15, 1913; and Bean paid to Walton the rentals due under the lease up to July 15, 1913 (less the sum of \$64.20), and thereafter he made no further payments.

On October 22, 1913, Walton sued Bean and the Stock Farm Company in the Fayette circuit court for the rentals due under the lease to October 15, 1913, amounting to \$664.20; the company being joined as a defendant upon the theory that Bean leased the lands as its agent. By an amended petition it was charged that the defendant corporation (by its president, Stokes) had agreed to pay plaintiff for the grazing of the mares. The cause was submitted on July 11, 1914, and on July 15, 1914, the order of submission was set aside, and plaintiff filed a second amended petition, wherein he sought to assert an agister's lien on the mares, which, it seems, were at that time on Walton's premises under a contract between him and the corporation direct. An attachment was a few days later sued out. The chancellor rendered a judgment in plaintiff's favor against the defendant corporation in the sum of \$664.20, and sustained the attachment. The defendant Patchen-Wilkes Stock Farm appeals.

It appears from the evidence that Stokes, the president of the Stock Farm Company, promised Walton to make such checks as were sent to Bean for the board of the mares, payable to both Bean and Walton, so that the latter could protect himself in the matter of the rentals due him from Bean under his lease, although Stokes claims this promise was qualified to the extent that such checks were to be so sent only so long as the Stock Farm Company was indebted to Bean. In any event, the proof fails to show any promise of the defendant corporation to pay the rentals provided for in the lease from Walton to Bean, and it is therefore unnecessary to discuss whether, as appellant contends, such promise is within the statute of frauds. Appellee upon this appeal, in fact, abandons that theory of the case, and rests his right of recovery purely upon the ground that he was entitled to an agister's lien.

It appears from the record that the Stock Farm Company did, in fact, send checks for the board of the mares made payable to the order of Bean and of Walton, up to August 15, 1913, after which date the company refused to make further payments to Bean,

claiming that he was indebted to it. The mares, however, remained on the premises leased by Walton to Bean, and the Stock Farm Company knew this. Bean made no further payment of rentals under the lease.

Appellee states in his brief (though it does not otherwise appear) that the chancellor, in considering the case, became convinced that, in view of the fact that the company had sent checks for the board of the mares, made payable in the manner above mentioned, and then ceased to make further payments to Bean, but left its mares "on Walton's premises," such act was equivalent to the placing of the mares thereon by the corporation itself, and that Walton was therefore entitled to recover under Kentucky Statutes, § 2500, giving liens to agisters. This section reads as follows:

"All owners and keepers of livery stables, and persons feeding or grazing cattle for compensation, shall have a lien upon the cattle placed in such stable or put out to be fed or grazed by the owner or owners thereof, for their reasonable charges for keeping, caring for, feeding and grazing the same; and this lien shall attach whether the cattle are merely temporarily lodged, fed, grazed and cared for, or are placed at such stables or other place or pasture for regular board; but it shall be subject to the limitations and restrictions as provided in case of a landlord's lien for rent."

1. A lease is a conveyance of real property, and it divests the owner for a time of a certain estate therein, leaving in him the reversion. *Mattingly's Ex'r v. Brents*, 155 Ky. 571, 159 S. W. 1157.

Walton, having leased the premises in question to Bean for the term of one year beginning March 15, 1913, and ending March 15, 1914, was not in possession of the premises during the period of August 15, 1913, to October 15, 1913. In intentment of law, the lands so leased were in the possession of Bean, the lessee, and the landlord could not be entitled to an agister's lien on the brood mares thereon grazed. He was not "feeding or grazing" them; Bean was doing this.

"Agistment" is a species of bailment, and cannot arise where the animals were not delivered into the possession of the person who asserts the agister's lien; and, as the tenant was in possession of the premises, the landlord was not in the possession of the mares thereon grazed. *Cotton v. Arnold*, 118 Mo. App. 590, 95 S. W. 280.

It follows, therefore, that the chancellor erred in holding Walton entitled to an agister's lien on the mares in question and in rendering judgment in his favor against the defendant Stock Farm Company.

The judgment is reversed, with directions to enter a judgment dismissing the petition as to the defendant company.

SCOTT v. KIRTLEY.

(Court of Appeals of Kentucky. Nov. 16, 1915.)

1. JURY §—13—RIGHT TO TRIAL BY—EQUITABLE ACTION.

In an action by the owner to cancel a lien which defendant contractor was attempting to assert on a house he had repaired, the owner claiming that the work of reconstruction had been defectively done, damaging him, the contractor was entitled to a jury trial on the issue as to whether or not there was anything due him under the contract, since, as his right of action did not depend altogether on the mechanic's lien statute, he having an independent cause of action arising out of his contract with the owner, he had the right to a jury trial at common law.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35-83; Dec. Dig. §—18.]

2. APPEAL AND ERROR §—685—PREJUDICIAL ERROR—REFUSAL OF JURY TRIAL IN EQUITABLE ACTION.

Wherever, in an equitable action between an original contractor and the owner, involving such a legal issue as whether or not there was anything due the contractor under his contract, the record shows there was sufficient evidence to take the case to the jury, the refusal of a jury trial to the contractor was prejudicial error, but where the evidence is not in the record, it cannot be said that it was sufficient to raise a question for a jury and hence that it was prejudicial error to deny a jury trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2891; Dec. Dig. §—685.]

Appeal from Circuit Court, Kenton County, Criminal, Common Law, and Equity Division.

Action by J. H. Kirtley against J. W. Scott. Judgment for plaintiff, and defendant appeals. Affirmed.

Stephens L. Blakely and Samuel W. Adams, both of Covington, for appellant. A. E. Stricklett, of Covington, for appellee.

CLAY, C. J. W. Scott, a contractor, contracted with J. H. Kirtley, the owner, to remodel an old house and build an addition thereto for the price of \$1,890.08. Subsequently a few changes were made in the contract, which increased the contract price. Kirtley made certain payments on the contract. Scott, claiming a balance due under the contract of \$456.98, filed a statement of mechanic's lien in the Kenton county clerk's office. Charging that the work of construction was defectively done, and that by reason thereof the plaintiff had been damaged in the sum of \$600, and that there was nothing due defendant under the contract, plaintiff brought this action to cancel the lien which defendant was attempting to assert on the property. Defendant filed an answer and counterclaim, denying the allegations of the petition and seeking the enforcement of his lien. The allegations of the petition and counterclaim were denied by reply. Thereupon defendant moved for a jury trial as to the disputed issues of fact. The motion was overruled. The case was then referred to the commissioner, who reported in favor of plain-

tiff. On final hearing, the chancellor adjudged that defendant was not entitled to a lien on the property, and judgment was entered accordingly. Defendant appeals.

[1, 2] Defendant's chief complaint is that the trial court erred in refusing to transfer the case for trial by a jury of the disputed questions of fact. This precise question was before this court in the case of Carder & Val-landingham v. Weisenburgh, 95 Ky. 135, 23 S. W. 964, 15 Ky. Law Rep. 497. There Weisenburgh, a contractor who had repaired and remodeled a flouring mill belonging to appellants, sought to enforce a lien on the mill for the contract price. Appellants admitted the contract, but claimed that the work was not done in a workmanlike manner, and asked damages in consequence. Appellants asked that the court transfer the legal issues to the common law docket to be tried by a jury. The motion was overruled, and the case tried by the court. On appeal to this court the court held that the enforcement of the lien on the mill property depended on whether or not there was anything due under the contract, and that the latter question was an issue of fact properly triable by a jury. In discussing the question the court said:

"The Constitution of this state guarantees the right of jury trial. This means a trial according to the course of the common law, and secures the right only in cases where a jury trial was customarily used at common law; but in cases of purely equitable cognizance a trial by jury is not a matter of right, but it is addressed to the discretion of the chancellor. The right of trial by jury, as secured to the citizen by the Constitution of the state, cannot be taken away or placed at the discretion of the chancellor by converting a legal right into an equitable one, or by giving the chancellor an exclusive right to try legal issues, because there is some equitable right that arises out of the establishment of the legal issues, so as to infringe upon the right of trial by jury. That right must remain inviolate as a secured constitutional right of the citizen in all trials in which, according to the course of the common law, the right to a trial by jury exists."

In the case under consideration, Scott was not entitled to a lien unless there was a balance due under the contract. Whether or not there was a balance due was, under the rule above announced, properly triable by a jury. The case of Rieger et al. v. Schulte & Eicher et al., 151 Ky. 129, 151 S. W. 395, when properly understood, does not announce a contrary doctrine. There the lien claimants were subcontractors. They had no contract with the owner. There only rights were under and by virtue of the mechanics' lien statute. Having no rights at common law, no right of trial by jury as to the disputed issues of fact existed at the common law. It was therefore held that the remedy afforded by the mechanics' lien statute, upon which their cause of action was solely based, was exclusive, and that they were not entitled to a trial by a jury of the disputed issues of

fact. It is apparent, however, that in the case of an original contractor a different rule prevails. His right of action does not depend altogether on the statute. He has an independent cause of action arising out of his contract. On the question whether or not there was anything due under his contract, he had the right to a jury trial at common law. The mere fact that the statute gives him an additional right does not deprive him of the right to a jury trial, which existed at common law. We therefore conclude that in every case between the original contractor and the owner, involving such disputed legal issues as arise for decision in this case, either party has the right to have them tried by a jury, and it is prejudicial error to refuse such right wherever the record shows that there was sufficient evidence to take the case to the jury. The case of *Rieger et al. v. Schulte & Elcher et al.*, supra, in so far as it conflicts with this view, is hereby overruled. The difficulty in the present case, however, arises out of the fact that the evidence heard below is not in the record. The burden is always on the appellant to show that he has been prejudiced by an erroneous ruling of the trial court. In the absence of the evidence, we are unable to say that there was sufficient evidence to take the case to the jury, or that the appellant has been prejudiced by the refusal of the trial court to award him a jury trial.

Judgment affirmed.

GOFF v. GOFF.

(Court of Appeals of Kentucky. Nov. 16, 1915.)

DIVORCE \Leftrightarrow 240—ALIMONY—ALLOWANCE.

Where a wife suing for divorce established her charges of abandonment and cruel treatment, and there was no proof upon the counterclaim for a divorce on the ground of adultery, and she was then under 21, and was awarded the custody of two small children and had no estate, she was entitled, in addition to the allowance for their support, to alimony in the sum of \$150 per year out of the husband's earnings.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 675-678, 680; Dec. Dig. \Leftrightarrow 240.]

Appeal from Circuit Court, Pike County.

Suit for divorce by Hester Goff against Rudolph Goff, with counterclaim for divorce. Decree for plaintiff, without alimony, and she appeals. Reversed, with directions.

J. S. Cline, of Pikeville, for appellant. Roscoe Vanover, of Pikeville, for appellee.

NUNN, J. Appellant, the wife, sued her husband, the appellee, for divorce and alimony on the grounds of abandonment and cruel treatment. He answered with a counterclaim for divorce on the ground of adultery. The proof sustained her charge of abandonment and cruelty. There was no proof in support of his charge of adultery. The court so held, and granted a divorce,

and awarded to the wife the care and custody of the two infant children. The husband was directed to pay \$50 in quarterly payments to her for support of the children, being one year's allowance, and the case was reserved for further orders on the question of allowance after that period. The husband was directed also to pay the costs of the action, including a fee of \$25 to her attorney. The court refused to allow alimony to the wife. We approve of the chancellor's judgment on all questions except alimony, and the form of the order as to support for the children. We are of opinion that alimony in some amount should have been allowed to her. She has no estate, was not in fault, and at the time of the judgment was under 21 years of age. The children are twins, and are now about 3 years old. She is entitled to help from her husband for the support of herself as well as her children. The husband is young and strong, and is able and capable of supporting the mother and children. His daily earnings constitute his estate, but lack of other means will not justify a failure to award alimony.

The allowance of \$50 per annum for the children should be in the form of a standing order, and the payments continue until such time as the court may otherwise direct, if circumstances and conditions so change as to demand a modification. The court will allow alimony to the wife in the sum of \$150 per year, payable quarterly.

Judgment is reversed, with directions to proceed as herein indicated.

LOUISVILLE & N. R. CO. v. FEENEY.

(Court of Appeals of Kentucky. Nov. 16, 1915.)

1. PLEADING \Leftrightarrow 369—ELECTION—PARTIES.

In an action for damages by fire caused by sparks from a locomotive, the plaintiff was properly not required to elect as to whether she would prosecute the company owning the road-bed or the company running trains thereon, since the former was liable for the negligence, not only of its own servants, but also for the negligence of servants of the other company.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. \Leftrightarrow 369.]

2. RAILROADS \Leftrightarrow 484—OPERATION—FIRES—QUESTION OF FACT.

In an action for the burning of a barn by sparks from defendant's locomotive, evidence that such sparks caused the fire held sufficient to authorize the submission of defendant's negligence to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740-1746; Dec. Dig. \Leftrightarrow 484.]

3. RAILROADS \Leftrightarrow 479—OPERATION—FIRES—EVIDENCE.

In an action for the destruction of a barn by fire, set by sparks from defendant's locomotive, alleged to be due to the negligent operation of the train, evidence showing a defective spark arrester was not inadmissible because it was not pleaded.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1706-1706; Dec. Dig. \Leftrightarrow 479.]

4. APPEAL AND ERROR \Leftrightarrow 1070—PREJUDICIAL ERROR—VERDICT AND FINDINGS.

In an action for destruction of a barn by fire from sparks from a locomotive, failure of the jury to say whether the company owning the road or the company operating a train thereon started the fire was not prejudicial, where the company owning the road was liable for the negligence of the company operating the train.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4231-4233; Dec. Dig. \Leftrightarrow 1070.]

Appeal from Circuit Court, Scott County.

Action by Ellen Feeney against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Emmett M. Dickson, of Paris, and Benjamin D. Warfield, of Louisville, for appellant. James Bradley and B. M. Lee, both of Georgetown, for appellee.

MILLER, C. J. The appellee, Ellen Feeney, sued the Louisville & Nashville Railroad Company and the Chesapeake & Ohio Railway Company, jointly, for damages for the burning of her barn at Payne's Depot, in Scott county, on December 16, 1912. The petition alleges that the barn was set on fire by sparks emitted from an engine belonging to one of the defendants, but that plaintiff did not know which company owned the engine that caused the fire, and that the trains of both companies used appellant's railway track where the fire occurred. Both defendants moved the court to require the plaintiff to elect which of the defendants she would sue, but the court overruled both motions. The issues were made, and upon a trial in October, 1913, the jury returned a verdict against both defendants, for \$500; but, upon motions of both defendants, and the plaintiff, a new trial was granted. At a second trial, held in May, 1914, the court peremptorily instructed the jury to find for the Chesapeake Company; and, the case having been submitted to the jury as against the Louisville & Nashville Railroad Company, the jury returned a verdict against it for \$659.46. This appeal is by that company.

The evidence shows that shortly before plaintiff's barn was discovered to be on fire, about 4 o'clock in the afternoon, four trains passed the barn. The first was appellant's passenger train, going west from Lexington to Louisville; the second was appellant's freight train, going east from Louisville to Lexington; the third was the first section of the Chesapeake Company's freight train No. 92, going east from Louisville to Lexington; and the fourth was the second section of said train No. 92, going in the same direction. The petition, however, alleges that the fire was caused by an east-bound train; and, as no claim is made, by either party to this appeal, that the fire was caused by the appellant's passenger train first above enu-

merated, nothing further need be said concerning it.

At the point where the track passed appellee's barn there is a decided upgrade going eastwardly towards Lexington, and it is contended that the fire was caused by one of the three freight trains while ascending this grade.

[1] 1. Appellant first insists that the trial court erred in refusing to require the appellee to elect against which defendant she would prosecute her suit; and, it insists that the case of the Louisville & Nashville Railroad Co. v. Ft. Wayne Electric Co., 108 Ky. 113, 55 S. W. 918, 21 Ky. Law Rep. 1544, is conclusive of this question. A reading of that case, however, fails to convince us of that fact. And, in view of appellant's ownership of the track used by the trains of both companies in this case, it becomes unnecessary to discuss the question of pleading suggested by appellant, since the appellant was liable for the negligence, not only of its own servants and employes, but also for the negligence of the servants and employes of the Chesapeake Company.

In O'Bannion's Adm'r v. Southern Railway in Ky., 110 S. W. 329, 33 Ky. Law Rep. 436, we passed upon the question here raised, saying:

"The appellee railroad corporation having licensed the Cincinnati, New Orleans & Texas Pacific Railway Company to run its cars over its line, it is as responsible for whatever accident took place in the operation of the train as if it had been one of its own, and therefore, so far as the responsibility of the appellee for the injury involved here is concerned, we will treat the case as if the accident was occasioned by one of its own trains. McCabe's Adm'r v. Maysville & B. S. R. Co., etc., 112 Ky. 361 [66 S. W. 1064, 23 Ky. Law Rep. 2328]; Louisville & Nashville R. Co. v. Breeden's Adm'r, 111 Ky. 729 [64 S. W. 667, 23 Ky. Law Rep. 1021, 1763]."

In overruling the motion to require the plaintiff to elect, the trial court was clearly right.

[2] 2. Appellant next insists that there was no evidence that any one of the three freight trains in question emitted any sparks, and consequently that its motion for a directed verdict should have prevailed. There had been no fire in the barn during that day, or, so far as the evidence shows, for several days. The last person in the barn on the day of the fire closed the barn doors after throwing in a load of corn; and, when he left the barn there was no fire visible, either in or about it. Appellee's barn was situated about 150 feet north of the track, and the wind was blowing from the southeast. In the southeast end of the barn there was a window that was left open. This window faced the railroad track, and there was stored in the loft of the barn into which this window opened several tons of sheaf oats. There was also some straw in the stalls below the loft. The proof shows that the three

freight trains passed the barn shortly before the fire was discovered, and that in passing this barn shortly before the day of the fire they had set fire to the grass and fencing along the right of way. It further appears from the proof that the fire occurred on December 16, 1912, about 4 o'clock in the afternoon; that it was a gloomy and dark afternoon; that Miss Kate Feeney, the daughter of appellee, saw sparks emitted in great quantities from one of these engines as it ascended the grade; that Trowbridge, a neighbor, who was stripping tobacco in his barn near the track and near Mrs. Feeney's barn, had his attention called to these trains by the unusual puffing and laboring of the engines in ascending the grade; that he went to a crack in the barn and looked out to see what was the trouble; and that the engine was making such an effort to make the grade that he thought something was wrong with the train. The unusual puffing and laboring of the engine was also noticed by Branham, another neighbor; and all the witnesses who saw the fire testified that it occurred between 5 and 15 minutes after the engines had passed.

The facts of this case make it very like *L. C. R. Co. v. Scheble*, 162 Ky. 471, 172 S. W. 910, where we said:

"There is no direct evidence that sparks from the engine of the train that passed a few minutes before the fire was discovered set the house on fire, but direct evidence is not indispensable to a recovery in this class of cases. Circumstantial evidence is equally as sufficient as direct evidence would be when the circumstantial evidence connects the sparks from the passing train with the fire. It would be an exceedingly difficult, and in many cases an impossible thing, for the owner of property destroyed by fire to show by direct and positive evidence that the fire was started by sparks from a passing engine. In the nighttime live sparks falling from engines are very discernible, but in the daytime live sparks, although of sufficient heat to set fire to dry material, cannot well be seen by the naked eye as they come from the smokestack of the engine, and yet in many cases, including this one, circumstantial evidence leaves little room for doubt as to the origin of the fire. Several witnesses, who were in or about the house at all times during the morning of the fire and preceding it, testified very clearly and directly and without contradiction that there was no fire in or about the house from which the fire that destroyed it could have been started. Accepting as true the statements of these witnesses, as the jury had a right to do, and as we may well assume they did, it is apparent that the fire must have originated from some outside source, and under the evidence there was only one source from which it could have started, and that was this passing engine."

See, also, *Southern Ry. v. Hanna*, 21 Ky. Law Rep. 850, 53 S. W. 1, C., N. O. & T. P. R. R. Co. v. Falconer, 30 Ky. Law Rep. 152, 97 S. W. 727, *Southern Ry. v. McGeoughy*, 31 Ky. Law Rep. 291, 102 S. W. 270, *C. & O. R. Co. v. Preston*, 143 Ky. 189, 136 S. W. 203, and *C. & O. Ry. Co. v. Snyder*, 164 Ky. 433, 175 S. W. 640, holding that circumstantial evidence of this character is sufficient to take the case to the jury. But

the case at bar is stronger for the plaintiff than the cases just cited, since at least one witness testified that she saw sparks emitted by the engine shortly before the fire. And, in the *McGeoughy Case*, supra, the property destroyed by the fire was 260 feet from the company's right of way.

In our opinion, the evidence was sufficient to authorize a submission of the case to the jury upon the issue of appellant's negligence in the operation of its trains.

[3] 3. Appellant further insists that the petition did not allege there was any defect in the engine, or in the spark arrester thereof; and as it only charged negligence in the operation and management of the trains, the proof which tended to show a defective spark arrester did not sustain the charge of negligent operation. It is a general rule of pleading that in alleging an injury to any kind of property it will ordinarily be sufficient to state, in general terms, that it was caused by the negligence or carelessness of the defendant or his servants, without alleging all the circumstances necessary to show negligence; but where the petition specifies the acts of negligence relied upon, the plaintiff will be confined, in his proof, to the acts specified, and cannot recover by showing a different act of negligence. Here the allegation of negligence is general in so far as it relates to the operation of the train; and surely the charge that the train was so negligently operated as to set fire to appellee's barn was sufficient to permit the plaintiff to show that the fire was caused by sparks from appellant's engine. It was not necessary for the pleader to allege that the engine was defective in any particular respect, if its operation constituted negligence. *Southern Ry. v. Hanna*, 21 Ky. Law Rep. 850, 53 S. W. 1; *Southern Ry. v. McGeoughy*, 31 Ky. Law Rep. 291, 102 S. W. 270.

[4] 4. Finally, it is contended that the court erred in not requiring the jury to obey instruction No. 8, given by the court upon its own motion, which required the jury to say in their verdict whether the fire was started from a spark from the engine of the Chesapeake Company, or from one of the appellant's engines. The defendants did not file pleadings against each other, or request the jury to fix the responsibility as between them. On the contrary, they elected to make their fight jointly; and, as the appellant owned the track over which the Chesapeake Company operated its trains, the appellant was liable to the appellee for the negligence of either defendant. Under these circumstances, we fail to see how the jury's failure to obey the instruction by saying which defendant set fire to the barn, even though it were possible for it to do so, could prejudice the appellant.

We find no error, either substantial or otherwise, in the record.

Judgment affirmed.

IMPERIAL JELICO COAL CO. v. NEFF.
(Court of Appeals of Kentucky. Nov. 16, 1915.)

1. LIMITATION OF ACTIONS — 121 — RUNNING OF STATUTE — FILING OF PETITION.

Under Civ. Code Prac. § 134, declaring that the court may, at any time and on such terms as may be proper, permit a pleading to be amended by adding or striking out the name of a party, or by correcting a mistake in the name of a party, a petition, in an action against a corporation, which improperly named the corporation, may be corrected by amendment, and such amendment will relate back to and become part of the original petition, where the original service had been on the corporation's duly constituted agent and service of summons on such petition will stop the running of limitations, notwithstanding a corporation can have but one name and must be sued by such name.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 537-540; Dec. Dig. —121.]

2. DAMAGES — 131 — PERSONAL INJURIES — MEASURE.

An award of \$2,000 in favor of an employe of a coal company who was shocked by an electric wire carrying 250 volts is excessive, where he was able to return to work on the day of the accident and the next two days on which the mine was operated; medical testimony as to a subsequent illness being that it was caused by rheumatism and malaria.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370; Dec. Dig. —131.]

Appeal from Circuit Court, Whitley County.

Action by Charles Neff against the Imperial Jellico Coal Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Tye, Siler & Gatliff, of Williamsburg, for appellant. S. H. Kash, of Corbin, B. B. Golden, of Barbourville, Stephens & Steely, of Williamsburg, and W. R. Lay, of Barbourville, for appellee.

CARROLL, J. On July 31, 1913, the appellee, Neff, brought this suit in the Whitley circuit court against the Imperial Coal Company, to recover damages for personal injuries alleged to have been sustained by him on September 6, 1912, on account of the negligence and carelessness of the coal company. Summons on this petition was issued against the Imperial Coal Company, and on August 18, 1913, the sheriff made this return on the summons:

"Executed on the Imperial Jellico Coal Company, August 18, 1913, by giving a copy of same to R. F. Perkins, bookkeeper of said company."

On September 7, 1913, the Imperial Jellico Coal Company entered its appearance for the purpose only of quashing the return on the summons, and in support of this motion filed the affidavit of R. F. Perkins, stating that the Imperial Jellico Coal Company was a corporation created by the laws of Kentucky, and that the summons against the Imperial Coal Company was executed on R. F. Perkins as the bookkeeper of the Imperial Jellico Coal Company; that Neff was working for and an employe of the Imperial Jellico Coal

Company at the time he received the injury of which he complained; that there never was such a corporation as the Imperial Coal Company, and the affiant was not an officer or agent of the Imperial Coal Company—

"that John Morgan was, on the 18th day of August, 1913, and is now, the president of the Imperial Jellico Coal Company, and W. B. Wyatt was on said date and is now the vice president of the Imperial Jellico Coal Company, and J. C. Hoskins was and is now the secretary treasurer and general manager of the Imperial Jellico Coal Company; that J. C. Hoskins then resided in Whitley county, Ky., and that John Morgan and W. B. Wyatt then resided and do now reside in Whitley county, Ky."

Thereafter, on September 21st, the court quashed the return on the summons, and a few days afterwards the plaintiff filed an amended petition, in which it was averred that:

"By oversight and inadvertence on the part of his attorneys the full and correct name of the defendant was not stated in the petition; that the true defendant and the real and correct name of the defendant was the Imperial Jellico Coal Company, and that is the company and defendant whose acts, negligence and carelessness caused the injuries set forth in the petition, and is and was the defendant that he directed to be sued and intended to have sued herein, and his petition herein merely omitted the word 'Jellico' from the name and style of said company."

And he asked that the petition be corrected and the case proceed as if the correct name of the defendant had been set forth in the petition. On the same day a summons was issued against the Imperial Jellico Coal Company and executed on December 6, 1913, on "Fred Perkins, bookkeeper of the company." After this an answer was filed by the Imperial Jellico Coal Company, in which, after controverting the allegations of the original petition, and pleading assumed risk and contributory negligence, in a separate paragraph it pleaded and relied on the one-year statute of limitation, averring that the amended petition making it a party was not filed until more than one year after the cause of action accrued. To the paragraph pleading the statute of limitation, a demurrer was sustained. Thereupon the case went to trial, with the result that there was a verdict and judgment in favor of the appellee against the Imperial Jellico Coal Company for \$2,000, and on this appeal a reversal of that judgment is sought.

[1] The first ground relied on for reversal is that the action against the Imperial Jellico Coal Company was not commenced until the amended petition was filed on November 25, 1913, more than one year after the cause of action set up in the petition accrued, and at a time when the action was barred by the statute, and therefore the plea of limitation, to which a demurrer was sustained, presented a complete defense to the cause of action. It will be observed that the summons on the amended petition against the Imperial Jellico Coal Company was executed on "Fred Perkins, bookkeeper," and in view

of the fact that no question is raised as to the validity of this service, we may assume that Fred Perkins, as the bookkeeper of the Imperial Jellico Coal Company, was a proper person on whom to serve process against this company. So that the only question is, Did the court commit error in sustaining a demurrer to the plea of limitation interposed as a defense?

Of course a corporation can legally have only one name, and that must be the name given to it in its articles of incorporation, and by and in that name it is authorized to conduct the business for which it was created. If it brings a suit, it must be brought in its designated name; and, likewise, when it is sued, it should be sued by such name. But in the case we have the suit was against the Imperial Coal Company, and the negligence charged attributed to that company, when as a matter of fact the plaintiff at the time he sustained the injuries complained of was an employé of the Imperial Jellico Coal Company, and his cause of action was against that company, and not against the Imperial Coal Company, which was an entirely different and distinct corporation, if indeed there was any such corporation. It is true the summons on the petition against the Imperial Coal Company was executed on an authorized agent of the Imperial Jellico Coal Company, but this fact does not help the case for the plaintiff, as the Imperial Jellico Coal Company was not sued or before the court until after the amended petition was filed and summons issued thereon. But the error in omitting from the petition the word "Jellico" and styling the suit an action against the Imperial Coal Company, instead of against the Imperial Jellico Coal Company, was not, in view of the admitted fact that the Imperial Jellico Coal Company was the name of the company for which the plaintiff was working when injured and the name of the company which he intended to sue, so substantial as to affect the sufficiency of the petition as the commencement of an action against the Imperial Jellico Coal Company. It is provided in section 134 of the Code that:

"The court may, at any time, in furtherance of justice, and on such terms as may be proper, cause or permit a pleading or proceeding to be amended, by adding or striking out the name of a party; or, by correcting a mistake in the name of a party, or a mistake in any other respect. * * * The court must, in every stage of an action, disregard any error or defect in the proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

And we think this section of the Code affords us ample authority to disregard as immaterial the error in giving the incorrect name of the corporation intended to be sued, and that when the amendment was filed correcting this error, the amendment related back to and became a part of the original petition. *Johnson v. Central R. R.*

Co., 74 Ga. 397; *Burnham v. Stratford Co. Savings Bank*, 5 N. H. 446; *Lane v. Seaboard R. R. Co.*, 50 N. C. 25; *Dixon v. Melton*, 187 Ky. 689, 126 S. W. 358, Ann. Cas. 1912A, 457; *Teets v. Snider Heading Mfg. Co.*, 120 Ky. 653, 87 S. W. 803, 27 Ky. Law Rep. 1061.

In the case of *Geneva Cooperage Company v. Brown*, 124 Ky. 16, 98 S. W. 279, 30 Ky. Law Rep. 272, 124 Am. St. Rep. 388, the Geneva Cooperage Company was sued as a corporation when in fact it was a partnership, and it was held that the commencement of the action against the corporation was not the commencement of an action against the individual owners so as to suspend the running of the statute of limitation against them. A like conclusion was reached under similar facts in the case of *Leatherman v. Times Co.*, 88 Ky. 291, 11 S. W. 12, 10 Ky. Law Rep. 896, 3 L. R. A. 324, 21 Am. St. Rep. 342. But in each of these cases the amendment tendered after the statute of limitation had run against the original defendant was a substantial departure from the cause of action set up in the original petition. In each case the suit was against a corporation, while the amendment undertook to commence an action against individuals. In the case we have the suit was against a corporation, and the only error committed consisted in incorrectly designating the name of the corporation which was the real defendant intended to be, and that was, in truth, sued.

The instructions are also complained of, but we think they submitted with substantial fairness the issues made by the pleadings and supported by the evidence.

[2] It is complained that the damages are excessive, and we think this ground for reversal is well founded. The appellee received a shock by coming in contact with an electric wire carrying 250 volts. The wire had been attached to a wooden post, but the post had rotted, letting the wire sag, so that when the appellee went to turn a switch, the wire struck his forehead and knocked him down; but in a little while he was able to go back to his work, which was not heavy. The appellee testified that the mine was idle the day following the accident, but he worked the two succeeding days, and then quit and went home, where he was confined to his bed about three weeks; that the muscles in one of his hands were drawn so that he could not straighten his fingers; that he also suffered with pains in his head and neck; that he had lost a little flesh, was also afflicted with nervousness, and the nails on his fingers and toes came off. A number of witnesses, whose statements were not contradicted, testified for the coal company, and said that if a person came in contact, in the manner appellee did, with a wire carrying 250 volts, it might stun him for a little while and knock him down, but would not leave any bad after effects. The three doctors who

attended appellee when he was confined to his bed for some three weeks after the accident, and who saw him after this when he was going about, said that he had malaria and rheumatism and, in effect, that the injuries of which he complained were not attributable to the shock he received, but to other causes. No witness was introduced by appellee who said that an electric shock such as he sustained would produce the injuries, or any of them, he was suffering or had suffered with.

Under these circumstances, we think the verdict grossly excessive. If the nervous and physical conditions testified to by appellee were attributable directly to the electric shock, the verdict would not be excessive, but the evidence fails to connect these conditions with the shock.

The judgment is reversed, with directions for a new trial.

STONE v. DANIELS.

(Court of Appeals of Kentucky. Nov. 16, 1915.)

1. JUDGMENT ⇐17—PROCESS ON AMENDED PETITION—SUIT.

Under Civ. Code Prac. § 135, providing that if a plaintiff, having a lien for a debt due and a debt not due upon property which he seeks to subject thereto, states both claims in his petition, he may, upon suggestion of record that one of them has become due pendente lite, have judgment for a sale of the property therefor, plaintiff, whose petition in an action to enforce a vendor's lien note alleged a cause of action on other notes not then due, was entitled to a judgment on the notes maturing after the petition was filed, without other process.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33, 157, 422; Dec. Dig. ⇐17.]

2. VENDOR AND PURCHASER ⇐274—ACTION ON LIEN NOTE—DEFENSES.

In an action to enforce a vendor's lien note, stating a cause of action on other notes not then due, an answer, alleging the vendor's misrepresentations as to the acreage of the tract relied upon by the purchaser, and that part of the tract was in the actual adverse possession of other owners, if tendered in time, would set up a good defense.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 769-771; Dec. Dig. ⇐274.]

3. JUDGMENT ⇐188—SETTING ASIDE—DILIGENCE.

Where suit to enforce a vendor's lien was pending more than a year before final decree, and defendant had been allowed time to file an answer and had announced that he had no defense to make, a tendered answer, filed with a motion to set aside the decree, which did not aver that by the exercise of reasonable diligence a deficiency in the land, alleged in such answer, could not have been discovered before final decree, and which showed that part of the tract was in actual adverse possession of other parties at the time of the purchase, failed to show the exercise of proper diligence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-251, 254; Dec. Dig. ⇐188.]

Appeal from Circuit Court, Bell County.

Action by John W. Daniels against Maggie Stone. Judgment for plaintiff, and from an

order refusing to set aside the judgment and to allow a pleading to be filed, defendant appeals. Affirmed.

Metcalfe & Jeffries, of Pineville, for appellant. A. G. Patterson, of Pineville, for appellee.

CARROLL, J. In February, 1913, the appellant bought from the appellee a tract of land for the agreed consideration of \$8,500. Two thousand dollars of this sum was paid in cash, and for the remainder of the consideration three notes of \$500 each were executed, payable in 6, 12, and 18 months from the date of the conveyance. The first note fell due in August, 1913, and in September following the appellee brought suit, in which he averred that:

"As part consideration for said land defendant, on February 14, 1913, executed and delivered to plaintiff her three notes for the sum of \$500 each, whereby defendant promised and agreed to pay him \$500 6 months after date thereof, \$500 12 months after date thereof, and \$500 18 months after date thereof, all of said notes bearing 6 per cent. interest from date, and made negotiable and payable at the First State Bank at Pineville."

It was further averred that a lien was retained to secure the payment of all the notes, that no part of the note first due, or of the other notes, had been paid, and that there were no other liens on the land, and that it could be divided without materially impairing its value. Summons on this petition issued, and was executed in due time, and at the September term, 1913, of the Bell circuit court the defendant, by Baker & Rawlins, her attorneys, filed a demurrer to the petition, which was overruled, and, no answer or other pleading being filed by the defendant, there was a judgment on the note at the December term, 1913, and an order directing enough of the land sold to pay the judgment. In February, 1914, at which time the judgment had not been executed, the plaintiff filed in court an amended petition, setting out that the second note was due and unpaid, and he prayed for judgment for the amount of the note and for a sale of so much of the land as might be necessary to satisfy it. Thereupon there was a judgment in conformity to the prayer of the petition. On November 11, 1914, it appearing that the last note had become due, and that the judgment on the other two notes had not been executed, another amended petition was filed, asking for a judgment on the third note, and a sale of the land to satisfy the same. This last judgment was entered on November 23, 1914. In December, 1914, the defendant, by Metcalfe & Jeffries, her attorneys, made a motion to set aside the judgment, and offered to file an answer, set-off, and counterclaim, to which the plaintiff objected. The court sustained the objection and refused to allow the pleading to be filed, for the reason,

as set out in the order, that the defendant was given, at the time the second and amended petition was filed on November 11, 1914, until November 14th to file her answer, at which time counsel for defendant announced in open court that she had no defense to make, and agreed that judgment should be entered, which was accordingly done. From the order refusing to set aside the judgment and to allow the pleading to be filed, this appeal is prosecuted.

The tendered pleading set out, in substance, that the plaintiff was a nonresident of the state, and that when the conveyance was made he represented that the tract of land conveyed contained 100 acres, and the defendant relied on these representations, and would not have purchased the land at the price named except for the fact that she believed the tract did contain 100 acres. She further averred that since November 14, 1914, she discovered for the first time that the tract contained only 78 acres, and that 8 acres of this 78 was in the actual adverse possession of other owners of the land at the time of her purchase in February, 1913, and she asked that she be allowed to set off the value of this deficiency, namely, \$1,050, against the notes sued on.

[1] It is suggested in argument for appellee that the judgments on the last two notes were void because no process was issued on the amended petition, seeking judgment on these notes, and the defendant was not before the court. But this contention is not well founded. Section 135 of the Civil Code provides, in part:

"If a plaintiff, having a lien for a debt due and a debt not due upon property which he seeks to subject, state both claims in his petition, he may, upon a suggestion of record that one of them has become due pendente lite, have judgment for a sale of the property therefor."

The plaintiff set up in his petition a cause of action on all of the notes, and as the defendant was summoned to answer the petition, the plaintiff was entitled to a judgment on the notes maturing after the petition was filed, without other process. *Moshell v. Reed & Wilcox*, 97 S. W. 372, 30 Ky. Law Rep. 10.

[2, 3] The answer sets up a good cause of action, but we think it was tendered too late. The defendant was summoned and was represented by attorneys in 1913, and the tendered pleading does not disclose any reason why she could not then have ascertained the deficiency in the land, or have made the defense set up in the tendered pleading. It is true the tendered pleading averred that:

"Since the last supplemental judgment herein rendered at the present term of court, and within less than a week prior to the filing of this answer, set-off, and counterclaim, she has for the first time learned and discovered that the said tract of land described and attempted to be conveyed in the said deed contains a total gross area of 78 acres, and no more."

But there is no averment that by the exercise of reasonable diligence this deficiency could not have earlier been discovered. The pleading does not disclose any reason for the delay, except the naked allegation that she learned of the deficiency only about a week before the tendered petition was filed. Why she could not have learned of it sooner does not appear.

Aside from this, the tendered pleading shows that 8 acres of the land was in the actual, adverse possession of other claimants, holding the same under superior title at the time of her purchase of the land in 1913, and certainly she knew this fact at the time she was before the court by her attorneys in 1913. It seems to us that the effort of the defendant was to delay the execution of the judgment.

If the defendant has a meritorious claim against the plaintiff, she may assert it in a separate action, if she can aver and establish by evidence sufficient facts to excuse her delay in not setting up her defense in seasonable time.

The judgment is affirmed.

HATFIELD'S ADM'R v. HATFIELD.

(Court of Appeals of Kentucky. Nov. 17, 1915.)

1. APPEAL AND ERROR § 837—REVIEW—SUFFICIENCY OF EVIDENCE—INADMISSIBLE EVIDENCE.

Where inadmissible testimony was unobjectionable, it must be allowed to stand for what it is worth, on appeal, as part of the evidence of the party whom it favors.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3272, 3274-3277, 3289; Dec. Dig. § 837.]

2. BILLS AND NOTES § 493—PRESUMPTION—CONSIDERATION FOR CHECK.

In the absence of proof to the contrary, the presumption will be indulged that a paid check was executed for valuable consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652-1662; Dec. Dig. § 493.]

3. BILLS AND NOTES § 518—CONSIDERATION—SUFFICIENCY OF EVIDENCE.

In an administrator's action on a note found among decedent's papers, the claim being that the note, made by decedent's grandson to pay for land, was indorsed in blank to decedent, when the vendor of the land was paid with decedent's funds, evidence held sufficient to support the chancellor's judgment for the grandson that the decedent's payment by check to him was in return for his surrendering the unexpired term of his lease of decedent's land, which decedent wished to sell.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1816-1820; Dec. Dig. § 518.]

4. APPEAL AND ERROR § 837—REVIEW—ERROR WAIVED FOR DELAY OF COURT—ERRONEOUS ADMISSION OF EVIDENCE.

Under Civ. Code Prac. § 589, providing that errors of the court in its decisions upon exceptions to depositions are waived, unless excepted to, where appellant filed exceptions below to all the depositions taken and filed by the appellee, but the court failed to pass on such exceptions, and was not asked to do so, ap-

pellant's contention that, as appellee was incompetent as a witness, his testimony on former trial, embodied in a deposition, must be wholly disregarded by the court on appeal, was invalid, since, no objection having been pressed to the testimony, error in its admission was waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3272, 3274-3277, 3289; Dec. Dig. § 837.]

Appeal from Circuit Court, McLean County.
Action by Thomas Hatfield's administrator against W. R. Hatfield. Judgment for defendant, and plaintiff appeals. Affirmed.

L. P. Tanner, of Owensboro, for appellant. Richard Alexander, of Calhoun, and Little & Slack, of Owensboro, for appellee.

SETTLE, J. Thomas Hatfield died, intestate, in the month of March, 1913, domiciled in McLean county. Thereafter the appellant, John E. Cowgell, was appointed and duly qualified as the administrator of his estate. Following his appointment as such administrator, he found among other notes and papers that had been left by the decedent a note which had been executed by his grandson, the appellee, W. R. Hatfield, December 23, 1910, to one E. W. Tucker, upon the back of which the name of the payee was written, but above which there were no words indicating a sale or assignment of the note. Subsequently the administrator brought this action upon the note seeking its recovery of the appellee, alleging that after its execution to Tucker by the latter Tucker sold and assigned it to the decedent, whereby he became the owner thereof, and, further that the note was due and wholly unpaid. It was also alleged in the petition that the note was executed by appellee to E. W. Tucker in part payment for a 75-acre tract of land in McLean county, which the latter by deed of date of December 23, 1910, conveyed to him, and that the deed retained a lien upon the land to secure the payment of the note. By the prayer of the petition judgment was asked for the amount of the note, with 6 per cent. interest from January 4, 1911, and for the enforcement of the lien by a sale of the land, or enough thereof to pay same.

Appellee's answer denied that the note had been sold or assigned the decedent by Tucker, also denied the decedent's former ownership thereof, and pleaded its payment by appellee to Tucker.

The appellant then filed an amended petition, in which it was, in substance, alleged that the decedent, while sick and infirm, had furnished appellee the money with which to pay the note, by giving him a check for the amount thereof, under an agreement with him that Tucker would indorse or assign the note to the decedent, which, it was alleged, had been done, and by the prayer of the amended petition a recovery was sought against appellee upon the check, if not to be had on the note, with 6 per cent. interest

from January 4, 1911, and for the enforcement of a lien upon the land for its payment.

By his answer to the amended petition appellee traversed its averments, and alleged that the check of \$1,000 he had received from the decedent and applied to the discharge of the note in question was a payment for the delivery to the decedent of the possession of a farm he had leased of him, and for improvements appellee had made thereon, which farm, as further alleged, he had leased from the decedent for a term of three years, but the possession of which, at the expiration of the first year thereof, he had, at the decedent's request and upon his promise to pay him therefor the \$1,000 mentioned, redelivered to him.

The affirmative matter in the two answers was controverted of record, and, following the taking of proof by depositions and submission of the case, the circuit court rendered judgment dismissing the appellant's petition and allowing appellee his costs. From that judgment, the former has appealed.

The following facts appearing in the record are undisputed: E. W. Tucker conveyed to the appellee, W. R. Hatfield, by deed of December 23, 1910, a 75-acre tract of land in McLean county, the consideration being \$1,800 of which \$260 was paid in cash, and notes were executed by appellee to Tucker for the remainder, in the several months, and payable as follows: \$1,000 January 4, 1911; \$190 January 20, 1911; and \$350 January 10, 1912—these notes being secured by a lien retained by the deed on the land. The payment to Tucker of the several notes mentioned and the release of the lien retained as security for their payment is shown by the following entry appearing on the margin of the deed as recorded in the office of the clerk of the McLean county court:

"The notes described in this deed have been paid in full. The lien on property is hereby released. This 12th day of February, 1912.

"[Signed] E. W. Tucker.
"Attest: John R. Priest, Clerk,
"By John E. Cary, D. C."

[1] The only evidence introduced by the appellant was furnished by the depositions of himself, E. W. Tucker, and C. W. Thomasson. Appellant merely testified that the note had been found by him in the Bank of Livermore among certain other papers of the decedent, and that he had no knowledge as to the latter's ownership of it, other than the presumption arising from its being among his papers. C. W. Thomasson, cashier of the Bank of Livermore, testified that the check of the decedent for \$1,000, of date January 1, 1911, payable to appellee, was brought by the latter to the bank, there indorsed by him, and the proceeds deposited to his credit January 5, 1911, and that appellee then drew his check on the bank for \$1,000, which he gave to Thomasson, with the direction that he deliver it to Tucker when the latter presented the note, which he (Thomasson) did later

on the same day, and received from Tucker the note, and that, following the delivery of the check to Tucker, the same was charged to appellee's account. Thomasson further testified that during the last few years of his life the decedent had left notes and other valuable papers in the bank for safe-keeping, but that he had no recollection of delivering the \$1,000 note to decedent after its payment by appellee, or of any direction from the decedent to place it among his papers; nor did either appellee or Tucker direct him to place it among the papers of the decedent. In this connection it is proper, however, to call attention to the following question asked Thomasson, and his answer thereto:

"Q. State whether or not, if the said F. W. Tucker left said note at said time, you would have placed same with the papers of Thomasson, unless you had been ordered to do so by the parties interested at that time. A. I certainly would not."

The incompetency of the question and answer is patent, the one calling for the witness' belief as to the probability, of his action on the state of case suggested, and the other amounting to a mere expression of the witness' opinion as to what he might have done under such circumstances. But, as the record does not disclose that the question or answer was objected to by appellee, it must be allowed to stand, for what it is worth, as a part of the appellant's evidence.

Tucker testified that both the decedent and appellee had informed him that the former would furnish the latter \$1,000 to pay on the land sold appellee by Tucker, but that neither of them had advised him whether the money would be furnished by the decedent as a loan, gift, or payment, and that he had not been requested by either of them to assign the note to the decedent for any purpose; that all he did was to take the note to the bank January 5th for payment; and that when he got to the bank the cashier delivered to him the individual check of appellee, which had been left there by him, and upon its receipt he indorsed the note in blank and left it with Thomasson.

It will be observed that the only thing appearing in the evidence referred to as conducing to show the decedent's ownership of the note is the presumption arising from the fact that it was found after his death among his papers. The evidence wholly fails to show how or when it got among his papers for what purpose it was placed there, or even that its presence among his papers was ever known to him. Although the decedent lived more than two years after the payment of the note by appellee, it does not appear that he mentioned the note to any one during that time or that he claimed to be the owner of it. He also lived more than a year after the release of the lien made upon the deed book in the clerk's office by Tucker, which release contained an acknowledgment

of the payment of all the notes appellee had given for the land conveyed him by Tucker; yet, with the implied notice of such release, no complaint was made by the decedent that the release of the lien as to the \$1,000 note was unauthorized.

[2] The most that can be claimed for appellant's evidence is that it only inferentially shows the decedent's possession of the note at the time of his death. It is, however, contended by appellant that, if not entitled to recover upon the note, he is entitled to recover upon the check. This contention rests upon the theory that the presumption should be indulged that the amount of the check was a loan, and that this presumption casts upon appellee the burden to show its consideration. The contention is manifestly unsound, for ordinarily, in the absence of proof to the contrary, the presumption will be indulged that a paid check was executed for a valuable consideration, and in this case the evidence of appellant falls short of destroying that presumption.

[3] It now becomes necessary to consider the evidence introduced in behalf of the appellee. It appears from appellee's own testimony that the check in question was given for a valuable consideration; that he had rented from the decedent for a term of three years a farm owned by the latter, upon which he had at his own expense built new fences, made repairs upon the buildings, and, by the sowing of timothy, otherwise improved the land; that at the end of the first year of his tenancy the decedent conceived the idea of selling the farm, in order to do which it was necessary for him to cancel the remaining two years of the lease, which could not be done without the appellee's consent; and that in order to regain the possession of the farm at the end of the first year of the lease, and to pay appellee for the improvements he had put upon the place, the decedent agreed to pay him the sum of \$1,000, which sum was, in fact, paid appellee in the check that the latter applied to the discharge of the note of \$1,000 executed to Tucker on the land Tucker conveyed him.

Appellee further testified that the \$1,000 thus paid Tucker fully discharged the note due January 5, 1911; that it was not placed with other papers of the decedent with his knowledge or consent; and that he did not himself get possession of the note when it was paid by him, because Thomasson, the cashier of the bank, did not then have it, and, while he was unable to recall that he made of Thomasson any request to deliver to him the note the latter received from Tucker, he was, nevertheless, entitled to its possession after its payment, and expected that it would be delivered to him.

C. H. Salmon, introduced in appellee's behalf, testified that he knew appellee had leased of the decedent, his grandfather, a farm for the term of three years, that about

the date of the expiration of the first year of the lease, and after the sale by decedent of the farm, the decedent told him that he had sold or would sell the farm, and, when asked by the witness what he was going to do with Riley (appellee), he said he had paid Riley, and paid him well, to give possession so he could sell it, and, further, that he had raised Riley and wanted to help him some way, so he paid him well to get possession that he might sell the farm, as he was getting old and wanted to get things shaped up.

A. C. Smith testified that in a conversation he had with the decedent in the latter part of 1910, just before the latter sold his farm, the decedent said he was going to sell the farm, but that he would have to pay Riley something to move off, as he had agreed to fix the farm up for him and had rented it to him for three or four years. This witness also testified, as did Salmon, that the decedent was then in good health for a man of his age and capable of transacting his own business, and, further, that appellee waited upon and took care of his grandfather during his last illness, which occurred more than a year after the conversation referred to.

J. R. Cox testified that his farm joined that of the decedent in 1910. To him just before the farm was sold the decedent said:

"Riley had gone there and fixed up the place, and has sowed grass, and talked as if he was going to stay there a number of years. He said that Riley always treated him all right and had never given him any trouble, and he said that he wasn't going to lose anything by it. * * * He just said that Riley was going to give him possession, and he was going to pay him well for it. He said that Riley wanted a farm, and he was going to help him pay for it."

From what has been said of the testimony of Smith and Cox, it appears that shortly before he sold his farm the decedent told them of his intention to sell it and to pay appellee well for the possession, and that he intended to help appellee in his purchase of another farm, and it appears from the testimony of Salmon that the decedent said to him shortly after the sale of the farm that he had paid appellee well for possession in order to effect his (the decedent's) sale of his farm, and that he intended to help appellee. While none of the witnesses last named were told by the decedent that he intended to pay or had paid appellee \$1,000 to obtain a cancellation of two years of the lease the latter had upon his farm, it is evident from their testimony that he intended to pay him well, in view of which it is not unreasonable that the payment he made appellee amounted to \$1,000; and, as the check for the \$1,000 was furnished appellee by the decedent, and no other payment was known to have been made him by the latter, it is fairly apparent that in giving him the check, the proceeds of which were paid to Tucker on the note due January 5, 1911, the decedent

carried out his agreement to compensate him for the surrender of two years of his lease on the farm.

[4] If we were to give to appellant's evidence all the force and effect claimed for it by his counsel, the testimony of appellee and the corroboration of it furnished by the witnesses Salmon, Smith, and Cox must be held to outweigh it and authorize the judgment of the chancellor. It is, however, insisted for appellant that, as appellee was incompetent as a witness, his testimony must be wholly disregarded on the present appeal. This contention cannot be sustained, because it was admitted by appellant's waiver of any objection thereto. It appears that he filed exceptions to all of the depositions taken and filed by appellee, but the record fails to show that the exceptions were passed on by the circuit court, or that it was asked to do so.

Section 589, Civil Code, provides:

"Errors of the court, in its decisions upon exceptions to depositions, are waived unless excepted to."

In *Lewis v. Wright*, 3 Bush, 311, we held that exceptions to depositions as incompetent evidence, which do not appear to have been acted on by the court below, will be regarded by this court as waived. In the opinion it is said:

"Much of the testimony of Wright was directed to the issue formed by the affidavits of himself and Redmon, controverting the ground of Lewis' attachments, and exceptions were filed by Lewis to this deposition as incompetent evidence; but they do not appear to have been acted on by the court below, and must therefore be regarded in this court as having been waived."

In *Corn, etc., v. Sims, etc.*, 3 Metc. 398, we said:

"The exceptions to the deposition of Sims were not acted on by the court below, and therefore no question as to the competency of the witness, or the admissibility of his testimony, is presented. Even if the court had erroneously decided upon the exceptions, such error, unless excepted to at the time, is waived, and furnishes no ground of reversal here. Civil Code, § 653, now section 589. We need not refer to the numerous recent decisions which settle this point conclusively." *Patterson v. Hansel*, 4 Bush, 654; *L. & N. R. Co. v. Graves*, 78 Ky. 74; *L. & N. R. Co. v. Montgomery*, 32 S. W. 738, 17 Ky. Law Rep. 807; *Bronston v. Bronston*, 141 Ky. 639, 133 S. W. 584.

It is manifest from the authorities supra that appellant cannot now complain of the admission of appellee's testimony in the court below.

Judgment affirmed.

WEIL v. HAGAN.

(Court of Appeals of Kentucky. Nov. 17, 1915.)

1. MASTER AND SERVANT \Leftrightarrow 333 — PARTIES ENTITLED TO ALLEGE ERROR — VERDICT AGAINST MASTER EXONERATING SERVANT.

In an action against the owner of an automobile for damages in collision with it, verdict for the plaintiff against the car's owner, who was not in the car, exonerating the chauffeur.

feur who had driven it, through whose negligence alone the owner was liable, could not be complained of by such owner.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1279; Dec. Dig. ¶333.]

2. MUNICIPAL CORPORATIONS ¶706—STREETS—ACTION FOR DAMAGES BY AUTOMOBILE—PLEADING AND PROOF—IMMATERIAL VARIANCE—STATUTE.

Under Civ. Code Prac. § 129, providing that no variance between pleadings and proof is material which does not mislead a party to his prejudice in maintaining his action or defense upon the merits, where the petition, in an action against the owner of an automobile and his chauffeur for damages sustained in collision with the car, rested plaintiff's case on the charge that the car struck plaintiff's horse and caused him to run away, while the proof showed that the car only ran so close to the horse as to frighten him, without striking him, thereby causing him to run away, the variance was not material.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. ¶706.]

Appeal from Circuit Court, Clark County.

Action by L. V. Hagan against Morris Well and another. Judgment for plaintiff against the named defendant, and the latter appeals. **Affirmed.**

Pendleton, Bush & Bush, of Winchester, for appellant. Hays & Hays, of Winchester, for appellee.

MILLER, C. J. The appellee, L. V. Hagan, sued Morris Well, the owner of an automobile, and Walter Wash, his chauffeur, for negligently colliding with plaintiff's buggy while he was driving on the pike between Winchester and Lexington. He recovered a judgment for \$600 damages against Well.

Upon a former trial of the case plaintiff recovered a verdict for \$700, but, upon appeal that judgment was reversed on account of the improper argument of the plaintiff's attorney, and the failure of the instructions to furnish a guide for determining the amount of damages. *Well v. Hagan*, 161 Ky. 292, 170 S. W. 618. The facts connected with the accident are stated in the former opinion, and will not be repeated here.

Appellant, Well, assigns three grounds for a reversal: (1) That the verdict did not authorize a judgment against the defendant Well; (2) that the court erred in giving instruction No. 5; and (3) that the verdict is not sustained by sufficient evidence, and is contrary to law.

[1] 1. Well was not present when the accident happened, and the recovery against him was permitted because he was the owner of the automobile which his chauffeur, Wash, was driving, upon his master's business, at the time of the collision.

The jury returned the following verdict:

"We, the jury, find for the plaintiff \$600 against Morris Well, and find for the defendant Walter Wash."

Immediately, and before judgment was entered, Well objected to the entering of any

judgment against him on the verdict, and moved the court to enter a judgment for him, notwithstanding the verdict. The court, however, overruled Well's motion, and entered a judgment against him in accordance with the verdict, and at the same time it entered a judgment exonerating Wash. From that judgment, Well prosecutes this appeal.

It is argued that, since the only ground upon which Well can be held liable is that he is responsible for the negligence, if any, of his servant, Wash, Well is only secondarily, and not primarily, liable; and, being liable only for the negligence of Wash, a verdict exonerating Wash from negligence necessarily exonerated Well, his master.

The precise question here presented was before this court in *Broadway Coal Mining Co. v. Robinson*, 150 Ky. 716, 150 S. W. 1000, and it was there decided against the contention of appellant. In that case the company was sued for the negligence of its employes Chumbley and Jones, and the jury returned a verdict against the company, and in favor of Chumbley and Jones. This court, however, sustained the finding, saying that, if the plaintiff failed to get a verdict against the other defendants who were equally liable in damages, the plaintiff might be aggrieved at the verdict, but not the defendant. That rule was first announced in this jurisdiction in *I. C. R. R. Co. v. Murphy*, 123 Ky. 787, 97 S. W. 729, 30 Ky. Law Rep. 93, 11 L. R. A. (N. S.) 352; and it was approved in the later cases of *I. C. R. R. Co. v. Outland's Adm'r*, 160 Ky. 714, 170 S. W. 48, and *National Cash Register Co. v. Williams*, 161 Ky. 551, 171 S. W. 162. Whatever may be the ruling in other jurisdictions, the question may be treated as at rest in this jurisdiction.

2. The fifth instruction reads as follows:

"If the jury find for the plaintiff as against one defendant, and for the other defendant, they shall so state in their verdict."

Appellant contends that under this instruction the jury were permitted to find for the defendant Wash and against the defendant Well, although the liability of Well, if any, was entirely secondary, and dependent wholly upon the negligence of Wash. This is but a repetition, in another form, of the objection to the verdict, heretofore considered.

But, since the jury had the right, under the decisions of this court, to find a verdict against Well and exonerate Wash, the chauffeur, as we have heretofore held, the instruction complained of was not erroneous. If the jury had the right to find the verdict, it certainly was no error to instruct them that they might do so. The instruction is the usual one given in cases of this character, where there is more than one defendant.

[2] 3. The evidence upon the second trial,

now appealed from, was substantially the same as it was upon the first trial, where the appellant assigned as a ground for a reversal that the verdict was not supported by the evidence, and was contrary to the law and the evidence. In the former opinion, however, no suggestion was made that the verdict was not sustained by the evidence; and, in our opinion, it cannot properly be now so held.

Appellant, however, draws rather a fine distinction, by saying that, while the petition rested the case upon the charge that the automobile struck appellee's horse and caused him to run away, the proof shows that appellant's automobile only ran so close to the horse as to frighten him, but without striking him, and thereby caused him to run away. The proof, however, does not sustain this distinction; and, if it did, we would be slow to say that it constituted a material variance. Certainly, appellant was in no way prejudiced in this connection, even though his contention as to the facts were true. Civil Code, § 129.

Judgment affirmed.

CHESAPEAKE & O. RY. CO. v. SHAMBLEN.

(Court of Appeals of Kentucky. Nov. 18, 1915.)

1. MASTER AND SERVANT ⇨113—NEGLIGENCE—SAFE PLACE—RAILROAD TRACKS.

For an engineer and conductor in charge of switching operations to leave a car on the siding so close that it endangered trainmen on passing trains is gross negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 213, 224-227; Dec. Dig. ⇨113.]

2. MASTER AND SERVANT ⇨281—ACTIONS—EVIDENCE—ADMISSIONS.

In an action by a fireman injured when his head came in contact with a car on a siding as he leaned from the cab of the engine which he was running during the temporary absence of the engineer, his testimony that, when the cars were placed on the siding, he was on the opposite side of the cab, and that, when he drove the engine past, he did not look out, because he was injecting water in the boiler, is not an admission that he knew of the presence of the car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. ⇨281.]

3. MASTER AND SERVANT ⇨202—INJURIES TO SERVANT—ACTIONS—NEGLIGENCE.

For a fireman to recover for injuries caused by the negligence of the engineer and the conductor on the same train, who were his superiors, their negligence must be gross.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 535-537; Dec. Dig. ⇨202.]

4. MASTER AND SERVANT ⇨198—INJURIES TO SERVANT—NEGLIGENCE.

Where an engineer and conductor in switching operations placed cars on a siding, so near the end that they endangered those on passing trains, their negligence as to a fireman who was subsequently directed to take the engineer's

place during a temporary absence must be deemed that of superior servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 493-514; Dec. Dig. ⇨198.]

5. APPEAL AND ERROR ⇨1170—REVIEW—HARMLESS ERROR.

In view of Civ. Code Prac. §§ 135, 335, 756, requiring the disregarding of nonprejudicial error, where the petition of a fireman injured through the negligence of the engineer and conductor in charge of his train averred that their negligence was gross, and the evidence conclusively showed that fact, an instruction allowing recovery for ordinary negligence is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4093, 4101, 4454, 4540-4545; Dec. Dig. ⇨1170.]

Appeal from Circuit Court, Lewis County. Action by G. W. Shamblen against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Worthington, Cochran & Browning, of Maysville, for appellant. Allan D. Cole, of Maysville, for appellee.

NUNN, J. Appellee was operating a locomotive engine on a freight train at Garrison, a station on appellant's railroad. Leaning out of the cab window observing his train, his head was injured by striking against a freight car which had been left on a switch too close to the main track. In this action for damages he recovered \$500. He was employed as a fireman, but when injured he was operating the engine in place of the engineer who had been called off temporarily.

[1] Shortly after the train stopped at Garrison, his engineer, under direction of the conductor, placed a cut of cars upon a switch, filling it completely, so that the one nearest the main track came within a foot of it. It is conceded that the engineer and conductor were guilty of negligence in leaving the car so close to the main track that the trains passing thereon would not have a safe clearance. The act of the conductor and engineer in thus placing this car was deliberate. It was not a mere failure to observe. They knew at the time that they had filled the switch until there was not room on it for another car, and the one in question extended so close to the main line as to imperil the life of trainmen thereon. They explain that they left the car so close to the main track because there was not room on the switch to get it further away. As said in the case of *L. & N. v. Earl's Adm'r*, 94 Ky. 373, 22 S. W. 608, 15 Ky. Law Rep. 186:

"It was inexcusable negligence to leave the 'kicked in' car so close to the main track that the engineer's cab could barely pass it."

This switch was on the right of the main line; that is, on the side where the engineer worked. The appellee was working as fireman on the other side of the engine when the

cars were placed. While he knew when the cars were run in on the switch, he did not know that any of them had been left in dangerous proximity to the main line. After the switch had been filled with cars, as above stated, and while the train crew were still engaged in switching in and about Garrison, the engineer was temporarily called away, and by his direction the fireman took his place. The engineer testifies that at the time he left appellee, his fireman, in charge of the engine, "I told him that the cars were there [on the switch], that I had come by, and for him to look out for those cars," and that Shamblen replied that he knew they were there. Appellee denies that any such warning was given, although he admits, as above stated, that he knew that cars were on the switch; for he was on the engine that had shoved them in there a short while before, but he could not and did not see or know that they were dangerously near the track.

[2] In answer to a signal from the brakeman, appellee, now operating the engine, pushed two cars ahead of it on the main line to a point several hundred feet beyond the switch in question. Cutting loose from these cars, he was directed to return; that is, "back up" and again pass the switch. On the return, with the train running from 10 to 12 miles an hour, appellee leaned outside of the cab to look backwards just as he was passing the car in question, when it struck him. A severe gash was cut over his eye. It required three stitches to close the wound. His ear was also involved or injured, due, in all probability, according to the evidence of the company's physician, to infection from the wound through a tube leading from the frontal sinus to the eardrum. On this appeal the company, although admitting the negligence of the conductor and engineer in so placing the car, and conceding such a conflict in the evidence on the question of whether he was warned by the engineer of its dangerous proximity as to take the case to the jury, yet insists that the circumstances, independent of the warning, show that he did know, and that his failure to guard himself against the car was negligence per se on his part. The circumstances referred to are the facts that he was on the engine when the cars were placed on the switch, and that he had gone past the cars a few moments prior to the accident, and his testimony that as he started to "back up" his engine again to a point beyond the cars "I looked up here, and saw the cars on the track, but I couldn't tell whether they were on the track, or how about that." Manifestly, his testimony could not be construed as an admission of knowledge of the danger. When the cars were placed on the switch he was on the opposite side of the engine, in the performance of his duties as fireman. He next passed the switch while acting as engineer, but did not

see the cars. At that time, as he says, he was intent upon his duties in operating the engine, being the only man upon it, and running at from 10 to 12 miles an hour. This time, in passing the cars, "I was putting water in the boiler [with an injector]. I never had my head out to notice about being clear."

[3, 4] The master's negligence in this case is not in failing to provide a safe place to work. It is not like the case of posts, buildings, or other obstructions set too close to the track by employes engaged in other lines of service. Nor is it like the case of a cut of cars left too close to the track by the crew of another engine or train. In cases of that character the doctrine of unsafe place would apply, and the master would be liable if there was a failure to exercise ordinary care. But here the negligence is that of servants immediately superior to appellee engaged on the same train. Under these circumstances, there can be no recovery by appellee, unless the superior servants were guilty of gross negligence. The proximate cause of the injury, and the only negligence on which a recovery can be predicated, is the gross negligence of his superior servants, the conductor and engineer, in placing and leaving the car dangerously near the main track. But appellant argues that at the time appellee was injured the engineer and conductor were not superior servants, for he was, in fact, acting as engineer, and therefore a fellow servant with them. It is appellant's contention that appellee's right to recover for the negligence of another servant is determined as of the time of the accident, and not as of the time of the performance of the negligent act. It is insisted that, although the thing negligently done was the act of a superior servant, yet, when he was later injured as a result of that negligence, he had been elevated to a grade equal in service, and therefore his injury resulted from the negligence of a fellow servant, and he cannot recover; in other words, although appellee was a fireman at the time the engineer and conductor negligently placed the cars which caused his injury, yet, if at the time he received the injury he himself was an engineer, he cannot recover because the negligent acts of the engineer were the acts of a fellow servant. This reasoning is unsound, and the authorities cited by appellant do not support it. Appellant relies upon *Butler v. Townsend*, 128 N. Y. 105, 28 N. E. 1017, where the court said:

"The new servant takes the risk of any existing negligence of his fellow servants, as well as that which may thereafter occur."

But in that case, as held by the court, the negligent cause of the injury was the work of those who were fellow servants not only when the negligent act was committed, but when the accident happened. *L. & N. v. Moore*, 83 Ky. 675, was where a brakeman was injured by the negligence of one em-

played as a fireman, but who at the time was permitted by the railroad to act as engineer. The railroad claimed that the brakeman could not recover because the injury was due to the negligence of the fireman, a fellow servant of the brakeman, and that his temporary service as engineer when the negligent act was committed did not make it the negligence of an engineer and superior servant. The court held that the fireman was at the time and to all intents and purposes the engineer of the train, and applied the rule of respondeat superior; in other words, the negligence was committed by one while acting as the engineer, a superior servant, just as in the case at bar the negligent act was that of the engineer and conductor, who were at the time superior servants of the appellee. Appellant insists that the negligence was that of a fellow servant, for the further reason that, according to the custom of doing switching work such as the crew were engaged in at Garrison, the members of the crew were, as the work might require, shifted from one position to another and all the members of the crew should, therefore, while engaged in such work, be treated as in a common employment. But the evidence does not show such a state of affairs. Each member of the crew had his special duties, and no custom or rule is shown that could operate to place the crew upon the same grade of service, or to render them fellow servants for the time being. It was customary for the fireman to relieve the engineer temporarily when directed by him, but in doing so he did not assume the risk of prior negligence of the engineer, his superior. The cases of *Whitson v. American Bridge Co.*, 158 Ky. 814, 166 S. W. 603, and *Sinclair's Adm'r v. I. C. R. R.*, 140 Ky. 152, 130 S. W. 978, are relied upon by appellant in support of this proposition of temporary fellow workers in a common service.

In the *Whitson Case* Dempsey was the foreman of a crew of bridge carpenters, but at the time Whitson was injured Dempsey was doing the work of one of the carpenters; that is, he was assisting Whitson, another carpenter, to carry a cross-tie. Dempsey stumbled, and the tie was thrown against Whitson, to his injury. It is conceded in that case that Dempsey, while doing the work of a carpenter, was a fellow servant to the injured carpenter.

In the second case *Sinclair*, a member of a section crew, was killed by the alleged negligent act of Pruitt, the foreman. Although Pruitt was foreman of the crew, he was at the time working as a member of the crew. The court, in disposing of the case, concluded that the fact that Pruitt was foreman was of no importance. The court held the accident to be one of the ordinary risks of the employment, and the fact that Pruitt, its

foreman, happened at the time to be doing the work of one of the employees would not render the company liable. There is no analogy, however, in these cases to the one at bar. The fireman was not injured by the negligence of the engineer and conductor while they were, for the time being, performing some of his duties as fireman.

[5] This brings us to appellant's complaint that the instructions of the court authorized a recovery for the ordinary negligence of servants superior to appellee in authority. The petition charges that the car in question was placed in such close proximity to the main track by the gross negligence and carelessness of appellant's agents and servants, but the instructions authorized a recovery for the ordinary negligence of those in charge of the train. This was error; for, as we have already indicated, the plaintiff was not entitled to recover at all, unless his superior servants were guilty of gross negligence. But appellant's substantial rights were not prejudiced by the error. The damages allowed are moderate in view of the injury sustained, and as to the character of negligence of which appellant's servants were guilty there can be, and there was, no question. There was no dispute about the facts, and from them it appears that the conductor and engineer were guilty of the grossest kind of negligence in leaving the car so close to the main track. There was a wanton and reckless disregard on their part of the safety of employees operating trains on the main track. There really were but two issues in the case, and they were whether the appellee knew or by the exercise of ordinary care could have known that the cars were so close to the track, or whether the engineer, in fact, warned or notified him thereof. Both of these questions were fairly submitted to the jury. Although the instruction complained of erroneously permitted a recovery for ordinary negligence, yet, where admittedly and beyond dispute the facts show gross negligence, and there is nothing in the record to indicate that appellant was prejudiced by the error, we do not feel authorized to remand the case.

In the recent case of *Consolidated Coal Co. v. Baldridge*, 166 Ky. 187, 179 S. W. 18, where we had under consideration a similar error, a reversal was refused, because in that case the negligence found by the jury was necessarily gross. Although the instructions submitted the case on the question of ordinary negligence, it was held that the error was not such as to justify a reversal, because a reversible error "must affect the substantial rights of the appellant, and that it does so affect them must as clearly appear as the error itself." Civil Code, §§ 134, 335, 756.

For the reasons indicated, the judgment is affirmed.

HODGE TOBACCO CO. v. WHALEY.

(Court of Appeals of Kentucky. Nov. 19, 1915.)

1. TRIAL ⚡143—PROVINCE OF JURY—CONFLICTING EVIDENCE.

It is the province of the jury to determine the facts, where the evidence is conflicting.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. ⚡143.]

2. APPEAL AND ERROR ⚡1003—REVIEW—QUESTIONS OF FACT.

A verdict of a jury will not be set aside because it is not supported by the evidence or not sustained by a sufficiency of the evidence, unless it is clearly and palpably against the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. ⚡1008.]

3. APPEAL AND ERROR ⚡1041—HARMLESS ERROR—AMENDMENT OF PLEADING.

Plaintiff sued defendant, alleging an agreement under which he was to purchase and ship tobacco for defendant and was to receive, in addition to a commission for his personal services in buying and receiving the tobacco, compensation for certain additional labors, and repayment of his expenses for cooperage, drayage, etc. The petition further alleged that under this arrangement he bought and shipped 518,000 pounds of tobacco. An amended petition filed after the jury had been impaneled alleged that he purchased and shipped 518,875 pounds, that the cost of making hogsheads in which to ship the tobacco amounted to \$81.25 and that the drayage amounted to \$85. Held that, as this did not set up any new cause of action or any new claim, but simply made more definite some of the allegations of the petition with regard to the items of indebtedness for which recovery was sought, defendant was not prejudiced by its filing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. ⚡1041.]

4. PLEADING ⚡236—AMENDMENT—DISCRETION OF COURT.

Permission to file an amended pleading is a matter in the sound discretion of the court, which it may exercise in furtherance of justice, upon proper terms.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. ⚡236.]

Appeal from Circuit Court, Lyon County.

Action by D. W. Whaley against the Hodge Tobacco Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wheeler & Hughes, of Paducah, for appellant. Utley & Utley, of Eddyville, for appellee.

HURT, J. This was an action in the Lyon circuit court by the appellee, D. W. Whaley, against the appellant, Hodge Tobacco Company, in which he sought to recover from it in his petition the sum of \$1,500. He alleged that about the 10th day of December, 1913, he and the appellant entered into a contract, by which it was agreed that he would purchase tobacco for appellant in Lyon county, Ky., and surrounding counties, and would receive the tobacco for it at Kuttawa, at which point he would superintend the loading of the tobacco into cars from the wagons,

and cause same to be shipped to appellant at Paducah, and for these services the appellant was to pay him 35 cents on each 100 pounds of tobacco so purchased and shipped to the appellant, and thereafter, about the last of December, he and appellant made another contract, by which they annulled the former one, and by this last contract it was agreed that he was to purchase tobacco for the appellant, as stated above, and receive it at Kuttawa, where it was to be placed in a warehouse furnished by him, and that he should there class and prize the tobacco into light-weight hogsheads, which he should cause to be shipped by the railroad to appellant at Paducah, and in consideration of these services the appellant was to pay him 35 cents for each 100 pounds of tobacco for his personal services in buying and receiving the tobacco, and, in addition to that, the appellant agreed to pay him such a sum, by way of commissions, as would reasonably compensate him for the additional labors required of him under the new contract, and as would fully repay him the actual expenses that he would necessarily be put to for wages paid to laborers, cooperage, and drayage, and that the sum of 25 cents per each 100 pounds for the tobacco bought and handled by him for the appellant would be a reasonable sum for the additional labors and expenses incurred by him under the contract; that he bought and shipped to appellant under this arrangement 518,000 pounds of tobacco.

The appellant, by answer, denied the making of the contract as alleged by appellee, about the 10th day of December, but alleged that it did make a contract, in which it agreed to buy tobacco from appellee at certain prices, and was not to pay him any commission for his services, but that about the last of December they entered into a contract, by which the appellee agreed to buy and ship tobacco as the agent for appellant, and that, in consideration of appellee's services in so doing, it agreed to pay him 35 cents per 100 pounds for all the tobacco that he would buy and ship to it, and, in addition to that, would pay one-half of the cost of drayage required in moving the tobacco from the warehouse in Kuttawa to the depot, and would furnish the materials necessary out of which to make the hogsheads, and appellee was to receive the tobacco in a warehouse provided by him, class and prize the same, and put it upon cars at Kuttawa, consigned to the appellant, and that it had paid him all that it owed him under said contract, and denied the making of the contract as alleged by the appellee in his petition. By way of counterclaim it pleaded that the appellee had converted to his own use \$834.50 of tobacco, which he had bought for it, and for which it had paid, and asked a judgment against him for \$834.50. The affirmative allegations

in the answer, counterclaim, and set-off were controverted by reply.

Thereafter, when the case came on for trial, and after the jury had been impaneled, the appellee offered an amended petition, to the filing of which the appellant objected, when the court overruled its objection and permitted it to be filed, to which appellant excepted. By this amended petition the appellee alleged that, under the contract as set out in the petition, he purchased and shipped to the appellant 518,875 pounds of tobacco, and that appellant owed him by way of compensation for the services which he was to perform under the contract, over and above those agreed to be performed, for the sum of 35 cents per 100 pounds, the sum of \$1,297.18, and that the cost of making the hogsheads was 25 cents per hogshead, and that he had caused to be made and shipped to the appellant 325 hogsheads, which amounted to \$81.25, and that the drayage in removing the tobacco from the warehouse to the depot amounted to \$65, and prayed for a recovery against appellant of \$1,443, instead of \$1,500, as alleged in the original petition. By agreement of parties, affirmative allegations in the amended petition were agreed to be taken as controverted upon the record.

The trial resulted in a verdict by the jury in favor of appellee for the sum of \$865.80, and a judgment was rendered accordingly. The appellant, having filed grounds for a new trial, entered a motion to set aside the verdict and judgment and grant it a new trial, which being overruled by the court, it appeals to this court.

The reasons insisted upon for the reversal of the judgment are: First, that the verdict of the jury is not sustained by the evidence, and shows on its face to be contrary to the evidence; second, the court erred in permitting the appellee to file the amended petition.

[1, 2] The evidence given by the appellee and that of witnesses offered by him tended to sustain the claim made by him, and to disprove the counterclaim of the appellant, while the testimony of the witnesses offered by the appellant tended to sustain its counterclaim and to disprove the claim of appellee. There was conflicting evidence given and heard upon each necessary averment of the petition and amended petition and upon the necessary averments of the counterclaim. The instructions of the court submitted to the jury for its decision each of the issues of the case. There was sufficient evidence to support the verdict, if the jury believed the appellee and his witnesses. It was the province of the jury to determine the facts in the case, where the evidence is conflicting, and a verdict of the jury will not be

set aside because it is not supported by the evidence or is not sustained by a sufficiency of the evidence, unless the verdict is clearly and palpably against the weight of the evidence. *Bell v. Keach*, 80 Ky. 42; *L. & N. R. R. Co. v. Graves*, 78 Ky. 74; *McClain v. Esham*, 17 B. Mon. 146; *Thomson v. Thomson*, 93 Ky. 435, 20 S. W. 373, 14 Ky. Law Rep. 513; and many others. It cannot be said that the verdict was contrary to the evidence in the case, or that it is not supported by the weight of the evidence.

[3, 4] Nothing prejudicial to the appellant arose from the filing of the amended petition. It did not set up any new cause of action, or any new claim, but simply made more definite some of the allegations of the petition with regard to the items of indebtedness for which recovery was sought. The petition alleged that the number of pounds of tobacco which had been purchased and shipped to appellant under the contract was 518,000 pounds, and the amendment corrects this, and alleges that it was 518,875 pounds. The petition sought a recovery for the drayage and cooperage which appellee claimed that he had paid and was entitled to recover under the contract, and the amendment stated the amount of the drayage and cooperage and the number of hogsheads built and the cost to him of having them built. The permission to file an amended pleading is a matter in the sound discretion of the court, which it may exercise in furtherance of justice, upon proper terms.

In the case of *Mattingly v. Bank of Commerce of Owensboro*, 53 S. W. 1043, 21 Ky Law Rep. 1029, the court said:

"The power of the trial court to allow amendments of pleadings in furtherance of justice is, under the Code, very broad. It is a judicial discretion, and not to be exercised arbitrarily; but being a matter peculiarly within the discretion of the trial court, on appeal his ruling will never be reversed, unless there has been an abuse of discretion by which injustice has been done."

This principle has been upheld in repeated decisions of this court. *Title Guaranty Co. v. Com.*, 141 Ky. 570, 133 S. W. 577; *Vaught v. Hogue*, 107 S. W. 757, 32 Ky. Law Rep. 1061; *Staton v. Byron*, 105 S. W. 928, 32 Ky. Law Rep. 246; *Continental Casualty Co. v. Semple*, 112 S. W. 1123. The reason stated in the amendment for its having been offered at that time was the mistake of appellee's attorney in drafting the petition. The appellant does not indicate any way in which it did or could have suffered injustice by the filing of the amendment, and there is no apparent way in which it could have suffered such, and the order permitting it to be filed was not prejudicial to its substantial rights.

The judgment is therefore affirmed.

BRACKEN COUNTY INS. CO. v. MURRAY.
(Court of Appeals of Kentucky. Nov. 19, 1915.)

1. INSURANCE — 57 — MUTUAL COMPANIES — INSURING NONMEMBERS.

There could be no valid contract of insurance between a co-operative or assessment insurance company and a person not a member of the company, as such companies are organized for the purpose of insuring only the property of their members, especially where this purpose was emphasized and clearly expressed in the by-laws of a company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 71-75; Dec. Dig. ¶ 57.]

2. INSURANCE — 55 — MUTUAL COMPANIES — INSURING NONMEMBERS.

Where the by-laws of an assessment or co-operative fire insurance company provided that any person living in B. county and owning property therein, who should sign an application and be granted a policy in the company, should become a member thereof, a person did not become a member by signing an application for insurance without any action on the part of the insurance company, and there could be no valid agreement between him and the company's agent that the insurance should be in force from the date of the application, as Ky. St. § 702, providing that every person insured in such a corporation who shall sign an application for insurance, as required by the certificate of incorporation or the by-laws, shall thereby become a member, does not make a person a member upon the mere signing of an application, but means that either the articles of incorporation or the by-laws shall prescribe how the applicant for insurance may become a member.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 67-69; Dec. Dig. ¶ 55.]

3. INSURANCE — 131 — VALIDITY OF ORAL CONTRACTS OF INSURANCE.

A valid and enforceable oral contract of insurance may be made between insured and the company, or between him and its authorized agent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 208-209; Dec. Dig. ¶ 131.]

Appeal from Circuit Court, Bracken County.

Action by A. L. Murray against the Bracken County Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Allan D. Cole, of Maysville, and W. A. Byron, of Brooksville, for appellant. M. Hargett, of Augusta, and G. F. Boughner, of Covington, for appellee.

TURNER, J. Appellant is an assessment or co-operative fire insurance company organized under subdivision 5, c. 32, Ky. St., and is authorized to do business in Bracken county. Appellee is a resident of and property owner in that county, and on the 10th day of February, 1914, signed, in the presence of an agent of appellant, an application for insurance on a building he owned. The application was promptly forwarded by the agent to the office of the company, and it thereafter wrote and inquired of him if the building sought to be insured was not the same building in which was located a stock of goods belonging to a certain mercantile

company which appellant had already insured for \$2,500. The agent immediately answered, stating that it was, whereupon, on the 14th day of February, the application was marked, "Rejected," and the agent notified. But notwithstanding this notice to the agent, he failed to notify appellee of the rejection until after the 24th day of February, upon which day the building was destroyed by fire. This is an action on an oral contract of insurance entered into between appellee and the agent, the allegation being that the agent contracted with appellee that his property was insured by the company from the date of the application if it should be accepted, and, if not, until he was given notice of the rejection. Upon a trial in the circuit court appellee recovered a verdict and judgment for \$1,200, the amount specified in the application, and the company has appealed.

[1] Co-operative or assessment insurance companies from their very nature are organized for the purpose of insuring only the property of their members, and it is apparent from the reading of our statute on the subject that it so contemplates; and this purpose of appellant company is emphasized and clearly expressed in its by-laws.

[2] The only question we deem it necessary to consider is whether the appellee, by his own voluntary act in signing the application for insurance, became a member of appellant company, without any action whatever upon its part; for unless he was a member, no valid contract of insurance, oral or written, could have been made between him and the agent. After diligent search we have been unable to find any direct authority upon this question, but it seems that a statement of the proposition furnishes its own answer. Clearly it was the purpose of the statute to authorize the organization of such companies only for the purpose of insuring the property of its members, and giving such members, through the medium of the corporation, the authority to enter into mutual contracts of insurance with other members; that is to say, that each member who is admitted is at one and the same time both insurer and insured. To say that one may become by his own act a member of such a company, whether it be agreeable to the organization or contrary to its wishes, would be to compel the other members of the company to accept insurance risks which they might not be willing to accept, and would place such assessment companies, who would thus be compelled to accept unsatisfactory and undesirable risks, at a great disadvantage in their quest for business.

The last sentence in section 702 of the Kentucky Statute, providing for the organization of such companies, says:

"Every person insured in such a corporation, who shall sign an application for insurance, as required by the certificate of incorporation, or

the by-laws of the corporation, shall thereby become a member thereof"

—and it is argued for appellee from this that the mere signing of an application for insurance made the appellee a member of the company, so as that a verbal contract between him and the agent became enforceable as against the company. But such is not the meaning of those words. While the sentence is awkwardly constructed and inaptly expressed, its true and correct meaning is that either the articles of incorporation or the by-laws of the company shall prescribe how the applicant for insurance may become a member. The construction contended for by appellee would authorize any person, however undesirable, to make himself a member, although the constituted authorities of the corporation might not be willing to accept him as such. It is not difficult to see what would be the end of an insurance corporation which had no power to protect itself against issuing policies to undesirable persons. The statute quoted provides that the insuring of the applicants in the manner required by the certificate of incorporation or by the by-laws of the corporation shall entitle one to become a member; and, if we had any doubt of the foregoing interpretation of the statute, a by-law of appellant corporation, taken in connection with the statute, is conclusive of the question. That by-law provides:

"Any person living in Bracken county and owning property in same who shall sign an application and be granted a policy in this company shall become a member thereof."

From this by-law and the statute authorizing it, it cannot be doubted that the condition precedent to becoming a member is, not only that the application shall be signed, but that the policy shall be granted. These assessment companies by the act of granting a policy of insurance to one thereby make him a member of the corporation, and we are unwilling to hold that these small assessment companies may be placed at the mercy of the larger corporations because of their inability to protect themselves from undesirable membership.

[3] It is well settled that a valid and enforceable oral contract of insurance may be made, either between the company and the assured, or between its authorized agent and the assured; but the question here is not whether there may be a valid oral contract of insurance between this assessment com-

pany and one of its members, but is whether appellee ever became a member so as that he might have made such an enforceable contract.

The case of *Fidelity & Casualty Co. v. Ballard & Ballard Co.*, 105 Ky. 253, 48 S. W. 1074, 20 Ky. Law Rep. 1169, is in no wise in conflict with the views we have expressed. In the first place, the opinion does not disclose whether or not the company in that case was an assessment or co-operative company, and in the next place, if it had, it is shown in the opinion that the assured at the time had another policy with the company, and was therefore a member of it.

The case of *Kentucky Growers Ins. Co. v. Logan*, 149 Ky. 453, 149 S. W. 922, was where one who was already a member of an assessment company entered into an agreement with the agent of the company under which he took additional insurance on the property. The property was destroyed, and the assessment company defended upon the ground that Logan, being a member of its company, should be charged with notice of its by-laws and of the fact that the agent had no authority to agree to the additional insurance, and the court held that the action of the agent was binding upon the company.

While, as stated, we have found no direct authority upon the exact proposition here presented, the general rule seems to be that one does not become a member of a mutual fire insurance company until he receives his policy. *Russell v. Detroit Fire Ins. Co.*, 80 Mich. 407, 45 N. W. 356; *Ellenberger v. Protective Fire Ins. Co.*, 89 Pa. 464; *Columbia Ins. Co. v. Cooper*, 50 Pa. 340; *Cumberland Valley Mutual Protection Co. v. Schell*, 29 Pa. 37; *Farmers' Mutual Ins. Co. v. Mylin* (Pa.) 15 Atl. 710. There is no claim that the agent in this case had authority from the corporation to admit members, and it is therefore unnecessary to determine whether such power might be granted.

Under the evidence appellee never became a member of appellant company, and consequently there could have been no valid contract of insurance entered into between him and the company or its agent. The court should have directed a verdict for appellant as asked by it.

The judgment is reversed, with directions to grant appellant a new trial and for further proceedings consistent herewith.

COMMONWEALTH v. BRAND.

(Court of Appeals of Kentucky. Nov. 17, 1915.)

1. CRIMINAL LAW \S 1026—APPEAL—APPEALS BY ACCUSED—CROSS-APPEAL ON COMMONWEALTH'S APPEAL.

Defendant in a criminal case under Cr. Code Prac. \S 335, 337, has an appeal from the final judgment, but he cannot appeal before judgment of conviction and afterwards also, nor can he prosecute a cross-appeal upon appeal by the commonwealth in such cases as it is allowed an appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2615-2618; Dec. Dig. \S 1026.]

2. CRIMINAL LAW \S 1024—APPEAL—APPEAL BY COMMONWEALTH.

The commonwealth can appeal in criminal cases under Cr. Code Prac. \S 337, only from decisions of the court adverse to it.

[Ed. Note.—For other cases, see Criminal Law Cent. Dig. \S 2599-2614; Dec. Dig. \S 1024.]

8. CRIMINAL LAW \S 371—EVIDENCE—INTENT—OTHER CRIMINAL ACTS.

In a prosecution for embezzlement, where defendant relies upon the absence of intent fraudulently to convert, or claims that his act was the result of oversight, accident, or mistake, evidence of other acts of embezzlement is admissible to show guilty knowledge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 830-832; Dec. Dig. \S 371.]

4. EMBEZZLEMENT \S 38—EVIDENCE—INTENT.

In a prosecution of a sheriff for embezzling a county tax collected by him, evidence of the clerk of the county court during defendant's term of office that the latter had failed to report to the court the collections made by him of the public moneys as required by Ky. St. \S 4147, was admissible, since his failure to do so was a fact tending to show his purpose of fraudulent concealment and conversion of the county funds.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. \S 61, 65, 66; Dec. Dig. \S 38.]

5. CRIMINAL LAW \S 673—INSTRUCTION—PURPOSE OF ADMISSION OF EVIDENCE.

Where, in the prosecution of a sheriff for embezzling a tax he had collected, the testimony of the clerk of the county court during the sheriff's term of office that he had failed to report tax collections is admitted, the court should admonish the jury that the evidence should be considered only as evidence tending to show intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1597, 1872-1876; Dec. Dig. \S 673.]

6. EMBEZZLEMENT \S 38—EVIDENCE.

In a prosecution of a sheriff for embezzlement, testimony as to the receipt given the sheriff by his deputy, as to the handwriting of the receipt, the person who had given it, and the cause of ill feeling between the deputy and the defendant growing out of the receipt, was inadmissible.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. \S 61, 65, 66; Dec. Dig. \S 38.]

7. CRIMINAL LAW \S 448—EVIDENCE—OPINION.

In a prosecution of a sheriff for embezzlement of a franchise tax collected by him from a corporation, testimony of the former county attorney that after investigation he had arrived at the conclusion that the tax had never

been certified by the county court clerk to the defendant for collection, so that as attorney for the county he had sued defendant for failure to perform his duty and not to recover the amount of the tax, was inadmissible as opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. \S 448.]

8. EMBEZZLEMENT \S 38—PROSECUTION—EVIDENCE.

In a prosecution of a sheriff for embezzling a franchise tax collected by him from a corporation, the pleadings, in a suit by defendant's sureties on his official bonds against him seeking to recover sums which they were required to pay on account of his defalcations in office, were inadmissible in evidence as irrelevant.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. \S 61, 65, 66; Dec. Dig. \S 38.]

9. EMBEZZLEMENT \S 38—PROSECUTION—EVIDENCE—DEMAND.

In a prosecution for embezzlement, the prosecution may prove that a demand has been made by the proper person for the payment by defendant of the money he is accused of embezzling, as his refusal or failure to make payment of the demand is evidence of a fraudulent conversion.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. \S 61, 65, 66; Dec. Dig. \S 38.]

10. EMBEZZLEMENT \S 39—PROSECUTION—EVIDENCE.

In a prosecution of a sheriff for embezzlement of a franchise tax, where, as it had the right to do, the prosecution proved demand by the county before the indictment for payment of the tax, the defendant to rebut the inference of guilt arising from his failure to pay over the tax in response to the demand could show that when he learned at that time he had not accounted for the tax he was financially unable to do so.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. \S 62; Dec. Dig. \S 39.]

11. EMBEZZLEMENT \S 39—PROSECUTION—EVIDENCE.

In a prosecution against a sheriff for embezzling a franchise tax, collected by him, where the sheriff claims that he had no memory of receiving the tax, and that there was an absence of guilty knowledge, evidence that at the time of the tax's receipt defendant suffered greatly from his nervous condition and was unable to look after the affairs of his office was admissible.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. \S 62; Dec. Dig. \S 39.]

12. EMBEZZLEMENT \S 38—EVIDENCE—IMMATERIALITY.

Evidence that defendant had made an arrangement with his deputy to take a former sheriff's books and collect the taxes yet unpaid to the latter, and that such deputy had never accounted to defendant, who had been unable to recover his books, was inadmissible as irrelevant.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. \S 61, 65, 66; Dec. Dig. \S 38.]

13. EMBEZZLEMENT \S 9—EMBEZZLEMENT OF TAX—NECESSITY FOR CERTIFICATION.

Before a sheriff can be prosecuted for having embezzled as such franchise taxes due the county from a corporation, the money arising from the collection of the franchise tax must necessarily have been legally in the sheriff's possession and custody as the custodian of the county funds, and therefore that the tax had

been certified to him for collection was a necessary condition precedent to his embezzling it.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 7; Dec. Dig. ¶9.]

14. CRIMINAL LAW ¶371—EVIDENCE—MOTIVE—OTHER CRIMINAL ACTS.

In a prosecution for crime, the commission by defendant of other criminal acts of the same nature cannot be considered by the jury as substantive testimony of defendant's guilt, but only as indicating motive and intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. ¶371.]

15. CRIMINAL LAW ¶561—EVIDENCE—BURDEN OF PROOF.

The jury must acquit if they have a reasonable doubt of defendant's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. ¶561.]

Appeal from Circuit Court, Graves County.

Prosecution of W. L. Brand by the Commonwealth for embezzlement. There was a failure by the jury to reach a verdict on account of the disagreement, and the Commonwealth appeals, as provided by Cr. Code Prac. §§ 335, 337. Opinion ordered certified to the circuit court.

H. J. Moorman, of Mayfield, and Samuel H. Crossland, of Paducah, for the Commonwealth. Hester & Hester, of Mayfield, for appellee.

HURT, J. This is an appeal by the attorney for the commonwealth of Kentucky, from decisions of the circuit court upon the admission and rejection of proof of facts offered to be given in evidence, and decisions upon the giving of instructions to the jury upon the trial of the appellee in the Graves circuit court, upon an indictment which charged him with the crime of embezzlement, as denounced by section 1205 of Ky. Statutes. The trial resulted in a failure by the jury to arrive at a verdict on account of disagreement as to the guilt of the accused, under the evidence and instructions of the court, and the commonwealth's attorney has brought the case here by appeal, as provided by sections 335 and 337 of the Criminal Code, regulating procedure in criminal cases, insisting that it is important to the correct and uniform administration of the criminal law that this court should determine the questions before the appellee is again put upon trial.

[1] The appellee made many objections and saved many exceptions to the decisions of the court upon the trial adverse to him, and insists that these decisions be also reviewed. The authority of this court to review decisions and judgments of the circuit court, in criminal trials, is confined and limited by the provisions of the Criminal Code, and beyond the authority there granted this court cannot go. Section 335 of the Criminal Code provides:

"An appeal shall only be taken on a final judgment, except on behalf of the commonwealth. An appeal by the commonwealth from

a decision by the circuit court shall not suspend the proceedings in the case. * * *

Section 337, supra, provides that an appeal by the commonwealth's attorney must be taken at the term at which the decision is rendered. An appeal may be taken by the commonwealth from the decisions of the circuit court when a mistrial has been had, as in this case, and even when an acquittal of the accused is the result of the trial, if the attorney for the commonwealth and the Attorney General shall be of the opinion that an error to the prejudice of the commonwealth has been made by any decision of the circuit court and it is important for a correct administration of the criminal law that this court should review the decision. The reason for the legislation is apparent, when it is considered that, if a decision prejudicial to the commonwealth results in the acquittal of the accused, he cannot be required again to undergo a trial, however erroneously or mistakenly his acquittal was brought about. The right of the accused to an appeal, however, is different. He suffers no harm unless he is convicted, and, if he suffers conviction, he may appeal from the final judgment and bring up for review all of the errors which are prejudicial to him in the proceedings. It will be observed that the Code expressly provides that the accused can appeal from a final judgment only. He loses nothing by this. He is granted an appeal from the final judgment, but he cannot appeal before judgment against him and afterwards, too. Neither can the accused prosecute a cross-appeal, upon an appeal by the commonwealth, for the purposes for which an appeal is allowed to it. *Smith v. Com.*, 5 Ky. Law Rep. 852; *Riley v. Com.*, 55 S. W. 7, 21 Ky. Law Rep. 1406; *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 333, 11 Ky. Law Rep. 505; *Com. v. Bullock*, 67 S. W. 992, 24 Ky. Law Rep. 78; *Com. v. Hourigan*, 89 Ky. 305, 12 S. W. 550, 11 Ky. Law Rep. 506; *Com. v. Huber*, 126 Ky. 456, 104 S. W. 282, 345, 31 Ky. Law Rep. 845, 929.

[2] The commonwealth can, however, appeal only from decisions of the court which are adverse to it. For the reasons stated, only such decisions of the court below as were adverse to the commonwealth and to which the attorney for the commonwealth saved exceptions, will be considered. The indictment was based upon the accusation that the appellee was the sheriff of Graves county for the term beginning on the first Monday of January, 1906, and that as such he collected the tax due the county of Graves for the year 1906, amounting to the sum of \$1,031, which had been levied upon the franchise of the Illinois Central Railroad Company, and fraudulently converted it to his own use. To the indictment the appellee entered a plea of not guilty. The proof showed that the tax was received by the appel-

lee; that it was never charged to him in any settlement made by him with a commissioner of the fiscal court, nor was it accounted for by him to the county in any way. The appellee admitted having received the tax, but denied the fraudulent conversion of it, and contended that the tax had never been certified by the county clerk to him for collection; that he was in a low state of health at the time he received the check from the railroad for it, and was practically unable to either physically or mentally give his business any attention, and had no memory of the transaction; that his settlements were made up by the commissioner of the fiscal court, without his presence or assistance; that he did not know that he was not charged with the tax until five or six years afterward, when the county was having an investigation of the affairs of his office made, when for the first time he learned that he had not accounted for the tax; that he had during his term of office paid all that the commissioner of the fiscal court informed him that he was due the county, upon his settlements; that when he learned that he had never accounted for the franchise tax, and demand was made by the county of him for it, he was then financially unable to pay it, and had no money with which to pay it. The commonwealth offered proof tending to show that the appellee made conversions of the public money, in different amounts and at different times, during each year of his term of office, and that during his four-year term, he failed to account to the county for about \$14,000 of the public moneys. The manner of making this proof by the commonwealth we do not pass upon, as the questions are not before us. This statement of what the evidence tended to show is given for the purpose of determining the correctness of the decisions adverse to the commonwealth upon the admission and rejection of evidence, and the decisions made in giving instructions.

[3] The proof of the facts which this evidence seems to have been offered to show was admitted under the rule that in a prosecution for embezzlement where the accused relies for a defense upon absence of intent upon his part to make the fraudulent conversion, or that his act was the result of oversight, accident, or mistake, evidence of other acts of embezzlement are admissible to show guilty knowledge in the commission of the act charged. *Morse v. Com.*, 129 Ky. 294, 111 S. W. 714, 33 Ky. Law Rep. 831, 894.

[4, 5] First. The attorney for the commonwealth offered to prove, by the person who was clerk of the county court during appellee's term of office, that the appellee had failed to report to the county court the collections made by him of the public moneys, as required by section 4147 of Kentucky Statutes. Upon objection, the court excluded testimony of such failures. This was error, as it was the duty of appellee, as sheriff, to have

made a report to the county court of the collection of the franchise tax, which he is charged with embezzling, at the time fixed in the statute, thereafter, and his failure to do so would be a fact tending to show that his purpose was to conceal the fact of the collection and to convert it to his own use. Upon admission of the proof of appellee's failure to make such report, if objected to, or it is requested, the court should admonish the jury that it should only consider the evidence of such failure to report the collection as evidence tending to show the intent with which appellee appropriated the money to his own use, if it did tend to prove such intent.

[6] Second. Over the objection of the attorney for the commonwealth, the court permitted appellee to introduce in evidence a receipt given by B. W. Sullivan, and to make inquiries in regard to the giving of such receipt, and to examine witnesses as to the handwriting of the receipt, and who had given it, and the cause of the ill feeling between Sullivan and appellee growing out of the giving of the receipt. All of this was error and should have been excluded.

[7] Third. The appellee, over the objection of the attorney for the commonwealth, was permitted to prove by M. B. Hollifield that as county attorney he had made an investigation of appellee's accounts with the county, and had arrived at the conclusion that the franchise tax which appellee is accused of embezzling had never been certified by the county court clerk to the sheriff for collection, and that, by reason of such conclusion, he, as attorney for the county, had sued the appellee for failure to perform his duty, and not to recover the amount of the tax. This was an opinion of the witness as to the existence or nonexistence of a material fact in the case, and the introduction of an opinion that had been formed by the witness, instead of proof of the facts upon which the jury should make an opinion, and its admission was error and should have been excluded.

[8] Fourth. The attorney for the commonwealth offered to put in evidence the pleadings of a suit, which it was claimed was a suit by the sureties of appellee in his official bonds, against him, seeking to recover sums, which they were required to pay on account of his defalcations in his office, and to subject certain property, either owned by appellee or alleged to be owned by him, to the satisfaction of his indebtedness to them. To the admission of these pleadings the appellee objected, and, his objection being sustained, the appellant excepted. There could be no error of the court in this decision, as it does not appear that the allegations of the sureties in the suit could possibly have any relevancy to the issues in this case.

[9, 10] Fifth. The appellee, in testifying for himself upon the trial, was permitted, over the objection of the attorney for the commonwealth, to state his financial condition, at the time he says that he learned that

the franchise tax, which he is accused of embezzling, had never been charged to him in any settlement of his accounts, and had not been properly accounted for by him; and to state that he then had no money nor property which he could apply to the payment of the demand made upon him by the county; that his property had been sacrificed in the payment of debts which he owed to his former bondsmen, as a surety for others; and to give in detail what had become of all the money which he had acquired through the office of sheriff. In a prosecution for embezzlement, it is competent to be proven by the prosecution that a demand had been made of the accused by the proper person for the payment of the money which he is accused of embezzling, as his refusal or failure to make payment of the demand, in due course, to the owner, may be considered as evidence from which a fraudulent conversion may be inferred. Roberson, vol. 1, p. 655. The commonwealth avails itself of its right, in the case at bar, and made proof, that the county, before the indictment, had made a demand of appellee for the payment of the tax to it. When it was proved the appellee had not paid the amount of the franchise tax, in due course, and failed upon demand to pay it, this proof was such, from which it could be inferred that he had fraudulently converted the money. It was then admissible for him to rebut the inference by such facts as would tend to show that at the time he learned, according to his statement, that he had not accounted for the tax, he was not financially able to do so. While it was not proper, in his examination in chief, to allow him to give in detail what had become of his money and property, he should be allowed to show that at the time he learned, according to his statement, that he had by oversight or mistake converted the money to his own use, or to that of another, he had no money or property, and could not make payment.

[11] Sixth. The court permitted appellee to prove that at and about the time he received the tax, which he is accused of embezzling, he suffered greatly from his nervous condition and was unable to look after the affairs of his office. The commonwealth's attorney objected and saved exceptions to the ruling of the court. This evidence was admissible in corroboration of his claim that he had no memory of receiving the tax, and that there was an absence of a guilty knowledge of having fraudulently converted the money.

[12] Seventh. Appellee was permitted, over objection, to prove by J. N. Harris that he had made an arrangement with one Sullivan, who was a deputy of appellee, to take the books of Harris, who was a former sheriff, and to collect the taxes yet unpaid to Harris, and that Sullivan had never accounted to him, and that he was unable to get his books back from Sullivan. This evidence was irrelevant and should have been excluded.

[13] Eighth. The court gave to the jury three instructions, to each of which the attorney for the commonwealth objected, and, his objection being overruled, he excepted. As to the first instruction, he insists that the court was in error when it directed the jury, with other things, that it must believe beyond a reasonable doubt that the franchise tax levied upon the Illinois Central Railroad Company for the year 1906 was duly certified by the Auditor of Public Accounts to the clerk of the Graves county court, and by him was certified to the appellee, as sheriff, for collection, before a verdict of guilty could be returned. The instruction followed the allegations of the indictment, as to the certification of the tax by the Auditor of Public Accounts to the county court clerk and by him to the sheriff, and without such allegation in the indictment it would not have been sufficient. Before a prosecution could be maintained against the appellee as sheriff, for having, as such, embezzled the franchise taxes due the county from the railroad company, the money arising from the collection of the franchise tax must have been necessarily legally in his possession and custody as the custodian of the funds of the county. The sheriff is not authorized to collect the franchise tax of a railroad until it has been certified to him for collection, and the railroad company cannot pay same to the sheriff and be acquitted of its obligation for said tax until such certification takes place. Such a tax due a county is not due until the railroad company has received notice for 30 days from the officer authorized to collect it. If the sheriff should collect same without first being authorized, as provided by law, he would be the custodian of the money of the railroad, and not the county. Ky. Statutes, §§ 4067, 4077, 4103; *Com. v. Alexander*, 129 Ky. 430, 112 S. W. 586, 33 Ky. Law Rep. 971; *Com. v. Baske*, 124 Ky. 468, 99 S. W. 316, 30 Ky. Law Rep. 400, 11 L. R. A. (N. S.) 1104; *Whaley v. Com.*, 110 Ky. 154, 61 S. W. 35, 23 Ky. Law Rep. 1292; *Com. v. Stone*, 114 Ky. 511, 71 S. W. 428, 24 Ky. Law Rep. 1297.

[14] The second instruction directed the jury, in substance, that it should not consider the evidence of other acts of embezzlement of appellee, in connection with his office of sheriff, other than the one charged in the indictment, as substantive testimony of appellee's guilt of the crime charged in the indictment, but that such evidence was to be considered only as indicating the motive and intent of appellee, if the jury believed beyond a reasonable doubt that it did so indicate. It would have been prejudicial error to the substantial rights of the appellee if the court had not given the instruction or a similar one. This has been so often held that it is needless to further consider it.

[15] The third instruction directed the jury to acquit appellee if it had a reasonable

doubt of appellee having been proven to be guilty.

The instructions substantially presented the law of the case upon the evidence heard.

It is therefore ordered that this opinion be certified to the circuit court.

O'DOHERTY & YONTS et al. v. BICKEL et al.

(Court of Appeals of Kentucky. Nov. 16, 1915.)

1. ATTORNEY AND CLIENT ⇨133—COMPENSATION — NECESSITY OF CONTRACTUAL RELATIONS.

As a general rule, an attorney cannot recover fees for his services from one who has not employed him or authorized his employment, although the services may have been beneficial to such person.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 305, 317-327; Dec. Dig. ⇨133.]

2. ATTORNEY AND CLIENT ⇨133—COMPENSATION—CONTRACTUAL RELATIONS.

Holders of stock in an insolvent bank employed a trust company as their agent to make sale of the stock. The stock was sold to a bank on a contract providing for a certain absolute payment per share, and for additional payments upon certain contingencies. The purchasing bank, however, refused to make such additional payments, and certain shareholders sued on the contract, employing plaintiffs as their attorneys, and, it appearing that a suit might terminate successfully, other shareholders intervened, but were represented by other attorneys, although they had an opportunity to employ plaintiffs. A settlement was made between the claimants and purchasing bank, and part of the fund deposited in court. Plaintiffs, whose contract with their clients provided for a contingent fee of one-third of the amount recovered, demanded compensation at the same rate from the other stockholders. Held that, there being no contractual relations with other stockholders, they were not entitled to compensation, although their services had been of benefit to the other stockholders.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 305, 317-327; Dec. Dig. ⇨133.]

3. ATTORNEY AND CLIENT ⇨133—COMPENSATION—CONTRACTUAL RELATIONS.

Where, through the efforts of attorneys for certain stockholders, recovery was had upon a contract for the sale of the stock of a defunct bank, Ky. St. § 468, providing that in actions for the recovery of money or property held in joint tenancy, coparcenary, or as tenants in common, if it shall be made to appear that one or more of the parties in interest have prosecuted for the benefit of others interested with themselves, and have been at expense in conducting the same, such persons may be allowed a reasonable compensation for their trouble out of the funds recovered, did not entitle the attorneys to compensation as against stockholders not employing them.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 305, 317-327; Dec. Dig. ⇨133.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Proceedings by O'Doherty & Yonts and another, attorneys at law, against C. C. Bickel and others, for compensation out of a fund deposited in court recovered for the

benefit of C. C. Bickel and others. From an adverse decision, the attorneys appeal. Affirmed.

A. P. Dodd, J. C. Dodd, and O'Doherty & Yonts, all of Louisville, for appellants. Trabue, Doolan & Cox, of Louisville, for appellees Lewman and others. W. Pratt Dale, of Louisville, for appellees Bickel and others. T. K. Helm and Helm & Helm, all of Louisville, for appellee Clark. Percy N. Booth, of Louisville, for appellee Abrams.

HANNAH, J. During the year 1909 the first National Bank of Louisville was found to be in a precarious condition in respect of its solvency; and the owners of 2,914 of its shares of capital stock constituted and appointed the Fidelity Trust Company their attorney in fact to make a sale of their holdings.

On September 4, 1909, the Fidelity Trust Company, as such attorney in fact, entered into a written contract for the sale of the shares mentioned, with the Kentucky Title Savings Bank & Trust Company, which contract provided for an absolute payment of \$40 per share, and stipulated for certain additional payments to be made upon certain contingencies connected with the amount that might be realized from the assets of the defunct bank, the exact details of which are complicated, and not here necessary to be dwelt upon. The purchasing bank paid the \$40 per share, took over the assets of the First National Bank, and proceeded to a liquidation thereof, but declined to make any further payments to the selling shareholders; its contention being that, upon a proper interpretation of its contract with their attorney in fact, nothing more was due.

Three of the shareholders, E. H. Ferguson, Miss Nellie Peter, and C. C. McClarty, thereupon employed counsel in the person of Messrs. O'Doherty & Yonts and J. C. Dodd, for the purpose of enforcing further payments upon their shares so sold. A meeting of all the shareholders who had deposited their shares with the Fidelity Trust Company was called, at which the other shareholders were given an opportunity to employ the counsel mentioned; but none of the other shareholders availed themselves of this privilege. Some of them had personal counsel under whose advice they were proceeding.

In April, 1912, the three shareholders heretofore named each filed a separate suit in the Jefferson circuit court against the purchasing bank to obtain further payments on the shares sold by them; the suits being prosecuted by O'Doherty & Yonts and J. C. Dodd under an agreement for a contingent fee equal to one-third of any recovery had therein.

After these suits had progressed for some months, it seemed likely from the rulings of the chancellor that a recovery would event-

ually be had of some further payments upon the shares so sold; and on March 20, 1913, appellee Abrams became a party thereto by intervention. He was claiming 32 of the 653 shares which had been pooled by C. C. McClarty, the plaintiff in one of the actions mentioned, and was represented by Percy N. Booth.

Later, on April 17, 1913, C. C. Bickel, who owned in his own right 602 shares in the pool, and also owned jointly with said E. H. Ferguson 544 shares (none of which, however, were set up by Ferguson in his action), also became a party by intervention, suing on all of said shares. He was represented by W. Pratt Dale.

On May 27, 1913, an order was entered permitting the plaintiff Miss Nellie Peter to prosecute said actions for and on behalf of all the shareholders, presumably upon the assumption that section 25 of the Civil Code authorized such privilege.

On May 29, 1913, as the result of negotiations which had been pending for some days, the purchasing bank paid to the Fidelity Trust Company the sum of \$45,000 to await the acceptance thereof by all the pooling shareholders; this sum being tendered in full settlement of all of their claims.

On June 5, 1913, Jas. Clark, Jr., one of the pooling shareholders, applied for and obtained the rescission of the order of May 27, 1913, permitting Miss Peter to sue for all the shareholders, in so far as that order affected him, and he became a party by intervention. He was represented by T. K. Helm. On the same day the same proceedings were had by H. P. Lewman, J. B. Lewman, and W. N. Cox, executors of G. W. Lewman, H. P. Lewman, J. B. Lewman, W. N. Cox, and Josephine L. Cox, and they became parties by intervention, being represented by Trabue, Doolan & Cox.

By July 16, 1913, the acceptance by all the pooling shareholders of the \$45,000 tendered in full satisfaction of their claims had been obtained. It appears, however, that on June 2, 1913, attorneys O'Doherty & Yonts and J. C. Dodd had written to each of the pooling shareholders informing them of the offer of \$45,000 in satisfaction of the claims of all such shareholders, and notifying them that in the event of an acceptance of this offer each of such shareholders would be expected to pay to them a fee equal to one-third of the recovery, the same as that agreed upon by the three plaintiffs in the actions heretofore mentioned. When the consent of all the shareholders to the settlement had been obtained, there remained only this dispute between the attorneys for the plaintiffs in the original actions mentioned and Bickel, Abrams, Clark, and the Lewmans (who had been represented by other attorneys when they became parties by intervention) as to whether any sum was due from them to the said attorneys O'Doherty & Yonts and Dodd. In order to expedite the settlement, it was

finally agreed that the shareholders mentioned should permit one-third of the sums due to them to be paid into court pending an adjudication of this dispute as to fees. The three actions mentioned were then consolidated, and proceeded only upon the issue as to the right of the attorneys mentioned to claim a fee from those shareholders who had intervened and who had employed attorneys of their own. The chancellor upon the trial refused to adjudge to O'Doherty & Yonts and J. C. Dodd any fee as against those shareholders, and the attorneys appeal from that judgment.

[1] 1. The general rule in this state is that an attorney cannot recover fees for his services from one who has not employed him or authorized his employment, although the services may have been beneficial to such person.

In *Savings Bank of Cincinnati v. Benton*, 2 Metc. 240, Benton was employed by a defendant, Sandford, to represent him and his codefendant, the Savings Bank of Cincinnati. The bank had its own counsel. In an action by Benton against the bank to recover compensation for his services, the plaintiff obtained a verdict; and this court, in reversing the judgment, said:

"If it [the bank] had counsel of its own employed, and the plaintiff had not been employed by it, but had been employed only by Sandford, and the bank, through its president, knew of that employment, then, although the plaintiff's services may have been beneficial to the bank, and received and accepted by it, yet it would not thereby incur any liability to pay for them. To impose such liability upon it, under the circumstances of the case, it must have been apprised that it was looked to by the plaintiff for compensation for his services, and afterwards received them, without informing him that it would not pay for them."

Of course, this general rule is subject to the qualification that the acceptance of or acquiescence in the services rendered may raise an implied promise to pay therefor.

Thus in *Patterson v. Fleenor*, 89 S. W. 705, 28 Ky. Law Rep. 582, Patterson had employed one Gillum as his attorney in an action involving the title to land. Fleenor was a partner of Gillum's at the inception of that litigation, or became such soon after, and Gillum while it was pending removed to another state. Fleenor continued to conduct the case, with the knowledge and consent of Patterson. This court held that, under these circumstances, an agreement on the part of Patterson to pay for the services so rendered would be implied. To the same effect is *Crawford v. Wiedemann*, 158 Ky. 333, 164 S. W. 981, wherein this court said:

"Acquiescence by the client in the attorney's conduct may supply the place of a request to act, provided the case is such that the client might reasonably know that he would be expected to pay for the work; and the same would be true if the client by his acts induced the attorney to believe that his services were desired." 4 Cyc. 985."

It must be apparent, however, that under the spirit of the rules stated, the acquies-

cence which would raise an implied promise must be such as presumes volition upon the part of the person sought to be charged with the duty of compensating the attorney. It will not do to say that, where the circumstances are such that one has no choice but to avail himself of efforts which have been made by an attorney, this would constitute acquiescence.

[2] In the case at bar the pooling shareholders were offered an opportunity to avail themselves of the services of appellants, and they declined the offer. The appellants then proceeded with the actions on behalf of the three shareholders who did employ them. The nature of those actions was such that their success must of necessity be of some benefit to the other pooling shareholders. If they were successful, their success would naturally redound to the benefit of the other shareholders, who had like claims against the purchasing bank, should they care to assert them. If the three actions mentioned had proceeded to a judgment in favor of the plaintiffs, of course, there would have been little, if any, incentive for the purchasing bank to have compelled the remaining shareholders to resort to the courts in order to obtain their rights under the contract in question. Yet, had such been the course of events in respect of the three actions mentioned, if the remaining shareholders were to settle at all with the purchasing bank, in doing so they must have in a sense availed themselves of benefits resulting from the successful presentation by appellants of the cases in which they were employed by the three suing shareholders. That, however, would not constitute the acquiescence in the conduct or acceptance of an attorney's services such as raises a duty to pay therefor by implication of law. It would not be accepting services rendered for them, but, rather, availing themselves of the benefits of services which had been rendered to, and paid for by, others. Nor was there any exercise of voluntary choice in the matter; for, if the remaining shareholders were ever to effect any settlement of their claims with the purchasing bank, they must of necessity have profited in a way by the efforts of the attorneys employed by the three suing shareholders.

It is not claimed by the appellants that they had any contract with or employment from the appellees; but it is contended that, because the appellees agreed to and effected the compromise offered by the purchasing bank, after appellees had been notified that appellants would look to them for a fee in that event, there was such an acceptance of their services as would operate to create legal liability by implication of law. But what services did appellants perform for appellees? None at all, as we view it, for which the law imposes liability. The appellants had been employed by and had brought three suits

for three of the pooling shareholders; appellees not being parties thereto. The services performed by them in those cases they were in duty bound to perform, under the employment which they accepted. They were not employed by appellees, and they performed no services for appellees. If the three actions mentioned had proceeded to judgment favorable to the plaintiffs therein, and the purchasing bank had thereafter settled with the remaining shareholders, would appellants here contend that they were entitled to a fee of one-third of the sums so paid to the remaining shareholders? It may be conceded that, as an incidental result of the efforts of appellants upon behalf of their clients (the plaintiffs in the three original actions), the purchasing bank was led to a desire to settle with all of the pooling shareholders; but the benefits derived by appellees in that respect were only incidental benefits which of necessity flowed from the performance by appellants of the services which they were by their clients employed to perform, and which they were in duty bound to perform for them; and for such benefits they cannot claim compensation from appellees, who were not their clients, either by express contract or implication of law. *Hand v. Savannah Ry. Co.*, 21 S. C. 162; *Rives v. Patty*, 74 Miss. 381, 20 South. 862, 60 Am. St. Rep. 510. As well might it be contended that the attorney who obtains the enunciation of a new doctrine of the law should have compensation from all who are thereafter, in virtue of that doctrine, victorious in the courts.

In *Pepper v. Pepper*, 98 S. W. 1039, 30 Ky. Law Rep. 480, the following state of facts is found: Certain attorneys were employed by some of the heirs of one W. B. Pepper, and succeeded in recovering several thousand dollars for the estate. One of the heirs received the benefit of one-third of the sum so recovered. He had not employed any attorney to represent him in the litigation. Those who had employed the attorneys paid the agreed compensation, and the attorneys then sought to recover an additional fee from the heir who had not employed them; and this court held that they could not maintain an action against a person who was not their client, and with whom they had no agreement, either express or implied.

[3] This latter case may also be referred to as demonstrating conclusively the inapplicability of section 489, Kentucky Statutes, to the state of facts here shown. It was explained in that case that the section mentioned applies where one party in interest recovers a fund which necessarily inures to the benefit of others jointly interested therein; the statute effecting a sort of contribution among them, to the end that all persons jointly interested in and benefited by the recovery shall bear their proportion of the expenses incurred in securing the benefits thereof. See, also, *Clark v. Pepper's Adm'r*, 132 Ky. 192, 116 S. W. 353.

But in the case at bar we have simply three plaintiffs suing a defendant against whom other persons have similar claims. The defendant compromises with all of them; and the attorneys for the plaintiffs first suing seek a fee from those claimants who were not their clients, but who were, in point of fact, represented by other attorneys. It may be that those claimants who did not sue originally (but who came in later by intervention) were benefited by the services performed by the attorneys whom the plaintiffs had employed; but there was no legal liability thereby created.

Much has been made to appear in the record tending to show that certain of the claimants who did not sue had such relations with the plaintiffs, or some of them, as would have rendered the employment of a common attorney injudicious; and much has been said concerning the fact that the appellees who did not sue were nevertheless availing themselves of the constant advice of other attorneys than appellants during the course of the matters in question; but we have not found it necessary to consider or discuss these contentions in detail, in view of the conclusions which we have reached, as hereinbefore stated. Be these matters as they may, appellees are not liable to appellants for compensation under the facts disclosed by the record and here conceded.

The judgment is affirmed.

CINCINNATI, N. O. & T. P. RY. CO. v. JONES' ADM'R.

(Court of Appeals of Kentucky. Nov. 19, 1915.)

1. RAILROADS ⚡376—INJURIES TO PERSONS ON TRACK—TRESPASS—“TRESPASSER.”

One walking on a railroad track which was not used by the public in such large numbers as to impose on the company the duty to have its trains under reasonable control, or to keep a lookout, is a trespasser, and can only demand that those in charge of trains use all reasonable means to avoid injuring him after discovering his peril.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1275-1279; Dec. Dig. ⚡376.]

For other definitions, see Words and Phrases, First and Second Series, Trespasser.]

2. RAILROADS ⚡376—INJURY TO PERSONS ON TRACK—TRESPASSER—DUTY OF ENGINEER.

Where a railroad engineer discovers a trespasser on the track in a position of peril, and the distance is too short to stop the train, it is negligence for him to fail to give the alarm signal.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1275-1279; Dec. Dig. ⚡376.]

3. RAILROADS ⚡400—INJURY TO PERSONS ON TRACK—JURY QUESTION.

Testimony by persons in position to hear it that a railroad whistle was not heard, though of a negative character, presents an issue of fact as to whether an alarm signal was given.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365-1381; Dec. Dig. ⚡400.]

4. RAILROADS ⚡390—INJURY TO PERSONS ON TRACK—HUMANITARIAN DOCTRINE.

Though a trespasser on a railroad track was guilty of contributory negligence, recovery for his death may be had where those in charge of a train did not use reasonable care after discovering his position of peril.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1324, 1325; Dec. Dig. ⚡390.]

Appeal from Circuit Court, McCreary County.

Action by William Jones' Administrator against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Edward Colston and John Galvin, both of Cincinnati, Ohio, and Tye, Siler & Gatliff, of Williamsburg, for appellant. R. L. Pope, of Williamsburg, W. F. Hinkle, of Whitley City, and Rose & Pope, of Williamsburg, for appellee.

CLAY, C. In this action by the administrator of William Jones against the Cincinnati, New Orleans & Texas Pacific Railway Company to recover damages for his death, there was a verdict and judgment in favor of plaintiff for \$1,500. The railroad company appeals. The only ground urged for reversal is the failure of the trial court to give a peremptory instruction in favor of the defendant.

The facts are these: Jones was killed at 6:15 a. m. June 26, 1913, by engine No. 922 extra, which at the time was pulling a freight train consisting of 3 loaded cars and 42 empty cars. The accident occurred between the towns of Silversville and Pine Knot, which are located about 2 miles apart. At the place of the accident the defendant's road is double-tracked. The east track is called the north-bound main and the west track is called the south-bound main. Trains going north run on the north-bound main. The train which struck decedent was going north at the rate of 35 miles per hour. Decedent's home was east of Silversville. Decedent had left his home and walked to the railroad, which runs to the county road. After reaching the railroad he proceeded north on his way to Tow Wad mines, a mining camp south of Pine Knot. The county road runs parallel with the railroad from Silversville to the place where Jones was going to work. On each side of the railroad was a wire fence, and it was the purpose of the decedent to leave the railroad at a point 300 or 400 yards north of where he was struck. Just before reaching the point where decedent was killed there is a sharp curve on the railroad, which is estimated to be from 14 to 17 rail lengths, or a distance of from 462 feet to 561 feet, from the place where the accident occurred. The evidence shows that, when the engineer discovered decedent on the track, the engine was about 12 rail lengths, or 396 feet, distant from decedent. It further appears that a train like the one

in question could not be stopped within less than from 900 to 1,000 feet, and that ordinarily it would require from 1,400 to 1,600 feet to stop such a train. The engineer said that when he discovered decedent he immediately sounded the alarm and put on the emergency brakes. He did everything in his power to stop the train, but it was absolutely impossible to do so within the short distance that lay between him and the decedent. However, for plaintiff a number of witnesses testified that they had their attention directed to the train and were in a position to hear, and did not hear, any alarm blast until after the train had stopped.

[1] It may be conceded that the evidence fails to show that the track at the place of the accident was used by the public in such large numbers as to impose on the company the duty of having the train under reasonable control, and of keeping a lookout and giving timely warning of its approach; in other words, decedent was a trespasser, and, that being true, the company owed him no duty other than to use ordinary care in the exercise of all reasonable means at its command, consistent with the safety of the train, to avoid injuring him after his peril was discovered. *C. & O. Ry. Co. v. Montjoy's Adm'r*, 148 Ky. 279, 146 S. W. 371.

[2] The company insists that, as the engineer says that he gave the alarm whistle and then applied the brakes in emergency, and as the evidence conclusively shows that the train could not possibly have been stopped in time to prevent the injury, the case is one calling for a peremptory in its favor. It may be conceded that the train could not have been stopped in time to prevent the accident, and, if the failure to stop the train were the only negligence relied on, a peremptory should have gone. But plaintiff relies on the fact that the engineer failed to give any signal of the train's approach after discovering decedent's presence on the track. In view of the short distance between the train and the decedent after his peril had been discovered, and the impossibility of stopping the train in that distance, it is manifest that the sounding of the whistle was a more effective means to avoid injury than the application of the emergency brakes, and,

unless the engineer gave the alarm, it cannot be said that he used ordinary care in the exercise of all reasonable means at his command, consistent with the safety of the train, to avoid injuring decedent after his peril was discovered. *C., N. O. & T. P. Ry. Co. v. Blankenship*, 157 Ky. 702, 163 S. W. 1123; *Creager's Adm'r v. I. O. R. R. Co.*, 134 Ky. 548, 121 S. W. 458.

[3] The case therefore turns on whether or not the alarm blast was sounded. The engineer says emphatically that it was. On the other hand, Henry Vahle, Mrs. Gillmore, Burrel Wilson, Mary Davenport, Bob Davenport, and Cal West all say that they were in the vicinity of the scene of the accident and had their attention directed to the train; that they knew what an alarm whistle was, and did not hear the alarm whistle sounded until after the train had stopped. It is the rule in this state that evidence to the effect that the blowing of a whistle was not heard by persons who were in a position to hear it if it had been blown, though of a negative character, presents an issue of fact triable by the jury, and is sufficient to sustain a verdict. *C. & O. Ry. Co. v. Nipp's Adm'r*, 125 Ky. 49, 100 S. W. 246, 30 Ky. Law Rep. 1131; *L. & N. R. R. Co. v. Molloy's Adm'r*, 107 S. W. 217, 32 Ky. Law Rep. 747; *C. & O. Ry. Co. v. Brashear's Adm'r*, 124 S. W. 278. Unless we depart from this ruling, which we have no inclination to do, it cannot be said, as a matter of law, that the signal of the train was sounded after the peril of decedent was discovered. Under the circumstances, the question was for the jury.

[4] The fact that decedent was guilty of contributory negligence in going upon the track and in failing to heed the approaching train is not sufficient to defeat a recovery, for, notwithstanding his contributory negligence, a failure on the part of the company to use ordinary care in the exercise of all reasonable means at its command to avoid injuring him after his peril is discovered will render the company liable. *C. & O. Ry. Co. v. Montjoy's Adm'r*, supra.

It follows that defendant's motion for a peremptory instruction was properly overruled.

Judgment affirmed.

**HOUSTON BELT & TERMINAL RY. CO.
v. JOHANSEN. (No. 2414.)**

(Supreme Court of Texas. Nov. 3, 1915.)

**1. DAMAGES — 208 — ACTIONS — QUESTIONS
FOR JURY.**

In an action by a member of a city fire department against a railway company for injuries due to an explosion of combustible material in a box car, where the evidence was conflicting as to whether money paid by the city to the fireman while disabled was paid as wages or as a gratuity, and where there was evidence that he actually suffered loss of time, the issue of damages for lost time was properly submitted to the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. —208.]

2. EXPLOSIVES — 8 — INJURIES FROM EXPLOSION — CONTRIBUTORY NEGLIGENCE.

A railway company stored a car containing combustible material in its yard. Some of the material exploded, causing a fire, which was followed by other explosions. The fire department was called, and plaintiff, a member thereof, was injured by an explosion occurring after his arrival at the fire. Held that, inasmuch as the negligence of defendant was the proximate cause of the explosion setting the fire, as well as the subsequent one by which plaintiff was injured, the negligence of defendant was a continuing one, and plaintiff was not negligent in entering upon the premises.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. —8.]

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

Action by Frederick Johansen against the Houston Belt & Terminal Railway Company for personal injuries. Judgment for plaintiff, affirmed by the Court of Civil Appeals upon remittitur (143 S. W. 1186), and defendant brings error. Affirmed.

Andrews, Ball & Streetman and A. L. Jackson, all of Houston, for plaintiff in error. John Lovejoy and Presley K. Ewing, both of Houston, for defendant in error.

PHILLIPS, C. J. [1] The suit was by Johansen, the defendant in error, on account of personal injuries suffered by him while in the discharge of his duty as a member of the fire department of the city of Houston by the explosion of combustible materials contained in a box car in the custody and charge of the plaintiff in error. The evidence warranted the conclusion that the explosion was caused by a sudden collision of the car with other cars, due to its being "kicked in" on the track where they were standing. The original explosion was followed by recurrent explosions of the contents, causing a fire in the car, as the result of which the contents were consumed, and the car wrecked. The burning car threatened adjacent property, and, in response to an alarm, Johansen, with other members of the fire department, went to the scene for the purpose of extinguishing the fire. While engaged in that duty, and in proximity to the car, a further explosion of its contents occurred, of a violent character,

causing his injury. The jury resolved against the plaintiff in error the issue of whether the explosion was caused by its negligent handling of the car, returning a verdict in Johansen's favor in the sum of \$12,500; the verdict itemizing \$2,500 of that amount as allowed for lost time, an issue of damages submitted in the charge. The honorable Court of Civil Appeals ordered a remittitur of \$840 of the damages given for lost time, the judgment to be affirmed upon the remittitur being filed; and it was so filed. The writ of error was allowed on the petition of the railway company, on the ground there urged, that the undisputed evidence showed that during the whole of the time for which damages were allowed on account of lost time, that is, from the date of the injury down to the time of the trial, Johansen had received the same, and during a part of the time a greater, salary than he was receiving at the time of the injury. The charge of the court instructed the jury upon this feature of the damages that the plaintiff would only be allowed the reasonable value of time actually lost by him down to the time of the trial as the result of his injury, but that no deduction should be made of any amount paid him by the city as a mere matter of grace or gratuity.

If on account of his injury any time was actually lost by Johansen during this period, a finding favorable to him upon the other issues submitted in the charge would have entitled him to damages in the amount of its reasonable value; and if during such period he was paid by the city, as a gratuity or bounty, the same or a greater salary than he was receiving when injured, the railway company was not entitled to the benefit of such payment. Railway Company v. Jarrard, 65 Tex. 560. There was a conflict in the evidence as to whether the amount paid by the city in that interval was a gratuity; and there was evidence that he actually suffered the loss of such time. This fully warranted the submission of the issue of lost time as a part of the recoverable damages.

[2] The case is a companion one to that of Houston Belt & Terminal Railway Company v. O'Leary (Civ. App.) 136 S. W. 601, with substantially the same questions involved; O'Leary being the chief of the fire department, and having been injured by the same explosion, causing his death. A judgment in favor of the wife and minor child of O'Leary was affirmed by the Court of Civil Appeals, and the petition of the railway company for writ of error denied by this court. In the present case the writ of error was allowed only because of the charge on the measure of damages. We do not find it necessary to discuss the other questions presented in the petition for writ of error. The case of Denison Light & Power Company v. Patton, 105 Tex. 621, 154 S. W. 540, 45 L. R. A. (N. S.) 303, urged by the learned counsel for the plaintiff in error as determining the

question of its liability, has no controlling analogy. There Patton, without any right to do so, was making an unauthorized use of the light company's property; and it was held that the latter was under no duty of anticipating its use by him, or, in particular, such as would create the situation which caused his injury. Johansen was at the scene of the fire in the performance of a duty. If it be admitted that he was a licensee, the railway company would be liable for any act of negligence on its part causing him injury, since it was under the duty of refraining from such an act. If, for illustration, before any explosion had occurred, he had been engaged in extinguishing the fire in this car, and another car had been negligently run into it by the company, causing the explosion, the issues of contributory negligence and assumed risk aside, there could be no question as to its liability. While the act which caused the original explosion was committed before Johansen reached the premises, in the nature of the case the successive explosions, set in motion by the original act, made it one of a continuing nature; and if it was a negligent act, as it was within the province of the jury to determine, the fact that Johansen went upon the premises after its commission would not affect the question. His situation, as well as the duty of the railway company, was the same as if he had reached the premises before the first explosion occurred and it had caused his injury. It therefore cannot be said that he went upon the premises dangerous at the time and took them as he found them.

The judgment of the Court of Civil Appeals is affirmed.

INTERNATIONAL & G. N. R. CO. v. WALTERS. (No. 2782.)

(Supreme Court of Texas. Nov. 10, 1915.)

1. MASTER AND SERVANT ⇨137—INJURIES TO SERVANT—NEGLIGENCE OF MASTER'S AGENTS—NOTICE OF DANGER.

Where a railroad car inspector was riding upon a car which had been "kicked" down toward others standing still, and the crew of the engine which had kicked it were not in possession of sufficient facts from which an ordinarily prudent person under the same circumstances would have anticipated that the car inspector might alight from the kicked car and enter upon the track on which the engine was moving, or near enough thereto to receive injury from such engine, the engine crew was under no duty to ring the bell or blow the whistle.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. ⇨137.]

2. MASTER AND SERVANT ⇨286—INJURIES TO SERVANT—NEGLIGENCE OF MASTER'S AGENTS—NOTICE OF DANGER—QUESTION FOR JURY.

Where an engine crew has sufficient information to put them on notice that a car inspector on a "kicked" car running parallel with the engine's track might leave the car and place himself in a position of danger to be struck by the engine, it is a question of fact for the jury whether the engine crew should have foreseen

that the car inspector would thus place himself in such position.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. ⇨286.]

3. MASTER AND SERVANT ⇨286—INJURIES TO SERVANT—NEGLIGENCE OF EMPLOYER'S AGENTS—QUESTION FOR JURY.

In an action by a car inspector against his employing railroad for personal injuries received when he leaped from a "kicked car" traveling toward stationary cars at an excessive speed and was injured by running onto a parallel track before the engine which had kicked his car and which was approaching without warning, whether the engine crew had notice that the inspector would alight and run across the track held for the jury under the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. ⇨286.]

4. TRIAL ⇨139—TAKING CASE FROM JURY.

Unless all reasonable minds would agree that the evidence is insufficient to establish the facts necessary to a cause of action, the court is not warranted in taking the case from the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ⇨139.]

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Frank S. Walters against the International & Great Northern Railroad Company. Judgment for plaintiff was affirmed by the Court of Civil Appeals (165 S. W. 525), and defendant brings error. Judgment affirmed.

Wilson, Dabney & King, of Houston, for plaintiff in error. Llewellyn & Foster, of Conroe, and J. W. Parker, of Houston, for defendant in error.

YANTIS, J. Walters, the defendant in error, recovered a judgment against the plaintiff in error for personal injuries inflicted upon him while he was engaged in the service of said company as a car inspector and repairer at Sellars station, where there were switching yards containing nine side tracks. At the time of his injury he was riding on the side of a box car that had been kicked, with eight others, at a rate of speed alleged to be excessive, for the purpose of coupling them with several stationary cars further down the switch track, with the purpose in view of completing the train in this way and then continuing the train and the engine attached thereto to Houston. The engine that was pulling said train was used in making the kick referred to. After doing which, it then entered a side track which ran parallel to and in about ten feet of the track on which the defendant in error was riding the box car, with the purpose in view of going to the oil and water tanks to secure oil and water. It was Walters' duty to inspect the stationary cars before permitting them to leave on their journey, and it was with this in view that he was riding one of

the nine cars that had been kicked towards the stationary cars. Before the car upon which Walters was riding collided with the stationary cars, he became alarmed, as he testified, for his own safety, believing that the speed at which the cars were going would make a violent collision with the stationary cars and might injure him with falling doors and other debris; that in this frame of mind he alighted from the car and ran across the track on which the engine was moving, without looking for an engine, and without knowing that one was approaching. The engine struck him and caused the injuries for which he sued.

[1-3] A portion of the ground of negligence alleged was that the engine crew failed to ring a bell or blow the whistle to warn him of their approach. The writ of error was granted by this court because it then inclined to the view that the evidence was insufficient to charge the engineer and fireman with notice that Walters would alight from the car on which he was riding, and that he would run across the track on which the engine was moving. Upon a closer and a more mature consideration of the evidence bearing upon this question, we have reached a different conclusion. It is quite true that if the engine crew were not in possession of sufficient facts from which an ordinarily prudent person, under the same circumstances which surrounded them, would have anticipated or foreseen that Walters might alight from the car, and might enter upon the track where the engine was moving, or near enough thereto to receive the injuries which he did receive, or some similar injuries, then the law would absolve them from the duty of ringing the bell or blowing the whistle, or, rather, no such duty would arise. But while this is true, it is also a settled rule that if there was information which the engine crew possessed sufficient to place them upon notice that Walters might leave the car on which he was riding, and might place himself in a position of danger of being struck by the engine, then it became a question of fact for the jury to settle whether or not they should have foreseen that Walters would thus place himself in a position where he might be injured. It would then become a question of fact for the jury to determine whether, under such circumstances, the train crew was guilty of negligence in failing to ring the bell or blow the whistle, or otherwise warn Walters of their approach so that he might avoid coming in contact with the engine. Of course, it is true that, if there was no evidence which would charge the train crew with such notice, then the duty to warn Walters by ringing the bell or blowing the whistle, or otherwise, would not arise.

A careful investigation has convinced us that there was sufficient evidence to warrant the court in submitting the question of no-

tice to the jury. The evidence was sufficient to support a finding by the jury that the engineer, notwithstanding his denial, did see Walters riding on the car. The evidence shows that Walters was riding on the side of the box car next to the track on which the engine was moving, and that the engineer and fireman were riding in their places in the engine which was backing, but that they were looking in the direction in which they were going, and that two men named Tucker were riding on the tender facing and looking the way they were going, or in the direction of Walters. The track on which the engine was moving was but ten feet from the track on which Walters was riding the car. They all knew that Walters was a car inspector, and was riding down to inspect the cars that were to be attached to the train. They knew the cars that had been kicked were going at an excessive rate of speed, if we give full credit to the findings of the jury, for the jury had a right to reach this conclusion from the testimony of Walters that they were going about six miles an hour. It is reasonable that the engine crew should conclude that Walters would alight from the car, either when the kicked cars struck the stationary cars, or just before doing so, for the purpose of making inspection of the cars. It might be deducible from the speed at which the cars were going that the engine crew had notice that the collision would be violent, and that Walters might become alarmed for his safety, and might alight from the car to escape injury. Before Walters alighted from the car, the yardmaster, Harlan, who was riding on the first of said cars next to the place of collision, alighted and ran across the track in front of the engine. From this it might be fair to conclude, and it was within the province of the jury to do so, that the engine crew had notice that Walters might attempt to do likewise, either from fright, or from some other reason. The jury had a right to conclude from the evidence that the engine crew would have notice that when Walters alighted from the car to inspect the stationary cars there would be considerable momentum on account of the excessive speed that the cars were going, which might cause his body to reach the track on which the engine was riding, or so near to it as to raise a probability of some serious injury to him. The tracks were only about ten feet apart, and of course the cars and engine would cover several feet of this distance, and Walters' body would occupy a considerable portion of the distance, so that the space was so small where he could alight that it might be reasonable for the jury to conclude that in alighting from the car, even without fear, at the speed it was going, he might come in contact with their engine. That the engine crew might have foreseen that Walters might enter upon their track is intensified by the fact that the evidence is

sufficient to support a finding by the jury that Walters was ignorant of the approach of the engine, and that the crew knew this, and not being advised thereof he might not be as careful about avoiding the track on which the engine was moving as he otherwise would be. The plaintiff testified that he did not know the engine was on this track; that he supposed it was not on this track, but that it was still at its position for the purpose of connecting with the main train and continuing its journey to Houston; that it was customary for the engines, when coming into this town, to secure their oil and water before they entered it, and he supposed that they were already equipped with oil and water, and that they would not return to the oil and water tanks which they had passed in coming in. He testified that it was customary for an engine, when moving in switch yards, to keep its bell ringing. The engine crew saw that Walters' back was to them, and this was some evidence of notice that he did not know of their approach. If they did not ring the bell or blow the whistle, as there was evidence to prove, this fact was some evidence that he was ignorant of their approach.

[4] From such facts as these the jury had a right to conclude that the train crew should have foreseen that Walters was ignorant of their approach, and that in his situation he might alight from the car on which he was riding and cross the track upon which the engine was moving, or place himself near enough thereto to receive the injuries; and if they had such notice, as the jury would be warranted in concluding, then it was a question of fact whether an ordinarily prudent person would have warned Walters by ringing the bell and blowing the whistle, or otherwise. The rule is well settled, from which this court has never wavered, that unless all reasonable minds would agree that the evidence was insufficient to prove that the train crew should have anticipated that Walters might leave the car on which he was riding, and place himself on the track, or near enough thereto as to be injured, then it became a question of fact for the jury, and the court would not be warranted in declaring as a matter of law that the engine crew could not anticipate such action on the part of Walters.

Measuring the point at issue by this rule, we have reached the conclusion that for us to hold as a matter of law that the engine crew had no evidence from which they could reasonably anticipate such action on the part of Walters would be to usurp the province of a jury in passing upon facts which it was their exclusive province to decide.

We have considered the other questions involved in this appeal, but have decided that they are without merit, and that the Court of Civil Appeals made the proper holding on each of them.

The judgment of the Court of Civil Appeals and of the district court should be affirmed, and it is, accordingly, so ordered.

CAPLES et al. v. WARD et al. (No. 2778.)

(Supreme Court of Texas. Nov. 3, 1915.)

1. EXECUTION §33 — PROPERTY SUBJECT — VESTED REMAINDER.

A vested remainder is subject to execution against the remaindermen.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 76-82, 86, 87; Dec. Dig. §33.]

2. WILLS §634—"VESTED REMAINDER."

A remainder is vested, where there is a person in being who would have an immediate right to the possession upon the termination of the intermediate estate; it being an immediate right of present enjoyment, or a present right of future enjoyment, a fixed interest, with only the right of possession postponed until the ending of a particular estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. §634.]

For other definitions, see Words and Phrases, First and Second Series, Vested Remainder.]

3. WILLS §634—VESTED REMAINDER—CREATION.

Where a will provided that the testator gave his residuary estate to his wife, M. A. C., "for the term of her natural life, with remainder over upon her death to our five children, E. T. C., J. C., W. C., R. C., Jr., and M. C., share and share alike," such will gave J. C. a vested remainder, as investing him with a present interest in the estate and a right to its future enjoyment.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. §634.]

4. WILLS §634 — REMAINDERS — CONSTRUCTION—FAVOR OF LAW.

The law will not construe a remainder as contingent where the estate can reasonably be taken as vested, since it favors the vesting of estates at the earliest possible moment.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. §634.]

5. WILLS §634—VESTED REMAINDER—POWER OF DISPOSITION IN LIFE TENANT.

Where testator bequeathed his residuary estate to his wife for life, with remainder over to his five children, the wife being granted power of disposition to sell, mortgage, etc., with the consent of the majority of the children, the remainder of a child was yet vested, since a remainder is not made contingent by uncertainty as to the amount of the estate remaining undisposed of at the expiration of the life estate, but by uncertainty as to the persons who are to take, the contingency that the estate may be exhausted by the life tenant's disposition being merely a condition subsequent, possibly affecting the amount of the remainderman's interest or defeating its enjoyment, while an estate limited upon a condition subsequent vests at once, subject to divestment.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. §634.]

6. WILLS §634—VESTED REMAINDER.

Where a testator bequeathed his residuary estate to his wife, with remainder over to his five children by name, share and share alike, directing in another clause of the will that the descendants of any remainderman dying before the life tenant should succeed to the remainderman's share of the residuary estate, such direction will be construed as intended to prevent the lapsing of the legacies in favor of the remain-

dermen, and so as not affecting the vested character of the remainders.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. ¶634.]

7. WILLS ¶634—VESTED REMAINDER.

The contingency that the death of a remainderman before the expiration of the life estate may prevent such remainderman from coming into possession of his interest does not render the remainder contingent, if otherwise vested.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. ¶634.]

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

Action by Margaret A. Caples and others against T. W. Ward and others. Judgment for plaintiffs, and defendants appealed to the Court of Civil Appeals, which reversed the order of the district judge and remanded the cause (170 S. W. 816), and plaintiffs bring error. Affirmed.

Stanton & Weeks and W. D. Howe, all of El Paso, for plaintiffs in error. J. G. McGrady, of El Paso, for defendants in error.

PHILLIPS, C. J. The appeal prosecuted in the case to the honorable Court of Civil Appeals was from an order of the district judge granting a temporary injunction, restraining the sale, under execution, of the interest of Joseph A. Caples in certain real property, a part of the estate of his deceased father, Richard Caples, theretofore levied upon to satisfy a judgment obtained against him by Ward, one of the defendants in error. It is only necessary to determine the question of whether Joseph A. Caples had such an interest in the real property levied upon as was subject to execution. The honorable Court of Civil Appeals reversed the order of the district judge and remanded the cause, holding that he had such an interest; and the writ of error was granted on account of probable error in that decision.

The estate of Richard Caples was devised by will, the provisions of the will pertinent to the issue here, being as follows:

"Fourth. I give and bequeath to my said wife, Margaret Ann Caples, the sum of one thousand (\$1,000.00) dollars out of my half interest in the community estate of myself and my said wife Margaret Ann Caples, in trust, however, for the purpose of caring for and keeping in decent order the graves of my father and mother, Thomas and Briget Caples, in Concordia Cemetery near the city of El Paso in this county, and I direct that the said one thousand (\$1,000.00) dollars be invested or located as in the discretion of the trustee may seem best, and the income therefrom, or so much thereof as may be necessary, devoted to the care of said graves, and should the income therefrom be more than sufficient to properly care for said graves, then such surplus shall be devoted by my trustee to the care of the graves of any other members of my immediate family who may be buried at El Paso or in the vicinity, but should said income be more than sufficient for the purposes aforesaid, then such surplus shall be added to the said one thousand (\$1,000.00) dollars and invested therewith for the purposes aforesaid. I direct that my wife shall designate by will or otherwise one or — of our chil-

dren to execute this trust after her death and such child or children in turn so designated shall designate some one to carry out said trust after their decease, but should my said wife or children fail to make such designation or at any time the trusteeship provided for fail, then it is my will that the mayor of the city of El Paso become the trustee for said fund and discharge said trust.

"Fifth. All the rest and residue of my estate, real, personal and mixed, consisting of my half of the community property of myself and my said wife, Margaret Ann Caples, and such separate property, if any, of which I may die seised or possessed, or to which I may be entitled, wheresoever the same may be situated, I give and bequeath to my beloved wife, Margaret Ann Caples, for the term of her natural life, with remainder over upon her death to our five children, Edward Thomas Caples, Joseph Caples, William Caples, Richard Caples, Jr., and Margaret Caples, share and share alike.

"Sixth. It is my will and desire that my said property shall be managed by my wife during her life as it has been hitherto controlled by me as nearly as may be. Should my said wife deem it to the best interest of my said estate that any portion of same should be sold, alienated, conveyed, mortgaged or incumbered, it is my will and desire that she with the written consent of the majority of our said children, then living, who are of age or married, shall have full power to sell, alienate, convey, mortgage or incumber such part of same as in her judgment and that of the said majority of said children may seem proper and to the best interest of said estate.

"Seventh. It is my desire that upon the death of my said wife and the termination of the life estate in her hereby created, that all of my estate consisting of my half of the community property of myself and my said wife, real and personal of whatsoever character, as well as all separate property of whatsoever character, if any, and wheresoever situated, of which I may die possessed or be entitled to, or which may have accrued to my estate, shall be divided equally between all of my above-named five children then living, or their descendants, share and share alike; that is to say such descendants of any deceased child shall have that portion to which their ancestor, if living, would have been entitled to."

[1] Under the terms of the will the residuary estate of Richard Caples, of which the real estate levied upon to the extent of the interest of Joseph Caples (called in the pleading Joseph A. Caples) is a part, is clearly bequeathed to Margaret A. Caples, the wife of Richard and the mother of Joseph, for life, with remainder over to the five children, by name, including Joseph, share and share alike. Each of the five children was living at the time of the testator's death. Margaret A. Caples is still living, and the life estate in her, therefore, not determined. The real estate levied upon is alleged to be of the market value of \$598,500, and the value of Joseph Caples' interest, an undivided one-tenth, \$59,850, Ward's judgment against him, with costs, amounting to \$3,412.30. The question is whether the remainder created by the will in favor of Joseph Caples is a vested or contingent estate. If a vested remainder, it is subject to execution against Joseph Caples. Freeman on Executions, § 178.

[2] A remainder is vested where there is a

person in being who would have an immediate right to the possession upon the termination of the intermediate estate. It is an immediate right of present enjoyment, or a present right of future enjoyment, a fixed interest, with only the right of possession postponed until the ending of a particular estate. 4 Kent, 202; *Bufford v. Holliman*, 10 Tex. 560, 60 Am. Dec. 223. To use a common illustration of the books, where there is a grant of an estate to A. for life, and, after his death, to B. in fee, the remainder is a vested one, since the grant creates a present fixed interest, with the right of future enjoyment in B.

[3] According to these established rules, the fifth clause of the will plainly gives Joseph Caples a vested remainder in the residuary part of the estate, for, in terms as positive as those applied to the creation of the life estate, it invests him with a present interest and right to its future enjoyment.

We have, then, only to consider whether the remainder is rendered contingent by the subsequent provisions of the will. The only provisions which may be regarded as having that force are those embodied in the sixth clause, whereby the life tenant is clothed with the power of sale if exercised with the consent of a majority of the remaindermen; and in the seventh, directing that the descendants of a remainderman shall succeed to his portion of the estate in the event of his death before the termination of the life estate.

[4] The law favors the vesting of estates at the earliest possible period, and will not construe a remainder as contingent where it can reasonably be taken as vested. *Bufford v. Holliman*; *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869.

[5] Whatever the consequence of the grant of property to another generally or indefinitely with the power of disposition, an express limitation of the grant to that of a life estate, with such power added, does not raise the estate to a fee. There is merely constituted an estate for life, with the power of disposition annexed. Though the test of a vested remainder is the existence of an ascertained person having an immediate right to the possession on its becoming vacant by the termination of the intervening estate, this does not imply any certainty as to the quantity and value of the remainderman's interest. The remainder is not made contingent by uncertainty as to the amount of the estate remaining undisposed of at the expiration of the life estate, but by uncertainty as to the persons who are to take. *Hellman v. Hellman*, 129 Ind. 59, 28 N. E. 310. With certainty existing as to the person who is to take, with that person named in the will and in being at the time of the testator's death, and with no condition imposed upon his right to the possession except the expiration of the life estate through the

death of the life tenant, as is the case here, the sale of the property by the life tenant could not be said to prevent the vesting of the estate of the remainderman at the death of the testator. The remainder vests, subject to the power of sale in the life tenant.

Whether there will be any of the estate remaining under the exercise of the power presents a contingency, it is true. But under the will the vesting of the interest of Joseph Caples, and the other remaindermen, is not made dependent upon that contingency. It is not a condition precedent to the vesting of his interest, but only a condition subsequent, which may affect the amount of his interest, or defeat its enjoyment. An estate limited upon a contingency, to which the effect of a condition subsequent only is given, vests at once, subject to be divested upon the happening of the contingency. *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; A. & E. Enc. of Law (2d Ed.) vol. 24, 393. In 4 Kent. 204, it is said:

"A limitation, after a power of appointment, as to the use of A. for life, remainder to such use as A. shall appoint, and in default of appointment, remainder to B., is a vested remainder, though liable to be divested by the execution of the power."

It is held, generally, that a power of sale in the life tenant does not prevent the vesting of the estate of a remainderman. A. & E. Enc. of Law (2d Ed.) vol. 24, 389; *Roberts v. Roberts*, 102 Md. 131, 62 Atl. 161, 1 L. R. A. (N. S.) 782, 111 Am. St. Rep. 344, 5 Ann. Cas. 805, and notes; *Hellman v. Hellman*, 129 Ind. 59, 28 N. E. 310; *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; *Pedigo v. Botts* (Ky.) 89 S. W. 164.

[6, 7] The direction in the seventh clause of the will that the descendants of any remainderman dying before the expiration of the life estate should succeed to his share of the residuary estate should be construed, we think, as intended to prevent the lapsing of the legacies in favor of the remaindermen. It is to be noted that the devise to Joseph Caples, and the other remaindermen, is not made contingent upon his or their surviving the mother. In the fifth clause his and their interests are devised directly. The only contingency which, under the will, will prevent Joseph Caples from coming into the possession of his interest is his own death before the expiration of the life estate; and this, it is settled, does not render the remainder contingent. The remainder is vested, defeasible on a condition subsequent, his death before the expiration of the life estate, his share, in such event, passing to his descendants. In 2 Redfield on Wills, § 17 (12), it is said:

"It is also settled that where a devise is made to one for life, and afterwards to certain other persons by name, and in the event of any such persons entitled in remainder dying during the continuance of the life estate, leaving issue, to go to such issue, it creates a vested interest in all thus entitled in remainder."

The cases of *Blanchard v. Blanchard*, 1 Allen (83 Mass.) 223, *Gibbens v. Gibbens*, 140 Mass. 102, 3 N. E. 1, 54 Am. Rep. 453, *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135, and *Heilman v. Hellman*, 129 Ind. 59, 28 N. E. 310, are to like effect.

The authorities relied upon by the plaintiffs in error have been considered; but none of the decisions of the courts of this state are opposed to the holding that, under this will, Joseph Caples took a vested interest in the residuary estate of his father. In *Thornton v. Zea*, 22 Tex. Civ. App. 509, 55 S. W. 798, for instance, which is cited as holding to the contrary, the residue of the estate of James T. Thornton was by his will given in trust to five of his children, named, to be held by them for the benefit of their children. The trial court held that upon the death of the testator the residue of the estate vested immediately in his grandchildren, the children of the trustees. But three of the testator's children had no children at the time of his death, making it uncertain therefore as to the persons who were to take as remaindermen; and, because of this condition, and the further provision of the will that should any of the testator's children die without issue living, the share held in trust for his or her children should be divided among the children of the survivors in the same proportion as if it had descended by law to the testator's children named, the Court of Civil Appeals held that the trial court was in error in its conclusion.

Lee v. McFarland, 19 Tex. Civ. App. 292, 46 S. W. 281, involved the will of Jasper McFarland, whereby he gave a tract of land of 75 acres to his granddaughter, Gertrude Murphy, providing that, in the event of her death without heirs of her body, the tract should be equally divided between Jasper T. and Newton McFarland, his sons. The residue of his estate was devised to his wife for life, or until she should marry; and, upon the happening of either of such events, it was to be divided equally between the two sons, Jasper T. and Newton, or their descendants. The granddaughter, Gertrude Murphy, died before the testator. The son Jasper T. McFarland survived the testator a few months, leaving a surviving wife, but no descendants; no children having ever been born to him. He died, however, before the termination of the life estate in his mother. The suit was by the surviving wife of the son Jasper T., to recover an undivided one-half of the 75-acre tract and of the other lands comprising the residue of the estate. It was held by the Court of Civil Appeals, as to the 75-acre tract, that inasmuch as the devise of that tract, Gertrude Murphy, had died before the testator, the title thereto, un-

der the will, became vested in the two sons, then living, and the interest of Jasper T. therein having been devised by his will to his wife, the plaintiff, she was entitled to an undivided half interest in that tract. As to the balance of the property in issue, it was held that the plaintiff's claim of title rested entirely upon the will of Jasper McFarland, under which it was provided, as to such balance, that the interest of Jasper T., in the event of his death, should go to his descendants, and not to others; that, as he left no descendants, the only class capable under the will of taking his interest upon the death of the life tenant, if he were then dead, the devise to him lapsed, and the plaintiff was accordingly not entitled to recover. This conclusion was obviously correct, since the will was properly construed as having made distinct provision for the disposal of the interest of Jasper T. in the event of his death before the expiration of the life estate; that is, that it should, in such event, go to his descendants, which, at all events, excluded his wife. The remainder, in other words, was defeated by the happening of a subsequent condition.

In *Chace v. Gregg*, 88 Tex. 552, 32 S. W. 520, the testator's devise of the residue of his estate was to his son and his wife, equally, with the express condition annexed that if the wife should die without issue from her body, the property then held by her in virtue of the will should go to the son, if living, and, if dead, to his nearest heirs. The remainder thus created in the son was held to be contingent, and properly so, because it was provided in the will, as a condition precedent to his having any interest in such estate of the wife, that she should die without issue of her body, and otherwise he was to acquire no such interest.

It is apparent, from the allegations of the petition respecting the value of the estate, that the execution of the trust created by the fourth clause of the will for the expenditure of \$1,000 and the income from such amount, for the care of the graves of the testator's parents, will not be affected by the levy upon the interest of Joseph Caples and its sale under execution. We accordingly hold that Joseph Caples took under the will a vested remainder in the residuary estate. It is capable of sale under execution, subject to the life estate in Margaret A. Caples, and the exercise by her of all the powers conferred upon her under the sixth clause of the will, and to defeasance by his death before the termination of the life estate.

The honorable Court of Civil Appeals has, in our opinion, correctly determined the case, and its judgment is affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. AREY. (No. 2781.)

(Supreme Court of Texas. Nov. 10, 1915.)

1. NEGLIGENCE ⚡68—ANTICIPATION—MAXIM.
It is a maxim that no one is bound to anticipate another's negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 92, 94, 95; Dec. Dig. ⚡68.]

2. RAILROADS ⚡460—OPERATION—FIRES—CONTRIBUTORY NEGLIGENCE OF OWNER.

Where the owner of a barn adjacent to a railroad right of way left a window therein which faced toward the railroad open, and the interior of the structure littered with loose oat straw, his contributory negligence in so doing debarred any recovery by him against the road for destruction of the barn by fire caused by the ignition of the straw by a spark from defendant's locomotive carried through the open window.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1681; Dec. Dig. ⚡460.]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by G. E. Arey against the St. Louis Southwestern Railway Company of Texas. Judgment for defendant was reversed and remanded by the Court of Civil Appeals (170 S. W. 802), and defendant brings error. Affirmed, with instructions.

E. B. Perkins, of Dallas, and Crosby, Hamilton & Harrell, of Greenville, for appellant. Robt. F. Spearman, N. E. Peak, and Evans & Carpenter, all of Greenville, for appellee.

PHILLIPS, C. J. The suit of the plaintiff in the trial court, G. E. Arey, the present defendant in error, was for the recovery of damages on account of the destruction of certain property, a barn and its contents, charged to have been due to escaping sparks from a passing engine of the railway company. The barn was upon premises near the railroad track, leased by the plaintiff, the barn itself being 108 feet south of the track. The track extended in a northeast and southwest direction. This situation placed the west side of the barn toward the track. In that side or end of the barn were two windows opening into a crib in the lower story, and one window, about three feet square opening into the loft. These windows were left open, having no shutters or covering of any kind. The plaintiff had placed a ton of baled oat straw in the loft near the window, and had used about half of it at the time of the fire. In feeding the oat straw loose straw had become scattered and banked up in the crib and stalls, and probably in the loft. The wind at the time was blowing from the railroad toward these windows; and, if the fire was caused by sparks from a passing engine, they must have been blown through the windows.

Contributory negligence on the part of the plaintiff was pleaded by the defendant, and in the court's charge the issue was submitted to the jury in the following form.

"You are further charged that plaintiff, in the use of the barn and lot and his property therein, and in regard to openings and the accumulation of combustible materials, is required to use ordinary care to prevent its destruction or injury, such care as a person of ordinary prudence would commonly exercise under like circumstances; and if plaintiff failed to use such care; and if such failure, if any, caused or contributed to the injury or destruction of plaintiff's property, then plaintiff cannot recover."

A verdict in favor of the railway company was rendered.

The honorable Court of Civil Appeals for the Fifth District, in an opinion rendered by its learned Chief Justice, reversed the judgment; one of the grounds of its action being the submission of the issue of contributory negligence. In so doing it expressly overruled its previous decision in *Railway Co. v. Crabb*, 80 S. W. 408, a case of practical identity in its facts with the present one. Its holding, as we gain it from the opinion, is that in cases of this character—the destruction of property on premises in lawful use, adjoining or near a railroad track, by fire caused by sparks from a railroad engine—the doctrine of contributory negligence is out of place, and that question cannot arise; a principal authority relied upon being *Le Roy Fiber Co. v. Railway Co.*, 232 U. S. 340, 34 Sup. Ct. 415, 58 L. Ed. 631, in which a proposition to that effect is announced. We do not subscribe to this broad holding, either upon principle or authority. It subverts, in our opinion, the fundamental doctrine of the law that no man should benefit from his own wrong. It affirms, in substance, that while other men are held to the duty of exercising ordinary care to prevent injury either to their persons or property, and will be denied the right of recovery for such injury if it was proximately contributed to by their want of such care, the owner or lessee of premises adjacent to a railroad track, because alone of their use being lawful, is wholly exempted from that duty. It furthermore declares that a right denied, generally, to others will be allowed him, however careless or reckless, or even deliberate and intentional, was his exposure of his property to the danger. The proposition does not commend itself to sound reason, and cannot, in our judgment, be sustained.

[1, 2] It is unnecessary to here restate that the owner of premises has the full beneficial right to their free enjoyment for all lawful purposes; for it has often been unmistakably so declared by this court. It is a right which is not limited by another's use of his property; nor is it subject to the servitude of another's wrongful use of the premises. That the owner is not bound to anticipate another's negligence is also true; as it is likewise true of men, generally, in the use of their property and the conduct of themselves. But the doctrine of contributory negligence is not related to these considera-

tions, and is not defeated by them. It is founded, as has been said, on the mutuality of the wrong, the impolicy of allowing a party to recover for his own wrong, and the policy of making personal interests of men dependent upon their own prudence and care. It recognizes that one's use of his premises or his property, as well as his conduct, may be perfectly lawful, and also that in either using his property or in his conduct he is not bound to anticipate the negligence of another. But it declares that, notwithstanding this, a man may not court or invite injury to his person or property. And, furthermore, it affirms that, when faced with danger to either his person or his property, he is under the duty of using the care that a man of ordinary prudence would use under the same circumstances to avoid an injurious consequence to himself. It proceeds from the rule of conduct which actuates men in general, from the natural law which prompts them to self-preservation, that no man of common prudence, no matter how wrongful the act of another, or lawful his own conduct and the particular use of his property, will stand by and suffer injury from such act, either in his person or property, without an effort to prevent it; and therefore all men, as a rule of action, to avoid such injury, ought to use the care that such a man would exert under like circumstances.

While, in general, negligence cannot be predicated upon an owner's lawful use of his premises, that is, the mere fact that he makes use of them for his home, his business, or pursuit, though in proximity to other premises whose equally lawful use creates a danger to neighboring property, as in a case like the present one, a man may have under lease premises near a railroad track over which pass engines, from which live sparks customarily escape, even in the exercise of ordinary care by their owners, causing constant apprehension of fire, and, because his use of the premises is rightful, be exempt, as a rule, from any charge of negligence for merely maintaining thereon his residence, his barn, and other structures, and devoting them to their usual and proper purposes, will it do to say that under no circumstances will his use of the premises, or the location of his property upon them, be negligent? Will his right to damages be countenanced in a court, though, in truth, he may aid in the destruction of his own property by rashly or purposely exposing it to the hazard? That is the question here. An affirmative answer to these questions must be given in the future administration of the law by the courts, if it is to be held, as is stated in *Le Roy Fiber Company v. Railway Company*, that in cases of this nature the doctrine of contributory negligence is entirely out of place; and in such holding it will further have to be said, as to

such cases at least, that the law is no longer an influence for prudence and care in the conduct of men.

It is not a question of the lawful use by an owner of his premises. It is a question of his negligent use of them, and the legal consequence of such use when it is directly responsible, in whole or in part, for injury to the owner's property. If others, in the lawful use of their property, are required to exercise ordinary care to prevent its negligent injury or destruction, what is there in the situation of an owner or lessee of premises like these that creates for him a different rule? It clearly does not lie in the fact that his use of the premises is lawful. Nor does it rest in the maxim that no one is bound to anticipate another's negligence; for that is a principle of general application. No other ground for the distinction is advanced in the authorities which affirm the proposition. It is not believed that any other can be urged; and neither ground, in our opinion, is sound.

Of more importance than this conviction is the fact that the question has been definitely settled in this court in two comprehensive opinions, distinguished for their reason and clearness, rendered by Chief Justice Stayton, one of the ablest judges in its history, *Railway Co. v. Levi*, 59 Tex. 674, and *Martin, Wise & Fitzhugh v. Railway Co.*, 87 Tex. 117, 20 S. W. 1052. We have no inclination to overrule them, as reluctant as we are to differ from the honorable Court of Civil Appeals or any of the authorities to which it refers. Both were cases where cotton had been placed upon premises contiguous to a railroad track. In the first the baling of the cotton had been cut, or it was badly baled, rendering it more exposed to fire than if well baled; and the other the cotton was placed near the track without covering over it. In the *Martin, Wise & Fitzhugh Case* a question certified for the court' answer was as follows:

"If the railway company knew of the situation of the cotton, and by the exercise of ordinary care could have avoided setting fire to it and destroying it, would the fact that it was negligence on the part of the compress company to place the cotton in that position, uncovered, permit a recovery against the railway company?"

In response to the question the court said:

"To hold that the knowledge of the railway company of the situation of the cotton would fix liability on it, if its employees failed to use ordinary care for its protection, although the compress company, the representative of plaintiffs, knew the same fact, and also failed to use ordinary care in view of the surroundings, would be, in effect, to hold that the railway company was under obligation to use greater care for protection of the cotton against fire than were its owners."

In the *Levi Case* the trial court had given the following charge:

"You are instructed that plaintiffs had a right to place their cotton upon their cotton yard, and in so doing they would not on this

account alone be guilty of negligence, although said cotton yard was in close proximity to defendant's roadbed."

In the course of the opinion, after speaking of the impracticability of preventing entirely the escape of sparks from locomotives, it is said:

"It is true that a person owning or renting property near a railway is entitled to use such property; but the greater the degree of exposure to injury from such proximity the greater degree of care should be exercised by such person to prevent injury from causes for which a railway company will not be responsible, because impracticable to prevent them. What constitutes negligence sometimes may be a matter of law; but whether it exists in a given case is a question of fact for the determination of the jury, in all cases where there is a conflict of evidence, or the facts are disputed; and in no case submitted to a jury, where the facts are contested, or even where the evidence admitted to be true is of such character that different, well-organized minds might honestly arrive at different conclusions as to whether a person had or had not used due care, should a jury be instructed that an act does or does not constitute negligence. But there are cases in which, as matter of law, there being no controversy about the facts, in which a court would be authorized to instruct a jury that a given use of property was not negligence, when considered with reference to a specific use to which contiguous property is lawfully appropriated; as, for instance, if the appellees had been using the open yard in which the cotton was stored for the purpose of storing iron, stone, brick, or other nonflammable material, which, however, may be injured by fire, the court, with reference to an injury caused by sparks from a passing locomotive, might instruct a jury that such use was not negligence. If the same lot was used as a lumber yard, in which to store plank and other inflammable material, it would be a question of doubt as to whether such use, reference being had to the use to which contiguous property was lawfully appropriated, was negligence or not.

"So, in the use of a yard contiguous to a railway track, for the purpose of storing baled cotton, which, as matter of common knowledge, is inflammable, and easily ignited, when it is shown that contiguous property is lawfully used for a purpose from which it * * * results that the cotton will be subjected to some danger from fire, it might be doubtful if the storing of baled cotton in such a place was a prudent act, and the question should be submitted to the jury.

"If cotton badly baled, or of which the baling had been cut, which seems to have been the case with the cotton injured, for the purpose of sampling it, and thus more exposed to fire than if the cotton was well baled, it would become more doubtful still if such use would be a prudent use, and hence the greater necessity for leaving the entire question of negligence to the jury, under all the evidence. * * *

"If we take an extreme case, and suppose that, instead of using the yard in which the cotton was stored for that purpose, the appellees had used it for a powder magazine, in which, without any covering, they left open kegs of gunpowder, then, if it be admitted that such was the case, and that locomotives were passing within a few yards of that place frequently, and that therefrom sparks would escape which might reach such explosive, even with the exercise of that care required by law of a railway company to prevent injury to contiguous property by fire from its locomotives, the court might instruct the jury that such use was not a prudent use; but if there was a controversy as to the facts, even in such a case the whole matter should be

left to the jury. Wharton on Negligence, 420, and citations."

There can be no doubt, under these authorities, that in the present case the question of whether the plaintiff was guilty of contributory negligence under the circumstances shown was one for the jury's determination; and the submission of the issue by the trial court was therefore proper.

The judgment was reversed by the Court of Civil Appeals upon other grounds, as well, presenting questions over which its jurisdiction is final. Its judgment reversing the trial court judgment and remanding the cause will therefore stand, and is affirmed, with instructions that upon the further trial of the case this opinion be followed in respect to the issue of contributory negligence.

Affirmed, with instructions.

CRAVER et al. v. GREER et al. (No. 2752)
(Supreme Court of Texas. Nov. 10, 1915.)

1. APPEAL AND ERROR \Leftrightarrow 282—PRESERVATION OF GROUNDS—TRIAL WITHOUT JURY—MOTION FOR NEW TRIAL.

Under Rev. St. 1911, art. 1991, providing that in trials by the court, "it shall be sufficient for the party excepting to the conclusions of law or judgment of the court to cause it to be noted on the record in the judgment entry that he excepts thereto, and such party may thereupon take his appeal or writ of error," it is not a prerequisite to perfecting an appeal that the party shall move for new trial, where the trial below is to the judge and not to a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1662-1665; Dec. Dig. \Leftrightarrow 282.]

2. APPEAL AND ERROR \Leftrightarrow 282—PRESERVATION OF GROUNDS—TRIAL WITHOUT JURY—MOTION FOR NEW TRIAL.

In spite of rule 24 of the Supreme Court (142 S. W. xii) providing that "a ground of error not distinctly set forth in a motion for a new trial in the cause shall be considered as waived," it is not a prerequisite to the perfection of an appeal that a motion for new trial be made by the appealing party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1662-1665; Dec. Dig. \Leftrightarrow 282.]

3. APPEAL AND ERROR \Leftrightarrow 282—PRESERVATION OF GROUNDS—TRIAL WITHOUT JURY—MOTION FOR NEW TRIAL.

Rule 24 of Supreme Court, providing that a ground of error not distinctly set forth in the motion for new trial shall be considered as waived, must be construed with other court rules, including 71a (145 S. W. vii), requiring motion for new trial to be filed before appeal, except in such cases as the statute does not require a motion for a new trial, and, when so construed, does not require a motion for a new trial in cases tried to the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1662-1665; Dec. Dig. \Leftrightarrow 282.]

4. APPEAL AND ERROR \Leftrightarrow 282—RECORD—CONCLUSIONS—CONCLUSIONS OF LAW AND FACT.

The right to have an appeal considered, in cases tried to the court, without a motion for new trial does not depend upon filing by the trial judge of his conclusions of fact or law, since the filing of his conclusions is required by

Rev. St. 1911, art. 1991, only upon the request of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1662-1665; Dec. Dig. ¶ 282.]

5. RECEIVERS ¶155 — POWERS OF COURT — QUASI PUBLIC CORPORATIONS—PRIORITY OF CLAIMS — OPERATION BY RECEIVER — EXPENSES.

Where the court takes charge of quasi public corporations, such as railways, operating them through a receiver, it may make the necessary debts of such operation a prior lien upon the income or the property itself, but this is an extraordinary power, depending upon the public interest, and does not extend to receiverships for private corporations, since a court of equity cannot impair the force of contracts, in spite of its broad powers to give relief.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 283-292; Dec. Dig. ¶155.]

6. RECEIVERS ¶155—PRIVATE CORPORATIONS — OPERATION BY RECEIVER — EXPENSES — PRIORITY.

In the case of private corporations or individuals, the only ground for displacement of vested liens in favor of the receiver's operating expenses must be based on an estoppel of the lienholder, as where he procures authority to the receiver to continue the business, or is privy to such action, but the mere fact that he is a party to the suit in which such action is taken will not produce that result.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 283-292; Dec. Dig. ¶155.]

7. RECEIVERS ¶155—PRIVATE CORPORATIONS — OPERATION BY RECEIVER — EXPENSES — PRIORITY.

Where other creditors intervened in plaintiff's action to foreclose his mortgage against a lumber concern, and procured the appointment of a receiver to operate the business, and plaintiff during the receivership insisted on the priority of his lien and moved the court for its protection, his mortgage cannot be subordinated to the receiver's operating expenses in the distribution of assets.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 283-292; Dec. Dig. ¶155.]

8. RECEIVERS ¶155—PRIVATE CORPORATIONS — OPERATION BY RECEIVER — EXPENSES — PRIORITY.

Where mortgage creditors of a lumber concern were present at a meeting of creditors, at which it was decided to intervene for the appointment of a receiver, with power to continue the business, in a suit to foreclose a mortgage, but took no part in the meeting, and gave no consent to the proposal, and where, in their intervention in the suit to prove their claims as ordered by the court, they insisted on the priority of their claims, they were not estopped to claim priority for their liens over the receiver's operating expenses.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 283-292; Dec. Dig. ¶155.]

9. RECEIVERS ¶155—PRIVATE CORPORATIONS — OPERATION BY RECEIVER—EXPENSES—PRIORITY.

Where a bank, holding a mortgage against a lumber concern, was active in procuring a receivership by intervention in a pending foreclosure suit, and its cashier served as one of a committee chosen at a creditors' meeting to recommend a receiver to be appointed to continue the business, it could not object to the subordination of its lien to the receiver's operating expenses.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 283-292; Dec. Dig. ¶155.]

Certified Question from Court of Civil Appeals of Sixth Supreme Judicial District.

Action by D. C. Craver against T. A. Greer and others, in which the National Bank of Daingerfield, Galt & Galt, and Castleberry, Lawrence & Rodden, and others intervened, and in which receivers were appointed. An order, postponing the liens of plaintiff and the interveners named to the receivers' operating expenses, was affirmed by the Court of Civil Appeals (178 S. W. 699), and that court certified questions to the Supreme Court. Questions answered, adversely to the decision of the Court of Civil Appeals, and also as to the trial court, except as to the National Bank of Daingerfield.

Beard & Davidson, of Marshall, for plaintiff D. C. Craver. F. H. Prendergast and A. G. Carter, both of Marshall, for defendants T. A. Greer and C. A. Wheeler. Henderson & Bolin, of Daingerfield, for intervenor National Bank of Daingerfield. Carter & Strength, of Marshall, for interveners Castleberry, Lawrence & Rodden. Lacy & Bramlette, of Longview, for interveners Galt & Galt.

PHILLIPS, C. J. The appellants, D. C. Craver, National Bank of Daingerfield, Galt & Galt, and Castleberry, Lawrence & Rodden, were contract lien creditors of T. A. Greer, a lumber manufacturer, operating sawmills in Harrison and Marion counties, and a lumber yard in the city of Marshall. The property of Greer upon which their mortgage liens existed had been subjected to a receivership on the order of the district court of Harrison county, the operation of Greer's sawmill and manufacturing business being continued by the receivers at the direction of the court, resulting in a considerable indebtedness being incurred by the receivers in the course of its operation. The appeal was from the final decree rendered in the receivership proceeding, subordinating the claims of the appellants to the proceeds of the property, at the same time directed to be sold, to the costs and expenses of the receivership.

Summarizing the statement made in its certificate by the honorable Court of Civil Appeals, it appears that Craver's claim consisted of purchase-money notes, aggregating \$6,000 in amount, given by Greer in payment for the sawmill in Harrison county, certain adjacent tracts of growing trees, and certain standing timber in Marion county, and a number of mules, wagons, etc., secured by a duly registered mortgage lien. Greer's indebtedness to the other appellants, respectively, was likewise secured by chattel mortgage liens on personal property taken charge of by the receiver, each duly registered. Being insolvent, Greer, in October, 1913, made a general assignment of all his property for the benefit of creditors, a large number of

whom were unsecured, and the assignee took possession of the property. On the following day Craver filed a suit in the district court of Harrison county against Greer and the assignee, setting up the indebtedness due him, and praying for foreclosure of his lien and order of sale. In this suit, on November 8, 1913, three certain creditors of Greer intervened, for themselves and such other creditors as might enter the proceeding and be responsible for costs, alleging Greer's property to be insufficient to pay his debts unless properly managed; that a creditors' meeting had been held at which a recommendation had been adopted for the making of an application for the appointment of a receiver to operate Greer's sawmills and manufacturing business, which it was believed would prove profitable, and whereby all creditors might be paid; and that if the property was subjected to forced sale to satisfy only the claims of the secured creditors, the result would be its waste and loss to the unsecured creditors. Upon this application the court appointed three receivers, with authority to take charge of all the property and operate the mills. Thereafter the court entered an order requiring all creditors to intervene for the establishment of their claims, by the first Monday in January, 1914, and later made a further order in February, 1914, authorizing a list of 80 creditors to intervene. Following the first order of the court requiring the intervention of creditors, the appellants other than Craver, respectively, filed their interventions, duly pleading the indebtedness due them by Greer and their mortgage liens, and praying judgment for their debts, foreclosure of their liens and for order of sale. Galt & Galt expressly prayed that no part of the proceeds of the property covered by their lien be used to pay any of the expenses of the receivership until the payment of their debt in full, and Castleberry, Lawrence & Rodden, that their claim be classified as preferred.

At the January, 1914, term of the court Craver presented a motion, alleging that the proceeds of the timber on which his lien existed were likely to be dissipated by the indebtedness created by the receivers, and asked that they be required to desist from cutting any of it; but if such should be permitted, that a special fund be created in the hands of the clerk of the court to represent the value of the timber which was cut. An order was entered on February 20, 1914, creating such fund and providing that it should not be used for any other purpose. On March 20, 1914, judgment was entered in Craver's favor for his debt and for foreclosure of his lien. At the same time similar judgments were rendered in favor of the other appellants. An interlocutory decree was entered on the same date, making a classification of claims, Class A to include court costs and expenses of administration, with salary for

the attorneys of "the applicant" and the receiver; Class B, the claims of laborers; Class C, mortgages, vendor's liens, and other contract liens; Class D, materialmen's liens adjudged to have a lien under the statute; and Class E, the unsecured debts. In the judgment rendered in Craver's favor it was recited that the court reserved the right to sell the property in pursuance of the foreclosure decreed, and that until the satisfaction of Craver's debt the receivers should pay, as a separate fund, into the hands of the clerk of the court \$1.50 per thousand feet, to stand in the place of the timber, and to be exempted from all other charges and expenses; and as to the timber thereafter cut from the land, it should be adjudged as an operating expense of the receivers.

The receivers operated the plant until August, 1914, at a loss, the operation being discontinued by an order of the court at that time. At different times personal property belonging to the estate, and covered by the appellants' liens, was sold by the receivers under the court's orders. Debts were incurred by the receivers, under the authority of the court in the necessary operation of the plant and business, amounting to approximately \$6,500, of which about \$800 represented the claims of laborers, all of which were unpaid at the time of the rendition of the final decree. The estimated value of the assets of the estate on hand is about \$10,000, materially less than Craver's judgment and the debts of the receivership, practically all of the property on hand being that impressed with the liens of the respective appellants. The claims of creditors in Classes C, D, and E, according to the order of the court, aggregate more than \$22,000.

On May 30, 1914, Craver presented a motion asking that the court order the operation of the plant to be discontinued, and that the property subject to his mortgage be sold to satisfy his judgment. This was opposed by the receivers, and the motion was thereupon denied. In July, 1914, he filed another similar motion, which was also denied. The appellants Castleberry, Lawrence & Rodden at one time joined other creditors in an application for the appointment of a master in chancery, but it was dismissed without action by the court.

At the creditors' meeting held prior to the filing of the application for the appointment of the receivers, about 80 per cent. of Greer's creditors were present and represented. Craver was present, but did not vote or participate in the discussion of the plan for a receivership. It appears that he said nothing at the meeting. The cashier of the appellant bank was present as its representative, participated in the proceedings, and acted as one of the committee appointed to select the person to be recommended to the court for appointment as the active receiver. One of the firm of Galt & Galt was present,

but in the proceedings neither objected nor consented to the proposal for a receivership. No member of the firm of Castleberry, Lawrence & Rodden was present, nor were they represented.

The final decree was rendered after a hearing before the court, and a motion for new trial was not filed by either of the appellants. The assignments of error in the Court of Civil Appeals assailed the ruling of the trial court in classifying the debts of the receivership as superior to the mortgage debts of the appellants, and ordering their payment out of the proceeds of the property directed to be sold, accordingly.

Four questions are certified by the honorable Court of Civil Appeals as follows:

"(1) Whether or not, under the statute and the present rules for the courts of the state, it was necessary for appellants to have made a motion for new trial in the trial court in this cause to entitle them on appeal to a revision of the judgment, either as pertaining to question of fact or question of law, or as well to questions of law as to questions of fact involved in the case. ('A fundamental error' excepted from the question.)"

And in the event of negative answer to the foregoing:

"(2) Whether or not the evidence, which is fully set out above, when considered with reference to the pleadings and motions in intervention of each of the appellants, is sufficient to support the conclusion of fact, as comprehended in the judgment of the trial court, that

"(a) Appellant D. C. Craver acquiesced in and consented to the administration of the property by a receiver, and to the incurring of the debts by the receiver as such in continuing the business and operation of the plant; that

"(b) Appellant National Bank of Daingerfield acquiesced in and consented to the administration of the property by a receiver, and to the incurring of the debts by the receiver as such in continuing the business and operation of the plant; that

"(c) Appellants Galt & Galt acquiesced in and consented to the administration of the property by a receiver, and to the incurring of the debts by the receiver as such in continuing the business and operation of the plant; that

"(d) Appellants Castleberry, Lawrence & Rodden acquiesced in and consented to the administration of the property by a receiver, and to the incurring of the debts by the receiver as such in continuing the business and operation of the plant.

"(3) Whether or not the trial court erred, as done, in adjudging the necessary debts incurred by the receiver in continuing the business and operation of the plant during the receivership to be paid from the proceeds of the sale of the specific property covered by appellants' mortgages in priority and before the payment of

"(a) Appellant D. C. Craver's debt and mortgage;

"(b) Appellant National Bank of Daingerfield's debt and mortgage;

"(c) Appellants Galt & Galt's debt and mortgage; and

"(d) Appellants Castleberry, Lawrence & Rodden's debt and mortgage."

[1] The first question was definitely settled by Greer, Mills & Co. v. Featherston, 95 Tex. 654, 69 S. W. 69. The trial there considered was before the court, without a jury, the appeal was prosecuted upon a statement

of facts, without conclusions of law or fact filed by the trial judge, and the judgment was assailed as being contrary to the law and the evidence. Having in mind, as it must be assumed, the rule early announced in Foster v. Smith, 1 Tex. 70, and constantly since adhered to, that in jury trials the grounds of complaint against the verdict must, in a motion for a new trial, be called to the attention of the trial court to entitle to revision upon appeal questions essentially involving the jury's action, it was held that in trials without a jury a different rule prevails, since there the judgment is wholly the act of the court itself, rendered upon a consideration of all phases of the evidence, and presenting a question of law, as to which—the judge having once ruled, and it not being presumable that he will change his ruling—there could be no reason for requiring a motion for a new trial. The decision was also rested upon the statute, then article 1333, R. S. 1895, which, in its relation to trials before the court, declared:

"And it shall be sufficient for the party excepting to the conclusions of law or judgment of the court to cause it to be noted on the record in the judgment entry that he excepts thereto, and such party may thereupon take his appeal or writ of error without a statement of facts or further exceptions in the transcript, but the transcript shall in such case contain the * * * conclusions of fact and law aforesaid and the judgment rendered thereon."

Such is still the statute law, this provision being, in exact terms, article 1991, R. S. 1911. The question remains, therefore, controlled by that decision.

The statute is plain in its declaration that upon causing the exception to be noted in the judgment entry, the party may, without further formality, take his appeal or writ of error. If he so elects, he may do so without a statement of facts, but upon the judge's conclusions of law and fact, where request has been made that they be filed. He may appeal only upon a statement of facts, or without either conclusions of fact or a statement of facts, since the filing of neither is made a condition of the right of appeal. Whatever be the course pursued in these matters, it is not necessary in such trials that a motion for a new trial be filed, though it is an optional and commendable practice.

[2] Because of the adoption by this court on January 24, 1912, since the decision of Greer, Mills & Co. v. Featherston, of amended rule 24 (142 S. W. xii), providing that "a ground of error not distinctly set forth in a motion for a new trial in the cause * * * shall be considered as waived," it has been ruled by some of the Courts of Civil Appeals that the holding in that case is no longer authoritative. But a construction of amended rule 24, which gives it that force, itself invalidates the rule. This court, as emphasized in Railway Co. v. Beasley, 155 S. W. 183, where both this rule and amended rule 25 (142 S. W. xii) were considered, is by

the Constitution denied the authority to establish a rule of procedure which is inconsistent with a statute; and the rule is therefore to be understood as without application to a trial in which the statute declares the appeal may be taken without the necessity of a motion for a new trial. Certainly it should be considered as in harmony with an express decision of this court that such is the effect of the statute in trials of this nature.

[3] No confusion on the subject is found in the rules when they are considered as a body and in the light of the decisions of this court, for in other rules it is clearly recognized that not in all trials is a motion for a new trial necessary in order for the appeal to be considered. Rule 71a for the district and county courts (145 S. W. vii) reads:

"71a. A motion for a new trial shall be filed in all cases where parties desire to appeal from a judgment of the trial court, or sue out a writ of error in the cause, unless the error complained of is fundamental, except in such cases as the statute does not require a motion for a new trial."

This exception is without meaning unless it refers to trials before the court without a jury. This is also true of the provision of rule 101a for the same courts (159 S. W. xi), adopted to meet the act of the Thirty-Third Legislature (chapter 136), respecting assignments of error, that:

"All errors not distinctly specified in such motion, or in the assignments of error where a motion for a new trial is not filed, shall be waived."

[4] That the question in all of its phases may be relieved of any doubt we have deemed it proper to state in this opinion that the right to have the appeal considered, in cases of this character, without having filed a motion for a new trial, is not dependent upon conclusions of fact or law being filed by the trial judge, as seems to have been affirmed by two of the Courts of Civil Appeals in *Cooney v. Dandridge*, 158 S. W. 177, and *Moore v. Rabb*, 159 S. W. 85, each citing the decision of the Court of Civil Appeals for the Fourth District in *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.*, 155 S. W. 286. In its application to trials before the court, article 1991, after declaring that the appeal may be taken upon exception to the conclusions of law or the judgment being noted in the judgment entry without a statement of facts or other exceptions in the transcript, does provide that in such cases the transcript shall contain the conclusions of fact and law, as it is also required to contain the judgment rendered. It is not made the duty of the judge, however, to file his conclusions except at the request of one of the parties, and the making of such request is left optional with the parties. Article 1989. It cannot therefore be supposed that in such cases the right of appeal, without other action than causing due exception to be noted, is conditioned upon

the filing by the judge of his conclusions. The direction of the statute that the transcript shall contain them, means only that they are to be so included in the record when a party has requested that they be filed.

[5] Upon the other questions, it is hardly necessary to restate the general rule that a receivership is always subject to vested rights. As broad as are the powers of a court of chancery, it is without authority to impair the force of contracts. Where the court takes charge of railroads or other corporations affected with a public use, and undertakes to operate them through a receiver, the necessary debts of such operation may, as against all parties to the suit, be made a prior lien upon the income, and, if that be insufficient, upon the property itself. But, as has been frequently stated, this is an extraordinary power; and it is exercised only because of the public duty resting upon such corporations and the public interest accordingly involved in the continuance of their operation.

[6] On the other hand, the conduct of the business of an insolvent private corporation, or an insolvent person, is no part of the duty of a court of equity; and the authority, if it exists, for the displacement in such receiverships of a vested lien for indebtedness incurred through an operation of the business by the court must be found in an estoppel which is justly enforceable against the owner of the lien. The distinction which governs the question, according to whether the property is impressed with a public use or is purely private in its nature, is generally recognized, and is announced in the decision of this court in *Clint v. Houston Ice & Brewing Co.*, 169 S. W. 411.

Where a lienholder procures the appointment of a receiver with the power to operate the property, which is subject to his lien, in a continuance of the business to which it is devoted, it is only just that the consequent expenses should take precedence over his lien, since it must be anticipated that such operation will be attended with cost, and possibly in excess of the income. *Helsen v. Binz*, 147 Ind. 284, 45 N. E. 104. The same rule should be applied to a party who, while not directly the applicant upon whose petition the receiver is appointed, is privy to the action which results in the appointment. But the indebtedness of the receiver has no right of priority over the vested lien of a creditor who neither applied for the receivership nor was a party to its procurement, merely because he is a party to the suit. *Metropolitan Trust Co. v. Railroad Co.*, 103 N. Y. 245, 8 N. E. 488.

These, in brief, are the principles which, in our opinion, should control the decision of the second and third questions.

[7, 8] The respective liens of the appellants, Oraver, Galt & Galt, and Castleberry, Lawrence & Rodden, should not have been

subordinated to the indebtedness of the receivers. Neither of them applied for the receivership, and, according to the statement of the case made by the Court of Civil Appeals, neither of them was responsible for it. It was Craver's suit, already instituted for the enforcement of his lien, that was made use of by intervening creditors to obtain the appointment of the receivers. It could not be held necessary under such circumstances for him to assert the superiority of his lien, for he might well assume that its rank would be preserved by the court, yet he did so with reasonable promptness. He followed his motion, made at the January term of the court, after the appointment of the receivers in the preceding November, to prevent the impairment of his lien through the receiver being required to desist from the cutting of the timber, by successive motions that the receivership be closed and his lien be given effect by a sale of the property. His mere presence at the creditors' meeting at which the receivership was determined upon did not make him a party to the receivership. He did not participate in the discussion and took no part in the proceedings. Nor did the presence of a member of the firm of Galt & Galt at that meeting affect them with responsibility for the receivership, since it does not appear that their representative gave any consent to the proposal or took any action upon it. No member of the firm of Castleberry, Lawrence & Rodden was present at the meeting; nor were they represented. Galt & Galt and Castleberry, Lawrence & Rodden intervened in the suit, but, it seems, that was after the court had directed that creditors, desiring to establish their claims, should enter the suit for that purpose. Both asserted in their pleas of intervention the precedence of their claims.

[9] The attitude, however, of the National Bank of Daingerfield was different. It was active in the procurement of the receivership; its cashier serving as one of the committee selected at the creditors' meeting to recommend to the court a receiver to be appointed with such powers as, in their exercise, produced the receivership's indebtedness. Its lien, therefore, is not entitled to prevail over such indebtedness.

It is our opinion, therefore, that the trial court incorrectly concluded that the appellants, Craver, Galt & Galt, and Castleberry, Lawrence & Rodden, acquiesced in and consented to the administration of the property by a receiver, and erred in adjudging the debts of the receivers as entitled to prior payment from the proceeds of property covered by their liens, but correctly determined that the National Bank of Daingerfield consented to the receivership, and properly subordinated its lien to the receivership indebtedness in the judgment; and the second and third questions are so answered.

STATE v. INTERNATIONAL & G. N. RY. CO. (No. 2070.)

(Supreme Court of Texas. Nov. 10, 1915.)

1. STATUTES \S 241—CONSTRUCTION—PENAL ACT.

An act of the Legislature penal in its nature should be strictly construed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 322, 323; Dec. Dig. \S 241.]

2. STATUTES \S 47—VALIDITY—CERTAINTY AND DEFINITENESS—PENAL ACT.

An act, penal in its nature, levying penalties upon any person failing to erect a shed wherein railroad repair work may be conducted, must be plain enough for those operating the industry affected to know and realize whether by engaging in an act of repair without erecting the shed they would breach its terms, and, if such act is not sufficiently plain in meaning for those engaged in railroading to understand its terms and provisions, it must be held void for uncertainty.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 47; Dec. Dig. \S 47.]

3. STATUTES \S 47—VALIDITY—CERTAINTY AND DEFINITENESS—PENAL ACT.

Where an act of the Legislature requiring persons engaged in the repair of railroad equipment to erect a shed therefor except in case of light repairs was as definite in meaning as the nature of the subject would allow, the rule that a penal act must be certain in its provisions was complied with.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 47; Dec. Dig. \S 47.]

4. STATUTES \S 47—CERTAINTY—PENAL ACT.

Rev. St. 1911, arts. 6581, 6582, require the erection and maintenance of a building or shed by every person, corporation, or receiver engaged in constructing or repairing railroad cars or other railroad equipment, and provide a penalty of from \$50 to \$100 at suit of the state for each ten days of its violation, containing the exemption that the act shall not apply at "points where it is necessary to make light repairs only." In the state's suit to collect the penalties defendant contended that the act was too indefinite in its terms to be enforceable, as "light repairs" was a relative term and wholly unintelligible. *Held*, that the statute in question was sufficiently definite for those affected by it to understand its meaning so as to know under what circumstances they would be transcending it, since no plainer words than "light repairs," conveying a clearer meaning, could have been used by the Legislature in limiting the intended exemption, so that it was not void for uncertainty, especially in view of the fact that the term, as used, was not a portion of the act penalizing the infraction of the provision, and not a portion creating a quasi penal offense, but was used in a provision exempting from suit or prosecution under the act persons affected by its provisions.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 47; Dec. Dig. \S 47.]

Error to Court of Civil Appeals of First Supreme Judicial District.

Suit by the State against the International & Great Northern Railway Company to recover penalties for violation of Rev. St. 1911, arts. 6581, 6582. Judgment for defendant was affirmed by the Court of Civil Appeals (165 S. W. 892), and the State brings error. Reversed, and cause remanded for new trial.

B. F. Looney, Atty. Gen., and Luther Nickels, Asst. Atty. Gen., for the State. Wilson, Dabney & King, of Houston, for defendant in error.

YANTIS, J. Suit was by the state of Texas to recover penalties for the alleged violation of articles 6581 and 6582, Revised Statutes 1911, which required the erection and maintenance of a building or shed by every person, corporation, or receiver engaged in constructing or repairing railroad cars, trucks, or other railroad equipment, and provided a penalty of from \$50 to \$100 for each ten days of its violation. The act has several exemptions, by the terms of which such person, corporation, or receiver would be absolved from its penalties. Among these exemptions is the provision that the act shall not apply at "points where it is necessary to make light repairs only." A general demurrer was sustained to the state's petition upon the ground that the act was too indefinite in its terms to be enforceable, the trial court holding that the term "light repair" is a relative term, and wholly unintelligible." The Court of Civil Appeals affirmed the judgment of the trial court, adopting its opinion, which was in writing, for its own opinion, and which can be found in 165 S. W. 892.

The act of the Legislature which is assailed is as follows:

"Art. 6581. Every person, corporation, or receiver, engaged in constructing or repairing railroad cars, trucks or other railroad equipment, shall erect and maintain a building or shed at every station or other point where as many as five men are regularly employed on such repair work, the building or shed to cover a sufficient portion of its track so as to provide that all men regularly employed in the construction and repair of cars, trucks, or other railroad equipment shall be sheltered from rain and protected from other inclement weather. The provisions of this article shall not apply at points where less than five men are regularly employed in the repair service, nor at division terminals, or other points where it is necessary to make light repairs only on cars, nor to cars loaded with time or perishable freight, nor to cars when trains are being held for the movement of said cars.

"Art. 6582. Any person, corporation, or receiver who shall violate the provisions of the foregoing article shall be liable to the state of Texas for a penalty in any sum not less than fifty dollars nor more than one hundred dollars, and each ten days of such failure or refusal to so comply shall be considered a separate infraction authorizing the recovery of a separate penalty; provided, however, that all persons, corporations, or receivers, affected by the preceding article, shall have until June 1, 1911, within which to comply with the provisions thereof."

[1-3] The holding of the trial court, and of the Court of Civil Appeals, that the statute in question was too indefinite in its terms to be enforceable, presents the only question for our determination. It will be observed that the act of the Legislature in question is penal in its nature, and for this reason it should be strictly construed. Construing it strictly, if its provisions are vague and uncertain of meaning to a degree that those engaged in the line of industry affected by

the act as operatives and managers of such industry could not comprehend its meaning, then the act should be held inoperative and void for uncertainty of meaning. The provisions of the act, in order for it to be enforceable, should be plain enough in meaning for those operating the industry affected by it to know and realize whether by engaging in an act of repair they would breach its terms. If the act meets and fulfills the requirements of this rule, it would be sufficiently definite in meaning to be operative. If it is not sufficiently plain in meaning for those engaged in the line of industry affected to so understand its terms and provisions, then the act would and should be held void for uncertainty, as it would be inexcusable for a government to fine or punish its citizens for an infraction of a law which in its terms could not be understood by them. But it is equally true that, if the act of the Legislature is as definite in meaning as the nature of the subject would allow, no more than this should be expected to meet the rule of certainty required; to hold otherwise would be to nullify the power of the Legislature to legislate at all on a proper subject for its consideration.

[4] It is worthy of notice to observe that the term "light repairs," as used in said section, is not a portion of the act which penalizes the infraction of its provision, and not a portion of the act which creates the quasi penal offense, but the term is used in a provision exempting from suit or prosecution under the act the persons affected by its provisions. It is one of the defenses to a prosecution under the act which the act itself provides for the benefit of those engaged in the construction and repair of railroad equipment. As used in this connection, we think the meaning of that portion of the act of the Legislature which creates the offense is not rendered as uncertain as it would be if the term "light repairs" constituted an ingredient of the offense itself.

The subject of legislation was the protection of those engaged in repair work from exposure to inclement weather. This was a proper subject for legislation, and the Legislature was within its constitutional powers in considering the subject. It was their duty, however, in passing upon it, to write the law plain enough to advise persons affected by it when and under what circumstances their acts and conduct would breach its terms. At the same time no one should contend that it was the Legislature's duty to accomplish in expression of clearness that which is impossible. While within their jurisdiction they were legislating upon a proper subject, could the Legislature have made this exemption any plainer in meaning than they did make it? The term "light repairs" is composed of two words of common and constant use by those engaged in every line of employment, and, when used

together, should be reasonably plain in meaning to any person; and, when the term "light repairs" is considered by those engaged in a special line of industry and calling, such as the railroad business, it is possible that it might have a technical meaning in common use as applied to such industry, and in such event the expression "light repairs" would mean what it is commonly understood to mean among those engaged in such special line of industry. But, aside from the possibility of this technical meaning, the inquiry is pertinent as to whether the Legislature could have used plainer words than "light repairs" and conveyed a clearer meaning than that term imports. What clearer expression could have been used? What could have been provided in the act to make the meaning plainer? It occurs to us that a more definite expression could not have been used to cover the subject intended. If a definition of the term "light repairs" had been attempted, it would have been impossible of construction, unless a catalogue of all repairs that might be considered "light" was embraced in the act. This would have been indeed a difficult, if not an impossible, task, when all the separate parts of the complicated machinery in use in the equipment and operation of railroads which might need repairs were considered, and the character of the repairs to each of said pieces of machinery, whether "light" or otherwise, were taken into account. The task of cataloguing all repairs on all the machinery of a railroad company, and of properly classifying the repairs which would be "light repairs" would appear entirely unreasonable to demand of the Legislature. Such a rigid requirement would be too great a restriction upon the legislative functions, and, if followed, would shorten the arm of the Legislature to an extent that would amount to a serious hindrance to the exercise of their constitutional functions. We know of no rule of construction that would authorize us to nullify an act of the Legislature because of uncertainty in meaning, when from the nature of the subject legislated upon no more definite meaning could reasonably be expressed, the effect of which would be to prohibit legislation upon the subject. What constitutes "light repairs" in any stated line of industry should find little difficulty among those engaged in that particular line of employment. We think the statute in question is sufficiently definite for those affected by it to understand its meaning so as to know under what circumstances they would be transgressing its provisions. This is all that is or should be required.

Several expressions used in the act of the Thirty-First Legislature, commonly known as the "Water-Closet Law," do not seem more certain than the term "light repairs"; yet this statute has been sustained against the identical attack that is made upon the statute

involved in the instant case. In the water-closet statute (Acts 29th Leg. c. 183), which was penal in its nature, one of the requirements of the railroad companies was to keep water-closets or privies in a "reasonably clean and sanitary condition." Another of its provisions was that said water-closets should be maintained "either within its passenger depots, or in connection therewith, or within a reasonable and convenient distance therefrom." Another was "to keep said water-closets and depot grounds adjacent thereto well lighted at such hours in the nighttime as its passengers and patrons at such stations may have occasion to be at the same."

At a glance it is seen, and requires no argument to establish, that each of said provisions in the water-closet law contains no greater degree of certainty than the repair statute. The water-closet statute was by this court held to be suitable to the subject-matter of the act, and not violative of the Constitution, or inoperative on account of uncertainty. In passing upon that case this court, speaking through Mr. Justice Phillips, clearly expressed the true rule, and the reason therefor, in the following language:

"Neither do we regard the act inoperative or violative of either the federal or state Constitution because of any vagueness or uncertainty in its terms. A requirement that the water-closets be kept in a reasonably clean and sanitary condition, that they be located within a reasonable * * * distance from the passenger depots, or be kept in connection therewith, and that they be kept well lighted, presents no difficulty to the understanding, and should present none in its observance. Its terms are suitable to the subject-matter of the act; and, having regard for the difference in conditions at the stations upon railway lines where it is made operative, the use of more specific language would very probably have provided only an arbitrary and impracticable rule." *State v. T & P. Ry. Co.*, 154 S. W. 1159.

We think the rule stated, and the reasons given therefor, in that case by this court, have direct application to the question involved in this case.

In 1907 the federal Congress passed an act regulating the hours of service for the employes of common carriers. Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (U. S. Comp. St. 1913, § 8678). Among its provisions is this:

Telegraph operators, train dispatchers, etc., are not permitted to serve more than nine hours in the twenty-four hour period in offices operated continuously night and day, or thirteen hours in offices operated only during daytime, except in case of emergency, when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in the twenty-four hour period, or not exceeding three days in any week.

The constitutionality of this act of Congress was assailed on the ground that the use of the term "except in case of emergency" rendered the act so uncertain and vague as to be incapable of enforcement as a penal statute. This contention was overruled by the United States Supreme Court in the case

of Baltimore & Ohio Railway Company v. I. C. O., 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878. In passing upon the question that court said:

"It is said that the words 'except in case of emergency' make the application of the act so uncertain as to destroy its validity. But this argument, in substance, denies to the Legislature the power to use a generic description, and, if pressed to its logical conclusion, would practically nullify the legislative authority by making it essential that legislation should define, without the use of generic terms, all the specific instances to be brought within it. In a legal sense there is no uncertainty. Congress, by an appropriate description of an exceptional class, has established a standard with respect to which cases that arise must be adjudged."

The Texas Anti-Trust Act of 1899 (Acts 26th Leg. c. 146) denounces contracts and arrangements "reasonably calculated to fix and regulate the price of commodities," etc. And the Texas Anti-Trust Act of 1903 (Acts 28th Leg. c. 94) prohibits acts which "tend to fix and regulate the price of commodities." Each of said acts was penal in its nature. They were attacked on the ground that they were vague, indefinite, and uncertain. The Court of Civil Appeals overruled this contention in the case of Waters-Pierce Oil Co. v. State, 48 Tex. Civ. App. 162, 106 S. W. 918. This court denied a writ of error in said case. The same attack was made upon these acts in the same case before the United States Supreme Court, and their contention that the acts were vague and uncertain was overruled by that court. 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417. These statutes contain a greater element of uncertainty than does the statute involved in the case under consideration. The Sherman Anti-Trust Act is not more specific than this statute, which requires the erection of sheds for repair work, and it has been many times sustained against attacks for uncertainty in meaning. That act provides that:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1913, §§ 8820, 8821).

It contains no definition or explanation of the meaning of a "contract or combination in the form of trust," or of the expression "conspiracy in restraint of trade," or of the

expression "who shall monopolize," or of the expression "combine or conspire with other persons," but it has withstood many attacks for uncertainty of meaning. United States v. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; United States v. Trans-Missouri Freight Ass'n, 168 U. S. 291, 17 Sup. Ct. 540, 41 L. Ed. 1007; United States v. Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; Hopkins v. United States, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v. United States, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608; Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. These instances serve to illustrate the futility of the contention that the act of the Legislature which requires shelter to be provided for the employes of railway companies when engaged in the construction or repair of their equipment is too vague and indefinite to be operative. We think the term "light repairs" makes plain the intent of the Legislature, and that the industries affected by the legislation will not suffer from a failure to understand its meaning, and that the courts and juries will find no difficulty in determining from the facts in each case whether the repairs were "light," or otherwise.

We conclude that the holding of the Court of Civil Appeals, and of the trial court, should be reversed, and the cause remanded for another trial; and it is so ordered.

ACOSTA et al. v. STATE. (No. 3762.)

(Court of Criminal Appeals of Texas. Oct. 27, 1915.)

1. CRIMINAL LAW \Rightarrow 1131—APPEAL—DISMISSAL.

Where, since conviction and pending appeal, accused escaped from custody, the appeal will be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2971-2979, 2985; Dec. Dig. \Rightarrow 1131.]

2. ROBBERY \Rightarrow 24—PROSECUTION—EVIDENCE—SUFFICIENCY.

Where the indictment charged that defendants made an unlawful assault on the complaining witness and by violence put him in fear of life and bodily injury and in that way robbed him, a conviction where the death penalty was not assessed is warranted on proof that they terrorized the witness with a razor and despoiled him, though a razor be not a deadly weapon.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 32-36; Dec. Dig. \Rightarrow 24.]

Appeal from District Court, Potter County; Hugh L. Umphres, Judge.

Jesus Acosta and Samuel Rosas were convicted of robbery, and they appeal. Affirmed as to Jesus Acosta, and appeal of Samuel Rosas dismissed.

J. Marvin Jones, of Amarillo, for appellants. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellants were convicted under an indictment charging them with robbery, and their punishment assessed at five years' confinement in the penitentiary.

[1] Since said conviction, and while this case was pending in this court on appeal, it is made to appear by affidavits on file that appellant Samuel Rosas has escaped from custody. The state's motion to dismiss the appeal as to said appellant is therefore sustained, and this cause dismissed as to said appellant Samuel Rosas.

[2] There are no bills of exception in the record. The special charges requested by appellant were all given; consequently, if the evidence sustains the verdict, the judgment as to Jesus Acosta must be affirmed. Margarito Estrada testified that the two appellants agreed to show him the way to a barber shop; that they carried him into a room, drew a razor on him, and told him to hold up his hands, and when he did so they went through his pockets and took his money. This made a case, if the jury believed the testimony; and evidently they did believe it. Appellant contends that a razor is not per se a deadly weapon. We are inclined to believe that all mankind know that death can be inflicted by a razor in the hands of a grown man. At any rate, the death penalty was not assessed, but only five years adjudged. If the razor should be held not to be a deadly weapon, as the indictment alleged that appellants made an unlawful assault on Margarito Estrada and by violence did put the said Estrada in fear of life and bodily injury, the evidence supports the verdict.

The judgment is affirmed as to Jesus Acosta, and the appeal is dismissed as to Samuel Rosas.

GRANT v. STATE. (No. 3756.)

(Court of Criminal Appeals of Texas. Oct. 27, 1915.)

1. CRIMINAL LAW §598—CONTINUANCE—SURPRISE—DILIGENCE.

In a prosecution for unlawfully carrying a pistol, where the state showed that defendant had unlawfully carried a pistol once at a card game, and the other time at another place, and defendant, after announcement for trial, applied for a continuance on the ground that he did not know that the state would show that he carried the pistol at the card game, and that he could prove that he did not have the pistol there, in view of the pendency of the case for six months, his having the pistol at another place, and the fact that he produced no testimony with reference to the card game, the continuance was properly denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.]

2. CRIMINAL LAW §1159—APPEAL—QUESTION OF FACT—CONFLICTING EVIDENCE.

Where a direct conflict in the testimony has been decided adversely to the accused, the Court

of Criminal Appeals is not ordinarily authorized to reverse the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.]

Appeal from Van Zandt County Court; R. M. Lively, Judge.

Charlie Grant was convicted of unlawfully carrying a pistol, and he appeals. Affirmed.

L. Davidson, of Canton, for appellant. O. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of unlawfully carrying a pistol; his punishment being assessed at a fine of \$100.

The facts are in conflict. The state made out a case showing that appellant on two different occasions had a pistol under circumstances which would not justify him in carrying it—once at a card game; and the other time at a different place subsequent to the time of having it at the card game.

[1] After announcement for trial appellant filed what we suppose was intended to operate as an application for a continuance. In this he says he was not aware of the fact that the state would produce evidence that he had the pistol at the time of the card playing, and that he could prove by certain named witnesses whom he alleges were present at the time and place of the card game who would testify he did not at that place have a pistol. The court qualifies this bill by stating that the case had been pending for six months, and that appellant had not employed counsel until the day of the trial, and no effort had been made to obtain any evidence, and no process issued for witnesses. This would show a want of diligence in the preparation of his case for trial. He might have ascertained very readily that the state's witnesses would testify he had a pistol at the card game, but if, as a matter of fact, he did not have the pistol at the card game, he should have investigated the matter to ascertain what the state's case would be, or upon what testimony the state would rely. But if his witnesses would so swear, the other incident remains that he had the pistol at the house of Fred Henderson, where the state's witness Sandy Carmichael resided. He was the main state witness, especially as to the card game. There is other testimony supporting Carmichael as to the incident at Henderson's residence. If the witnesses would testify as he indicated in his application with reference to the card game, the other incident still remained. He denies having the pistol on both occasions, but his application for postponement on account of surprise does not include the incident at the Henderson house. There is another weakness in this record with reference to this particular matter, to wit: That none of these witnesses were produced on the motion for new trial, or, rather, no testimony from any of them with reference to

the card game was offered as to whether they were there or whether the pistol was exhibited at that particular time and place. So from any viewpoint we do not think there is any particular merit in this application, and no error in the action of the court refusing the motion for new trial.

[2] The other bill of exceptions was reserved to the insufficiency of the testimony. Where there is a direct conflict in the testimony, and this has been decided adversely to the accused, this court would not be authorized ordinarily to reverse the judgment. Appellant testified one way, and the state's witness the other, making a direct conflict, in regard to the fact of having the pistol at both places. There was no election asked as to which transaction the state would rely upon, and the case went before the court with testimony in regard to both transactions and without objection.

So from any viewpoint we think this judgment should be affirmed; and it is accordingly so ordered.

SOUTHALL v. STATE. (No. 3672.)

(Court of Criminal Appeals of Texas. Oct. 13, 1915. Rehearing Denied Nov. 10, 1915.)

1. CRIMINAL LAW § 422—EVIDENCE—DECLARATIONS OF THIRD PARTIES.

Where defendant and three other boys were together when one of them made an assault, and were also together some time prior to the assault, and in such a position as to lead the jury to believe that defendant could have and did hear a remark made by one of the crowd that they would get the prosecuting witness on his way home, such remark was admissible on the question of whether defendant was a principal in the commission of the assault.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-988; Dec. Dig. § 422.]

2. CRIMINAL LAW § 418—EVIDENCE—DECLARATIONS IN DEFENDANT'S PRESENCE.

On a trial for assaulting a party while he was on his way home in G.'s buggy, evidence that before starting for home G. approached him and said, "Come on and let's go home," and that the assaulted party responded, "All right," was admissible over the objection that defendant was not present, where it appeared that he was near enough that the assaulted party heard a remark made by him or one of his companions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 963-972; Dec. Dig. § 418.]

3. CRIMINAL LAW § 423—EVIDENCE—DECLARATIONS OF THIRD PARTIES.

Where, on a trial for assault involving a dispute as to whether defendant was a principal in the commission of the assault by W., the evidence placed defendant where he could and probably did hear arrangements for the assaulted party to ride home with G., and showed that he was with W. when W. and his companions placed their buggies so that G. could not pass, and that, when the prosecuting witness struck W. with a plank and knocked him down, defendant jerked the plank from the prosecuting witness, evidence that, when G. drove up to the point where the road was blocked by the buggies, W. told him to tell the prosecuting witness to get out and that he was going to whip him, was ad-

missible on the issue of whether there was a premeditated assault, whether there was a conspiracy between defendant, W., and their companions to bring about the assault, and whether, with a knowledge of these facts, defendant so conducted himself as to become a principal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 989-1001; Dec. Dig. § 423.]

4. CRIMINAL LAW § 423—EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS.

Evidence as to what W. did to the prosecuting witness after he ran away, pursued by W., was admissible over the objection that defendant was not present, if he was a principal in the commission of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 989-1001; Dec. Dig. § 423.]

5. CRIMINAL LAW § 427—PARTIES—EVIDENCE.

Where the evidence showed that after the assaulted party ran, pursued by W., defendant and W.'s other companions followed after them, and when they came up with W. and the assaulted party remarked that W. ought to beat such party's head off, this was a strong circumstance tending to show that defendant was present and lending encouragement to W. in the commission of the assault and guilty of such conduct as would make him principal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1012-1017; Dec. Dig. § 427.]

6. CRIMINAL LAW § 419, 420—EVIDENCE—HEARSAY.

Where an assaulted party testified that W. beat him with a fence rail, and that he knew it was a fence rail because one was found on the ground the next morning with blood on it, but on cross-examination it appeared that he did not go back to the scene of difficulty or see the rail, but that G. went back and found the rail and saw the blood, the assaulted party should not have been permitted to testify as to what he learned from G.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. § 419, 420.]

7. CRIMINAL LAW § 1169—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of his testimony concerning the fence rail was not reversible error, where G. testified to the same facts, and there was no evidence to the contrary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3068, 3130, 3137-3143; Dec. Dig. § 1169.]

8. ASSAULT AND BATTERY § 92—EVIDENCE—WEIGHT AND SUFFICIENCY.

On a trial for assault, evidence as to whether defendant was a principal in the offense or an innocent bystander held to support a verdict of guilty.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137-139; Dec. Dig. § 92.]

9. ASSAULT AND BATTERY § 92—EVIDENCE—WEIGHT AND SUFFICIENCY.

On a trial for aggravated assault, evidence held sufficient to show a premeditated plan to waylay an assaulted party, and that he was waylaid and a fight forced at a point selected by defendant and his companions.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137-139; Dec. Dig. § 92.]

Appeal from Johnson County Court; G. Jay Jackson, Judge.

Unice Southall was convicted of aggravated assault, and he appeals. Affirmed.

Johnson & Harrell, of Cleburne, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant prosecutes this appeal from a conviction for aggravated assault. Under this record there could be no question that Otis Woods did make an aggravated assault upon M. M. Wilshire; the only contested issue in the case being whether or not appellant's conduct on that occasion was such as to make him a principal in the commission of the offense.

[1] The undisputed testimony in the case would show a number of young gentlemen had attended a moving picture show at Burleson. After the show Wilshire asked Wood Haynes if he knew when Miller was coming back. Otis Woods responded, "I don't know anything about him." Wilshire said, "I was not speaking to you," when Wood cursed him, and invited him to go behind the stores, when he would whip him. It is made to appear, by defendant's testimony, that at this time appellant advised Woods to desist, and Woods said he would if Wilshire did not want to fight. Wilshire retired into a restaurant, and Woods, appellant, Wyatt Hunt, and Travis Brown got together on the gallery of the restaurant. Several witnesses testify, while these four boys were together, some one said, referring to Wilshire, "We will get him, or I will get him on his road home." Appellant accepted the bills as filed by the court, and in the qualification the court says the evidence shows "that at the time such remarks were made appellant, Otis Woods, Wyatt Hunt, and Travis Brown were together in front of the restaurant, and that the remark came from the crowd so bunched up." As qualified by the court, these bills present no error. All four were together when the assault was made by Woods, and, the testimony showing that, if appellant did not make the remark himself, he was standing in such proximity as to lead a jury to believe that he could have and did hear it, it would be material testimony on the issue of whether or not appellant was a principal in the commission of the offense.

[2, 3] There are also several bills in the record objecting to the admissibility of a statement made by Gulley to Wilshire while he was in the restaurant and appellant and the other young men were on the gallery. It is made to appear by the testimony that Wilshire, instead of going to his own home to avoid a difficulty, went with Gulley in Gulley's buggy. After Wilshire had stayed in the restaurant for some time, Gulley approached him and said, "Come on and let's go home," to which Wilshire responded, "All right." Appellant objected to this on the ground that he was not present when the language was used. The record discloses that

appellant and the other young men were on the gallery of the restaurant at the time; that Wilshire could and did hear what was said by them when the remark was made, "We or I will get him on his way home," and consequently appellant and those with him were in such a position that they could, and probably did, hear what was said. The record further discloses that, when Wilshire and Gulley got in the buggy and started and had gone about two miles, appellant, Woods, Hunt, and Brown were in buggies in the forks of the road, their buggies being so placed that it was impossible for Gulley to drive on; that Woods asked him if Wilshire was in the buggy, and, upon being answered in the affirmative, said, "Tell Wilshire to get out; I am going to whip him." Appellant being placed by the evidence in a position where he could and probably did hear the arrangements made between Gulley and Wilshire for Wilshire to accompany Gulley home, and appellant also being in company with Woods on Gulley's road home at the time the buggies were so placed that Gulley could not pass, and Woods said to Gulley, "Tell Wilshire to get out; I am going to whip him," the testimony was admissible on the issue of whether or not there was a premeditated assault, and, if there was a conspiracy between appellant, Woods, and the other two young gentlemen to so place themselves in the road as to bring it about, and whether or not appellant, with a knowledge of these facts, so conducted himself at the time of the assault as to render himself a principal in the offense committed by Woods. The state's evidence would show, when Wilshire struck Woods with a plank and knocked him down, appellant jerked the plank from Wilshire and handed it to Woods. Appellant admits getting the plank from Wilshire, but says he did not hand it to Woods; that Woods jerked it out of his hand. The testimony objected to was properly admitted. Holden v. State, 18 Tex. App. 106; La Grone v. State, 61 Tex. Cr. R. 170, 135 S. W. 122.

[4, 5] When the fight took place in the road, and appellant took the plank away from Wilshire, and he either handed it to Woods, or Woods wrenched it out of his hands and struck Wilshire, Wilshire ran, Woods pursuing him. Appellant objected to Wilshire testifying what Woods did to him after he ran, on the ground that appellant was not present. If appellant was a principal in the commission of the offense, the evidence would be admissible, and, as the evidence shows that appellant, Brown, and Hunt followed on after them, and the state's testimony would show that when they caught him with Woods and Wilshire they remarked "that he [Woods] ought to beat your [Wilshire's] damned head off," it would be a strong circumstance tending to show that appellant was present and lending encouragement to Woods in the commission of the as-

sault, and guilty of such conduct as would make him a principal in the commission of the offense.

[6, 7] Wilshire testified that after he fled he got tangled in some brush, when Woods overtook him and beat him with a fence rail; that he knew it was a fence rail because one was found on the ground the next morning with blood on it. On cross-examination it appeared that Wilshire did not go back to the scene of the difficulty, and did not see the rail, but Gulley did go back and find the rail and saw the blood. Wilshire should not have been permitted to testify as to what he had learned from Gulley. It was hearsay, but, inasmuch as Gulley testified to the same state of facts, and there is no testimony denying this state of facts, this does not present reversible error. If appellant had raised an issue by any testimony that it was not a fence rail, or that one was not found on the ground with blood on it, we might take a different view of the matter.

[8] Appellant's testimony would raise the issue that he was not a principal, and was an innocent bystander, who merely happened to be present when all these matters occurred; that he in no way aided or encouraged Woods, and did no acts and was guilty of no conduct that would make him a principal. This issue was fairly and fully presented in the two special charges given at appellant's request, and the jury found against such contention, and we would not be authorized to disturb their finding, as the evidence offered by the state will support the verdict of the jury on this and all other issues in the case.

[9] Appellant contends there is no evidence tending to raise the issue of a premeditated assault. We think the state's evidence would amply show a preconceived premeditated plan to waylay Gulley and Wilshire; that they were waylaid and a fight forced by Woods at a point in the road selected by Woods, appellant, Hunt, and Brown, when all four were present.

The judgment is affirmed.

POPE v. STATE. (No. 3698.)

(Court of Criminal Appeals of Texas. Oct. 27, 1915.)

AFFIDAVITS —5— AUTHORITY TO TAKE—AT—TORNEYS.

On motion for new trial in a criminal case on the ground of newly discovered evidence, affidavits, made before the attorney of defendant, are invalid and cannot be considered.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 18-27; Dec. Dig. —5.]

Appeal from District Court, Hill County; Horton B. Porter, Judge.

G. C. Pope was convicted of passing a forged instrument, and he appeals. Affirmed.

Will M. Martin and Geo. W. Dupree, both of Hillsboro, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for passing a forged instrument, and assessed the lowest punishment. The indictment is in two counts; one for forging a check, the other for passing the alleged forged check. The court submitted both issues for a finding. The jury expressly found him guilty of passing the forged instrument, thereby acquitting him of the forgery thereof. There were some questions raised by the appellant pertaining to the charge on the first count, but as he was acquitted on that count, those questions, even if they had been on that issue material, pass out of the case, and it is wholly unnecessary to consider them. The state clearly proved that the alleged forged instrument was a forgery, and the state's witness positively identified appellant and swore that he had passed that identical instrument on him and that he paid him therefor in goods and money. The testimony as to the second count was positive, and his guilt thereunder did not depend wholly on circumstantial evidence and no charge on circumstantial evidence on that count should have been given.

Appellant requested several special charges which the court correctly refused to give. None of them should have been given even if they had been presented in such a way that this court would have to consider any of them.

The evidence shows that about a month after the alleged forged instrument was passed A. W. White, whose name had been forged thereto, and appellant, went to see Mr. Downing, the party on whom it was passed and talked with him about the facts. Downing swore positively that the instrument was passed on him one Saturday evening between 4 and 6 o'clock, and that it was not at night, and he as positively and unequivocally swore that he did not tell White and appellant on said occasion that it was passed on him at night. They swore he did so tell them. Downing was the state's main witness. Appellant did not express, at the time, any surprise at Downing's testimony, but he swore positively that he was not the man who passed on Downing said forged instrument at all, and that he had never been in Downing's store until about a month after the alleged offense. He did not testify where he was during the hours between 4 and 6 o'clock on the evening Downing swore he passed said forged instrument on him. Of course he knew where he was. After the trial, he made a motion setting up that he was at a different place between said hours, and attached the purported affidavits of several of his kinfolks to the same effect. Each of these affidavits were sworn to before one of

his attorneys, who represented him at the time, and did in this court. The state objects to the consideration of each of these affidavits on that account. This court, in *Maples v. State*, 60 Tex. Cr. R. 171, 131 S. W. 567, expressly held that affidavits made before the attorneys of either side were invalid and could not be considered. This decision has been followed and adhered to uniformly in a large number of cases since then. As presented, the court did not err in refusing a new trial on the claimed ground of newly discovered evidence. Appellant himself made no affidavit at all on the subject.

No error is pointed out that would authorize this court to reverse this case. It is therefore affirmed.

GALVAN v. STATE. (No. 3732.)

(Court of Criminal Appeals of Texas. Oct. 27, 1915.)

1. CRIMINAL LAW §1166—APPEAL—DENIAL OF CONTINUANCE.

The denial of a continuance asked for absence of witnesses whose attendance was secured presents no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3100-3102, 3107-3113; Dec. Dig. §1166.]

2. CRIMINAL LAW §596—CONTINUANCE—GROUNDS—ABSENCE OF IMPEACHING WITNESSES.

A continuance sought to secure the attendance of a witness whose testimony can only be available to impeach a state's witness should be denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1328-1330; Dec. Dig. §596.]

3. WITNESSES §78—COMPETENCY.

Evidence held to show that a witness was not defendant's wife and therefore competent to testify.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 195-200; Dec. Dig. §78.]

4. INDICTMENT AND INFORMATION §34—ALTERATION—INDORSEMENT OF NAMES OF WITNESSES.

The indorsement of names of witnesses upon the back of an indictment after its return into court was not an alteration invalidating it.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 138-143; Dec. Dig. §34.]

5. INDICTMENT AND INFORMATION §138—EXCEPTION TO INDICTMENT FOR ALTERATION.

Where, the motion excepting to the indictment on the ground that it had been altered after return was not sworn to, had no affidavit of any person attached thereto, and made no specific allegation that any changes were made after the indictment was returned into court, the indictment reading regularly in every respect, the claimed alterations being an erasure and blotch in the words "to die" and irregularities in the figures "1914," overruling of the motion was proper.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 472; Dec. Dig. §138.]

6. CRIMINAL LAW §1056—RESERVATION OF GROUNDS OF REVIEW—REFUSAL OF SPECIAL CHARGES.

Where no exceptions were reserved to the court's charge when submitted to defendant's

counsel for inspection, the refusal of special charges requested by defendant was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2868, 2870; Dec. Dig. §1056.]

7. HOMICIDE §236—MURDER—SUFFICIENCY OF EVIDENCE.

In a prosecution for murder, evidence held to show that decedent, a three year old girl, received fatal injury when flung into an adjoining room by defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 495-499; Dec. Dig. §236.]

Appeal from District Court, Atascosa County; F. G. Chambliss, Judge.

Eustacio Galvan was convicted of murder, and he appeals. Judgment reformed and affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted, charged with murder, and, when tried, was convicted, and his punishment assessed at imprisonment in the penitentiary for life.

[1,2] There are three applications for a continuance or postponement of the case when called for trial. One was on account of the absence of Geo. Shaw, his mother, Mrs. Shaw, and Pedro Herrera. Another was to secure the attendance of Dr. Will Gibson. The attendance of all these witnesses was secured; consequently these two applications present no error. The third application was to secure the attendance of Calna Morales and Sam Alberts, who are alleged to reside in Bexar county, Tex. The return of the sheriff of Bexar county shows that they could not be found in that county. As the testimony, it is stated, expected to be elicited from them, would only go to impeach the state's witness Pabla Gaitan—that she made statements out of court different to what her testimony would be and was on the trial—it is not of that material character that we can say the court abused his discretion in overruling the application. The rule is that, where the testimony sought could only be available to impeach a state's witness, who is to testify in the case, the continuance should be refused. *Garrett v. State*, 37 Tex. Cr. R. 198, 38 S. W. 1017, 39 S. W. 108; *Rodgers v. State*, 36 Tex. Cr. R. 563, 38 S. W. 184. When the witness Pabla Gaitan was on the witness stand, she was not questioned in regard to this matter. If she had been, she might have admitted making the statements alleged to have been made by her to Calna Morales and Sam Alberts, and if she had admitted making the statements, if the witnesses had been present, their testimony would not have been admissible.

[3] It is claimed the court erred in permitting the witness Pabla Gaitan to testify, as she was the wife of appellant. If she had been his wife, it would have been improper to permit her to testify. She testified:

"I was never married to Eustacio Galvan; we were just living together. I was married and am now married to another man, but he is not living with me. I have never been divorced from him."

Appellant himself testified:

"I am not married to Pabla Gaitan. I am married to another and different woman, and have never been divorced from that woman."

The court did not err in permitting the witness to testify.

[4, 5] Appellant excepted to the indictment on the ground that changes had been made therein; that the names of witnesses had been placed on the back of the indictment since it had been returned into court. This would not be an alteration of the indictment. The motion also states that on the face thereof there appears an erasure and blotch in the words "to die" and irregularities in the figures "1914." The original indictment is not sent to us for inspection, and the indictment copied in the record is regular in every respect. There is no affidavit of any person attached to the motion. It is not sworn to, and no specific allegation that any such changes had been made since it was returned into court. Under such circumstances, the court did not err in overruling the motion.

[8] There were no exceptions reserved to the charge of the court when submitted to counsel for inspection, and no complaint is made to it even in the motion for a new trial. In the motion for new trial there is complaint that the court erred in refusing to give the special charges requested by appellant, citing them by number. As the court's charge was not in any manner excepted to, no error is presented by the special charges requested.

[7] The only other complaint is that the evidence is insufficient. The state's testimony is that appellant came home angry; that the little three year old girl was crying on a pallet, and he picked her up and placed her on the door of the stove or range, which had fallen to the floor; that the door was hot, and the little girl began to cry, and began urinating; that he picked the child up and threw her some eight or ten feet into the next room; the child was picked up in a dying condition. Dr. McDuff, a few days after the little girl was buried, had the body exhumed, and he testifies:

"Its head was cracked. I clipped the skin on its head, and pulled its skull apart, and made a careful examination of the same. This child has had a blow, or violence has been used on its head to cause its death; that is, the head had come in contact with some hard substance, from which contact the skull was cracked, causing blood to settle around the brain, and to clot, which produced death. The leg which I speak of had been broken for some time prior to its death."

No other cause is suggested for the death of the child than that it received the fatal injury when thrown into the next room by appellant. She died almost instantly after

being thrown into the room by appellant. There is nothing suggested in the record whereby the child could have received the injury in any other way.

The judge, in passing sentence, ignored the indeterminate sentence law, and sentenced appellant to a fixed term of imprisonment. The judgment will be reformed so that the sentence will read that he be imprisoned in the penitentiary for a term not less than five years nor longer than his natural life, and the clerk of this court will enter proper judgment.

The judgment is reformed and affirmed.

RICE v. STATE. (No. 3734.)

(Court of Criminal Appeals of Texas. Oct. 27, 1915.)

1. CRIMINAL LAW §406—EVIDENCE—STATEMENTS OF ACCUSED.

Where a police officer was merely making an investigation as to defendant's possession of a sack containing medicines, and made no arrest until after the investigation, defendant's statements, after the officer had asked him to go with him, to the effect that he was taking the medicine to a certain place for delivery, the testimony of the one to whom defendant said he was to deliver it that he had never ordered it, and defendant's reply that such person knew he had ordered it, were not inadmissible on the ground that defendant was under arrest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. §406.]

2. LARCENY §40—COMPLAINT—MATTERS TO BE PROVED.

Under a complaint alleging that defendant fraudulently took 500 asperine tablets, it was incumbent on the state to prove that the tablets taken were asperine, as this was descriptive; but it was not necessary to prove their exact number, as that was in no way descriptive, but related solely to the quantity taken.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 102, 126, 160; Dec. Dig. §40.]

3. CRIMINAL LAW §730—EVIDENCE—CHARACTER—ARGUMENT OF COUNSEL.

The county attorney's statement that he did not know whether it was the first time defendant had been charged with an offense presented no error, where the court sustained the objection that, as defendant had not put his character in issue, the state could not attack it, and instructed the jury not to consider it, and gave the defendant's special charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. §730.]

4. CRIMINAL LAW §829—INSTRUCTIONS—REQUESTS COVERED.

In a prosecution for larceny, where the court instructed, as to defendant's explanation of his possession, that if he was in possession of the property described in the information for delivery to some other person for his alleged employer he was not guilty, it was unnecessary to give special charges asked on that issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. §829.]

Appeal from Criminal District Court, Dallas County; W. L. Crawford, Jr., Judge.

Jim Rice was convicted of theft, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of theft, and his punishment assessed at a fine of \$5 and 30 days' imprisonment in the county jail.

[1] R. A. Aldrich testified: That he was an officer of the city of Dallas, and on the 2d of February he saw appellant between San Jacinto and Bryan streets with a sack on his shoulder. That he examined the sack and found it contained medicines, one article being a bottle of asperine tablets, with the label on it: "500 Compound Tablets, Asperine, five grains, Manufactured and guaranteed by the First Texas Chemical Company, Dallas, Texas." That he asked appellant where he was going with this medicine, and that appellant replied he was working for the chemical company, and was taking the medicine to Williams' drug store for delivery. He asked appellant for the order sheet, and appellant made a pretense as if searching for it. When appellant did not find the order sheet, Officer Aldrich told appellant he would go with him to the Williams Drug Company and see if he had ordered the medicine. That when they got to the Williams Drug Company he asked Dr. Williams if he had ordered the medicine, and Dr. Williams replied, "No, I never ordered anything from the First Texas Chemical Company in my life"; that he purchased from the Griener-Kelly Drug Company. Appellant replied to him, "You know you ordered this stuff," when Dr. Williams replied, "I did not order that medicine." The officer says he then arrested appellant, and took the sack of medicine. A bill of exceptions was reserved to the admissibility of all this testimony, he contending that he was under arrest. The officer says he did not arrest appellant until after the conversation with Dr. Williams, and would not have done so had not the doctor stated he had ordered no such medicines. Appellant does not testify, and there is no testimony that he considered himself under arrest until after this conversation. So far as this record discloses, he went with the officer to the Williams Drug Company store willingly, and there insisted that the Williams Drug Company had ordered the medicine found in his possession. In the case of Hilcher v. State, 60 Tex. Cr. R. 180, 131 S. W. 592, Judge Davidson, speaking for the court, held:

"It is true the officer said he did not intend to let him get away until he had satisfied himself about the matter, and that after he satisfied himself about the matter he did arrest appellant. Appellant was not conscious of the fact, so far as the record is concerned, that he was to be arrested, and it is not shown, as we understand this testimony, that he was under any duress, or that he believed he was under duress, when he made the statement. We are of the opinion therefore these bills do not justify this court in reversing the judgment."

This is peculiarly applicable to the facts in this case. It is merely shown the officer was making an investigation, and after the investigation he determined to and did arrest appellant, but no arrest had been made nor determined upon until after the investigation. *Girtman v. State*, 73 Tex. Cr. R. 158, 164 S. W. 1010; *Hiles v. State*, 73 Tex. Cr. R. 23, 163 S. W. 717; and cases cited in these two opinions.

[2] Appellant seems to have made his defense on the theory that, as the complaint alleged that he did fraudulently take 500 asperine tablets of the value of \$2.50, it was incumbent on the state to prove that the bottle contained 500 tablets, and no less. Objections to testimony along this line were made, and special charges requested asking the court to instruct the jury that, if the state had not shown by the evidence beyond a reasonable doubt that appellant took 500 asperine tablets, they would acquit. This is not the law. Of course, it was incumbent on the state to prove that the tablets taken were asperine tablets, as this was descriptive of the property taken; but it was not necessary to prove the exact number of tablets—this is in no way descriptive of the property, but relates solely to the quantity taken. And under such an allegation, if the state proved appellant took 100, 200, or any other number of asperine tablets, and they had a value, a conviction would be authorized. *Jones v. State*, 44 S. W. 162.

[3] In another bill it is complained that in the argument the county attorney stated that they did not know whether or not this was the first time appellant had been charged with an offense; that the defendant had not put his character in issue, and the state could not attack it. On objection, the court at once sustained the objection, and instructed the jury not to consider the remarks, giving the special charge requested by appellant. This presents no error. *Mercer v. State*, 17 Tex. App. 467.

[4] The court instructed the jury in regard to the explanation of defendant of his possession of the property in the following language:

"You are further instructed that if you find and believe from the evidence beyond a reasonable doubt that the defendant was found in possession of certain asperine tablets, if any, described in the information in this cause by Officer Aldrich, but you further find, or have a reasonable doubt thereof, that at the time the defendant was so found in possession of said tablets, if any, that defendant had said tablets in his possession for the purpose of delivering same to the Williams Drug Company or any other person, firm or corporation for J. S. Keene of the First Texas Chemical Company, then, if you so find, you will acquit the defendant and say by your verdict not guilty."

It was therefore unnecessary to give the special charges requested on this issue.

The judgment is affirmed.

HYROOP v. STATE. (No. 3642.)

(Court of Criminal Appeals of Texas. June 25, 1915. Rehearing Denied Nov. 10, 1915.)

1. INDICTMENT AND INFORMATION — JOINDER OF COUNTS—SUFFICIENCY.

Where an indictment was in two counts, and one of them was good, there was no available error in overruling a motion to quash, where the conviction under the indictment was general.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. —137.]

2. PHYSICIANS AND SURGEONS — MEDICAL PRACTICE ACT—CONSTITUTIONALITY.

The medical practice act is not unconstitutional.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 2; Dec. Dig. —2.]

3. CRIMINAL LAW — ACCOMPLICES — WHO ARE.

The fact that officers went to one charged with practicing medicine unlawfully, and, though perfectly well, procured him to treat them for a supposed trouble in order to catch him, does not make them his accomplices so as to require a charge on accomplices.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1839-1863; Dec. Dig. —730.]

4. PHYSICIANS AND SURGEONS — UNLICENSED PRACTICE—MASSEURS — EVIDENCE — ADMISSIBILITY.

In a prosecution for unlawfully practicing medicine, where the defense is that defendant was a masseur, and not a physician, evidence for the state that he treated disease by other means than those usually ascribed to a masseur is admissible.

[Ed. Note.—For other cases, see Physicians, and Surgeons, Cent. Dig. §§ 6-11; Dec. Dig. —6.]

5. PHYSICIANS AND SURGEONS — LICENSE TO PRACTICE — "PRACTICING MEDICINE"—"PHYSICIAN."

Under Rev. St. 1911, art. 5745, providing that any person is "practicing" medicine when he publicly professes to be a physician or surgeon or offers to treat any disease, deformity, or injury by any system or method, or to effect cures thereof, and charges money or other compensation therefor, one professing to be a masseur is a "physician," where he professes to cure diseases or disorders.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6-11; Dec. Dig. —6.]

For other definitions, see Words and Phrases, First and Second Series, Practice of Medicine.]

6. CRIMINAL LAW — BEST EVIDENCE — ADMISSIBILITY.

On defendant's admission that a circular was one used by him in advertising his business as a masseur, the court properly admitted the circular in evidence to show the purpose for which he held himself out.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. —406.]

7. CRIMINAL LAW — SECONDARY EVIDENCE.

Parol evidence of the contents of a circular was properly rejected, where the circular itself could be put in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886, 1208-1210; Dec. Dig. —400.]

8. PHYSICIANS AND SURGEONS — UNLAWFUL PRACTICE.

Under Rev. St. 1911, art. 5745, providing that any person is practicing medicine when he publicly professes to be a physician or surgeon or treats or offers to treat any disease, deformity, or injury by any system or method, or to effect cures thereof, and charges money or other compensation therefor, it is not necessary to complete the offense that the defendant shall have held himself out as practicing medicine.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6-11; Dec. Dig. —6.]

Appeal from Tarrant County Court; Jesse M. Brown, Judge.

C. E. Hyroop was convicted of unlawfully practicing medicine, and he appeals. Affirmed.

Roy & Rowland, Mike E. Smith, and G. W. Dunaway, all of Ft. Worth, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. [1] Appellant was adjudged guilty of unlawfully practicing medicine. As the second count in the information, at least, is not subject to the objection leveled at it, and the conviction being general, and can be applied to either count, the court did not err in overruling the motion to quash it. This count in the information is drawn in terms frequently approved by this court. Collins v. State, 152 S. W. 1047, and cases there cited.

[2] Neither is the medical practice act unconstitutional, as has been heretofore held by this court and the United States Supreme Court. Collins v. Texas, 223 U. S. 288, 32 Sup. Ct. 286, 56 L. Ed. 439.

R. E. Tyler testified that he went to the office of appellant, and complained that he had appendicitis, and told appellant that he had had a violent attack some five weeks before his visit. Appellant told him he did not look like a man that had appendicitis, but that he was suffering from inflammation of the colon, and proceeded to treat Tyler for that affliction, saying he could cure him in a little while. Appellant first gave Tyler an enema, saying it was necessary to wash out his stomach. He then had Tyler to lie down, and rolled two pillows, placing one under his hips, and the other under his chest, there being nothing under the center of the body. He then mashed him up and down, pushing him clear to the table. After giving this treatment for awhile, he placed Tyler on another table, and gave him an electric treatment with an electrode, later so using the electrode as to produce what is called the violet ray. Without going into further details of the treatment, he told Tyler when leaving that he must eat nothing but soup and milk, and leave off all heavy diets, especially meat.

As a matter of fact, Tyler was not sick with any disease or disorder when he went to see appellant, but went there at the in-

stance of others to see whether or not appellant was practicing medicine, within the provisions of the medical practice act, and making a charge therefor. Tyler paid appellant \$3 for the treatment.

G. W. Day testified he went with Tyler, and testifies to, in substance, the same state of facts as did Tyler.

[3] Appellant contends this made them accomplices, and the court should have so instructed the jury. These men, knowing or believing that appellant was practicing medicine in violation of law, went there to detect him, and under no rule of law we know of, would their acts constitute them accomplices.

[4] Appellant objected to the testimony of Joseph Winterman who testified: That appellant treated him for an affection of the hand and arm. That his hand just hurt, elbow ached, and muscles of the arm hurt. Appellant treated him for some time, and charged him \$25. He gave Winterman an electric treatment with a battery, and also gave him what is termed a "hot-air" treatment, putting the hand in a "sweat box." That appellant told him he could cure him, but he did not do so, although he underwent treatment for some two or three months. Appellant's contention was that he was a "masseur," and therefore did not have to obtain and register a certificate. As this was his contention, it was permissible for the state to show that he was treating disease by other means and methods than that usually ascribed to a masseur, and the court did not err in admitting this testimony, nor in admitting that he had an account at a drug store for medicines, and in one instance had prescribed and furnished a salve for a sore on the leg of a patient.

The testimony of Tyler and Day was clearly admissible, and the objections urged to certain portions thereof are untenable.

The testimony of the witnesses Brown, Castello, and Day, excluded by the court, presents no error. Appellant does not state that he expected to or could have proven by the witnesses that the treatment given by him to Tyler, and which he admitted giving, was the treatment of a "masseur" in his particular sphere of labor. It is true he offered to prove by these witnesses that a "masseur" treatment was good for certain character of ailments, but the fact that he advertised and held himself out as a masseur would not prevent the state from showing, if it could, that he treated his patients by other means than those customarily used by a masseur in his particular sphere of labor. The giving of enema treatment by electric machinery, and by the use of a hot-air apparatus, does not come within the means and modes usually ascribed to the sphere of a masseur in the treatment of a disease, and as used by them aforesaid, and could not come within the exemption as defined by the

Legislature in exempting a masseur in his sphere of labor.

[5] Appellant seems to think the treatment must have been by administering medicines before he would be included within the prohibition of the law. Article 5745 of the Rev. Statutes reads:

"Any person shall be regarded as practicing medicine within the meaning of this law:

"1. Who shall publicly profess to be a physician or surgeon and shall treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof;

"2. Or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method, or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation."

McEachin's Rev. Stats.

This article was construed in *Ex parte Collins*, 57 Tex. Cr. R. 2, 121 S. W. 501, and the construction therein is the correct one and has always been adhered to.

If appellant could have proven that the particular sphere of a masseur was "manipulating, stroking, kneading, tapping, or beating the body by hands or mechanical means," this would not have embraced the treatment shown to have been given Tyler on his visit to his office, and would be immaterial in this case.

[6-8] As appellant admitted the circular introduced in evidence was one he used for advertising purposes, the court did not err in refusing to sustain his objection to its admissibility. This would likely show in what way he held himself out. Of this we cannot judge; for, although it was introduced in evidence, it is not contained in the record. The circular, when introduced, would speak for itself, and it was not error to refuse to permit witnesses to testify as to its contents. There does not appear to have been used any terms needing explanation; at least the bill does not so state nor contend. The fact he did not hold himself out as a "physician and surgeon" would not prevent his conviction if he practiced medicine within the meaning of that term as defined in the Revised Statutes.

We have carefully read each of the bills of exceptions, and are of the opinion that none of them present error, and the judgment is therefore affirmed.

FLETCHER v. STATE. (No. 3716.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915. Rehearing Denied Nov. 10, 1915.)

1. PROSTITUTION \S 4—PROCURING—EVIDENCE—SUFFICIENCY.

In a prosecution against defendant for unlawfully giving the name of his wife to another for the purpose of enabling the latter to have sexual intercourse with her, evidence held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. \S 4.]

2. CRIMINAL LAW §595 — CONTINUANCE — GROUNDS—INTOXICATION OF WITNESSES.

In a criminal prosecution, it was not error to refuse a continuance, where the affidavit of the absent witness stated that he had seen the prosecuting witness intoxicated at about the time the offense was alleged to have been committed; the fact of the witness' intoxication not rendering him incompetent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 1323-1327; Dec. Dig. §595.]

Appeal from Fannin County Court; S. F. Leslie, Judge.

Callie Fletcher was convicted of giving the name of his wife to another for the purpose of enabling the latter to have sexual intercourse with her, and he appeals. Affirmed.

E. S. McAlester and Thos. P. Steger, both of Bonham, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. The charging part of the affidavit and information is that on or about the 13th day of February, 1915, Callie Fletcher unlawfully gave to Albert Crittenden the name of Ida Fletcher for the purpose of enabling Albert Crittenden to have unlawful sexual intercourse with and to meet said Ida Fletcher.

[1] The facts are less than a page in length, and are made alone by the testimony of Albert Crittenden. He says:

"I am a single person, and room over the Ragsdale Building, over what is called Sid Smith's store. I keep a room furnished there, and, in addition to the ordinary furniture of an unmarried man, I keep a small oil cooking stove. I keep this to cook game on some time, as I hunt a good deal. I do not eat there regularly, and only have this stove to cook game on when I desire. I know the defendant, Callie Fletcher. There he sits in the courtroom. About the 13th day of February he came to my room. There was no one there but he and I. After remaining in my room some time, he asked me what I was doing with that stove. I told him I kept it there, and sometimes cooked my game on it after going hunting. He said to me that he would bring his wife, Ida, up there, and she could cook me a meal on it. I told him I did not eat here in the room, but only used the stove to cook game on occasionally. The defendant said that was all right; he would bring his wife, Ida, up there and leave her with me, and she would cook me a good meal. I said, 'No,' and the defendant said he would bring Ida, his wife, up there and leave us alone there together and would go off. He said, 'You know Ida.' I said to him, 'Callie, you are a damn fool,' and got up and left, he coming with me."

This is the entire statement of facts, except the venue and date.

[2] Under our statute this testimony is sufficient to prove the case. Appellant asked for a continuance, which was overruled and made a ground of the motion for new trial. The absent witness, Cole, filed an affidavit in connection with the motion for new trial as to what his testimony would be. He says that he was acquainted with defendant and the prosecuting witness, Crittenden; that he (witness) had been summoned as a witness for the defendant, Fletcher; that on

the 13th day of February, 1915, he saw Crittenden several times, and that on said date, immediately before and after the occasion on which defendant is alleged to have made certain statements to the witness Crittenden, on which statements the affidavit and information is based, he (said witness Cole) was with Crittenden in his (Crittenden's) place of business, and that on each of said occasions the witness Crittenden was drunk. We are of opinion there was no error in refusing this continuance. This witness does not show the state of drunkenness, or that he was too drunk to know what he was doing. If he was drunk at the time he was in his room, that fact could have been proved by Crittenden, or he could have been asked about it. This seems not to have been done. The mental status of a defendant by being drunk would not be an excuse for crime, and it could only be given in mitigation, if it is worth anything, and the inconclusiveness of the statement of Cole does not place the matter in such attitude the defendant is entitled, we think, to the continuance. The same rule or similar reasoning would apply to witness' testimony. It would not render him incompetent as a witness ordinarily. It was not sought to even prove by present testimony such condition.

The judgment therefore will be affirmed.

McDONALD v. STATE. (No. 3704.)
(Court of Criminal Appeals of Texas. Oct. 27, 1915.)

1. CRIMINAL LAW §844 — INSTRUCTIONS — GENERALITY OF OBJECTIONS.

The objection to a charge that it did not directly submit the issues as raised by the evidence, and did not instruct on certain named subjects, is too general to point out any specific error, as required by the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2025; Dec. Dig. §844.]

2. CRIMINAL LAW §1169—HARMLESS ERROR — ADMITTING AND STRIKING EVIDENCE—ADMISSION OF EVIDENCE.

Admission of evidence of propositions of defendant in seduction to witness was harmless, where it was stricken out, and the jury instructed to disregard it; the jury having assessed the lowest punishment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. §1169.]

3. CRIMINAL LAW §398 — EVIDENCE — CONTENTS OF LOST LETTER.

Witness, having lost a letter to her, could testify to its contents.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886; Dec. Dig. §398.]

4. CRIMINAL LAW §1169 — RECEPTION OF EVIDENCE—OBJECTIONS.

Where proper objection was not made till after witness had testified to part of the contents of a letter, and was then sustained, there was no error; the court having previously instructed that, under such circumstances, testimony should not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. §1169.]

5. WITNESSES — 369 — IMPROACHING TESTIMONY.

To impeach a witness for defendant in seduction, the state may show witness prescribed for prosecutrix to produce an abortion.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1187, 1188; Dec. Dig. —369.]

6. CRIMINAL LAW — 1169 — HARMLESS ERROR — ADMISSION OF EVIDENCE.

Erroneous admission of testimony is not ground for reversal; the same fact having been testified to by another, without objection.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 754, 8088, 3130, 3137-3143; Dec. Dig. —1169.]

7. CRIMINAL LAW — 413 — EVIDENCE — SELF-SERVING DECLARATIONS.

Refusing to allow defendant in seduction to show his previous statements to persons of his contemplated marriage to another than prosecutrix, it not being shown or attempted to be shown that they had been communicated directly or indirectly to prosecutrix, was not error, but it was enough to allow him to show that they had also been made to other persons more likely to communicate them to prosecutrix.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 928-935; Dec. Dig. —413.]

8. AFFIDAVITS — 5 — AUTHORITY TO TAKE — ATTORNEY OF ACCUSED.

Affidavits sworn to before defendant's attorney are not entitled to consideration on his motion for new trial.

[Ed. Note.—For other cases, see *Affidavits*, Cent. Dig. §§ 18-27; Dec. Dig. —5.]

9. CRIMINAL LAW — 1156 — APPEAL — DISCRETION — DENIAL OF NEW TRIAL.

Denial of a new trial on the ground of newly discovered evidence will not be disturbed, unless it appears that the trial court abused its discretion to defendant's prejudice.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3067-3071; Dec. Dig. —1156.]

Appeal from District Court, Denton County; C. F. Spencer, Judge.

J. T. McDonald was convicted, and appeals. Affirmed.

Owsley & Owsley, of Denton, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of seduction, and assessed the lowest punishment. It is useless to detail or discuss the evidence. There can be no question as to its sufficiency to sustain the verdict. There was some conflict in the evidence. That of the appellant and his witnesses, if believed, would have been sufficient to have authorized his acquittal. That question was for the jury, however, and not for this court. The prosecutrix was amply corroborated. *Williams v. State*, 59 Tex. Cr. R. 347, 128 S. W. 1120; *Beeson v. State*, 60 Tex. Cr. R. 39, 130 S. W. 1006; *Nash v. State*, 61 Tex. Cr. R. 269, 281, 134 S. W. 709; *Gillespie v. State*, 73 Tex. Cr. R. 602, 603, 166 S. W. 135.

[1] The only objections to the charge of the court, after it had been submitted to appellant's attorneys, and before it was read to the jury were "that the same did not directly

submit the issues as raised by the evidence, and did not instruct on lust, passion, or fear," and that the court refused to give his 11 special charges. These objections, under all of the decisions, are too general to point out any specific error, as required by the statute. However, we may discuss his refused charges herein later. The court gave a full and correct charge submitting every question raised by the evidence.

[2] Appellant has several bills to the admission and exclusion of certain evidence and the action of the court pertaining thereto. His first sets up that, while Renza Mitchell, the mother of the prosecutrix, was on the stand, certain questions and her answers thereto, which are copied in the bill, making some six typewritten pages, were had. This bill gives the questions and answers, his objections to some of them, the court's ruling, what the district attorney said, etc. The court, in approving the bill, did so with this qualification:

"When this witness was on the stand, she did not speak very plainly and talk from the point, as is often the case with negro witnesses, and her testimony up to the statement, in substance, that the defendant had made a proposition to her for carnal intercourse, would hardly indicate that she had such in mind, but I understood therefrom that she was meaning a conversation with defendant regarding his mistreatment of her daughter, who was a pupil of the defendant in the colored school at Denton. So soon as it became apparent that she had in mind an illicit proposition to herself by defendant, I immediately struck out the testimony, and instructed the jury not to consider the same. I think the proceeding had no effect on the jury whatever."

In our opinion, this bill, as explained by the judge, presents no reversible error. The jury assessed the lowest punishment. *Miller v. State*, 31 Tex. Cr. R. 638, 21 S. W. 925, 37 Am. St. Rep. 836; *Hatcher v. State*, 43 Tex. Cr. R. 239, 65 S. W. 97; *Robinson v. State*, 63 S. W. 869; *Trotter v. State*, 37 Tex. Cr. R. 474, 36 S. W. 278; *Jones v. State*, 33 Tex. Cr. R. 8, 23 S. W. 793; *Morgan v. State*, 31 Tex. Cr. R. 1, 18 S. W. 647; *Sutton v. State*, 2 Tex. App. 348; *Roberts v. State*, 48 Tex. Cr. R. 210, 87 S. W. 147; *Martoni v. State*, 167 S. W. 351.

[3, 4] In his next bill he complains that, when the witness Leta Mitchell, prosecutrix, was testifying, she was permitted, over his objections, first, to testify to the contents of a letter she had received from appellant. She testified that she had lost it. The court, in qualifying his bill on this point, states that she had lost that letter, which rendered its contents admissible. The court was correct in this. Then it appears the witness was asked about a letter she had written to the appellant. As to this the court, in qualifying and approving the bill, said:

"With reference to the letter she claims to have written defendant, objection was sustained to her telling the contents. However, some parts of it she had told over objection of defendant, but, when the objection was made that defendant had been given no notice to produce

it, the objection was sustained, and I had previously stated to the jury that, when an objection was sustained to any proffered testimony, they should not consider it, even though some part of it had been heard by them, as it frequently occurs that a portion of a witness' answers appears unobjectionable, and more of it shows the whole to be inadmissible."

As qualified, this bill shows no error.

[5] In his next bill he complains of the testimony of Renza Mitchell, introduced in rebuttal, to the effect that in June, 1914, when her daughter, the prosecutrix, was sick, caused by her pregnancy, Mrs. Lawson, one of the defendant's material witnesses, called on her and gave her a prescription for cotton root to produce a miscarriage on Leta. What the prescription was is not otherwise disclosed than as stated. In approving the bill, the court qualified it as follows:

"This bill is approved, with the qualification that the witness Mrs. Lawson had testified in favor of the defendant and against the contention of the prosecutrix, and showed considerable interest in the defense, as the court thought, and this testimony was admissible, in the opinion of the court, as affecting the credibility of the said Mrs. Lawson, and was limited orally to the jury for such purpose, and perhaps in the charge, which is not now accessible."

The charge did so limit it. Mrs. Lawson denied that she had given any such prescription. Appellant contends that, as Mrs. Lawson so denied, the state was bound by her denial, as she was attempted to be impeached on an immaterial matter. His contention does not apply in this case. The law is well established that the opposite side may show animus and prejudice on the part of the adverse witness towards him and its extent, and that in such examination great latitude is allowed when the object is to impeach the credit of the witness; also that motives which operate on the mind of the witness when he testified are never regarded as immaterial or collateral matters. A party may prove declarations of the witness which tend to show bias, interest, prejudice, or any other mental state, or status, which, fairly construed, might tend to affect his credibility. *Pope v. State*, 65 Tex. Cr. R. 51, 143 S. W. 611; *Earles v. State*, 64 Tex. Cr. R. 537, 142 S. W. 1181; *Cain v. State*, 68 Tex. Cr. R. 517, 153 S. W. 147; *Burnaman v. State*, 70 Tex. Cr. R. 365, 159 S. W. 244, 46 L. R. A. (N. S.) 1001; and authorities in the opinions in said cases.

[6] Besides this, before Renza Mitchell testified, her daughter, Leta, had testified to the same thing, without any objection thereto by the appellant, as shown by this record. As frequently held by this court:

"The erroneous admission of testimony is not cause for reversal, if the same fact is proven by other testimony not objected to." *Wagner v. State*, 53 Tex. Cr. R. 307, 109 S. W. 169; *Bailey v. State*, 69 Tex. Cr. R. 484, 155 S. W. 536; *Christie v. State*, 69 Tex. Cr. R. 602, 155 S. W. 541; and many other cases.

[7] By other bills appellant complains that the court refused to permit him to prove by the superintendent and some of the trustees of the public schools at Denton, white men,

that about June, 1913, when they first employed him as a teacher in the colored schools at Denton, he then told them he intended to get married, and that on another occasion he so told them. The court, in explanation of these bills, refusing to permit such testimony, shows that he did so because they were not shown or attempted to be shown to have been communicated, directly or indirectly, to the prosecutrix, and that they were therefore self-serving, but that all other testimony by all other negro witnesses (the appellant and the prosecutrix being negroes) as to statements by appellant of his approaching marriage with a woman other than prosecutrix, or his claimed intended marriage, were admitted, and that all other such statements, where it was thought prosecutrix would likely learn of it, were admitted. The record shows that many of the witnesses did testify to said declarations. These bills present no error.

Notwithstanding the court's refusal to give any of his special charges is not raised and presented in such a way that we could consider them, yet we have examined all of them, and, where proper to be given, they were clearly embraced in the court's charge, and those not so embraced should not have been given, and the refusal to give them presents no error.

[8, 9] The only other question is that appellant has the affidavits of three persons attached to his amended motion for new trial, claiming that they show newly discovered evidence which he claims ought to have resulted in the court's granting him a new trial. The first of these affidavits is sworn to before one of his attorneys, which as has been uniformly held prevents its consideration. *Maples v. State*, 60 Tex. Cr. R. 171, 131 S. W. 567, and many cases to the same effect. The appellant's motion on this ground was controverted and vigorously contested by the county attorney. It was all threshed out before the trial judge.

"It is well established by the decisions of this court that a motion for a new trial on this ground is closely scrutinized, and is largely confided to the discretion of the trial court; and the disposition there made of it will not be disturbed on appeal, unless it be apparent that the trial court abused its discretion to the prejudice of appellant. *Burns v. State*, 12 Tex. App. 269; *Bell v. State*, 1 Tex. App. 598; *Templeton v. State*, 5 Tex. App. 398; *Shaw v. State*, 27 Tex. 750; *West v. State*, 2 Tex. App. 209; *Terry v. State*, 3 Tex. App. 236.

"It is also well established that in a motion for new trial on this ground it is incumbent on the appellant to satisfy the court: (1) That the evidence has come to his knowledge since the former trial; (2) that it was not owing to want of due diligence on his part that it was not discovered and did not come to his knowledge before the trial; (3) that it is competent and material evidence, and not merely cumulative, corroborative, or collateral; (4) that it will probably produce a different verdict if a new trial is granted; (5) that it is not simply for the purpose of impeaching a former witness. If the application is defective in establishing any one of these essentials, a new trial should be

refused. *Fisher v. State*, 30 Tex. App. 502 [18 S. W. 80]; *West v. State*, supra; *Duval v. State*, 8 Tex. App. 370; *Gross v. State*, 4 Tex. App. 249; *Hutchinson v. State*, 6 Tex. App. 468. *White's Ann. C. C. P.* § 1149; *Gray v. State*, 65 Tex. Cr. R. 206, 207, 144 S. W. 283, 284.

We think the court's action in refusing a new trial on this ground was correct.

The judgment is affirmed.

FOX v. FOX. (No. 5616.)

(Court of Civil Appeals of Texas. San Antonio.
Oct. 27, 1915.)

1. DIVORCE — 124—JURISDICTIONAL FACTS—RESIDENCE IN COUNTY—SUFFICIENCY OF EVIDENCE.

Evidence in a wife's action for divorce and for the recovery of her separate property held to sustain a finding that at the time of the filing of her petition plaintiff had been an actual bona fide inhabitant of the state for twelve months, and had resided in the county where the suit was brought for six months next preceding the filing of the petition, within the jurisdictional requirement of *Vernon's Sayles' Ann. Civ. St.* 1914, art. 4632.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 392-398, 450, 455, 456; Dec. Dig. — 124.]

2. DIVORCE — 62—JURISDICTION—RESIDENCE—CONSTRUCTION—STATUTE.

Under *Vernon's Sayles' Ann. Civ. St.* 1914, art. 4632, requiring that a petition for divorce, and proof in support thereof, show that at the time of its filing the plaintiff had been an actual bona fide resident of the state for twelve months, and a resident of the county where suit was brought for six months next preceding the filing of the petition, a long-continued absence from the state or county would not be a substantial compliance with the requirement that the party be a bona fide inhabitant of the state, but a temporary absence from the state or county during the six months preceding the filing of a petition for divorce would not affect the right to maintain it.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 200-202, 208-216, 220, 282; Dec. Dig. — 62.]

3. VENUE — 8—STATUTE.

Where a wife furnished money to her husband to be loaned upon real estate securities in her name and for her benefit, but the husband converted it to his own use in B. county, or placed it upon securities and retained the evidence thereof in his own name and refused to deliver them, the wife's action, charging such fraud, that some of the property was situated in B. county, and seeking the establishment of a resulting trust, was properly brought in B. county, within the express provision of *Vernon's Sayles' Ann. Civ. St.* 1914, art. 1830, § 7.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. § 17; Dec. Dig. — 8.]

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

Action by Ida West Fox against E. A. Fox for divorce and the recovery of separate property. From an order of injunction, defendant appeals. Affirmed.

Arnold, Cozby & Peyton, M. W. Davis, and Davies & Davies, all of San Antonio, for appellant. Carlos Bee, C. C. Todd, and Ball & Seeligson, all of San Antonio, for appellee.

CARL, J. Appellee, Ida West Fox, on May 11, 1915, filed suit against appellant, E. A. Fox, for divorce, and for the recovery of her separate property, and obtained an injunction against appellant. On August 31, 1915, the court overruled a motion to dissolve this injunction, and continued same in force until the further orders of the court. This is the order from which this appeal is prosecuted.

The petition alleges that the plaintiff was, and had been at the time of the filing of the petition, a bona fide resident of the state of Texas and county of Bexar for one year before such filing of the petition. In addition to the allegations in support of the divorce prayed for, the petition charges that appellant married her in order to secure all her available money, and had appropriated the same to his own use; that prior to the marriage the appellant persuaded appellee to loan him \$2,500, and executed a deed of trust on certain real estate in San Antonio, which he never owned, but which stood in the name of his daughter, Blanche Fox, and since the marriage he has taken from appellee the notes and deed of trust covering this loan so that she would not have any evidence of said debt; and, further, that since the marriage appellant had secured from her \$10,000, agreeing to lend same for her and give her the securities for same, which he has failed and refused to do, and refuses to account to her for the same. The petition also alleges that a certain \$2,000 vendor's lien note was purchased out of her said money, and that certain other property and purchases were made with her money, and charges that funds in the State Bank & Trust Company are a part of her said sum of money.

A divorce was prayed for; also a judgment for \$12,500 so fraudulently obtained, and that same be declared a lien upon property alleged to belong to appellant; and for an injunction restraining the bank from paying out any of said money upon appellant's checks, and to restrain the defendant from disposing of the real estate pending the suit.

The motion to dissolve the injunction was based mainly upon the following grounds:

(1) That the plaintiff was not a bona fide resident citizen and inhabitant of the county of Bexar, state of Texas, and was not at the time of filing the suit; that when defendant and plaintiff married on February 13, 1915, appellee gave her residence as the city of St. Louis, in the state of Missouri, and was not at that time, and never had been, a resident citizen of the state of Texas. It is alleged therein that after the marriage they came to Texas and moved out on a ranch in Medina county, where they resided at the time this suit was filed, and that by reason thereof the Thirty-Seventh district court of Bexar county had no jurisdiction to try the cause, which, it is alleged, is a suit for divorce, and that neither plaintiff nor defend-

ant was an actual bona fide resident citizen of Bexar county.

(2) That the injunction issued and served upon the State Bank & Trust Company impounded and tied up funds belonging to E. A. Fox, defendant, and prevented him from selling any property.

The plaintiff below denied these allegations, and replied that it was necessary for her health, pleasure, and business that she be away from Bexar county a great deal, but that she had, while gone, kept her room here, in which her personal effects were left. She admitted that they went upon the ranch in Medina, Bexar, or Bandera county, but says she thinks it was situated partly in all of said counties, but says that this sojourn was never intended by either of them to be aught but temporary. She alleges that appellant did not own the ranch, but had merely a contract or option to buy same, and that a large part of her separate funds, acquired as formerly stated from her by defendant, was invested in same and improvements thereon, and asserted that she was entitled to an equitable lien on same. She alleges, further, that she believes that appellant has conspired with Becher, the man from whom he obtained the contract for said land, to surrender his contract or convey same to Becher, or some other person, to defraud her of the equity therein.

This supplemental petition and reply further alleges that the fraudulent acts of the defendant were committed in whole or in part in Bexar county, and that some of the stock purchased with the money fraudulently acquired from her were in Bexar county, and that since the injunction was issued defendant had disposed of a part of the stock, and converted the proceeds to his own use. Harry Becher was made a party. The injunction issued was later modified so that it would not prevent E. A. Fox from collecting from the State Bank & Trust Company the money on deposit in the name of E. A. Fox or the Fox Realty Company, and he was permitted to check all he desired either as E. A. Fox or Fox Realty Company.

Any further statement necessary will appear in course of the discussion which follows.

The main contention is that the evidence does not show that the plaintiff had been an actual bona fide inhabitant of the state of Texas for one year and had resided in Bexar county for six months next preceding the filing of the petition. This case, as it comes to us on the question of jurisdiction, must be controlled by the facts in evidence as to the residence of Mrs. Fox, the plaintiff below.

Under the law, as it now stands (article 4632, Vernon's Sayles' Statutes), the petition and proof in support thereof must show that at the time of the filing of such petition the plaintiff had been an actual bona fide inhabitant of the state for a period of twelve months, and had resided in the county where

the suit is brought for six months next preceding the filing of the same.

Defendant testified that he met the plaintiff about December 24, 1914, and they were married on the 13th of February, 1915, at St. Louis, Mo. There is an affidavit in evidence, made by both the parties to this suit for the purpose of obtaining a marriage license in St. Louis, in which the residence of appellee is given as 5331A, Ridge avenue, St. Louis, Mo. When they married they came to San Antonio, and he says they first lived at 121 Uvalde street, where they arrived on February 15th, which they were to vacate on March 1st. He says they vacated the house on Uvalde street, and stayed at the Travelers' Hotel. The house on Uvalde street was his home up to that time, according to his statement, and he brought his wife there to that house, which he says, however, was in his daughter's name. He says, further, that on the 2d of March they went to the Travelers' Hotel, but that on the 11th or 12th of March she made a trip to St. Louis, and came back on March 28th, and went out to the ranch with him. This ranch, according to his testimony, is in Medina county.

There is a great deal of testimony on both sides as to the matter of residence; but, since the court heard evidence on that issue and determined it in favor of the appellee, we will direct our investigation towards ascertaining whether there is sufficient evidence to sustain that finding.

Mrs. Fox says that prior to her marriage with Mr. Fox, in February of the present year, she lived in San Antonio most of the time for the past six years, and that she had an understanding with Mr. Fox prior to their marriage that they were to be here in San Antonio; that they were to go to the ranch for a short time to get things in order, and then come back to San Antonio, where he would carry on the real estate business. She says that she had a room here in the city all the time before she was married, and kept said room, with her furniture in it, during the time she was away from San Antonio, in St. Louis, Chicago, and other places, where her health, pleasure, or business called her. She says she went to St. Louis for an operation on her throat, but she says that, notwithstanding her trips and the periods of time she stayed away from San Antonio, it has always been her home for the past six years, and that her understanding and agreement with Mr. Fox was that their home would continue to be in San Antonio, as it had been in the past, except for that temporary absence for improving and preparing the ranch for the market. She says that Mr. Fox said it would be a useless expense to take the piano out to the ranch, and they left it at Goggan's music store. Further testifying, she said that he told her they would just go out there long enough to get some fences fixed up and the barn fixed, and get things in running order. This is further substantiated by the

fact that Mr. Fox wrote to her on February 13th, before their marriage, that he did not think either of them would want to live on the ranch, and that he would keep a house in town. On February 6th he wrote that his son would give up the cottage on Ulvalde street when wanted.

There is other evidence that Mr. Fox had stated to divers people that he did not intend to live on the ranch, and the further fact that he took a guaranty of title, of date March 20th, in which he gave his residence as Bexar county, Tex., together with the further fact that on April 26, 1915, he brought his wife and her trunk to San Antonio and paid her room rent and occupied the room with her.

So we have the positive statement of Mrs. Fox that San Antonio had been her home for six years next preceding the filing of the petition; that she had never abandoned it, and had been away only on trips for her health, pleasure, or business. She explained the affidavit made in St. Louis by saying that she told the clerk before whom it was made that she was in St. Louis a part of the time, where she was staying with a sister. A great part of the year preceding the filing of the petition for divorce she was out of the state, in St. Louis, Chicago, and other places; but she says that these trips were made on the advice of physicians, for her health, and in looking after her business interests in Illinois, as well as partly for pleasure. It is even made to appear that she was out of Bexar county more than she was in the county during that year, if we consider the time they lived at the ranch, which is said to be in Medina county.

[1] The question of whether parties have or have not resided in the county six months or been bona fide inhabitants of the state for twelve months before the petition is filed, while jurisdictional in its nature and necessary to be established before a divorce will be granted, is nevertheless a question of fact to be determined like any other issue in the case, and, the trial court having heard the evidence and determined that issue in favor of appellee, or in favor of the jurisdiction of the court, we would not be authorized to disturb that finding, where there is as much evidence as there is in this record that Mrs. Fox had lived here six years and had never abandoned her residence.

Supposing that appellant's ranch is in Medina county, that fact, which is relied upon to break the continuity of residence in Bexar county, is itself a disputed issue; that is, as to whether their residence there was merely temporary, or whether it was intended to be permanent. She testified that it was only a sojourn, temporary in its nature, and that neither of them ever intended to make that their home, but that both of them recognized that their home was in San Antonio. There is other evidence besides that of appellee

along this line, including that of Manton, the Ezells, and others.

[2] There is no doubt that a long-continued absence from the state or county, such as is shown in the Michael Case, 34 Tex. Civ. App. 680, 79 S. W. 78, where the plaintiff had been residing in Illinois for more than sixteen years prior to the filing of the suit, would not harmonize or be a substantial compliance with the requirement that the party must be an actual bona fide inhabitant of the state for the legal time prior to exhibiting the petition; or, as in the Haymond Case, 74 Tex. 414, 12 S. W. 90, where the plaintiff left his family in Bell county in 1881 and went to Central America, where he stayed for many years, and then returned to Bell county and filed his suit, alleging that he had never abandoned that as his home. Of course, there is a distinction between a legal residence for the purpose of voting, etc., and a residence contemplated by the divorce statute. In the Haymond Case, however, Judge Henry, speaking for the court, expressly stated:

"We do not think that a temporary absence from the state or county of an inhabitant of the state during the six months next preceding the filing of his petition for divorce would affect his right to maintain it."

And so it was held by Chief Justice Rainey, speaking for the Dallas court in the case of McLean v. Randall et al. (Civ. App.) 135 S. W. 1119, in dealing with a case where Mrs. McLean left Sherman and went to Beaumont, where she resided with a married daughter for several months, that the district court of Grayson county had jurisdiction of her cause of action for divorce.

The construction of any law ought to be a reasonable and common-sense construction, and, if we were to construe article 4632 of the Revised Statutes as requiring that a party should spend the entire year in the state or the entire six months in the county before bringing a suit of that nature, we think it would be an unreasonable construction. Many people in good faith claim San Antonio, for instance, as their home; but their business calls them away to such an extent that they may spend more time away from this county than they do in it. This is notably true of some traveling salesmen, and yet they have no home anywhere else. Would it be just for such a person to be denied the jurisdiction of the courts of the county where his home is? Or, if a person falls into bad health, and it becomes necessary to leave his home for the purpose of obtaining a cure, should he thereby lose the protection the laws of his home give him? We do not believe that absence in cases of this kind destroys the bona fides of residence, nor do we think that the fact that Mrs. Fox's health and business affairs called her away from San Antonio a great deal would preclude her from maintaining her suit in Bexar county, when she testifies positively that this had

been her home for six years, and that her absence was made necessary in the manner detailed. The Thirty-Seventh district court of Bexar county did have jurisdiction to entertain the bill for divorce.

[3] There is another reason, independent of the divorce phase of the case, which would give appellee the right to maintain this action in Bexar county, which is the allegation, supported by testimony, that money was furnished to the defendant for the purpose of being loaned upon real estate securities in the name and for the benefit of the plaintiff below, but that the defendant, instead of so loaning the money, converted it to his own use in this county, or placed it upon securities and retained the evidence thereof in his own name, refusing to deliver the same to Mrs. Fox. In other words, she charges that he practiced fraud upon her in Bexar county, Tex., and that some of the property is there situated. Her petition specifically sets these matters out, and asks that a resulting trust be established and fixed upon said properties. This would bring it squarely within the provisions of section 7 of the exceptions to article 1830 of Vernon's Sayles' Statutes. It is well established in Texas that a wife may maintain a suit against her husband for the protection of her separate property, and the petition in this case does not seek to deal with community property. *Dority v. Dority*, 96 Tex. 222, 71 S. W. 950, 60 L. R. A. 941. And if she has instituted such a suit for the protection of her separate property, and the alleged fraudulent acts of the defendant were committed in Bexar county, there is no reason why this suit should not there be maintained. *O'Brien v. Hilburn*, 9 Tex. 297; *Ryan v. Ryan*, 61 Tex. 473; *Hall v. Hall*, 52 Tex. 298, 36 Am. Rep. 725; *Price v. Cole*, 35 Tex. 471. In the case of *Dority v. Dority*, supra, we find a very learned discussion by Judge Williams.

The judgment of the trial court is in all things affirmed.

STEWART v. THOMAS et al. (No. 8252.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 30, 1915.)

1. VENDOR AND PURCHASER — 253 — VENDOR'S LIEN — FORECLOSURE — UNCERTAINTY AS TO LAND SOLD.

Where the description of land in a deed was defective as showing only three surveyor's calls, while the only description of the land in the purchase notes was by reference to the deed, in suit on the notes to recover personal judgment against the maker and indorser, and also for foreclosure of the vendor's lien, decree of foreclosure was erroneous, in the absence of proof that the omission in the description was by mutual mistake of the parties, or proof to show what property they really intended should be conveyed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 637-640; Dec. Dig. —253.]

2. EVIDENCE — 185 — BEST EVIDENCE — SECONDARY EVIDENCE OF DEED.

Where, in a suit to foreclose a vendor's lien, plaintiff alleged that the original deed to the land was in defendant's possession, and that the latter had been duly notified to produce the same and had failed to do so, there was a proper predicate for secondary evidence of the contents of the original deed by means of the deed record.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 642-660; Dec. Dig. —185.]

3. JUDGMENT — 951 — ADMISSION IN EVIDENCE.

In suit to foreclose a vendor's lien, where the only objection to the original judgment of partition admitted in evidence to show that title to the purchase money notes was vested in plaintiff's wards was that such judgment affected title to land and had never been recorded, its admission was proper.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1808-1812; Dec. Dig. —951.]

4. BILLS AND NOTES — 129 — SUIT AS ELECTION TO DECLARE DUE.

Where, in suit to foreclose a vendor's lien and for personal judgment against maker and indorser of the purchase-money notes, the notes contained stipulations that a failure to pay one when due should, at the election of the holder, mature both notes, one of the notes being long past due when suit was brought, the institution of suit was of itself sufficient to show an election by the holder to declare the second note due.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 283-292; Dec. Dig. —129.]

Appeal from District Court, Comanche County; J. H. Arnold, Judge.

Suit by Austin Thomas and others against H. L. Stewart and another. Judgment for plaintiffs, and the named defendant appeals. Reversed and remanded for another trial as to appellant.

Kearby & Kearby, of Comanche, for appellant. Smith & Palmer, of Comanche, for appellees.

DUNKLIN, J. H. L. Stewart purchased a tract of land from J. H. Magness, and in part consideration therefor executed two promissory notes for \$250 each, one payable November 1, 1913, and the other one year later. Thereafter the notes were sold to W. Thomas by Magness, who duly indorsed them. Later, in a certain suit for partition, styled *Ada Thomas v. W. Thomas*, the indorsee, the notes were set aside to Austin Thomas and other minors. The guardian of these minors instituted this suit to recover personal judgment against the maker and indorser, and also for a foreclosure of the vendor's lien upon the land for which they were executed, and from a judgment against both defendants for the relief prayed for. H. L. Stewart has appealed.

[1, 2] In plaintiff's petition it was alleged that, through clerical error in drafting the deed from Magness to Stewart, one of the calls in the description of the land was inadvertently omitted, such omission being a

mutual mistake of the parties; that the land which they intended to be embraced in said deed was the tract correctly described in the petition. The judgment of foreclosure described the land according to the alleged corrected description. The deed executed by Magness to Stewart at the time the notes were executed was introduced in evidence and also the notes. The description of the land contained in the deed showed only three surveyor's calls and was wholly insufficient as a predicate for the foreclosure, while the only description embraced in the notes was by reference to the deed. No evidence was introduced to sustain the allegation that such omission in the description was by mutual mistake of the parties, or to show what property the parties to the deed really intended should be conveyed; and, in the absence of such proof, the decree of foreclosure was erroneous. The deed from Magness to Stewart had been recorded in the deed records of Comanche county, and this record was introduced in evidence instead of the original or a certified copy. Stewart objected to this proof on the ground that it was secondary evidence and plaintiff had failed to file with the papers a certified copy of the deed and give notice to Stewart of such filing. But, as shown in the court's explanation of the ruling, plaintiff had alleged that the original deed was in the possession of Stewart, and he had been duly notified to produce same upon the trial and had failed to do so. This showed a proper predicate for secondary evidence of the contents of the original deed.

[3] Likewise, there was no error in admitting in evidence the original judgment of partition in the suit of Ada Thomas v. W. Thomas to show that title to the notes described in plaintiff's petition was vested in plaintiff's wards; the only objection offered to such proof being that said judgment affected title to land, and had never been recorded in the deed records of Comanche county.

[4] The notes in suit each contained a stipulation that a failure to pay same or any installment of interest thereon when due should, at the election of the holder, mature both notes. One of the notes was long past due when the suit was instituted, and the institution of the suit to collect both was of itself sufficient to show an election by the holder to declare the second note due without further proof of that fact on the trial, as appellant insists should have been furnished.

Since the judgment against Stewart is to be reversed, and as he has undoubtedly entered his appearance for another trial, other assignments of error questioning the sufficiency of service of citation upon Stewart will not be discussed.

For the error indicated, the judgment

against appellant Stewart is reversed, and the cause is remanded for another trial as to him; but the judgment against defendant Magness, who has not appealed, is undisturbed.

HOLMES v. TYNER. (No. 837.)

(Court of Civil Appeals of Texas. Amarillo. Oct. 30, 1915.)

1. PRINCIPAL AND AGENT ⇐23—AUTOMOBILE—SALE—REPUDIATED AGENT—SUFFICIENCY OF EVIDENCE.

In an action by an automobile dealer for the value of a car purchased by defendant from one representing himself as agent for plaintiff, evidence held to support a finding of agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. ⇐23.]

2. PRINCIPAL AND AGENT ⇐14 — IMPLIED AGENCY.

The relation of principal and agent does not arise from an express appointment merely, but also by implication from the words and conduct of the parties and the circumstances of the particular transaction.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 26-33; Dec. Dig. ⇐14.]

3. HUSBAND AND WIFE ⇐23½—AGENCY OF WIFE—SCOPE OF AUTHORITY.

In an action by an automobile dealer for the value of a car purchased by defendant from one representing himself as agent for plaintiff, evidence held to warrant a finding that plaintiff's wife was his agent with authority to employ salesmen.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 145, 146; Dec. Dig. ⇐23½.]

4. PRINCIPAL AND AGENT ⇐100 — GENERAL MANAGER—SCOPE OF AUTHORITY—HOW DETERMINED.

A general agent for the management of a business has authority, coextensive in scope with the business intrusted to him, to do what is customary in such business; consideration being given to the character of the business and the usual manner in which it is conducted.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 262-273, 345, 364, 368-373; Dec. Dig. ⇐100.]

5. PRINCIPAL AND AGENT ⇐103 — BUSINESS NECESSITY — AUTOMOBILE DEMONSTRATOR — IMPLIED AUTHORITY.

Where it appeared that to succeed as a going concern the nature of plaintiff's business required that salesmen travel about the country to demonstrate and sell cars, and the facts show an implied intention on plaintiff's part to authorize another to act as such agent, a sale by the latter was binding on plaintiff, since such agent had implied authority to sell.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. ⇐103.]

6. PRINCIPAL AND AGENT ⇐103 — AGENCY — SALESMAN—AUTHORITY TO EMPLOY.

Where plaintiff's wife was left in general charge of his automobile agency and she employed one to act as a demonstrator and salesman, such being customary in the business, or necessary to carry it on, a sale by the employé was binding on plaintiff, since, under such circumstances, the wife had implied authority to so employ.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. ⇐103.]

7. PRINCIPAL AND AGENT §145—EXPRESS OR IMPLIED AUTHORITY—THIRD PERSON—KNOWLEDGE OF AUTHORITY—IMMATERIALITY.

Where the act by which it is sought to bind the principal was within the authority actually conferred by the principal either expressly or by implication, one contracting with the agent need not show that he had knowledge of such authority and acted on the faith of it, since under either form of authority the act of the agent is that of the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 496, 513-520; Dec. Dig. §145.]

8. PRINCIPAL AND AGENT §137—UNAUTHORIZED ACT OF AGENT—ESTOPPEL—HOW CREATED.

Liability on the principal's part for the unauthorized acts of his agent rests upon estoppel arising from words or conduct of the principal indicating the existence of authority in the agent to do the thing in question upon which there is a reliance in good faith.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 492-494; Dec. Dig. §137.]

9. PRINCIPAL AND AGENT §103—SALES—AGENCY—BARTER EXCLUDED.

In general, the power of the agent to sell does not include the power to barter.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 273-293, 353-359, 367; Dec. Dig. §103.]

10. PRINCIPAL AND AGENT §100—APPARENT AUTHORITY—DETERMINABLE—EFFECT.

In determining the question of apparent authority, the character of the service, together with the usual practice of agents in such employment, may be looked to, and the agent is held to have implied authority to do all those acts which are naturally and ordinarily done and reasonably necessary in such cases.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 262-273, 345, 364, 368-373; Dec. Dig. §100.]

11. CUSTOMS AND USAGES §4—SCOPE OF AGENT'S AUTHORITY—DURATION OF OUSTOM.

A custom or usage to enlarge an agent's express authority must be shown by clear and satisfactory evidence, and must have existed long enough to make it widely and generally known, and such as will warrant the presumption that the principal had it in view at the time of appointing the agent.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 3; Dec. Dig. §4.]

12. PRINCIPAL AND AGENT §123—AUTOMOBILE DEMONSTRATOR—POWER TO BARTER—EVIDENCE—SUFFICIENCY.

In an action by an automobile dealer to recover the value of a car alleged to have been bartered by his sales agent in excess of authority, evidence held insufficient to establish authority in the agent to barter under his express authority or that implied by custom.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 420-429; Dec. Dig. §123.]

13. PRINCIPAL AND AGENT §152—UNAUTHORIZED ACT—AUTOMOBILE—BARTER—EFFECT.

Where defendant procured an automobile by barter from one holding himself out as a sales agent for plaintiff, an automobile dealer, but who had no authority to barter, defendant was liable as for a conversion, since, in the absence of authority in the agent to barter implied by

custom or otherwise, defendant was bound at his peril to ascertain the agent's true authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 567-569; Dec. Dig. §152.]

14. PRINCIPAL AND AGENT §40—DEMONSTRATOR—AUTHORITY TO SELL—REVOCATION—SUFFICIENCY OF EVIDENCE.

In an action by an automobile dealer to recover the value of a car procured by defendant through barter with plaintiff's sales agent, evidence held insufficient to show a revocation of the agent's authority prior to such sale.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 63; Dec. Dig. §40.]

Appeal from District Court, Childress County; J. A. Nabors, Judge.

Action by M. A. Holmes against W. C. Tyner. From a judgment for defendant, plaintiff appeals. Reversed.

Fires & Diggs, of Childress, for appellant. Jos. H. Ayneworth, of Childress, for appellee.

HUFF, O. J. [1] The appellant, Holmes, instituted this suit for the conversion of an automobile of the alleged value of \$2,050, by appellee, Tyner, alleging the title in himself. The appellee, Tyner, answered, admitting the possession and alleged he purchased same through appellant's agent; that one Hawkins was the agent of appellant and brought the machine to Childress and exposed it to sale and claimed to be the agent of appellant, who it is alleged held Hawkins out as such and that appellee was informed by Hawkins and others that he was the agent of appellant; that Hawkins offered to sell the car and distributed literature of appellant and had possession of the car for the purpose of selling and demonstrating the car to prospective purchasers, and did show to appellant and others the car and held himself out as agent of appellant with power to sell, and solicited the sales of other cars of the same make and manufacture; that, after full notice of the acts of Hawkins, appellant paid divers and sundry costs and expense bills for him, and ratified and confirmed the acts of Hawkins, and directed Hawkins to proceed with the sale and to advertise and demonstrate the merits of the car and to seek and sell prospective purchasers for the car, and that thereby appellant was estopped to deny the right and authority of Hawkins to make the sale; that all of said acts of Hawkins were within the apparent scope of his authority, "and was within the ordinary and customary authority of one so using, demonstrating, and offering for sale cars when they are permitted to handle, demonstrate, and use cars, and that plaintiff well knew such to be the usual, ordinary, and customary object of one out so demonstrating, and, if the plaintiff did not in fact give and authorize the said Hawkins full power to make the sale in question that

said plaintiff was negligent in permitting the said Hawkins to make such use of the car and is now estopped to say that Hawkins had no such authority"; that appellant, relying upon the acts and conduct of Hawkins, and the permission of Hawkins by appellant to so act, which was known to appellant, or by the exercise of ordinary care could have been known to him, induced appellee to purchase the car and pay full value to Hawkins, to wit, \$950 cash and one E. M. F. car, as the consideration therefor, and thereby appellant was estopped to deny the agency.

Appellant, by supplemental petition, denied specifically all the allegations in the answer, and denied that appellee got possession of the car from an agent of appellant, or that he purchased the same from such agent, but that in acquiring possession thereof he did so by barter and trade with Hawkins and never paid the value of the car in cash to any person. It is admitted therein that Hawkins was in possession of the car, but was so unlawfully, etc. The fact of Hawkins' possession and the manner by which he obtained and held it was specifically alleged, showing a wrongful possession. The facts hereinafter set out will indicate the specific facts relied on as showing an unlawful possession as relied on and set out in the supplemental petition.

A verdict was rendered for the appellee, upon which judgment was entered. The appellant requested the court to instruct a verdict for him, and also, in his motion for new trial, requested that the verdict of the jury be set aside for the reason that there was no evidence supporting the verdict, because: (a) It is admitted in the pleadings that appellant was the owner of the car, and the evidence did not warrant the jury to find Hawkins was his agent to sell and use the car in Childress county; (b) if he was the agent to sell, he was not authorized to accept in part payment trade as alleged by appellee; (c) if prior to the sale he was the agent, such agency was revoked before the trade to appellee, and the agency was not at any time known to appellee; (d) that appellee by his own evidence shows that he dealt with Hawkins as the owner and not as an agent.

In stating our conclusions of the facts we shall state them from appellee's standpoint. Appellant, Holmes, at the time of the transaction, had the state agency for the Jackson cars, situated in Ft. Worth. The car in question was one of that make. The cars, when delivered to appellant, were paid for by him and he employed agents thereafter to resell them. About the 20th day of April, 1913, appellant turned the car over to J. A. Hawkins, as he testifies, to go up the Denver road as far as Alvord or Decator, and to bring to Ft. Worth some prospective purchasers, which Hawkins claimed to have, and to show them the Jackson cars at Ft. Worth. The

facts in this case show that Hawkins at some time thereafter went to Childress with the car in issue, and showed and tried to sell it, and represented that he had authority to do so. Mr. Knight, who it appears was the local agent for the Jackson car at Childress, by virtue of a contract entered into with appellant at some time before the sale, went with Hawkins to visit the appellee. On this trip Hawkins showed the car to appellee and the manner of its working and at this time gave appellee some literature with reference to the Jackson make of cars. T. F. Abbott, who during this transaction was employed as an agent for appellant in the sale of these cars, testified that at that time he resided in Ft. Worth and in the absence of both appellant and his wife managed the office at Ft. Worth. This witness says, about five days before Hawkins left with the car on April 20th, he (witness) returned from a trip and found Hawkins in the office and was introduced to him by Mrs. Holmes. This witness states that when he left to go to Clarendon (from the trip thereto, from which he had just returned when he first met Hawkins) appellant was not at the office and was out somewhere, and when he returned appellant was still out of the office, but during the time had been back and had gone away. At the time the witness got back Mrs. Holmes was in charge of the office. The witness testified Mrs. Holmes introduced him to Hawkins and he thinks Mrs. Holmes then said, "or something to the effect she had a salesman there. I do not remember her exact words, but that is nearly as I can remember them. We did not talk but little." Hawkins appears to be the person there referred to. At the direction of Mrs. Holmes, Hawkins took the witness home from the office in a car. After this first conversation with Mrs. Holmes with reference to Hawkins, witness asked Mrs. Holmes if she knew anything about him.

"She said she had 'phoned to the manager of the Carter car, Mr. Mathews, and that he said he was a good man but would steal anything he got his hands on. Mathews claimed the fellow had sold one of the tires off of a car and had put on an old one in its place, and I said, 'No business man in town would keep a man on that recommendation,' and I think she replied she would keep him and try him, or that was the meaning of it."

The witness also testified the only car other than the one in issue, that he knew of Hawkins taking out, was one on the evening he (witness) returned. He took out a gray Roadster and took some one in it to show it. The witness testified that Holmes himself turned the car over to Hawkins, who left with it for some point up the Denver, and witness' understanding was that he was to work some territory up there. He testified that he thinks Hawkins first stopped at Alvord, and that he knew he stopped at Wichita Falls from the fact that the office got hotel bills from there. The bill was not paid by Mrs. Holmes then nor after,

that he knew of. The next he heard of Hawkins was at Childress. He heard this either through Mr. or Mrs. Holmes. There was then something said about recalling him from Childress, and he thinks it was Mr. Holmes that mentioned that. At this point he testified:

"I came into the office about the time Mr. Holmes finished a telephone conversation with some one up here (Childress), and he told me he had told whoever he had talked to up here to take the car and put it in the garage, and that this man at this end of the line said there was a chance to sell it, and he told this man here to put it in the garage, or if it was sold to have the check or draft made out to M. A. Holmes."

A day or two before Holmes 'phoned, he said:

"He thought he would go after the car, or that he had gotten a letter from Hawkins, or perhaps a telegram, saying he would be in with the car in a day or two, with some prospects. Holmes said he would be in with the car and two or three men he thought he would sell cars to. Hawkins was in Childress at that time, I believe."

This witness testified the duties of a demonstrator was to go out and get hold of a man who looked like he wanted an automobile and to either bring him in or sell him, or both. He also stated:

"It was customary, while I was working for Mr. Holmes, for him or me, and for other parties working for him, to go out and bring in prospects and sell them at the office. If we could not sell them the model we had out and thought we could land them, we would bring them to the office. If they liked the model we had out, we would sell it to them."

He further stated he (witness) had no authority to sell except for cash, unless he got permission from the office.

"I frequently took in old cars when the trade was satisfactory to Mr. Holmes. Whenever he said it was all right, I took in old cars on new ones. So far as my knowledge of the automobile business goes, it is the usual and customary way of placing cars, where the customer requires it and the conditions necessary to make a trade, take an old car and make a reasonable value on it where you can get the old car at a price you can turn it quickly for cash and enough cash for the new car."

The appellee testified that he had seen the car for some time previous to its purchase, in and around Childress. The week previous to the time he traded for the car Hawkins came to his place with the car in company with Mr. Knight, the local agent for the Jackson car at Childress, and two other parties, and showed him the car. In the next week after the above visit Hawkins brought the car down to his place and they traded. He paid \$950 cash for the car; that is, he paid \$900 cash to Hawkins and reserved back \$50 which was deposited in the bank until he should receive some repairs from the agency at Ft. Worth and put in on the trade his old E. M. F. car. This and the money was the consideration for the auto in question. In answer to what Hawkins represented as to his being the agent and demonstrator for the car, he answered: "He said he— he talked like he was one of the main men

to me." He testified he had never seen Holmes prior to the trade or had any conversation with him or did any business with him. On the Monday following his purchase, the week before, he had a talk with Holmes in Childress at that time. Holmes said Hawkins was a demonstrator. When he bought the car he did not know Holmes was the owner. Hawkins told him he was the demonstrator of the car.

"I bought the car thinking he (Hawkins) was the agent for the car. You ask me if I did not think he owned it? I do not know what you might call it. I thought I was buying from the right man. Q. The man who owned it? A. Yes, sir; I thought he was a member of the outfit, and that is the reason I bought it. You ask me if it is not a fact I did not buy it relying on his representation that he was the agent? I will say that he made me think he was part of the firm. I thought then for that reason that I was buying it from the owner, and acting on that I did buy it. Up to that time Holmes had never done any act that had led me to believe this man Hawkins was the agent. He had never had any transaction with me to cause me to believe that, and he never made any statement to me to cause me to believe that. I never knew him at all before that time and did not know him until after I bought the car."

In one portion of his testimony, on direct examination, he said that he bought the car because he thought Hawkins was the agent of Holmes, which was one of the reasons for the purchase. On redirect examination he testified:

Hawkins said "he was a part owner of the firm down there. I relied on his statement, and what I saw and observed, and thought he had authority to sell the car."

Mrs. Caroline Holmes, the wife of the appellant, testified that her occupation was that of a housekeeper and assisting her husband in his business of selling automobiles; that the car in question, as she understood, was her husband's, and if it had ever been sold she did not know it; that she knew J. A. Hawkins and had had some business transactions with him in reference to the car in question; that after he had taken the car she learned that he was in Childress, Tex., by a draft drawn on them indorsed by Knight for \$25. She says she paid the draft on the indorsement of Knight and told Mr. Knight not to indorse any more drafts for Hawkins; that she never authorized Hawkins to sell or dispose of in any manner the automobile in question to anybody, and did not authorize its sale to the appellee, and that when she learned that Hawkins was in Childress with the car she 'phoned him some two or three times relative to the car and tried to get him to return it, and at last told him to place the car in some garage subject to the order of John Knight, the local distributor. Her husband was not at home, and she did not know what else to do. She testified that there was no expense bill paid for Hawkins prior to his going to Childress, but that she did pay one such expense bill by draft for \$25. She testified that if Hawkins was the agent for Holmes in Child-

reass she did not know it, but she did know that Knight was the local distributor there, and she knew of no authority given Hawkins to demonstrate in Childress county.

"I heard Mr. Holmes tell Mr. Knight he could sell the car to some person living in Childress, and if Knight did not make that sale for him to put the car in the garage; that he did not want Hawkins running it or making any more bills, and if Knight did sell the car to get the draft and send it to Mr. Holmes. Mr. Holmes' instructions were that, if Mr. Knight did not sell the car, for him (Knight) to leave it in the garage and Mr. Holmes would go for it. I tried to get Mr. Hawkins immediately after I got the draft to bring the car back"

—and that she did not know that Hawkins was trying to make a sale in Childress or any other place.

The appellant himself testified that he gave no authority to Hawkins to sell the car to Tyner or any one else; that the last time he saw the car before he saw it in Tyner's possession was the 20th or 25th of April. When Hawkins left with the car, he had known him about two weeks. He testified: That he or his wife did not employ Hawkins. "My wife usually managed the business while I was gone, and I was gone some of the time. No, she did not manage it during the month of April, 1913." That he let Hawkins take the car, and his wife knew nothing about it. The witness stated he let Hawkins have the car to go up the Denver road to Decatur and Alvord to bring some prospective purchasers in the car to Ft. Worth. He states that Mr. Abbott says when Hawkins took the car it was the 20th, but that he was under the impression that it was a week later, but he might be mistaken as to the date. He states that he heard of Hawkins at Childress on the 8th or 9th of May, and that he learned this upon his return from Michigan to Ft. Worth. That he had gone to see his mother, who was sick in Michigan, and that his wife had charge of the office during the time he was absent from the city. "My wife was in charge of the office while I was gone. She was my duly authorized agent during my absence. I have discussed this matter with her. I have not seen letters of messages to her from Hawkins. She simply looked after the business while I was away." He says that he never employed Hawkins for any purpose except to unload the cars, but that he let him have the car to go up after prospective purchasers, and that he did not take the car without his consent. After his return from Michigan he stated:

"I had a conversation over the 'phone with John Knight of Childress, and he told me he had the prospect for selling one car. He did not say he had a prospect for selling more than one. I did not tell him at that time to go ahead and sell this particular car that Hawkins had up here. I told him I had given Hawkins instructions on Saturday night to put the car in the garage and leave it there, and he (Knight) said he thought I was making a mistake, and I said 'If you can sell this car, all right, and, if you do, get a draft made out to me and send it to me, but I don't want Hawkins to have anything more to do with the car.'"

He says he left for Michigan on the 23d or 24th of April, and returned home about the 8th of May, and learned at that time from his wife that Hawkins was in Childress. That he called Hawkins over the 'phone, but did not get him when he first called, but did get him the next day. That he called through Mr. Knight, who was selling the Jackson car at that place. Knight told him that Hawkins was there, but he did not tell the witness that he was trying to sell the car. He did not talk to him much. That he told Knight not to let Hawkins have anything more to do with the car and told him he did not want Hawkins to have the car. Hawkins said, "All right." Hawkins and Knight were there together at the time, and he then had a conversation with Hawkins, who said he would put the car in the garage, and he told Hawkins that he and his wife would come up Saturday night and drive the car back Sunday. That he did not know when the car was sold after that time. The following Sunday he went to Childress. In the meantime he received a letter from a Mr. Hughes at Quanah, stating that Hawkins had sold the car. On receipt of the letter, he 'phoned Knight, who said the car was in the garage. "I told him there must be a mistake about it and about receiving the letter." Knight asked him to hold the 'phone until he could go and see about it, and he came back and said it was gone. He says the conversation he had with Knight in regard to a good prospect for selling the car was not after it had been sold; that that conversation was just a week previous to the last conversation over the 'phone about the car being gone. "At that time he told me he had a man he thought he could sell the car to, and he told me who it was, but I do not remember the name." The facts in this case further show that the trade between Hawkins and appellee was made about the 11th day of May, and that the letter from Hughes to appellant, notifying him of the sale, was received by appellant about the 16th of May, when he called up Knight making further inquiry about the car.

[2-8] The relation of agency does not depend upon express appointment, but it must be, and frequently is, implied from the words and conduct of the parties and the circumstances of the particular case. If, from the facts and circumstances, it appears that there was at least an implied intention to create the relation, it will by implication be held to exist. The appellee has not, it may be conceded, proved an express agency, constituting Hawkins appellant's agent; that is as made by himself; but we believe the facts and circumstances raise an implied intention to create the relation, and the court would not have been warranted in instructing a verdict or setting aside the verdict on the ground alone that no agency was shown, or no sufficient evidence of agency shown. *Mechem on Agency* (2d Ed.) vol. 1, § 708; *McAlpin v. Cassidy*, 17 Tex. 449; *Railway*

Co. v. Jones, 82 Tex. 156, 17 S. W. 534; *Bradstreet v. Gill*, 72 Tex. 115, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768. Again, we think the fact will warrant the inference that the wife of appellant was in charge and management of his business in the absence of appellant. True, he seeks by his testimony to limit her authority to employing hands to unload cars, etc.; but all the parties agree that she controlled the office and business in the absence of her husband. He was absent when Hawkins was employed by the wife, if Abbott's statement is correct, and while she was in the management of the business. A general agent for the management of the business has authority coextensive in scope with the business entrusted to him to do what is usual and customary to do in the business. Due consideration should be given to the character of the business, the manner in which it is usual to carry it on, and the manner in which it has been previously carried on. *Collins v. Cooper*, 65 Tex. 460; *Wright v. Blackwood*, 57 Tex. 644. If the acts done are reasonably necessary to keep the same a going concern, etc. *Sun Printing & Pub. Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366. The nature of appellant's business required the employment of salesmen to go out over the country in search of purchasers and to sell and demonstrate the cars. Such an agency, in order to succeed as a going concern, required such employment. If the facts and circumstances will warrant the inference that there was an implied intention to authorize Hawkins to make the sale of the car by the appellant, or if in the absence of appellant his wife was in management of the business and she then employed Hawkins to sell the car and such act was usual and customary in the conduct of such business or reasonably necessary to carry it on, then Hawkins would be such an agent. If Hawkins was such agent, by implication or by employment, of the wife, and if the sale to appellee was otherwise unobjectionable, the title passed to him, whether he knew of such agency or not. 2 *Corpus Juris*, § 215, on page 576; *Kempner v. Dillard*, 100 Tex. 505, 101 S. W. 437, 123 Am. St. Rep. 822; *Hamm v. Drew*, 83 Tex. 77, 18 S. W. 434; *Hackett v. Van Frank*, 105 Mo. App. 384, 79 S. W. 1013; *Simpkins on Contract and Sale* (3d Ed.) p. 1049.

[7-9] Where the act, by which it is sought to bind the principal, was within the authority actually conferred by the principal, whether expressly or impliedly, it is not necessary for a third party to show that he had knowledge of that authority and acted on the faith of it; for, if the facts and circumstances justified the implication of an agency, then the act of the agent is the act of the principal. This should not be confused with the principles which govern an unauthorized act of the agent, for then, if we understand correctly, such act must be such that the third party can invoke estoppel. We do not

think agency by estoppel is in this case. Estoppel can only be relied on when the third party knew and relied upon the words or conduct of the principal. It is essential, in order to estop a man to deny the authority of another to act for him, that his representations of authority, whether by word or by conduct, should have been believed and relied on in good faith by the person asserting the estoppel. *Mechem on Agency*, vol. 1, 722 et seq.; 2 *Corpus Juris*, § 73, *Agency*, p. 465; *Simpkins, Contract and Sales* (3d Ed.) p. 1012 et seq. The facts in this case negative any reliance by appellee upon the words or acts of appellant. He did not know him; never saw him; knew nothing of his business. The mere possession of the car by Hawkins was not sufficient to invoke estoppel. Assuming the testimony is sufficient to support a finding that there was an implied authority in Hawkins to sell the car or to support the finding that the wife, as manager, in the absence of her husband, had authority to employ salesmen, and that she did so employ Hawkins, the question yet remains: Had he authority to sell for anything but cash? In other words, could he barter the car? As a general rule, a power to sell does not include the power to barter. *Stember v. Keene*, 152 S. W. 663; *Griffith v. Morrison*, 58 Tex. 46; *Fitzhugh v. Franco, etc.*, 81 Tex. 306, 16 S. W. 1078; *Equitable Life, etc., v. Cole*, 13 Tex. Civ. App. 486, 35 S. W. 720; *Low v. Moore*, 31 Tex. Civ. App. 460, 72 S. W. 421. There is no implied authority to exchange or barter property in the contract of agency to sell. *Mechem on Agency* (2d Ed.) vol. 1, § 895; *Kearns v. Nickse*, 80 Conn. 23, 66 Atl. 779, 10 L. R. A. (N. S.) 1118, 10 Ann. Cas. 420.

[10] In determining the question of apparent authority, the character of the service, together with the usual practice of agents in such employment, may be looked to, and the agent is held to have implied authority to do all those acts naturally and ordinarily done in such cases, which are reasonably necessary and proper to be done. *Mechem on Agency*, vol. 1, § 715. The appellee in this case pleaded authority to sell, such as was within the ordinary and customary authority. As above suggested, the law will not imply authority to barter. Clearly the evidence does not raise such authority in the implied agency in this case. On the other hand, it is shown that no exchange was authorized by Holmes to be made by his agents without being submitted to him for approval. The evidence of Abbott is not sufficient to establish a custom or usage. He only purported to state in so far as he knew, it was the custom, etc. He did not say he knew the custom.

[11-13] A usage or custom to affect the agent's power must be shown by clear and satisfactory evidence and must have existed for a length of time so as to become widely and generally known, such as will warrant the presumption that the principal had it in

view at the time of appointing the agent. Mechem on Agency, vol. 1, § 716; Wootters v. Kaufman, 67 Tex. 488, 8 S. W. 465. In this case there was no allegation that the exchange of property by the agent was the usage or custom known or practiced by agents generally. This must be alleged. We do not think the facts in this case, or the law, authorized the appellee to assume that Hawkins had authority to exchange the car for an old one. In this exchange he acted at his peril, and he was bound to take notice of the assumed agent's authority. Baker v. Kellett, etc., 84 S. W. 661; Sackville v. Storey, 149 S. W. 239. On this ground we think the court should have granted a new trial.

[14] We are not inclined to believe that the evidence in this case conclusively shows that appellant revoked the authority of Hawkins prior to the sale of the car. After he learned Hawkins was at Childress with the car, and after he was informed of the proposed purchaser, he instructed that if it was sold to send the draft to him. For a week he did nothing about the car, and not then until he received a letter from Hughes. The mere fact that he directed the car to be placed in the garage did not necessarily evidence the fact that he revoked the power to sell the car. Appellee, as is shown by the testimony, was evidently the proposed purchaser. Knight and Hawkins had visited him previously thereto with the car, and it may well be inferred this was the purchase to whom Knight referred when he informed appellant he was making a mistake. At any rate, when so admonished by Knight, he directed the sale of the car and if made to send him the draft. The evidence is not conclusive in our judgment that appellant revoked the authority of Hawkins to sell the car, if any such was granted him, before the sale to appellee.

It will not be necessary to discuss the other assignments. However, we think the charge of the court is subject to some of the criticisms made by appellant, as that it assumed the wife was the agent of appellant; and with reference to that part which instructed the jury if they found the car was sold for the consideration he did sell it for, or without any limitation as to what the consideration should be, etc. The law fixes the limitation for the consideration of the car as cash, not barter nor trade. We think the court should not have charged on estoppel, and that the fifth paragraph of his charge was therefore error. We believe that he should have excluded the testimony of Abbott, complained of in the twenty-seventh assignment of error, for the reasons heretofore suggested by us. The other exceptions to the testimony of the declarations made by Hawkins, with reference to his agency, we

think were properly admitted under the facts of this case.

For the reasons above suggested, the case will be reversed and remanded.

GRISHAM et al. v. WARD et al. (No. 8251.)
(Court of Civil Appeals of Texas. Ft. Worth.
Oct. 30, 1915.)

1. EXECUTION \Leftrightarrow 201—CLAIMS BY THIRD PERSONS—ISSUES AND QUESTIONS DETERMINABLE.

On the trial of a claim by third persons to property levied upon under an execution, there was no valid objection to the enforcement of an agreement by the claimants to pay the judgments by virtue of which the executions were issued by the delivery of the property levied upon at a specified price.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 531, 582; Dec. Dig. \Leftrightarrow 201.]

2. COMPROMISE AND SETTLEMENT \Leftrightarrow 6—CONSIDERATION—SUFFICIENCY.

Where a judgment debtor's sons were living with him as members of his family, and there was support for the judgment creditor's claim that hay levied upon, claimed by the sons, was the property of the judgment debtor, an agreement by the sons to pay the judgments by the delivery of the hay at a price exceeding its market price was not without consideration, since the mutual promises of the parties to thus settle the legal controversies existing between them constituted a sufficient consideration, as agreements for the compromise and settlement of disputes are favorably regarded, and are supported not only as beneficial in themselves, but as conducive to peace and harmony.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 35-50; Dec. Dig. \Leftrightarrow 6.]

3. EXECUTION \Leftrightarrow 184—CLAIMS BY THIRD PERSONS—AMENDMENT OF CLAIM.

Where, though a claimant's oath alleging that property levied upon under execution was the property of the claimant and his minor brother did not specifically aver that he was acting for his minor brother as well as for himself, this was evident on the face of the paper, the court did not err in permitting an amendment so as to include a specific allegation that in making the claim he was also acting for his brother.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 549-551; Dec. Dig. \Leftrightarrow 184.]

Appeal from Nolan County Court; John H. Cochran, Jr., Judge.

Proceeding on a claim by J. L. Ward and another to property levied upon under executions in favor of R. N. Grisham and others. From a judgment in favor of the claimants, the execution creditors appeal. Reversed and remanded.

R. N. Grisham, and J. S. Grisham, both of Sweetwater, for appellants. Beall & Douthit, of Sweetwater, and E. R. Spencer, for appellees.

CONNER, C. J. On the 7th day of December appellants R. N. Grisham, J. J. Monday, and Mrs. J. F. Eldson caused the levy of several writs of execution in their favor upon 750 bales of hay as the property of the judgment debtor, J. W. Ward, the value of

the property so seized being fixed by the sheriff at \$282.50. On December 12th thereafter appellee J. L. Ward, for himself and minor brother, W. H. Ward, presented to the county court a claimant's oath and bond, alleging that the hay levied upon was the joint property of the claimants. Thereafter issues in writing were presented by the respective parties for the trial of the right to the property under the title of our statutes relating to that subject (See Vernon's Sayles' Texas Civil Statutes, title 129), and the case went to trial before the judge without the intervention of a jury, and resulted in a judgment in favor of appellees J. L. Ward and W. H. Ward. From this judgment appellants have duly prosecuted an appeal.

[1, 2] Among other pleadings presented by appellants was a special plea to the effect that, on or about the 14th day of December, 1914, J. L. Ward claimed the hay as his own, but agreed with appellant R. N. Grisham, acting for himself and the other appellants, that he, J. L. Ward, would pay off and discharge the judgments by virtue of which the executions had issued by the delivery to Grisham of hay at the price of 65 cents per bale. It was alleged that Grisham, for himself and other appellants, assented to so receive said hay and discharge the judgment at the price per bale stated, notwithstanding the fact that the market price of the hay was but 35 cents per bale. The prayer of the plea was to the effect that, if upon the trial it should be found that J. L. Ward owned the hay, or any part thereof, the agreement might be enforced. The court sustained exceptions to this plea, and refused to hear proof in its support, to which action of the court appellants have assigned error.

Under the circumstances alleged we see no valid objection to the enforcement of this plea. The mutual promises of the parties to thus settle the legal controversies existing between them would seem to constitute a sufficient consideration for the agreement. See *Hilliard v. White*, 31 S. W. 553; *Little v. Allen*, 56 Tex. 133. Indeed, the agreement is not attacked on the ground of a want of consideration, and no other sufficient objection to its enforcement occurs to us, or has been presented. Agreements for the compromise and settlement of disputes are favorably regarded both in courts of law and equity, and are supported, not only as beneficial in themselves, but as conducive to peace and harmony. See 8 Cyc. 535; 5 Ruling Case Law, § 23, bottom page 901; *Taylor Co. v. Baines Gro. Co.*, 31 Tex. Civ. App. 385, 72 S. W. 260. This principle, we think, has proper application under the circumstances shown here. It appears that J. L. Ward and W. H. Ward, the claimants, were sons of J. W. Ward, the defendant in the executions; that the sons lived with the father as constituent members of the family, and appellants' claim that the property levied upon

was in fact owned by J. W. Ward, the father, was not without at least circumstantial evidence in its support. We conclude that under the circumstances the court erred in the particulars indicated.

[3] In the original oath made and filed by J. L. Ward, it was not specifically averred that J. L. Ward was acting for the minor, W. H. Ward. The writing, however, declared that the hay levied upon was the property of J. L. Ward and W. H. Ward, and it is evident on the face of the paper that J. L. Ward was acting for his brother. The action of the court, therefore, in later permitting an amendment of the oath so as to include a specific allegation that J. L. Ward in making the claim was acting also for his brother, W. H. Ward, cannot be said to constitute error.

We find nothing in other assignments requiring discussion, but for the error first noted it is ordered that the judgment be reversed, and the cause remanded.

ELKINS v. HOULIHAN et al. (No. 8259.)
(Court of Civil Appeals of Texas. Ft. Worth.
June 19, 1915. Rehearing Denied
Oct. 16, 1915.)

APPEAL AND ERROR 6784 — TAKING APPEAL — NOTICE OF APPEAL — STATUTES.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 2084, providing that an appeal may be taken during the term at which final judgment is rendered by notice of appeal in open court within 2 days thereafter or 2 days after judgment overruling a motion for a new trial, and by filing an appeal bond as required by law within 20 days after the term, appellant, whose notice of appeal was not given before the last day of the term, and who filed no appeal bond within 20 days after the expiration of the term or at any time did not perfect his appeal so as to give the Court of Civil Appeals jurisdiction, and it will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3126, 3127; Dec. Dig. 6784.]

Appeal from Cooke County Court; R. V. Bell, Judge.

Action between R. P. Elkins and J. J. Houlihan and others. Judgment for Houlihan and others, and Elkins appeals. Dismissed.

Stuart, Bell & Moore, of Gainesville, for appellant. Davis & Davis and C. R. Pearman, all of Gainesville, for appellees.

On Motion to Dismiss Appeal.

BUCK, J. Appellees have filed their motion to dismiss this appeal, predicated upon the following grounds, to wit: First, that the judgment attempted to be appealed from was rendered December 31, 1914; second, that the December term of the county court of Cooke county ended on the day preceding the first Monday in January, 1915, which was January 4th of that year; third, that the motion for new trial was not acted upon

during the December term, nor was notice of appeal given during said term, as provided in article 2084, Vernon's Sayles' Texas Civil Statutes, nor was an appeal bond filed within the 20 days after the expiration of the term, as provided by law, in order to give this court jurisdiction.

Appellees cite in support of their contention the case of Wells Fargo & Co. Express v. Mitchell, which case is reported on the original hearing on motion to dismiss appeal in 165 S. W. 139. On this hearing the Court of Civil Appeals for the Seventh District overruled the motion to dismiss, but it appears from the motion of appellees and the written agreements of both appellees and appellant that, on motion for rehearing, the Amarillo court granted appellees' motion for rehearing, and dismissed the appeal. While neither appellees nor appellant cites us to the report containing the opinion of the court on this last-mentioned action, yet there appears attached to appellees' argument, in support of their motion to dismiss the appeal in this case, what purports to be a copy of the opinion of the Amarillo court on motion for rehearing, which we presume to be correct. Appellant concedes that the Wells Fargo Case is authority in support of appellees' motion, but urges that the majority of the court for the Seventh district, Chief Justice Huff dissenting, are in error in holding that the case of Hughes v. Doyle, 91 Tex. 421, 44 S. W. 65, and other cases cited on the motion for rehearing, support the conclusions reached. But, irrespective of the question discussed and the conclusions reached by the Amarillo court in the case cited, as to the authority of the commissioners' court to prescribe the number of terms of the county court which may be held in any year and the time when such terms shall begin and end, we are confronted with the statement in the caption of the transcript that the term of the county court of Cooke county in which this judgment was rendered was "a term of the county court begun and holden at Gainesville, Tex., and for the county of Cooke, before Hon. R. V. Bell, judge of said court, on the 7th day of December, A. D. 1914, and ending on the 31st day of December, A. D. 1914." Thus it will be seen that, irrespective of the question as to whether or not the December term of the county court might have been legally caused to continue over and beyond January 4, 1915, the only evidence before us is that said December term of the court ended December 31, 1914, and that no notice of appeal was given by appellant prior to said last day of the term, and no appeal bond appears in the record as having been filed within 20 days after the expiration of the December term, or at any other time.

Under such a state of the record, we hold that the appellant has not perfected his ap-

peal so as to give this court jurisdiction, and therefore appellees' motion to dismiss is granted.

Appeal dismissed.

ARANSAS HARBOR TERMINAL RY. v. SIMS. (No. 5507.)*

(Court of Civil Appeals of Texas. San Antonio. Oct. 20, 1915. Rehearing Denied Nov. 17, 1915.)

1. CARRIERS—§347—CARRIAGE OF PASSENGERS—ALIGHTING—CONTRIBUTORY NEGLIGENCE.

Where a passenger, with weak eyes, wearing glasses, and weighing 246 pounds, in attempting to alight in the daytime from a railroad train by taking hold of the handrail with both hands, stepped off and was injured, the distance to the ground being about three feet and there being no footstool, such action did not constitute contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. §347.]

2. TRIAL—§352—ACTION FOR INJURIES—SUBMISSION OF ISSUES—FORM OF INTERROGATORIES.

In an action against a railroad company for injuries to a passenger in stepping from a train, the submission of the issue whether defendant was negligent, as negligence of a carrier of passengers was defined in an instruction given, was not reversible error on account of the form of the question as failing to limit the jury to the consideration of the facts raised by the pleadings; the court having informed the jury that the case would be submitted on the issues raised thereby.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 840-842, 844, 845; Dec. Dig. §352.]

Appeal from District Court, San Patricio County; W. W. Walling, Special Judge.

Action by Exer Sims against the Aransas Harbor Terminal Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

Denman, Franklin & McGown, of San Antonio, for appellant. Jas. G. Cook and M. C. Nelson, both of Sinton, for appellee.

MOURSUND, J. This is an appeal from a judgment for \$1,000, recovered by Miss Exer Sims against the Aransas Harbor Terminal Company on account of injuries sustained by her in alighting from a train, which injuries she alleged were caused by the negligence of said terminal company in failing to provide and maintain a safe way of departing from its cars, in failing to provide reasonably safe appliances to enable her to alight from the car, and in failing to provide assistance to her in alighting from the car. Defendant denied the allegations of the petition, and pleaded that plaintiff was guilty of contributory negligence which proximately caused her injuries.

[1] Appellant contends that the undisputed evidence shows that appellee was guilty of contributory negligence which directly and proximately caused her injuries. Appellee

was a passenger on appellant's train, which arrived at Aransas Pass in the daytime. All of the passengers got off, appellee being the last one to leave the car. In alighting, she took hold of the rod with both hands and stepped off. The distance was about three feet. She weighed 246 pounds. Her eyes were weak, and she wore glasses. She did not realize that the distance from the step to the ground was so great. She had on three-button Oxford shoes, and when she placed her foot on the ground and rested her weight on it, her ankle turned and was badly sprained. She was reasonably active, considering her weight, and had not theretofore fallen on account of her ankle giving way. Appellant failed to furnish any stool or to assist the passengers in any way in alighting from the car. This evidence does not conclusively show that plaintiff acted otherwise than an ordinarily prudent person would have acted under similar circumstances, and it cannot be held that she was guilty of contributory negligence as a matter of law. *M. P. Ry. v. Watson*, 72 Tex. 631, 10 S. W. 731; *G. C. & S. F. Ry. v. Vinson*, 24 S. W. 956; *T. & P. Ry. v. McLane*, 32 S. W. 776; *Weatherford, M. W. & N. W. Ry. v. White*, 55 Tex. Civ. App. 32, 118 S. W. 799.

[2] The court, after defining the term, "negligence," when applied to carriers of passengers, submitted the issue as follows:

"Was the defendant, Aransas Harbor Terminal Railway, negligent, as negligence of a carrier of passengers is above defined?"

Defendant, at the proper time, filed the following objections to such question:

"(a) The court does not state therein the acts of negligence charged in plaintiff's petition, but leaves it to the jury to determine what acts of negligence are charged in said petition; (b) because said petition charges several alleged acts as constituting a breach of defendant's duty, and avers what plaintiff erroneously construes to be defendant's duty, and the submission of the issue as framed by the court leaves it to the jury, not to find as to the alleged acts of omission or commission by defendant charged as breaches of duty by defendant, but to determine whether defendant has been negligent, thus leaving to the jury the decision of a legal question and the determination of the construction of plaintiff in her petition as to what are defendant's duties, and whether same have been so breached as to constitute negligence."

These objections were overruled, and error is assigned to the action of the court in submitting such issue. The charge should be so drawn as to direct the jury to the consideration of the specific acts of negligence alleged in the petition. Appellee contends that the question submitted was correct as far as it went, and was not an affirmative misdirection of the jury, but an omission of which advantage could not be taken without requesting the submission of an issue which would supply the omission, or requesting an instruction limiting the jury, in deciding the issue, to the acts alleged to have caused the injury. This contention is sustained by cases decided prior to the passage

of the amendment to article 1971, Revised Statutes 1911 (Acts 33d Leg. c. 59, § 3 [Vernon's Sayles' Ann. Civ. St. 1914, art. 1971]), requiring all objections to the charge to be made before it is given. See *Dallas Con. Elec. Ry. Co. v. Motwiler*, 101 Tex. 521, 109 S. W. 918; *S. A. & A. P. Ry. v. Long*, 19 Tex. Civ. App. 649, 48 S. W. 599. The reasons for not reversing a case on account of omissions were much more cogent when the court was not apprised of such omissions until after the verdict was returned, but as the amendment made no change in the rules to be applied with reference to omissions, it seems it is necessary, in order to be in a position to complain of an omission, that the party should present and request the giving of a charge covering the matter omitted. *Selden Brick Construction Co. v. Kelley*, 168 S. W. 985. But in this case, even if that rule should not be applied, no reversal should take place on account of the form of the question. The court, in its charge, informed the jury that the case would be submitted upon special issues raised "by the pleadings and the evidence," and the form of the question as submitted was not calculated to cause the jury to base its verdict upon matters proved but not alleged. Besides the statement of facts does not disclose any evidence of acts of omission or commission on the part of defendant causing injury to plaintiff other than those pleaded, so defendant could not have been harmed by the manner in which the issue was submitted. *Dallas Con. Elec. St. Ry. Co. v. Motwiler*, supra.

Appellant, by its third assignment of error, attacks the definition of negligence given by the court. The definition was correct. *H. & T. C. Ry. Co. v. Dotson*, 15 Tex. Civ. App. 73, 38 S. W. 642; *M., K. & T. Ry. Co. v. Kemp*, 173 S. W. 535; *St. Louis, A. & T. Ry. Co. v. Finley*, 79 Tex. 85, 15 S. W. 267; *I. & G. N. Ry. Co. v. Welsh*, 86 Tex. 203, 24 S. W. 391, 40 Am. St. Rep. 829. The matter of the failure to draw the issues so as to require a finding in answer to inquiry concerning the acts of negligence pleaded is again complained of under this assignment, but, having been fully discussed in disposing of the preceding assignment, it is unnecessary to say anything further concerning the same.

By the last assignment appellant attacks the sufficiency of the evidence to sustain the finding that appellee was not guilty of contributory negligence. We have already held that the evidence did not show contributory negligence as a matter of law, and this assignment, as we construe it, raises the same issue; but, if intended as a contention that the great preponderance of the evidence shows contributory negligence, and that the judgment is therefore manifestly unjust, the same must be overruled, for we consider the evidence to be of such character as to war-

rant the jury in finding that appellee was not guilty of contributory negligence.

The judgment is affirmed.

SCRUGGS v. E. L. WOODLEY LUMBER CO.
(No. 828.)

(Court of Civil Appeals of Texas. Amarillo. Oct. 30, 1915.)

1. APPEAL AND ERROR — 194—GROUNDS OF REVIEW—EXCEPTION.

The fact that a special exception in plaintiff's supplemental petition was not in due order of pleading was no cause for reversal, where no exception to the supplemental petition was taken in the court below, on the ground that it was not in due order of pleading.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241-1246; Dec. Dig. — 194.]

2. PAYMENT — 9—INCUMBERED PROPERTY—LEGAL TENDER.

A creditor is not required to accept incumbered property in settlement of his account and to assume the incumbrance, but need accept nothing but a legal tender.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 38, 40, 41, 49, 53; Dec. Dig. — 9.]

3. EVIDENCE — 354—BOOKS OF ACCOUNT—FIRST PERMANENT ENTRY—ORIGINAL ENTRY.

In an action for the balance due on a bill of lumber furnished to build a residence on land, the plaintiff's daybook or journal, kept as a book of account in the regular course of business, and the first book in which the items of sale entered by plaintiff's yardmen on slips torn from a pad were first permanently entered, after the preliminary proof, was admissible as a book of original entry.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1433; Dec. Dig. — 354.]

4. EVIDENCE — 354—BOOKS OF ACCOUNT—COLLATERAL FACTS.

Under the rule as to the admission of books of original entry containing items of account, books not containing charges made in the regular course of business are inadmissible to prove the collateral matters shown therein, which matters must be shown by independent testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1433; Dec. Dig. — 354.]

5. EVIDENCE — 354—BOOKS OF ACCOUNT—ALTERATION.

In an action for the balance due on a bill of lumber furnished to build a residence upon land, legal title to which was in defendant, who had contracted to convey it to one S. on payment of a certain sum, an account book, showing charges against J. F. or J. F. S., was not inadmissible because plaintiff's manager wrote after S.'s name the word "residence," where it appeared that S. was procuring material about the same time, and where there was no indication of fraudulent intent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1433; Dec. Dig. — 354.]

6. SALES — 53—ACTION FOR PRICE—QUESTION FOR JURY.

In an action for the balance due on a bill of lumber furnished to build a residence upon land, the legal title to which was in defendant, but which he had contracted to convey to one S. on payment of a certain amount, evidence

held to make defendant's agreement to pay therefor a question for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 145-151; Dec. Dig. — 53.]

7. TRIAL — 251—INSTRUCTIONS—PLEADING.

In such action, where the plaintiff did not plead any estoppel or waiver as against the defendant, an instruction that if defendant waived the size of the house, or knew the size of the house actually built, plaintiff could recover, and that defendant would be estopped to claim that the lumber was furnished for a house of that size for which there had been no agreement, should not have been given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. — 251.]

Appeal from Wheeler County Court; M. M. Miller, Judge.

Action by the E. L. Woodley Lumber Company against W. C. Scruggs. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

H. B. Hill, of Shamrock, and C. E. Gustavus and M. J. R. Jackson, both of Amarillo, for appellant. M. Reynolds and C. E. McVey, both of Shamrock, for appellee.

HUFF, C. J. This was a suit to recover the balance due appellee for the sum of \$391.43, on a bill of lumber furnished to build a residence upon land, the legal title to which was in appellant, but who had contracted with one Smith to deed the land to him upon the payment of certain sums of money. It is alleged, in effect, that appellant made the order for the lumber and, upon a sufficient consideration, agreed to pay the bill upon the contract so entered into with appellant. Appellee delivered the lumber to Smith, who erected the house upon the land, to which appellant had the legal title. There was a verdict and judgment in favor of appellee for the amount sued for.

The first assignment will be overruled. The facts are sufficient to raise the question of an agreement; that is, that the minds of the parties met.

[1, 2] The second assignment will be overruled. The fact that special exception No. 6 in appellee's supplemental petition was not in due order of pleading is no cause for reversal on the ground that the court sustained the exception to paragraph 6 of appellant's answer. This was a formal matter, and an exception should have been presented in the court below to the exception contained in the supplemental petition on the ground that it was not in due order of pleading. The exception will not be entertained in this court, where it is made for the first time. We think the court properly sustained the exception. We know of no rule of law or equity that will require a creditor to accept in settlement of his account property incumbered by indebtedness and to assume such indebtedness. The appellee was not required in law to accept anything but a legal tender.

[3] Under the third assignment it is urged

that the shopbooks of appellee should not have been admitted in evidence. The bill taken by appellant urges that this book was not the book of original entry. It appears to have been the daybook or journal. The testimony to which appellant refers as showing the book not to be one of original entry is to the effect that appellee was a lumber company and dealer in lumber. In making sales the yardmen noted on a tablet or pad the sales made, to whom made, and the articles sold. This pad or slip was turned in to the bookkeeper, who entered the items from this slip of paper which had been torn out of a pad by the yardman making the sale or delivering the article. Both the manager and bookkeeper testified as to the method, and the bookkeeper who made the entries testified as to the correctness of the books, and that he made the entries in the daybooks or journal. This book is shown by the testimony to be the first book of permanent entry. The objection here urged is that:

"The tickets were the matters of original entry and were the basis of the charges in such book, and that the tickets were the first and original entry."

It will be observed that there was no exception that the book kept, and the entries made were not entered in due course of business, and not correctly kept or proven up by the proper parties making them; the only objection being that the book was not the book of original entry. We shall, for the purpose of this opinion, presume all the necessary preliminary proof was made, and consider the sole question as to whether this was the book of original entry within the meaning of the rule. In *Railway Co. v. Johnson*, 7 S. W. 838, the Supreme Court, speaking through Judge Gaines, said:

"It seems, however, pretty well established that the first permanent records of the transactions by the creditor are to be deemed original entries, if made within a short time after the transactions themselves, although the items may have been previously entered, as a temporary assistance to the memory, upon some slate, book, paper, or other substance not intended to be preserved. In an old case this court admitted the rule generally recognized in the courts of this country, but strongly animadverted upon it as a dangerous innovation of the principles of the common law, and refused to extend it, in cases of merchant's account, beyond such articles as are usually sold by a merchant in course of his business. *Cole v. Dial*, 8 Tex. 347. It is usually confined to accounts for labor performed, or to goods sold by regular dealers in merchandise."

In the case then under consideration, the court refused to extend the rule to transactions between shippers of grain and the railroad. The appellant cites the case of *Cathey v. Railway Co.*, 104 Tex. 39, 133 S. W. 417, 33 L. R. A. (N. S.) 103. In that case the register of the railway company showed the time trains pass the yards. This register was made up from slips or cards prepared and furnished the keeper of the register by the employees operating the trains. It was held these slips or cards were original evidence.

In the case cited Judge Ramsey, who rendered the opinion of the court, cited the *Johnson Case*, evidencing thereby the shop rule would not be extended to registers of railroads as to the movement of its trains. In the case of *Guthrie v. Mann*, 35 S. W. 710, cited by appellant, the court simply held the books were not competent to prove a receipt, but the receipt itself should be proven. *Pohl v. Bradford*, 25 S. W. 984, held, as it is universally held, under the shopbook rule, that the ledger is not admissible where it is shown to have been made up from the daybook or journal. In *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565, it is held the books of original entry should be produced or accounted for, and that items on the account which do not appear to be such as were usually dealt in by the business could not be proven by the books.

[4] Books are not admissible under this rule, unless they are used in the regular course of business and kept by the parties as books of account. Hence books for some purpose other than that of making charges in the course of business do not fall under the rule or items entered in account books which are not such as are handled in the regular course of the business, and therefore cannot be proved by the books. It is the general holding, under this rule, that collateral facts cannot be shown by the books. If other facts, aside from the sale and delivery of the articles or the performance of the work and labor are necessary to make out the case, these facts cannot be established by the books or affidavit of the party, but must be made out by independent testimony. The cases cited by appellant evidently had in view these general principles in deciding the cases then in hand. *Mr. Jones on Evidence*, vol. 3, § 569, discusses the question now involved, as follows:

"In addition to the requirement that the entries in the book of account be made in the regular course of business, it is equally essential that they constitute the party's original entries or the first permanent records of the transaction in question, in order to be admissible in evidence. Thus, if the entries are made in a daybook or journal and transferred thence to a ledger, the entries in the ledger are not competent, but it is no objection to the book, if otherwise regular, that the entries which they contain were first made temporarily. * * * The former strict idea of what constituted original entries has been modified to fit the necessities of new business conditions. Inasmuch as under the modern methods of extensive business houses the information relative to the transactions constituting the accounts must pass through various hands before being permanently recorded, some system of temporary memoranda preparatory to the permanent records is necessary to insure convenience as well as accuracy. It would be impracticable to preserve, for any length of time, the tags, slips, or tokens constituting such original memoranda, and impossible, in view of the changing of employees, to obtain the testimony of the persons who made the temporary memoranda or conducted the transaction. Hence, following the rule of necessity, the courts do not regard such temporary memoranda as the originals, but look to

the permanent records as such original entries when properly verified by a suppletory oath."

See, also, Elliott on Evidence, vol. 1, §§ 459, 460; Rogers v. O'Barr et al., 81 S. W. 750; Barclay v. Deyerle, 53 Tex. Civ. App. 236, 116 S. W., on page 125. The books in this case clearly fall under the shopbook rule, and we think it is sufficient to show that the daybook or journal is the first permanent book of entry, and that, if the other necessary requirements are shown, is admissible, and that the slips of paper, used as memoranda, are not, under this rule, the original entry, such as will require their production. This assignment will be overruled.

[6] The fourth assignment urges the trial court should have excluded the books because it was shown that they had been altered. The account appears to be in the name of J. F. or J. Frank Smith, Residence. The manager says after the bookkeeper made the entries that he, the manager, wrote after Smith's name, "residence." We find nothing in the fact that the word "residence" was written in the account to indicate a fraudulent appearance. It appears Smith was procuring material about the same time for a church that he was procuring material for the house. We think the explanation was sufficient, and if it satisfied the trial court as to the appearance of the books, we think there would be no error shown requiring a reversal of the case. Jones on Evidence, vol. 3, § 576.

The fifth, seventh, and eighth assignments are overruled for the reasons given under the first assignment.

[6] The evidence presents a conflict as to whether appellant and appellee reached an agreement. If appellee's witnesses are to be believed, appellant agreed to pay and ordered the lumber to build the house. He did so for his own interest and financial benefit, and the inference may be drawn therefrom that he left the size the house should be to the determination of Smith. Appellant owned the land on which the house was being erected, that is, he had the legal title thereto and had contracted with Smith to deed him the property if Smith paid for it, and the testimony indicates Smith had practically defaulted before the lumber was delivered. The circumstances, we think, in this case, are sufficient to raise the issue presented by the trial court for the jury's finding.

[7] We believe the court, however, was in error in giving appellee's specially requested charge No. 3, which substantially instructed the jury that if appellant waived the size of the house, or, knowing it, that is, the size of the house actually built, that appellee could recover, or that appellant would be estopped to claim the lumber was furnished for a house of that size, for which there had been no agreement. There was no estoppel or waiver pleaded by appellee. Under the pleadings this charge should not have been

given. We doubt the sufficiency of the testimony to sustain the question of waiver or estoppel; however, we will not, at this time, hold the court was in error because of the insufficiency of the testimony. It occurs to us the only issue in the case was whether there was entered into the agreement alleged. If there was, appellant was liable; if not, he was not. Under the conflict and the peculiar state of facts in this case, this charge was calculated to divert the attention of the jury from the issue presented by the pleadings. Assignment No. 6 will be sustained, which will require a reversal of this case.

Reversed and remanded.

KING et ux. v. COLLINS. (No. 472.) *

(Court of Civil Appeals of Texas. El Paso.
Oct. 28, 1915. Rehearing Denied Nov.
18, 1915.)

1. CONTRACTS \S 332—ACTIONS—PETITION—SUFFICIENCY TO SUPPORT VERDICT.

A petition alleged that plaintiff contracted with defendant to install the plumbing and heating in a building, that the contract provided for payment upon architects' estimates as the work progressed, that payment of an estimate was refused, whereupon plaintiff abandoned the contract, but that he afterwards finished the work by special agreement with defendant, that there was due and owing him for work performed and material furnished \$1,200, after deducting \$1,300 theretofore paid, and after deducting from the contract price of \$2,700, the reasonable cost and expense of installing the heating and plumbing, which sum of \$1,200 was the fair and reasonable value over and above the amount paid for the work and material of which defendant had availed himself, and which he had used, kept, and retained. Held that, in the absence of an exception, the petition was sufficient to authorize a charge and a verdict either upon quantum meruit or for the balance of the contract price, as the amount due could be definitely ascertained in view of the allegation that the work was to be paid for upon estimates as the work progressed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1615-1639; Dec. Dig. \S 332.]

2. APPEAL AND ERROR \S 1066 — HARMLESS ERROR—ERRORS NOT AFFECTING RESULT.

A judgment would not be reversed on the ground that the petition stated a cause of action on a quantum meruit, and the charge authorized a recovery of the balance due under a contract, where there was no question as to the reasonable value of the work done and material furnished, and there could therefore have been no other verdict rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. \S 1066.]

3. MECHANICS' LIENS \S 93—PERSONS ENTITLED—STATUTORY PROVISIONS.

Under Rev. St. 1911, art. 5621, providing that any person or firm, etc., who may labor or furnish material, etc., to erect any house or improvement, shall have a lien on such house, building, etc., and all its properties, and on the lots of land necessarily connected therewith, where a contract for the installation of the heating and plumbing in a building provided for payments from time to time as the work progressed upon the architects' estimates, and the owner refused to make a payment on an es-

timate, for which reason the contractor abandoned the contract, he was entitled to a lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 124; Dec. Dig. ¶93.]

4. APPEAL AND ERROR ¶934—PRESUMPTIONS IN SUPPORT OF JUDGMENT.

Where, in an action by a contractor who installed the plumbing and heating in a building to recover the amount due him and for the foreclosure of a lien, the court did not submit any issue as to plaintiff's right to a lien, and defendant did not request the submission of such an issue, an assignment that the court erred in decreeing the foreclosure of a mechanic's lien for the reason the jury made no finding on that issue would be overruled under Rev. St. 1911, art. 1985, providing that upon appeal or writ of error an issue not submitted and not requested by a party to the cause shall be deemed as found by the court in such manner as to support the judgment, provided there be evidence to sustain such a finding.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. ¶934.]

5. APPEAL AND ERROR ¶1062—HARMLESS ERROR—SPECIAL ISSUES—ISSUES SUBMITTED.

In an action on a contract, an assignment that the court erred in submitting an issue as to whether certain parties were defendant's agents because the controverted issue was not whether they were his agents, but whether they were authorized to enter into the contract, would be overruled, where the court submitted another issue as to the authority of such agents to enter into the contract.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4212-4218; Dec. Dig. ¶1062.]

Appeal from District Court, Harris County; A. R. Hamblen, Special Judge.

Action by J. B. Collins against F. B. King and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

L. A. Carlton and John Broughton, both of Houston, for appellants. Howard & Kendall, of Houston, for appellee.

HARPER, C. J. Appellee, Collins, sued appellant for certain money, alleging: That he entered into a contract with F. B. King, who in the execution of the contract acted personally and through his agents and architects, to install, according to plans and specifications agreed upon, the plumbing and heating of a building to be constructed by said King. That it was provided in said contract that the payments should be made upon estimates of the architects from time to time as the work progressed. That after certain estimates had been paid an estimate of \$700 was given, upon which payment was refused, whereupon he abandoned his contract. Afterwards finished the work by special agreement with King. Appellants entered general denial; denied that the architects had authority to make contract; specially pleaded that they made no contract with appellee, but that the contract for the construction of the whole of the building was made with Russell & Co., as per contract attached. The case was submitted upon special issues, which, with the answers, are as follows:

"Special Issue No. 1. Do you or not find from the evidence that Dunderdale & Eastburn were the agents and representatives of defendant F. B. King? Answer: We find they were.

"Special Issue No. 2. Do you or not find from the evidence that defendant F. B. King authorized Dunderdale & Eastburn to enter into a contract with plaintiff, J. B. Collins, to install the heating and plumbing fixtures in defendant's building, and to bind defendant in the cost thereof? Answer: We find he did.

"Special Issue No. 2½. Did George Dunderdale, as the agent of the defendant F. B. King, in fact enter into a contract with the plaintiff, J. B. Collins, in which he purported to act as the agent of F. B. King? Answer: Yes.

"Special Issue No. 3. If you have answered issue No. 2½ in the affirmative, then, and only in that event, you will answer: What amount do you find from the evidence is the balance due plaintiff on said contract? Answer: \$1,342.05.

"Special Issue No. 4. Did or did not plaintiff, J. B. Collins, furnish on defendant's building any extra labor and material? Answer: He did.

"Special Issue No. 5. If you have answered issue No. 4 in the affirmative, then and only in that event you will answer: Did or did not defendant King authorize any person to contract for and bind defendant King to pay therefor? Answer: We find he did.

"Special Issue No. 6. If you have answered issue No. 5 in the affirmative, then, and only in that event, you will answer: What person or persons do you find defendant King authorized to make contract with plaintiff, and what amount do you find from the evidence was agreed to be paid? Answer: We find Dunderdale & Eastburn. The original contract \$2,700.00, and extras amounting to \$366.25."

Upon which a judgment was rendered for appellee for the sum of \$1,342.05, with foreclosure of lien.

[1] Assignments 1 to 5 urge that (a) the charge of the court, (b) the findings of the jury, and (c) the judgment rendered are not supported by the pleadings and the evidence, because appellee's action is to recover upon quantum meruit for work done, labor performed, and material furnished, and the charge permits the jury to find what was the balance due plaintiff on the contract pleaded.

The only paragraph of the plaintiff's petition which reveals whether he sued upon the contract or upon quantum meruit for that portion of the claim which arose before the contract was abandoned reads:

"That there is now due and owing this plaintiff, for work performed and material furnished in the installation of said heating and plumbing in said building under the said contract, the sum of \$1,200, after deducting the sum of \$1,300 heretofore paid to this plaintiff, and after deducting from the said contract price of \$2,700 the reasonable cost and expense of installing the heating and plumbing provided for by the terms of said contract, which said sum of \$1,200 is the fair and reasonable value over and above the amount paid for said work and material, of which the said King has availed himself, and which he has used, kept, and retained."

[2] Of course, the allegata and probata must correspond, and, if the above-quoted pleading is not sufficient to form the basis of the charge and the verdict, then the cause must be reversed. In the absence of an exception to the petition, we think it sufficient

to authorize the charge, either upon quantum meruit or for the balance of contract price. *Gonzales College v. McHugh*, 21 Tex. 257. The amount due could be definitely ascertained by reason of the fact pleaded, that the work was to be and was paid for upon estimates made by the architects as the work progressed, and, there being evidence to support the finding, it will not be disturbed. Besides, there seems to be no question of the reasonable value of the work done and material furnished by any evidence adduced by appellant, so there could have been no other verdict rendered, and in that case the cause should not be reversed upon the assignments, so they are overruled.

The sixth is that the court erred in establishing and decreeing foreclosure of a mechanic's lien on the defendant's property for the reason that the jury made no finding upon that issue; therefore the court could not look to the evidence for the purpose of ascertaining whether plaintiff was entitled to a lien.

The first proposition is that:

"If a case is submitted on special issues, answers made by the jury to questions submitted must form the basis of the judgment. If all of the issues necessary to support the judgment were not passed upon by the jury, it will be presumed on appeal that they were found by the court in such manner as to support the judgment. The application of this rule, however, will be confined to those issues which were necessary to support the judgment authorized by the findings. If there is an independent issue made by the pleadings upon which there is no request for a finding, and such issue is not essential to support the judgment entered on the findings made by the jury, the court is not authorized to determine such issue and enter judgment awarding other and further relief to that authorized by the finding."

The second proposition is:

"A contractor who abandons his contract because payments are not made by the owner at the time required by the contract is not entitled to a mechanic's lien, unless the payments are made conditions precedent to the performance of the work by the terms of the contract."

[3, 4] Appellee pleaded the contract between the parties, in which it is provided that the payments for the work shall be made from time to time, as it progressed, upon the estimates of the architects. He further pleaded that the appellant refused to make a \$700 payment on an estimate of the architects as he had agreed to do, and for that reason he abandoned the contract, and there is evidence in the record to sustain the allegations, and article 1985, Revised Civil Statutes, provides that upon appeal or writ of error an issue not submitted and not requested by a party to the cause shall be deemed as found by the court in such manner as to support the judgment, provided there be evidence to sustain such a finding. The record does not reveal that appellant requested a special issue to be submitted. Appellee is entitled to his lien and its foreclosure under the pleading and evidence. Article 5621, Rev. Stat.

1911. The assignment is therefore overruled.

The seventh assigns as error the refusal of the court to give a requested special charge upon agency. The issue was sufficiently covered by the general charge given.

[5] The eighth charges that the court erred in giving special issue No. 1 for the reason that the controverted issue in the case was not whether the parties were the agents of defendants, but whether they were authorized to enter into the contract; second, because undue prominence was given the question of agency by the court's charge. It will be noted in the answer to the first contention that the second special issue submits the question of whether King authorized the agents to enter into the contract. We fail to see how any undue prominence was given the issue by the court's charge, and the appellant by statements has failed to point it out to us.

The assignments are overruled, and the cause affirmed.

FT. WORTH & D. C. RY. CO. v. MORGAN. (No. 8233.)

(Court of Civil Appeals of Texas. Ft. Worth.
June 26, 1915.)

1. CARRIERS ⇐230 — SHIPMENT OF LIVE STOCK—ACTIONS FOR DAMAGES—INSTRUCTIONS.

Though in an action for damages to a shipment of cattle, the original petition alleged that the damages were proximately caused by defendant's breach of a contract to ship the cattle on a particular day, so as to reach a particular market, the court did not err in defining negligence in its charge, where the answer alleged that the delay was not caused by defendant's negligence, but by the burning of a railway bridge, and a supplemental petition alleged, in addition to what had been originally charged, that defendant was negligent in failing to properly bed the car in which the shipment was made.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 961, 962; Dec. Dig. ⇐230.]

2. CARRIERS ⇐213 — SHIPMENTS—LIABILITY FOR DAMAGES.

To the extent that delay in transporting a shipment of cattle was caused by the inability of the carrier's train to cross a burned bridge, which burned without fault on the carrier's part, it was not liable, and it was error to charge that, if there was an agreement to ship the cattle on a particular day, the burning of the bridge, though unavoidable, would be no defense for any damage resulting from the failure to comply with the contract.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 920-922; Dec. Dig. ⇐213.]

3. CARRIERS ⇐230—LIVE STOCK — DELAY — INSTRUCTIONS.

Where, in an action for delay in the transportation of a shipment of cattle, the evidence seemed to show that statements by the carrier's dispatcher were rather in the nature of information as to when a train to take the cattle might be expected than a specific contract to ship them on any particular day, and it appeared that plaintiff expected to, and subsequently did, sign a contract for the transportation of the cattle which expressly provided that the cattle were not to be transported within

any specified time, nor delivered at destination at any particular hour, nor in season for any particular market, an instruction submitting the issue of a special contract to ship the cattle on July 21st, in time for the market of July 22d, was at least misleading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 961, 962; Dec. Dig. ¶230.]

4. CARRIERS ¶230—ACTIONS FOR DELAY IN TRANSPORTATION—INSTRUCTIONS—MEASURE OF DAMAGES.

In an action for delay in the transportation of a shipment of cattle, the court charged that the measure of damages would be the difference in the reasonable market value of the cattle at their destination in the condition that they would have been, had they arrived there in the ordinary condition and usual time, and without any negligent delay, and their condition at the time when they did arrive there, and that, if the market was lower on the day the cattle were sold than on the day they should have arrived, plaintiff would be entitled to recover such difference. *Held*, that this was erroneous, as the measure of damages was the difference in the market value of the cattle at their destination in the condition in which they were delivered, and in the condition in which they should have been delivered, had the shipment been without negligence, and this difference includes, not only depreciation in weight and stale appearance caused by the delays charged, but also any decline in the market, and the charge authorized a double recovery for the decline in the market.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 961, 962; Dec. Dig. ¶230.]

Appeal from Wichita County Court; Harvey Harris, Judge.

Action by J. R. Morgan against the Ft. Worth & Denver City Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Carrigan, Montgomery & Britain, of Wichita Falls, Thompson & Barwise, of Ft. Worth, and F. S. Jones, of Wichita Falls, for appellant. Fitzgerald & Cox, of Wichita Falls, for appellee.

CONNER, C. J. The appellee recovered a judgment for damages alleged to have resulted to a car load of his cattle shipped from Burk Station, in Wichita county, to Ft. Worth. As alleged in his original petition, the damages were proximately caused by a breach of a contract on appellant's part to ship the cattle from Burk Station on the 21st day of July, so as to reach Ft. Worth in time for the market of July 22d. The defendant answered, among other things, that the delay, which was at Burk Station before the transportation began, was not caused by its negligence, but by the burning of a bridge on a line of railway between the shipping points named.

[1] The objection to the court's definition of negligence, on the ground that the plaintiff's cause of action was based alone on a breach of the contract and not upon a tort, is not maintainable, for the reason that the issue of negligence was not only raised by the defendant's answer, but also expressly presented in the plaintiff's supplemental pe-

tition, which, in addition to what had been originally charged, alleged that appellant had been guilty of negligence in failing to properly bed the car in which the shipment was made.

[2, 3] There was error, however, on the part of the court in the following instruction to the jury:

"If you find that there was an agreement to ship plaintiff's cattle on the 21st day of July, 1914, then you are charged that, even if the burning of the Pease River bridge was unavoidable, it would be no defense in this case for any damage that resulted by reason of a failure to comply with said contract; that is, if there was any damage."

There was evidence tending to show that on the morning of July 20, 1914, without fault on appellant's part, the bridge specified in the defendant's answer had burned, and that the repairs on the same had not been completed so that trains could cross it until about 6 o'clock p. m. on the night of July 21, 1914. There was also evidence subject to the construction that the delay in the shipment from Burk Station was caused, in part at least, by the inability of appellant's trains to cross the burned bridge, and to the extent that the delay was so caused appellant should not be charged. See *Railway Co. v. Noelke*, 125 S. W. 969; *Weesen v. Missouri Pac. Ry. Co.*, 175 Mo. App. 374, 162 S. W. 304; *Simkins on Contracts and Sales* (3d Ed.) pp. 572, 573; 4 R. C. L. 742, par. 210, and authorities cited. Moreover, we very much doubt whether the evidence authorized in any form a submission of the issue of a special contract to ship the cattle from Burk Station on July 21st in time for their arrival in Ft. Worth for the market of July 22d. It appears that Burk Station had cattle pens, but was without an agent, or shipping or watering facilities, and the substance of the evidence tending to show the special contract alleged substantially appears in the following testimony by the appellee:

"I was here in Wichita Falls on the morning of July 21, 1914, and called up the Denver for a car to be placed at Burk Station for cattle to be shipped to Ft. Worth, and they advised me to call the dispatcher's office, which I did, and the dispatcher said that he did not know for certain whether he would be able to have a train by there that day or not, on account of burn-out on Pease River bridge, but would know later on in the day. In order for me to get my cattle together, I had to leave Wichita Falls on the Electra Local, and went to Fowlkes Station, and a man met me there with a horse, and we got the cattle and started to the Burk pens with them. We got as far as Burnett's ranch, and I left my man with the cattle, and went there and phoned, and called the dispatcher, and he said they had already placed the car there and would be able to move my cattle that evening; that there would be a train along there that evening about 2 or 3 o'clock, and I put the cattle in the pens and waited there for the train. I penned my cattle between 10 and 11 o'clock that morning. My object in calling up the dispatcher after I had gathered my cattle was I did not want to pen my cattle until I found out for certain whether he could move them that day and he had told

me that he would know later in the day, and there was nothing else to do but to call him up and find out whether there would be a train. * * * My cattle remained in the pens there at Burk station until about 2 o'clock that night before a train came along that could have moved them. This train that came along did not take my cattle. The train slowed up, and one of the train crew dropped off of the engine as the engine came to the pens, and ran over to the pens and shone his lantern over to top of the pen, and jumped off and ran back and caught the caboose by the time it came by, and they pulled out. I was near the pens, but I was not at the pens, where my cattle were."

These statements by appellant's dispatcher seem to be, in the nature of mere information, in answer to appellee's inquiries as to when a train to take the cattle might be expected at Burk, rather than as amounting to a specific contract to ship them at any particular day. In addition to this, appellee further testified that he accompanied the shipment; that he got away from Burk Station with his cattle about 6 o'clock p. m. on July 22d; that he had a fairly good run to Ft. Worth, and that his cattle were not damaged in transit. He further testified that:

"At the time when I called up the dispatcher to see about getting a car to ship my cattle, I knew that I would be expected to sign a contract, and I expected to sign one; and the contract I signed was what I had been accustomed to doing under the same conditions. * * * Wichita Falls is a terminal, and I signed this contract at the terminal. I made no objection to signing the contract here."

Shipping contracts executed under similar circumstances have often been held to supersede previous verbal agreements relating to the same subject. See *H. & T. C. Ry. Co. v. Smith*, 44 Tex. Civ. App. 299, 97 S. W. 836; *S. A. & A. P. Ry. Co. v. Barnett*, 27 Tex. Civ. App. 498, 60 S. W. 474; *Chicago, R. I. & T. Ry. Co. v. Halsell*, 36 Tex. Civ. App. 522, 81 S. W. 1243. The contract referred to by the witness as the one signed by him at Wichita Falls was pleaded by the defendant and read in evidence, and contained an express provision that the live stock covered by it "is not to be transported within any specified time, nor delivered at destination at any particular hour, nor in season for any particular market." So that, on the whole, as it seems to us, it was misleading, to say the least of it, to undertake to submit the issue of a special contract as alleged by the plaintiff in his original petition.

[4] We are of opinion the court also erred, as assigned, in his charge on the measure of damages, which reads as follows:

"If you find for the plaintiff in this case, the measure of damages (if any) would be the difference in the reasonable market value of his cattle at Ft. Worth, Tex., in the condition that said cattle would have been had they arrived there in the ordinary condition and usual time, and without any negligent delay, and their condition at the time when they did arrive there. And if the market was lower on the day his cattle were sold on said market than the same cattle were on the market of July 22d, he would be entitled to recover said difference."

There was evidence tending to show that, in addition to the stale and injured condition of the cattle caused by the delay at Burk Station, there was a decline in the market between the 22d and 23d days of July, on account of which the plaintiff claimed damages. Plaintiff's measure of damages was the difference in the market value of his cattle at destination in the condition in which they were delivered and in the condition in which they should have been delivered had the shipment been made without negligence. This difference includes, not only depreciation in weight and stale appearance caused by the delays charged, but also any decline in the market, and the charge quoted is subject to the objection that it authorizes a double recovery, in that, to full damages authorized by the first sentence of the charge, the second sentence again authorizes the imposition of damages because of a decline in the market. *T. & P. Ry. Co. v. Tomlinson*, 157 S. W. 279; *Railway Co. v. Lane*, 49 Tex. Civ. App. 541, 110 S. W. 530.

We think it unlikely that other questions presented will arise on another trial. It is accordingly ordered that, for the errors noted, the judgment be reversed, and the cause remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. A. E. WANT & CO. (No. 8234.)
(Court of Civil Appeals of Texas. Ft. Worth. June 26, 1915. Rehearing Denied Oct. 15, 1915.)

1. CARRIERS \S 32—CHARGES—REBATES.

An agreement of the agent of a railway company transporting goods for the plaintiff, upon discovery that the goods are in a defective condition on delivery, to reimburse the plaintiff for damages suffered by reason of deterioration of goods, is not an agreement for a rebate, sufficient to make it discriminatory within the interstate commerce law, nor does the fact that proof of the amount of damage is to be determined by plaintiff's agents alter the situation in that respect.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 83-85; Dec. Dig. \S 32.]

2. EVIDENCE \S 130—ADMISSIBILITY—LETTERS.

It is not error to exclude from the evidence a letter written to defendant by defendant's agent in regard to plaintiff's claim for damages, for the letter is res inter alios acta, particularly where the letter itself does not rebut the evidence to which it is directed.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 403; Dec. Dig. \S 130.]

3. CARRIERS \S 60—INJURY TO GOODS—AGENTS—IMPLIED AUTHORITY.

Evidence, in an action for damages for deterioration of goods shipped, held to warrant submission of the issue as to whether defendant's agent, who assumed to compromise a claim, had been held out to shippers and consignees as having authority to do so.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 217-219, 222, 228, 230, 232-239; Dec. Dig. \S 69.]

Appeal from Tarrant County Court; Leon B. Fant, Judge.

Action by A. E. Want & Co. against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for the plaintiff, the defendant appeals. Affirmed.

Thompson & Barwise and George Thompson, Jr., all of Ft. Worth, for appellant. Baskin, Dodge & Eastus, of Ft. Worth, for appellee.

BUCK, J. From a judgment in the sum of \$155.87 in favor of plaintiff, A. E. Want & Co., the defendant railway company appeals.

Plaintiff sued defendant, alleging: That during the month of January, 1912, there was consigned to plaintiff at Ft. Worth, Tex., by D. E. Ryan Company of Minneapolis, Minn., a certain car of potatoes. That upon its arrival plaintiff became aware that the potatoes therein, or a portion thereof, were frozen and unmarketable, and refused to accept the shipment. That, in order to save the defendant the trouble and expense of handling said damaged potatoes, the defendant and its agents agreed with plaintiff that, if it would receive said shipment, the defendant company would pay all loss and damage on account of the condition of the potatoes, and directed the plaintiff to unload and assort the same, and promised when this was done, and the extent of the loss ascertained, the defendant company would pay to plaintiff the amount thereof. That said shipment was made with bill of lading attached, all of which was known to defendant and its agents, and that the contract contemplated that plaintiff should pay the attached draft and receive the potatoes, and that it was induced to so accept and pay for said shipment by the promises made by defendant. It was alleged that the loss amounted to \$155.87.

Defendant denied: (1) That any such promise was made by it as claimed by plaintiff; (2) that if it was made, the agent who made it had authority to bind the defendant, or (3) that the defendant had held out such agent as having such authority; (4) that though the promise was made, and though the agent had the authority to make it, or had been held out by defendant as having such authority, yet the promise and agreement was in violation of the federal statutes of February 19, 1903, and amended in 1906, prohibiting concessions, rebates, and discriminations as to freight rates and charges on interstate shipments, and therefore was not enforceable.

The evidence showed: That, upon the arrival of the shipment at Ft. Worth, the car was placed on plaintiff's house track, and that F. A. Jackson, agent and receiving clerk and warehouse foreman for plaintiff, looked at the potatoes and discovered their frosted and damaged condition, and called up the defendant's local freight office, and, asking for the claim clerk, reported the mat-

ter to him, and requested that some one from defendant's office come down and examine the potatoes, and advise plaintiff what should be done. That W. N. Baker, defendant's claim clerk or investigator under C. D. Rowe, local agent, in response to Mr. Jackson's request came to where the car was and saw the potatoes, and instructed Jackson "to go ahead and run this car of potatoes and let him know what the damage was, and he would protect us (plaintiff) on it." It was shown that Baker told Jackson "to handle the potatoes for the account of the M. K. & T. of Texas." Baker testified that he instructed Jackson to go ahead and handle the potatoes on account of the defendant, but that he did not promise that the railway company would pay for any loss sustained, but merely that "we would give it prompt handling and it would be handled and settled on its merits."

The evidence showed that both Rowe and Baker had many times prior thereto made settlements for damages claimed to shipments, without referring the claims to headquarters at Dallas; but both Messrs. Rowe and Baker testified that such a course was permitted under the rules of the defendant company only when the amount of the claim was less than \$100; that larger claims had to be referred to the Dallas office. In this instance, the evidence shows that the claim was referred to the Dallas office by Baker, but for some unexplained reason was not paid, though nearly three years had elapsed between the origin of the claim and the judgment in the trial court.

The first assignment is directed to the failure of the trial court to give defendant's special requested peremptory instruction, which appellant urges was error, for the following reasons set forth in its statement under said assignment:

"The uncontradicted evidence, and the weight of the evidence in the case, showing that contracts such as the one alleged by the plaintiff were not made by the various railroads in the city of Ft. Worth at that time, and further showing that there was no general custom or practice on the part of the railway companies in Ft. Worth, in existence at the time, whereby they would make such contracts or extend such privileges to shippers in Ft. Worth, or to parties to be notified of the arrival of shipments in the city of Ft. Worth, as was alleged by the plaintiff in its petition, and these facts being true, the alleged contract upon which plaintiff bases its suit was and is wholly discriminatory and conferred a privilege upon the said A. E. Want & Co. which was not conferred upon other shippers and parties to be notified of the arrival of shipments in the city of Ft. Worth, and was therefore unlawful, invalid, and not binding upon this defendant.

"The plaintiff having sued upon a breach of the alleged contract, and nowhere in its petition alleging that the said railway company was guilty of negligence in the handling of said shipment, but wholly relied upon the breach of said contract as alleged, the defendant, under the evidence and the facts adduced during the trial of the case, is clearly entitled to a peremptory instruction and the submission to the jury of its said special charge, No. 1."

[1] We do not think the agreement by Baker, acting for defendant company, to pay for the damaged potatoes, can reasonably be construed as being in the nature of a contract discriminating in favor of the plaintiff with reference to freight rates or charges. It was an acknowledgment of liability, the extent of which was to be determined by an examination of the potatoes, and sorting the damaged ones from the uninjured. The fact that this proof of the amount of the damages was to be made by plaintiff's agents and employees would not alter the character of said agreement or transaction. The separation of the good from the bad, and the ascertainment of the extent of the loss, was to be made "on the account of" defendant company, as testified to by Baker himself, and through the medium of his own selection. There is no pleading or proof to support the conclusion that the loss really suffered by plaintiff was not in the amount of the claim, or that the confidence Baker showed in the fairness and carefulness of plaintiff's employees was misplaced. The plaintiff pleaded an agreement of compromise and settlement, and we think the evidence amply sustains such plea. We do not think the arguments urged to the effect, or the cited authorities holding, that where a contract between shipper and carrier contains a provision that grants to the shipper a special privilege or advantage, are in point. Therefore, we overrule the first assignment, and likewise the second, which complains of the failure of the trial court to enter judgment for defendant company.

[2] We do not think the court erred in refusing to admit the letter written by Baker, for Rowe, March 7, 1912, to the Dallas office, with reference to this claim, and we hold that the objection of plaintiff to its introduction that it was res inter alios acta, irrelevant, and immaterial, was properly sustained. Moreover, if said letter could be held under any construction to be admissible, we cannot see how its exclusion could have injured appellant. The only reason assigned in support of its admissibility is that it tends to show that Baker had not recommended therein the payment of the claim and it was therefore in rebuttal of the testimony of Wardlaw, plaintiff's credit man, wherein he stated:

"I talked with Mr. Baker about this particular claim after some little time had elapsed, and he stated to me that he had made the agreement to pay this amount of money to protect us on this claim."

And later, having been recalled:

"I had a conversation with Mr. Baker subsequent to the occasion of Want & Co. receiving this shipment regarding the damage, claimed on the shipment, which conversation was over the phone. I had a second conversation with Mr. Baker, but I am not positive about it; I think I spoke to him about this claim, in connection with Mr. Williams, when he was in our office one day talking about it. I possi-

bly had a third conversation with him, and it was one of the ones over the phone. In the phone conversation, I recognized Mr. Baker as the party to whom I was talking. Mr. Williams had called my attention to the length of time the claim had been out, and that it had not been paid, and I remember the circumstances so clearly that I called Mr. Baker up and asked why it had not been paid, and he expressed surprise that it had not been paid, and went on and stated that he had put the claim up in the proper way, and would take it up again with the Dallas office and see that we did get paid, and that he thought the claim was a just one, and he expressed surprise that it had not been paid, and first he stated that it had been paid, and when I showed him that it had not, he said he would take it up right away. I cannot remember the second conversation, but this was the first time I talked to him, and the second time, I don't know whether I talked over the phone, but I rather think I did, and he came over there to see Mr. Williams—our desks are right near each other, and he was in the office talking about this claim, probably over there investigating some other claim at the time. He did not say anything to me with reference to his having agreed that they would protect Want & Co. on the claim. In substance, he stated that he had put the claim up in the proper way, and that he expected it to be paid, and was surprised that it had not been paid."

There is nothing in this letter which would render it even improbable that Baker did make the statements attributed to him by Wardlaw. The third assignment is overruled.

[3] We think the evidence justified the submission of issue No. 4, which reads as follows:

"Had the defendant railway company held out its agent, Baker, to the shippers and consignees as having authority to enter into such agreement as alleged by plaintiff?"

F. A. Jackson testified:

"From my experience up to that time, Mr. Baker, whenever anything was wrong there and I showed it to him, and he said, 'You go ahead and find out the damage and we will pay for it,' and in a few days later he would send a check to cover it."

Mr. Wardlaw, upon this point, testified in part as follows:

"It is customary with Mr. Baker and with any of the railroad companies who make any notations of shortage on examining the shipment, we go ahead and file the claim, and nothing more is heard from it; the claim is paid in a short while. All the agreements heretofore made with Mr. Baker about those claims on the occasion when Baker would come over and make notations on the expense bills were carried out; every one except this one."

Mr. Baker testified:

"I told Mr. Jackson to go ahead and handle the potatoes for the account of the M. K. & T. Ry. Co. of Texas as a matter of adjustment between the railroad and the consignees. That was my customary way of dealing with matters like that when I was called to inspect a shipment. By that I meant that Jackson, on behalf of his company, should handle these potatoes just like the railroad company would handle them if Want & Co. had not received them. I had done that previously in several shipments with Want & Co. which they had called me over to inspect. * * * It was my customary way of handling business in that position."

C. D. Rowe testified:

"I knew prior to this time that he (Baker) had been calling at A. E. Want & Co.'s establishment to inspect damaged shipments, and had requested them to handle the shipments for the railroad company. * * * When they are handling a shipment for our account, I would not expect that they would lose by the transaction—not be out any money."

Therefore, the fourth assignment is overruled, and also the fifth, which objects to the submission of issue No. 3, to wit:

"Had the witness Baker, prior to the transaction involved in this cause, made similar agreements to the one alleged by plaintiff to have been made, and which agreements were carried out by the defendant railway company?"

The sixth and last assignment directed to the action of the trial court in overruling defendant's motion to set aside the findings of the jury is overruled.

Judgment affirmed.

DANIEL v. LANE. (No. 8228.)

(Court of Civil Appeals of Texas. Ft. Worth. June 19, 1915. Rehearing Dismissed by Agreement, Oct. 16, 1915.)

1. PARTNERSHIP \Leftrightarrow 296—DISSOLUTION—PENDING MATTERS—SUFFICIENCY OF EVIDENCE.

In an action by a former member of a real estate partnership for a share in the commission on a sale completed after the dissolution of the partnership, evidence held to support the jury's findings that the partnership contract was not terminated until March 1, 1914; that there was an agreement at the time of the dissolution that plaintiff should receive one-third of the commission on pending deals; that the deal in question was pending at the time of the dissolution; and that plaintiff did not become a member of another firm until March 1, 1914.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 662, 663, 666-678; Dec. Dig. \Leftrightarrow 296.]

2. PARTNERSHIP \Leftrightarrow 296—DISSOLUTION—ACTIONS—INSTRUCTIONS—"PENDING."

In such action the court did not err in connection with the issue as to whether the deal in question was pending at the time of the dissolution in defining the word "pending" as meaning remaining undecided, in suspense, not terminated.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 662, 663, 666-678; Dec. Dig. \Leftrightarrow 296.]

For other definitions, see Words and Phrases, First and Second Series, Pending.]

3. TRIAL \Leftrightarrow 251, 350—DISSOLUTION OF PARTNERSHIP—INSTRUCTIONS—CONFORMITY TO PLEADINGS.

In such action, where the petition alleged that, on or about January 20, 1914, while plaintiff and defendant were partners, negotiations were begun for a sale of land, through which negotiations the property was finally sold; that plaintiff and defendant dissolved partnership on March 1, 1914; that it was agreed between them at the time that all sales pending and which had been begun should continue to completion; and that upon completion defendant should have two-thirds of the commission and plaintiff one-third—a special issue as to whether the sale in question was a pending deal at the time of the dissolution, and an instruction in connection therewith that "pending" meant remaining un-

decided in suspense, not terminated, were sustained by the pleading.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595, 828-833; Dec. Dig. \Leftrightarrow 251, 350.]

4. PARTNERSHIP \Leftrightarrow 296—ACTIONS—EVIDENCE.

That a former member of a real estate partnership, claiming to be entitled to a share of a commission on a deal pending at the time of the dissolution, participated in a fee earned by another firm prior to March 1, 1914, did not conclusively show that the jury's finding that he became a member of such firm on March 1, 1914, was not sustained by the evidence.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 662, 663, 666-678; Dec. Dig. \Leftrightarrow 296.]

5. TRIAL \Leftrightarrow 350—SPECIAL ISSUES—ISSUES TO BE SUBMITTED.

Special issues which were not put in controversy by the evidence, or were included in and controlled by issues which were submitted, were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. \Leftrightarrow 350.]

Error from District Court, Tarrant County Marvin H. Brown, Judge.

Action by R. L. Lane against J. B. Daniel. Judgment for plaintiff, and defendant brings error. Affirmed.

J. C. Terrell and Thompson & Barwise, all of Ft. Worth, for plaintiff in error. Roy Rowland & Young, and Lattimore, Cummings, Doyle & Bouldin, all of Ft. Worth, for defendant in error.

BUCK, J. This suit was filed by R. L. Lane against J. B. Daniel. Plaintiff alleged that he and defendant were partners in the real estate business in the city of Ft. Worth, Tarrant county, Tex., under the firm name of J. B. Daniel Realty Company; that on or about the 1st day of January, 1912, the J. B. Daniel Realty Company listed a certain tract of land for sale, known as the Mitchell tract, consisting of 808 acres and lying some miles north of Ft. Worth; that on or about January 20, 1914, while plaintiff and defendant were partners and composing said firm, negotiations were begun for the sale of said land to one L. M. Lockridge, and that through said negotiations said property was finally sold by said firm to said Lockridge for the sum of \$60,000; and that the report of sale was approved by the county judge of Tarrant county, sitting in probate on July 14, 1914. Plaintiff further alleged that he and defendant dissolved partnership on March 1, 1914, and that it was agreed by and between them at the time of said dissolution that all sales pending, and which had been begun during the term of said partnership, should continue to completion, and that upon completion of said sales said Daniel should have two-thirds of the commission and said Lane one-third. He alleged that \$1,000 of the \$3,000 commission had been retained by C. K. Lee, administrator of the Mitchell estate, and was held by said Lee to

await legal adjudication. Lee was therefore made a party defendant. In so far as the issues involved, which are necessary to be discussed, are concerned, the defendant denied that the dissolution of the partnership took place on March 1st, but alleged that said dissolution took place on January 1, 1914, and, while thereafter there was a semblance of partnership between him and plaintiff, yet on February 24th final dissolution of the partnership occurred, that the Mitchell deal was not then pending, nor was any agreement had between defendant and plaintiff as to the division of the commission on the sale of said property, and that in so far as the negotiations which finally resulted in the sale were concerned, they began subsequent to the dissolution of the partnership between him and plaintiff. The case was submitted to the jury on the following special issues:

"No. 1. When did the partnership contract between Lane, plaintiff herein, and defendant terminate? Ans. March 1, 1914.

"No. 2. What was the agreement between Lane and Daniel at the time of the dissolution of the partnership as to the division of commission on the pending deals? Ans. Daniel was to get two-thirds and Lane one-third.

"No. 3. At the time of the dissolution of the partnership between Lane and Daniel, was the sale of the Mitchell land a pending deal? By the word 'pending' is meant remaining undecided, in suspense, not terminated. Ans. At the time of the dissolution of the partnership the sale of the Mitchell land was a pending deal.

"No. 4. At what time did Lane become a partner in the firm of Blanton, Freeman & Lane? Ans. March 1, 1914."

Upon the answers of the jury, the court rendered a judgment for plaintiff for the amount sued for; the defendant prosecuted this writ of error.

The uncontroverted evidence shows that the property sold to Lockridge was shown to him by Daniel about January 20, 1914, and that an attempt was made by Daniel and Lockridge to negotiate a trade for the land at \$80 per acre, Lockridge to put into the trade some business property in the city of Ft. Worth at a valuation of \$18,000, but that C. K. Lee, as administrator, declined to consider any trade, and as testified to by Judge Daniel, defendant:

"I did not try to handle that part any further than we did, because Lee told me they would not accept it, and I dropped that feature of it. I took it up again after that; that was on the 24th of February."

It seems that some time prior to January 1st the defendant told plaintiff that he was not satisfied with the division of the profits, to wit, two-thirds to him and one-third to plaintiff, the expenses in the same ratio, and that he would suggest for the following years another basis of division, to wit, that he, defendant, should have all the profits derived from the out of county business, one-half of the city business, and one-third of the business in the county, but outside of Ft. Worth. Plaintiff replied that he would see about it and talk to defendant later, and so the mat-

ter rested apparently without any further discussion or other agreement, they continuing to divide their profits and expenses as during the previous year.

[1] It is practically admitted by plaintiff in error, both in his oral argument and in his brief, that if the answer to special issue No. 1 is supported by the evidence, the judgment should be sustained. The jury found that the partnership contract between plaintiff and defendant terminated March 1st. Upon this point, while the evidence is conflicting, we are of the opinion that it is sufficient to sustain the finding of the jury. Mr. Lane testified, in part, as follows:

"At the time the firm was dissolved there was an agreement between Daniel and myself in regard to any deals that were pending at that time. He mentioned it himself; he says, 'Now, all deals we have pending, we will still go ahead and divide the commissions as usual.' In fact, I was going to leave there a little before that; he asked me to stay until the 1st of March. * * * It was along about the 15th or 17th I told him that I would leave on the 1st of March. I do not know exactly the date, but just right about that time I told him I was going to leave, going to change places, and he says: 'You stay until the 1st of March, the bills will be coming in then, and it won't be any trouble in settling up, and we will just settle up the bills until the 1st of March.' * * * I paid all the bills, my part of the bills, up to the 1st of March. * * * The way that talk of the 22d of February came up, I told him that I had made arrangements to leave there as soon as we could adjust things, that I was going in to another firm, and he says, 'Well, you better stay here until the first of the month,' which was the 1st of March. * * * My agreement with Blanton & Freeman as to when I was to start in was the 1st of March. That agreement was made with both of them. We made that agreement along about, I think, the middle of February, or maybe a little later. * * * I settled up in full with Judge Daniel by memorandum on the 1st of March for the expenses of the office for the month of January, but we did not pass any money; that was for all the back expenses that had fallen behind that we did not have the money to pay at the time. On the first of the month there was bills run over, and it had been a custom for bills to run over. Some bills had run over for several months, and I settled my whole part of it by memorandum; that is, by agreement on the 1st of March. I did not pay the money, though; he got the money and paid me the difference. That was about 30 days, I guess, after I left there. That settlement included the expenses of the firm for January and February."

Mr. Daniel as to this feature testified, in part, as follows:

"While he [plaintiff] was a member of the firm I took the party out who finally did purchase it to see it. He looked at it twice; I took him out to see it twice. Lane was at that time a partner in the firm; that is, he had been—I don't know when he left the firm—he had been up until the 1st of January. Lockridge and I first went out to the farm on the 20th of January. I do not know when Lane left the firm. I do not know when he formed the new partnership. I know when he left the office; that was on the 24th of February. I thought he was a member of the firm until the time he left, but I do not know that he was. * * * When he told me after I found his name on the door [meaning the door of the firm of Blanton, Freeman & Lane], and he told me he had gone down to that place and formed a

partnership. Then we dissolved, and that was on the 24th. That is when he ceased to be a member of the firm; that is, when all of our relationships ceased. * * * Q. Then when you showed Lockridge this farm on the 20th of January, Lane was a member of the firm, wasn't he? A. Well, I don't know whether he was or not. Q. Didn't you tell the jury a minute ago that he ceased to be a member of the firm on the 24th of February? A. Well, I don't know whether he was or not. He ceased his relationships up there on the 24th. Q. Are you in the habit of making a fellow pay part of the expenses of the firm when he is not a member? A. That was his suggestion, just figure the expense up on to the 1st. I sent him an expense bill for January of that year. He paid it. Q. Why was you making him pay an expense bill if he was not a member of the firm? A. It was the basis of our agreement that we would settle up; that he would settle up until the first of the month. Q. If you thought he ceased to be a member of the firm on the 1st of January, what did you send him the expense bill for January for? A. Well, he was sitting around there and enjoying the benefits of the firm and the office. Unfortunately we did not have any profits in January for him to share in. * * * Q. Was Lane a member of the firm after the 1st day of January? A. We treated each other as partners up to that time, up to the time he notified me that he had gone down there, until the time I found out, and then he told me on the day following that he had formed a partnership with the other people, but did not tell me when. That was in February. * * * Lane was a partner up until the 24th of February. We worked together and divided all the profits."

Upon issue No. 2 as to the agreement between plaintiff and defendant at the time of the dissolution of the partnership as to the division of commissions on the pending deals, Lane testified, in part, as follows:

"At the time the firm was dissolved there was an agreement between Daniel and myself in regard to any deals that were pending at that time; he mentioned it himself. * * * In fact, I was going to leave there a little before that; he asked me to stay until the 1st of March. He says, 'All the deals we have pending, we will go ahead and divide the commissions as usual.' * * * When I left the office, on February 25th, I did not agree with Mr. Daniel that whatever sales he made he would have the commission and whatever sales I made I would have the commission, except the Durrett-Vincent deal; I did not have any such agreement as that with Judge Daniel. Just before I left there, when I had the Durrett-Vincent deal up and he had the Mitchell farm deal up, that made him a deal and me a deal, that is when I told him I would leave, as I was going to leave, and he said, 'Well, whatever deals we have on, we will divide the commission as we have been doing, as usual,' and I said it was all right."

Upon this matter Judge Daniel testified in part as follows:

"As to any agreement between us that all pending matters should be—we should go ahead and carry them out on the same basis, he mentioned the Webb trade [meaning the Durrett-Vincent trade]; that we would go ahead and complete that, and I says: 'Now, Bob, I don't want us to have any disagreement in the future, now all business that we transact from now on, if you sell it, it will be your commission, and if I sell it, it will be my commission, and you can handle any of the customers that we have had in the office from now on and sell them what you can and take the commission, and if I sell them I will take the commission.'"

Without unduly enlarging this opinion by further quoting from the testimony, it is sufficient to say that, in our judgment, the verdict of the jury upon all of the issues presented is sustained by the evidence, and in so finding we dispose of most of plaintiff in error's assignments.

[2-4] We do not think there was any error in the court's giving, in connection with the third special issue submitted, a definition of the word "pending," nor do we find that said special issue, or the explanatory charge given in connection therewith, is not sustained by the pleadings of plaintiff, as complained of in the fifth assignment, section "A." Nor does the fact that the plaintiff participated in a fee earned by the firm of Blanton, Freeman & Lane prior to March 1st conclusively show, as claimed by plaintiff in error in his fifth assignment, section "B," that the answer of the jury to special issue No. 4 was not sustained by the evidence. While it may be unusual, yet we are not prepared to say that there is any rule of public policy which would preclude a man from being a member at the same time of two firms engaged in a similar business, and participating in the profits arising from each.

[5] Finding no errors shown in the failure of the court to submit special issues Nos. 5, 6, and 7, requested by plaintiff in error, as shown in the fifteenth, twelfth, and thirteenth assignments, because we believe that either said issues were not put in controversy by the evidence, or were included in and controlled by issues which were submitted, said assignments are overruled.

The judgment is affirmed.

AMERICAN EXPRESS CO. v. NORTH FT. WORTH UNDERTAKING CO.* (No. 3141.)

(Court of Civil Appeals of Texas. Ft. Worth. July 3, 1915. Rehearing Denied Oct. 30, 1915.)

1. ACTION \S 4—GROUNDS—ILLEGAL OR IMMORAL ACTS.

If plaintiffs, a firm of undertakers and embalmers, under circumstances of duress wrongfully extorted from B. unreasonable and unjust charges for the preparation and shipment of his father's dead body, they had no lawful claim to so much of the amount exacted as was unjust and unreasonable; and, where B. subsequently garnished the amount exacted while in the possession of an express company, with which it had been deposited for transmission to plaintiffs, plaintiffs could not complain that, but for the company's negligence in not transmitting the money promptly, it would have obtained possession of and enjoyed its ill-gotten gains.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 17-24; Dec. Dig. \S 4.]

2. JUDGMENT \S 944—EVIDENCE—WEIGHT AND SUFFICIENCY.

In an action against an express company to recover money deposited with it by B. for transmission to plaintiffs and subsequently garnished by B., in which statutes of Wisconsin and the testimony of a practicing attorney as

to the laws of Wisconsin were introduced, evidence held to show that the judgment against plaintiffs on service by publication in the action in which the writ of garnishment was issued was a valid judgment under the laws of Wisconsin, though plaintiffs were sued in their firm name.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1783; Dec. Dig. ¶944.]

8. JUDGMENT ¶822—FOREIGN JUDGMENTS—CONSTITUTIONAL PROVISIONS.

If a Wisconsin court which rendered a judgment had jurisdiction under the Laws of Wisconsin over the subject-matter and obtained jurisdiction over the defendants, such judgment must, in the courts of Texas, be given all the force and effect that it has in Wisconsin, under Const. U. S. art. 4, § 1, providing that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1523-1525; Dec. Dig. ¶822.]

4. COURTS ¶511—COMITY—CONSTRUCTION OF FOREIGN STATUTES.

In construing the laws of another state, they will be given that construction and effect which is given them by the courts of final resort in the state where they were enacted.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1432; Dec. Dig. ¶511.]

5. PARTNERSHIP ¶200 — ACTIONS BY OR AGAINST FIRM—USE OF FIRM NAME.

To authorize a judgment in this state against a partnership, or its property, all the members of the partnership must be made parties, since suits can only be maintained by and against persons, natural or artificial, and a partnership is not considered as a person or a legal entity, but the lawmaking power may otherwise provide.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 369-371; Dec. Dig. ¶200.]

Appeal from Tarrant County Court; Charles T. Prewitt, Judge.

Action by the North Ft. Worth Undertaking Company against the American Express Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Thompson & Barwise, A. C. Wood, George Thompson, Jr., and G. W. Wharton, all of Ft. Worth, for appellant. Slay & Simon and Theodore Mack, all of Ft. Worth, for appellee.

CONNER, C. J. This suit was instituted in the county court of Tarrant county on the 13th day of August, 1909, by the North Ft. Worth Undertaking Company against the American Express Company, to recover the sum of \$327.50, which it was alleged had been deposited with the express company for the use and benefit of the plaintiff, but which the express company had refused to deliver. It was alleged that the plaintiff company was a partnership composed of George L. Gause and S. D. Shannon and engaged in the business of undertakers and embalmers, and that as such, pursuant to instructions, had, on July 17, 1909, received, embalmed, and prepared for shipment the dead body of one Theodore Bokoski; that the shipment was to be made to Frank Bokoski, a son of

the deceased, at New London in the state of Wisconsin; that the money to cover the cost of the casket, preparation of the body, etc., amounting to \$327.50, plus \$47.50 for the express charges, had been deposited by said Frank Bokoski with the defendant's agent at New London for the plaintiff's use, after which the dead body was delivered to the defendant at Ft. Worth, Tex., and shipped, but that defendant had failed to deliver to plaintiff the money so deposited.

On September 6, 1909, the defendant express company answered to the effect that it had received the body of Theodore Bokoski and had transported and delivered it to Frank Bokoski at New London, Wis., who made deposit of the charges as plaintiff had alleged, but that within 24 hours after such delivery the said Frank Bokoski had instituted suit against the plaintiff company in the proper circuit court in Wisconsin, alleging that the charges made by the plaintiff company were excessive to the extent of \$200, for which excess Frank Bokoski prayed judgment, at the same time duly causing the issuance and service of a writ of garnishment upon the defendant and its agent at New London, who was still in possession of the fund, theretofore deposited to plaintiff's use as stated. It was further alleged that the circuit court of Wisconsin had thus acquired jurisdiction over the defendant, and that the money claimed by plaintiff, in obedience to the laws of Wisconsin so requiring, had been deposited with the clerk of said circuit court to abide the result of the suit of Frank Bokoski. It was further alleged in defense that the plaintiff had been duly and regularly served with process in the cause pending in the Wisconsin court; that said cause would come up for trial in November following, and the prayer was that the present suit be held in abeyance until the Wisconsin case be determined, to the end that defendant should not be required to suffer a double recovery.

The record fails to show any further action of note until the 10th day of February, 1914, when the plaintiff herein filed its substitute or amended petition alleging substantially as in its original petition, with added averments to the effect that its delivery of the body of Theodore Bokoski at Ft. Worth was refused until the defendant gave its assurance that the deposit before mentioned had been made, and that said money would forthwith be transmitted from Wisconsin to plaintiff, and that the defendant company had negligently failed to so transmit said money, having on the contrary, through its agent, conspired with said Frank Bokoski to detain the fund until it could be seized under the process of the Wisconsin court.

On the same day, to wit, on February 10, 1914, the defendant filed its first amended answer in substance as before, with further

allegations to the effect that the Wisconsin suits had proceeded to judgment in favor of Frank Bokoski both against the plaintiff and against defendant as garnishee for the aggregate sum, including court costs, of \$231.85, which, by virtue of said judgments, defendant had been compelled to pay into the registry of the Wisconsin court for the benefit of Frank Bokoski. This answer abounded in allegations of due notice to and service upon the plaintiff of the judicial proceedings in Wisconsin, and pleaded the judgments therein rendered in bar, pro tanto, of the plaintiff's demand. The balance of the fund, \$137.50, the defendant tendered in open court, as it was alleged had been theretofore done, for plaintiff's use.

The case was submitted to the jury upon three special issues, in answer to which the jury found:

"First, that the defendant express company, receiving the money from Frank Bokoski, did not exercise reasonable diligence to transmit and deliver the same to the plaintiff company; second, that the money would not have been garnished if the defendant had exercised reasonable diligence to transmit and deliver same to plaintiff; and, third, that defendant's agent and agents were guilty of conspiracy and collusion with Frank Bokoski in holding or retaining the money in the possession of the express company, in order that the same might be garnished by Frank Bokoski."

The court on said findings of the jury entered judgment in favor of the plaintiff for \$327.50, together with interest thereon from July 17, 1909, and the defendant has appealed.

[1] After a statement of the pleadings and essential facts of the case the first 90 pages of the appellant's brief relate, in one form or another, to the issues upon which the case was submitted, it being contended, among other things, that the evidence fails to sustain the finding that appellant was guilty of the negligence and conspiracy charged. While we find but little evidence, if any, to support these charges, the entire subject and all questions relating thereto are wholly immaterial in the view of the case that we have taken. It is true that there are cases holding, and correctly so, that a garnishee will not be protected by a judgment against him which is fraudulent in character, and which he has collusively aided a plaintiff to obtain. But this principle can have no just application here. The only fraud on the part of the appellant that is alleged, or of which there is a pretense of proof, is founded alone on the alleged fraud of appellant's agent at New London, Wis., in negligently failing or refusing to forthwith send the deposited fund to Texas, whereby Frank Bokoski was enabled to garnish and detain it subject to his claim, if judicially established. There was no effort to show that appellant, or any one or more of its agents, joined, or sought to join, in establishing a fictitious or fraudulent claim. If, as Frank Bokoski alleged in the Wisconsin suit against the ap-

pellee undertaking company, the latter party had, under circumstances of duress, wrongfully extorted from him unreasonable and unjust charges for the preparation and shipment of his father's dead body, then as to such part of the exaction as was so unjust and unreasonable the undertaking company had no lawful claim. If such were the facts the undertaking company was in the situation of an extortioner, and cannot be indulged in a complaint that, but for the negligence of appellant, it could and would have been able to get possession of and enjoy the fruits of its ill-gotten gains. So that, as we think, the controlling questions for our determination go to the validity and binding effect of the Wisconsin judgments, the one establishing, or purporting to establish, Frank Bokoski's charge of extortion, and the other directing the appellant to pay part of the fund here claimed into the registry of the Wisconsin court.

Appellant thus presents the vital questions:

"Fourteenth Assignment of Error.

"The court erred in failing and refusing to give defendant's special charge No. 1, instructing a verdict in favor of the defendant, for the following reasons: (f) Because the testimony in this case further shows that the money deposited by the said Frank Bokoski with the agent of the defendant express company at New London, Wis., was garnished in a suit filed by the said Frank Bokoski against said defendant express company, and that said express company, under and by virtue of said writ of garnishment, did thereafter, within the reasonable time prescribed by law, deposit in the registry of the court, out of which said writ was sued, the sum of, to wit, \$327.50, the amount deposited with it to cover the undertaker's charges, and that the testimony further shows that afterwards and in due time after the undertaking company was notified, in accordance with the laws of the state of Wisconsin, of the pendency of the said suit, styled Frank Bokoski v. North Ft. Worth Undertaking Company, and for the time required by law, the said suit was called for trial, and the said North Ft. Worth Undertaking Company failed to appear, and after the evidence was introduced a judgment was rendered in favor of the plaintiff, Frank Bokoski, against the said North Ft. Worth Undertaking Company, which together with the costs incurred in connection with the original suit and garnishment suit and the amount tendered into court here, represented the total amount deposited with this company by said Frank Bokoski to cover the undertaking charges; that in pursuance to the judgment rendered as aforesaid, in case of Frank Bokoski v. North Ft. Worth Undertaking Company, the said sum of money and all of the money except the \$137.15 tendered into court, was taken by the court to satisfy the judgment of the said Frank Bokoski, rendered, as aforesaid, against the undertaking company; and the testimony further showing without dispute that this defendant had deposited in the registry of this court, and that the same has been tendered to the plaintiff herein, the said sum of \$137.15, that being the balance in its hands after satisfying the said judgment of Frank Bokoski; and, it further showing that under the laws of the state of Wisconsin the express company did not have to appear and defend the cause of action or suit of the North Ft. Worth Undertaking Company, but that it was the duty of the undertaking company so to do,

this judgment and all proceedings taken now having been presented into this court, it became the duty of this court, absolutely, under such situation, and in accordance with the laws of the state of Wisconsin and of the state of Texas and of the United States, to instruct a verdict in favor of the defendant herein."

[2] The undisputed evidence shows that the court in Wisconsin in which Frank Bokoski instituted his suit against the North Ft. Worth Undertaking Company had jurisdiction of the subject-matter of that suit, and had full power to cause the issuance and service of a writ of garnishment upon appellant and its agent at New London, Wis. It is further undisputed that a writ of garnishment was issued and served upon appellant, which under the laws of Wisconsin made it the duty of appellant to deposit the fund in its possession, and claimed by appellee herein, into the registry of the court out of which the writ issued to abide the result of the suit of Frank Bokoski against appellee. This was done, and thereafter, as further shown by the undisputed evidence, the Wisconsin court formally found that Frank Bokoski's allegations of unreasonable and unjust charges on the part of the undertaking company were true, and adjudged that said charges be annulled and abated to the extent of \$172.50, which, together with the further sum of \$59.35, costs of suit, the appellant was, by judgment against it in the garnishee proceedings, directed to pay into court for the use of Frank Bokoski. Appellant so paid the money, and the regularity of all of these proceedings is not questioned except in the particular hereinafter stated. Indeed, the validity and binding effect of the judgment against appellant as garnishee is in no wise questioned save, as will more fully hereinafter appear, it is contended that the judgment in favor of Frank Bokoski is invalid, and that the judgment in garnishment must therefore fall with it.

[3] What then must be said of the judgment of the Wisconsin court against the appellee company in favor of Frank Bokoski? If the court which rendered that judgment had jurisdiction, under the laws of Wisconsin, over the subject-matter, which is not disputed and which is undeniably established, and obtained jurisdiction over the appellee company, which alone is denied, then nothing is more firmly established in our law than that such judgment must, in the courts of this state, be given all the force and effect that it has and had in the state of Wisconsin. The Constitution of the United States, which with us is all-pervading and all-controlling, in section 1, art. 4, declares:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

[4] It is to be observed that the "full faith and credit" enjoined by this section of the Constitution takes in not only the records

and judicial proceedings, but also the public acts of another state, such as laws enacted by legislative bodies, and it is very uniformly held that in construing laws of another state they will be given that construction and effect that is given them by the courts of final resort in the state where enacted. These principles are too well known to require the citation of authority, and they are to be applied in the determination now to be made.

It was shown without question or objection that, upon service of the writ of garnishment upon appellant's agent in Wisconsin, its attorney promptly notified the appellee company of the suit of Frank Bokoski and of the service of the writ, accompanying such notice with a copy of the complaint and of the summons issued by the clerk of the court commanding the appearance of the North Ft. Worth Undertaking Company to appear at a time and place named to answer the complaint of Frank Bokoski. In this connection the undertaking company was informed that under the statutes of Wisconsin, which is verified by the proof, a garnishee was not required to appear and contest the claim of the plaintiff against the original defendant; that in this instance the express company would make no such contest, and the undertaking company was requested to do so. Of these proceedings, as we have already seen, the undertaking company was also given notice by the original answer filed in this suit by the express company months before the trials and judgments in the Wisconsin court, so that it is undeniably true that the undertaking company had actual notice of the proceedings in the Wisconsin court in ample time to make any defense to the suit of Frank Bokoski that the facts in its possession would have warranted. Under such circumstances it was proved by an expert, without objection to either the qualifications of the expert or to the competency of his testimony, that a judgment against a garnishee as in this case, preceded as hereby a judgment in favor of the plaintiff in garnishment against the original defendant, operated, under the laws of Wisconsin, as a discharge of the garnishee as to the claim of the original defendant. In illustration of this conclusion the following statute of Wisconsin, among others, and its construction by the Supreme Court of that state, was read in evidence, viz., section 2766:

"The proceeding against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant as parties defendant. * * * The judgment against a garnishee shall acquit and discharge him from all demands by the defendant or his representatives for all money, goods, effects or credits paid, delivered or accounted for by the garnishee, by force of such judgment."

In relation to which the Supreme Court of Wisconsin, in the case of Winner v. Hoyt Imp. Co., 68 Wis. 278, 32 N. W. 128, said:

"The argument at the bar was devoted largely to the question whether this section [Rev. St. § 2756] makes such service upon the defendant, in the principal action jurisdictional. Prior to

the enactment requiring such service to be made upon the defendant in the principal action, embraced in the above statute, there would seem to have been no doubt but what the payment of money or delivery of property in good faith by a garnishee, in pursuance of a valid judgment of garnishment obtained without such service, was a complete protection against any subsequent claim or suit by the defendant in the principal action. *Adam v. Filer*, 7 Wis. 306 [73 Am. Dec. 410]. As said in this last case, such proceeding was inter partes to the record, and binding upon all the property of the defendant found within the jurisdiction of the court but, to secure such protection, it was incumbent upon the garnishee to disclose every known defense, and, if necessary, notify the defendant in the principal action of the proceeding, and in good faith afford him an opportunity to defend his title. * * * In other words, there was to be no abuse of process. The difficulties arising out of such a state of the law, as illustrated by numerous cases which might be cited, undoubtedly lead to the enactment mentioned. The manifest purpose of such enactment was not only to protect the garnishee, but to conclude the defendant in the principal action by a final determination of the rights of all parties to the property or indebtedness sought to be reached by the garnishment. Accordingly, it is provided that the defendant in the principal action may, in all cases defend against the garnishment proceedings upon any of the grounds authorized, and so the garnishee may, at his option, defend the principal action. Section 2765, R. S."

Moreover, it was proven that in accordance with sections 2639 and 2640 of chapter 120 of the Statutes of Wisconsin, a formal summons in the suit of *Frank Bokoski v. North Ft. Worth Undertaking Company* was issued and published for the required time commanding the "North Ft. Worth Undertaking Company" to appear and defend. The sufficiency of this "summons" and of its due service is not questioned, except as hereinafter stated, and its effect is thus stated in decisions of the Supreme Court of Wisconsin read in evidence, viz.:

In *Bragg v. Gaynor*, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161, the court said:

"It has been the law in this state from a very early period that debts due to a nonresident debtor from citizens of this state are subject to garnishee process at the suit of his creditor in the courts of this state, and that such debtor can be brought into such courts by publication of summons; and, where the debt is claimed by another, he need not be summoned at all, but, in order to conclude him, it would be necessary to give him timely notice of the proceeding and to tender him the defense of it. * * * By force of statute law, as well as public policy declared thereby, and in the decisions of the courts, the situs or place where these debts are considered to be with reference to jurisdiction of our courts over them for the purpose of subjecting them to the satisfaction of debts due to a resident of this state from a nonresident, in order to protect, do justice to, and satisfy creditors resident here, is that of such resident debtor owing the same. The right to so reach and appropriate such debts for such purposes has been affirmed by numerous adjudications from the earliest period, and it is too late now to attempt to maintain the proposition that for all purposes the situs of debts so sought to be reached and applied is at the domicile of such nonresident. They are to be regarded, for the purposes of such proceedings, as property abiding or being in the domicile of the party owing them, and are as much subject to the jurisdiction and control of our courts as tangible property of a non-

resident found within our jurisdiction. It cannot be disputed that tangible property so situated could be seized and applied to the satisfaction of the debts of a nonresident; and it is equally clear, as it seems to us, that debts, things in action as distinguished from things in possession, may be subjected to the equitable jurisdiction of our courts for the same purpose. The process of garnishment operates as an attachment, and fastens on such debts a lien by which they are brought under the dominion and jurisdiction of the court. * * * The property may be bound without actual service, within the jurisdiction, of process upon the owner, where the only object of the proceeding is to enforce a claim against the property specifically of a nature to bind the title. Notice of the proceeding may be given by publication, etc., as prescribed in the statute * * * and the property will be effectually bound by the judgment that may follow. * * * Garnishee process under our statute is only the equivalent of an equitable attachment, and creates a lien in like manner as by filing a bill, and is in every essential element, so far as it extends, a creditor's bill."

In *Morawetz v. Sun Ins. Office*, 96 Wis. 175, 71 N. W. 109, 65 Am. St. Rep. 43, the court said:

"Practically, garnishment is a seizure in the hands of the garnishee by notice to him, creating an effectual lien upon the garnished property to satisfy whatever judgment the plaintiff may recover in the suit in which it is issued. * * * So the service of garnishee papers upon the garnishee operates as an equitable levy upon such of the debtor's property and credits as were, at the time of such service, in the hands of the garnishee. * * * Jurisdiction in such cases of garnishment, where the defendant in the principal action is a nonresident, has been upheld mainly upon the ground that such proceeding is substantially in rem to subject specific property or credits to the payment of a specific debt."

[5] As against the foregoing array of the undisputed facts, and of the laws of Wisconsin relating thereto, the only objection worthy of notice that appellee urges is that, as was alleged and shown by the undisputed testimony, the *North Ft. Worth Undertaking Company* was a partnership composed of *Geo. L. Gause* and *S. D. Shannon*, and that the suit of *Frank Bokoski* and the "summons" issued therein did not give the Wisconsin court jurisdiction, or authorize the judgments in *Bokoski's* favor, for the reason that the individual partners, *Gause* and *Shannon*, were neither sued nor served with any character of process. The rule of decision in this state is as appellee states it; that is, that in order to authorize a judgment against a partnership or its property, all of the members of the partnership must be made parties. *Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409; *Glasscock v. Price*, 92 Tex. 273, 47 S. W. 965, and numerous other cases cited in appellee's brief. In arriving at this conclusion our courts adopt the general rule announced by many authorities that suits in courts can only be maintained by and against persons, natural or artificial, that is, by or against individuals or corporations, and that unless otherwise provided by statute, a partnership is not considered a person—a legal entity—and hence must sue and be sued by its members.

An essential factor of all the Texas cases is a finding that our statutes give to a partnership, as such, no separate legal status or entity. All, however, either expressly or impliedly, recognize the fact that it may be otherwise provided by the lawmaking power. To illustrate, our court, in *Frank v. Tatum*, supra, said:

"California, Iowa, Ohio, Nebraska, and Alabama, and perhaps other states, have statutes which authorize suits to be brought by or against copartnerships in their firm names. The effect of such statutes is to give to the partnership recognition as 'an entity or distinct legal person distinct from its members.' *Bates on Law of Part.*, § 1059; *Newlon v. Heaton*, 42 Iowa, 593; *Fitzgerald v. Grinnell*, 64 Iowa, 261 [20 N. W. 179]; *Leach v. Milburn Wagon Co.*, 14 Neb. 106 [15 N. W. 232]; *Whitman v. Keith*, 18 Ohio St. 134; *Moore & McGee v. Burns & Co.*, 60 Ala. 270. Proceedings under such statutes are in the nature of proceedings in rem, and judgment can be entered only against the partnership, not against the individual members of the firm. *Bates on Law of Part.* § 1064; *Wyman v. Stewart*, 42 Ala. 163."

The only questions on this feature of the case, therefore, are: Was it proven on the trial below that under the laws of Wisconsin the suit and summons against the appellee partnership were maintainable, and, under such laws, does the judgment against such partnership bind it and its property? To the extent of the garnished fund we think both questions must be answered in the affirmative. In addition to what already appears, *R. L. Van Doren* testified that he had been a practicing lawyer at various places in the state of Wisconsin since July, 1898; that the judgment in favor of *Frank Bokoski* against the North Ft. Worth Undertaking Company was rendered by the circuit court of Waupaca county, on the 16th day of November, 1909, and duly entered of record in that court; that thereafter an order was obtained by *Frank Bokoski*, commanding the clerk of said court, to pay—

"to the plaintiff, from the moneys deposited with him by said garnishee American Express Company, the amount of said judgment, to wit: \$231.85, and that pursuant to said order, the clerk of said court paid to the plaintiff, the said *Frank Bokoski*, the said sum of \$231.85."

The witness further testified that:

"The judgment against the defendant North Ft. Worth Undertaking Company and the judgment against the garnishee American Express Company above referred to are final judgments. Said judgments have been fully paid off as stated above, and the amount paid upon said judgment was in satisfaction of the amount of the judgment obtained by *Frank Bokoski* against the North Ft. Worth Undertaking Company, for \$172.50 damages and \$59.35 costs. Under the laws of the state of Wisconsin, the judgments hereinbefore referred to are not subject to any defenses of any kind. The circuit court for Waupaca county, in which said proceedings were had and judgments entered, has the general jurisdiction prescribed by the Constitution, and in the exercise thereof it has power to issue all writs, processes, and commissions, provided therein and by statutes, which may be necessary to the due execution of the power with which it is vested. It has power to hear and determine all civil actions and proceedings and all cases of crimes and misdemeanors of every

kind not exclusively cognizable by a justice of the peace or some other inferior court, and it has all the powers according to the usages of courts of law and equity necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice and to carrying into effect its judgment, orders, and other determinations, subject to re-examination by the Supreme Court as provided by law. Said court is a court of record, and is a court of general jurisdiction. The claim upon which the garnishment in this case was issued was such a claim as would support a garnishment under the laws of the state of Wisconsin. * * * The claim of *Frank Bokoski* against the North Ft. Worth Undertaking Company was a claim founded upon contract, and was to recover damages for the breach of the contract of said North Ft. Worth Undertaking Company to properly embalm and ship the body of his father from Ft. Worth, Tex., to New London, Wis. The circuit court of Waupaca county, in which this proceeding was pending, had jurisdiction over the North Ft. Worth Undertaking Company at the time it rendered the judgments hereinbefore referred to, to the extent of the amount of the fund in the possession of the garnishee, American Express Company, but had no jurisdiction to render any personal judgment against said North Ft. Worth Undertaking Company which could be enforced upon any property of said undertaking company outside of this state. Said court had full and complete jurisdiction over the fund involved in controversy here, to wit, the fund held by the garnishee, American Express Company, as before stated. Under the laws of Wisconsin, the American Express Company, as garnishee, was not required, nor was it its duty, to plead or prove any defense the undertaking company had to the suit of *Frank Bokoski*. * * * Under the laws of Wisconsin, the garnishee is protected when the statutes applicable to garnishment actions are complied with. * * * The American Express Company, garnishee in this proceeding, complied with the provisions of such statutes. * * * Under the laws of the state of Wisconsin, the North Ft. Worth Undertaking Company was a party to the garnishment proceeding. * * * Service was obtained on the North Ft. Worth Undertaking Company in this garnishment case by a publication of the summons pursuant to the laws of the state of Wisconsin. * * * The plaintiff, in the case above inquired about, proceeded under said chapter 125 of the Wisconsin Statutes of 1898, and also under the provisions of section 2639 and 2640 of the Wisconsin Statutes of 1898, which said last two sections relate to the service of a summons by publication."

The testimony of this witness, which was by depositions taken in September and December, 1909, was accompanied by copies of letters, of the summons to the appellee company, of various statutes and decisions of Wisconsin (some of which we have quoted) and other things, which, as a whole, seem to amply support the regularity and validity of the court proceedings in Wisconsin. Nor does it appear that any objection whatever was urged to the qualification of the witness as a legal expert or to the competency of his evidence. Nor does it appear that appellee offered any testimony that conflicts in any material particular with that of the witness *Van Doren*, notwithstanding the fact, already shown, that his deposition had been taken in this case several years before the trial. On the whole, therefore, we find no sufficient reason to doubt the binding effect of the Wis-

consin judgments to the extent claimed, and conclude that appellant clearly established its defense and discharge as pleaded. See *American Express Co. v. Mullins*, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. Ed. 525, 15 Ann. Cas. 536; *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023, 3 Ann. Cas. 1084. The peremptory instruction should have been given, and the judgment below will accordingly, be reversed and here rendered for appellant, granting to appellee, however, the right to avail itself of appellant's tender.

Reversed and rendered.

PIPKIN et al. v. BANK OF MIAMI et al.*
(No. 868.)

(Court of Civil Appeals of Texas. Amarillo.
Oct. 16, 1915. On Motion for Rehearing,
Nov. 13, 1915.)

FRAUDS, STATUTE OF §119 — ORAL AGREEMENT FOR SUBSTITUTE SECURITY — PARTIAL PERFORMANCE.

Plaintiff's husband while in debt to defendant bank, which was the mortgagee of certain land owned by the husband, entered into a trade with a third person for the exchange of the mortgaged lands for others. In order that this exchange might be consummated, the bank released its mortgage on an oral agreement that the mortgagor, when he had acquired title to the other property, would execute a deed of trust thereon as substitute security. The exchange was made, but before the execution of the deed of trust the purchaser and his wife moved onto the property acquired and used it as a homestead. The bank attempted to sell the property under the subsequently executed trust deed, and plaintiff sought to enjoin the sale on the ground that the agreement for the substitution of security was within the statute of frauds. *Held*, that the fastening of the homestead character upon the land, acquired after the promise made to execute the trust deed, with a partial performance on the part of the defendant in releasing its vendor's lien with its consequences, created an equity in favor of defendant which would remove the case from the operation of the statute, since to apply the statute would effectuate fraud rather than prevent it.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 113, 266, 267, 270; Dec. Dig. §119.]

Appeal from District Court, Gray County; Frank Willis, Judge.

Suit by Mrs. Belle Pipkin and others against the Bank of Miami and others, for an injunction. Judgment for defendants, and plaintiffs appeal. Affirmed and rehearing refused.

Kimbrough, Underwood & Jackson, of Amarillo, for appellants. J. A. Holmes, of Miami, and Baker & Willis, of Canadian, for appellees.

HENDRICKS, J. In 1909, S. M. Pipkin, the husband of Mrs. Belle Pipkin, was in debt to the bank of Miami. The bank was mortgagee of certain sections of land in Roberts county, owned by the said Pipkin, and Pipkin and one Lard entered into a trade,

by the terms of which Lard was to pay certain cash for the Roberts county real estate mortgaged to the bank, and, in addition, was to exchange certain residence lots in the town of Pampa, Gray county, Tex., dependent, of course, upon the release by the bank of the Roberts county land. For the purpose of consummating this trade, and to clear the title to the Roberts county land, the bank released its mortgage upon said Roberts county land, contending that said release was made in consideration that Pipkin, when he acquired the title from Lard to the residence lots in Pampa, would execute a deed of trust upon said property in substitution, in part, for the previous security for the benefit of the bank. Before the execution of the deed of trust upon the Pampa lots Pipkin and his wife moved onto the Pampa property, using the same as their homestead, Pipkin thereafter executing a deed of trust upon said lots as security for the balance of the debt he owed the bank.

This suit is an application for a temporary writ of injunction to restrain the sale of the residence lots in Pampa, on the ground that the same constitutes the homestead, and, in addition to a denial of any previous oral agreement with reference to the substituted mortgage on said property, Mrs. Pipkin further asserts that said agreement, if made, is prohibited by the statute of frauds, citing, to sustain the latter position, the following cases: *Castro v. Illies*, 13 Tex. 229; *Boehl v. Wadgymer*, 54 Tex. 589; *Johnson v. Portwood*, 89 Tex. 235, 34 S. W. 596; *Poarch v. Duncan*, 41 Tex. Civ. App. 275, 91 S. W. 1110. Without a detailed analysis of the cases cited, we think the same are not pertinent to the condition of case presented in this record. Evidently the district judge, in refusing the temporary injunction, resolved the testimony in favor of the bank's witnesses, establishing the oral agreement to give the mortgage in consideration of the release by the bank upon the Roberts county property. It is to be noted that when this oral agreement was made, Pipkin had no real interest in, or title to, the residence lots in Pampa, as the contract with Lard was necessarily made subject to the acceptance of the bank and the latter's release of its lien upon the Roberts county property, without which the deal could not have been made. Though it is held that oral mortgages come within the purview of our statute of frauds, however, beginning with the leading case of *James v. Fulcro*, 5 Tex. 517, 55 Am. Dec. 743, it is held that there is an important difference between ours and the English statute, the court saying, in that case:

"All agreements within its scope should be brought under its operation; but to go further would be to assume legislative functions."

Neither does our statute require express declarations of trusts to be in writing, as

prescribed in the English statute. Same case, *supra*. On account of the omission in our statute of frauds of the language, "any interest in or concerning land," found in the English statute (which statute is adopted by many other states without change), there is a marked difference in the application of our statute and the application in other states of the English statute, when considering oral contracts. We have contracts affecting interests in or concerning lands in Texas, enforceable though resting in parol, but inhibited where the statute is as broad as the omitted language. *James v. Fulcrod supra*; *Long v. Gray*, 13 Tex. Civ. App. 172, 35 S. W. 35; *Miller v. Thatcher*, 9 Tex. 483, 60 Am. Dec. 172; *Houser v. Jordan*, 26 Tex. Civ. App. 398, 63 S. W. 1050; *Bailey v. Harris*, 19 Tex. 110. We know that an agreement in parol to locate a land certificate for a part of the land is not in the statute; the future acquisition of the title and interest which does not exist at the time the agreement was made inures to the benefit of the party contracting for the location. *Watkins v. Gilkerson*, 10 Tex. 340; *Ikard v. Thompson*, 81 Tex. 290, 16 S. W. 1019; *Gibbons v. Bell*, 45 Tex. 423. We also know that where two persons orally contract to purchase a piece of land, one of the parties to take the title in his own name, the other may enforce the contract, though verbal. *Gardner v. Randall*, 70 Tex. 453, 7 S. W. 781; *Reed v. Howard*, 71 Tex. 205, 9 S. W. 109; *Masterson v. Little*, 75 Tex. 697, 13 S. W. 154. The statute does not apply where a party who borrowed money to pay for the land permitted the creditor to take the title in his own name and the borrower tendered the money and sues for the land. *Long v. Gray*, 13 Tex. Civ. App. 172, 35 S. W. 35. Associate Justice Gaines said, in the case of *Sprague v. Haines*, 68 Tex. 217, 4 S. W. 371, that the words, "any contract for the sale of real estate," as used in the statute—

"include every agreement by which one promises to alienate an existing interest in land upon a consideration, either good or valuable."

The case of *Anderson v. Powers*, 59 Tex. 213, was under consideration by Justice Gaines, and overruled. He held that the court had misapplied the authorities to the real status of case in the *Anderson-Powers* record, saying that:

"In none of the cases cited did the parties who subsequently acquired the legal title by patent from the state have any interest in the land at the time of the contract."

In the instant case, *Pipkin*, not having any real interest in the land at the time the oral agreement was made with the bank for the substitute deed of trust, and said agreement being made to operate upon land to be acquired in the future, we think the case comes within the principle of the authorities cited, and numerous others which could be cited. It is clear, under our authorities, that if *Martin* had agreed with *Pipkin* for a re-

lease of the *Roberts* county land, in consideration that *Pipkin*, when he received the deed and title from *Lard* to the *Pampa* lots, would then convey the land to the bank in satisfaction of the balance of the debt, such an agreement would be enforceable, though verbal. Hence, when *Pipkin* orally agreed to execute a mortgage upon land to be acquired in the future, for the purpose of securing the balance of the debt, what difference can there be in the cases and the application of the principle? It is clear that if the mortgage, as to future acquired real estate, attaches a trust to the land for the benefit of the bank, the subsequent designation and vesting of the homestead interest is subordinate. *McCarty v. Breckenridge*, 1 Tex. Civ. App. 180, 20 S. W. 997 (writ of error denied).

The order of the district judge, refusing the preliminary injunction is affirmed.

On Motion for Rehearing.

The reasons for the affirmance of this cause, given in the original opinion, upon reconsideration, are not satisfactory, and are, to some extent, subject to the criticisms in appellants' argument on the motion. A portion of this criticism is due to a lack of perspicuity on our part, referring especially to appellants' argument that a mortgage is not a trust. We said:

"It is clear that if the mortgage, as to future acquired real estate, attaches a trust to the land for the benefit of the bank, the subsequent designation of the homestead is subordinate."

And appellant makes an extended argument that a mortgage is not a trust. We, of course, meant that if the contract for the mortgage as to future acquired real estate attached a trust to the land for the benefit of the bank, the supervening designation of the homestead would be subordinate to the bank's interest.

We admit, since equity has developed the subject, that a mortgagee's interest is hard to define, and very few law-writers have attempted its definition. *Lord Denman* said:

"It is very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other in any other terms than those very words"

—that is mortgagor and mortgagee. *Jones on Mortgages*, vol. 1, § 16. A mortgage, we all know, was originally a conveyance of land, subject to defeasance, under which, if not complied with, the mortgagee acquired the whole estate, including the title; but under the conception and development of equity the land is merely impounded or charged in a contractual sense as a fund as security, and this development, which, in working out the relations and rights between mortgagor and mortgagee of third parties, has developed seeming incongruities, probably is not yet ended. In this state the only view by which the statute operates upon a mortgage, or a contract to give one,

when affecting lands, is to view it as a conveyance of lands. The assignment of one, as to innocent third parties, is covered by our registration statutes, but the assignment of the debt, as between the parties, has always carried the mortgage. Outside this state, where the distinctions have been maintained, a mortgage goes to the personal representative as personal property, and not to the heir as real estate, the law of the place where the land is situated controls its construction, as to the rights of the parties in the land, and an after-acquired title inures to the benefit of the mortgagee. In some states the mortgagee can predicate ejectment against the mortgagor, but in this state it is unavailing unless the mortgagor has placed the mortgagee in possession under the mortgage. The different conceptions of a mortgage under the law, as affecting real estate, and in equity, treating the land merely as an auxiliary for the payment of the debt, could be extended unnecessarily, viewing the numerous incidents as cited by the courts in the development of the rights of the mortgagor, the mortgagee, and third persons. But we are convinced that this right inuring to a mortgagee, whether you would regard it as some estate in the land, or a mere right to a beneficial use of it upon condition broken, as a fund to pay the mortgagor's obligation, is nevertheless the subject of a trust, which we presume, under appropriate conditions, appellants would not deny.

"The rule is perfectly well settled that a party may, by express agreement, create a charge or claim in the nature of a lien on real estate of which he is the owner, or possessor, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons, who are either volunteers or who take the estate on which the lien is agreed to be given, with notice of the stipulation. Such an agreement raises a trust which binds the estate to which it relates. * * * Pinch v. Anthony et al., 8 Allen (Mass.) 539, citing several old English authorities, inaccessible to us. Washburn on Real Property, vol. 2, c. 16 (Mortgages) § 7, and cases cited, to which we add the case of Bridgeport Electric & Ice Co. v. Meader, 72 Fed. 119, 18 C. C. A. 451.

We also assume that in considering a contract to execute a mortgage, if in writing, where the remedy sought is for the specific performance of the same, or a mere establishment of the lien, equity, in either event, recognizes the trust feature in connection with the contract. The fact that a contract, obligating one to execute a mortgage, is not in writing would not lessen the trust if from the nature of the transaction a trust existed, though the language of the statute of conveyance is rather stringent. This statute, and the other now designated as the statute of frauds, is, after all, a regulation of a rule of evidence affording a successful means of resistance to the claim of estate. Bringhurst v. Texas Co., 39 Tex. Civ. App. 500, 87 S. W. 896, and authorities cited.

It is familiar that a part performance

by one, and the refusal of performance by another, with additional circumstances inherent in the transaction operating as a serious injury to the party partially performing as to constitute a fraud, creates an equity in favor of the losing party, and the statute does not apply, on the theory that the statute is to prevent, not to advance, fraud. A rather notable case in this state—and one cited by appellant, to sustain the position that an equitable mortgage cannot be created by an oral agreement—is *Johnson v. Portwood*, 89 Tex. 248, 34 S. W. 596, 787. The facts are somewhat complicated, but, stripping it of details unnecessary here, and reproducing the essentials for the purpose of exhibiting the analogy, it presents the following condition: Land was sold and vendor lien notes were executed. The vendee and the vendors made an independent agreement that if the former would pay a certain sum cash and another sum certain at a future time, and would reconvey one-third of the land to the vendors, the latter would release the lien and cancel all the notes on the remaining two-thirds of the land to the vendee. A third party, Long, furnished the first cash payment to the vendee, which was paid to the vendors, and, as pleaded by him, with an understanding with the vendee that when the contract was completed that the latter was to secure the advancement of this money with the released land as security, and that it was so understood by the vendors. An exception to the vendee's pleading, setting up an oral agreement, was sustained. We infer that the mere breach of the contract by the vendors, with a part payment upon the same by the vendee, was insufficient to take the case out of the statute; but as to the intervener Long, who advanced the money, the case was different. He could not claim under the contract Johnson, the vendee, had with his vendors for the release of the land, but he could claim under his own oral contract, and Justice Gaines said:

"It is settled law in this court that, in case of oral contracts for the sale of land, the payment of the purchase money alone is not such part performance as will take the case out of the statute. The ground upon which a specific performance is enforced in such cases when there has been a part performance is that the refusal of the defendant to perform would operate a fraud upon the plaintiff. When there has been nothing more done than the payment of the purchase money, the courts say that the vendee has a remedy by suit to recover it back. But in this case, unless the intervener be allowed his lien, he is without remedy for the recovery of his money. It was lent to the defendant, who is alleged to be insolvent. It has been paid to the plaintiffs upon a debt of defendant that was due, and they cannot be compelled to pay it back. It would be a fraud for them not to carry out their contract, at least in so far as it is necessary for the intervener's protection."

Justice Gaines said, that the intervener would be subrogated to the lien of the plaintiffs as to the two-thirds interest in the land they agreed to release to the vendee Johnson.

Apparently this might weaken the decision upon the equitable question with reference to the statute of frauds. However, Long advanced the money to Johnson for its payment to the vendors upon an independent agreement for the conveyance of land. This money was not paid under the original obligation of the vendee Johnson to pay his own debt, in which latter event, of course, subrogation always applies under any kind of a contract. The question might be asked how subrogation could apply if Johnson's contract was unenforceable. We assume that the Supreme Court merely meant that Long's contract with the vendees for the conveyance of the two-thirds interest to Johnson, was enforceable only in so far as to preserve Long's rights, under his own contract, which the vendors breached; and, being confronted with the anomalous condition of not being able to compel a conveyance of the land to Johnson, on account of the unenforceability of the contract with him, it raised the doctrine of subrogation for Long's benefit.

The real gist of the opinion is that it was an enforceable contract with Long on account of the partial performance and the raising of the equity. The line is often tenuous between a case of a mere violation of agreement with injury to the other party, and a case of a violation with such injury as constitutes a fraud and creates the equity. Lord Chancellor Selborne said, in the case of *Maddison v. Alderson*, 8 App. Cas. 478, before the House of Lords, in which Brown says the matter received very thorough consideration:

"That it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract. So long as the connection of those *res gestæ* with the alleged contract does not depend upon mere parol testimony, but is reasonable to be inferred from the *res gestæ* themselves, justice seems to require some limitation of the scope of the statute. * * * Browne, on the Statute of Frauds, § 455a.

The case of *Dean v. Anderson*, 34 N. J. Eq. 496, by the New Jersey Court of Chancery, is rather an applicable and instructive case upon this subject. Dean agreed to sell and convey to Anderson a certain estate, for the sum of £1,600, £875 at a certain date, and the balance of the purchase money to be secured by mortgage. Anderson, after having paid a part only of the £875, exchanged his interest in the Dean property to one Jackson, for other real estate. It was afterwards agreed between all parties that Dean should convey direct to Jackson, and that Jackson should convey to Anderson, and that Anderson should execute a bond with a mortgage on the Jackson property to Dean, which he refused to do. The Maryland court of chancery said:

"Where an agreement has been executed or in part performed by complainant, and the acts done place him in a situation which is a fraud upon him, unless the agreement is executed, equity will not permit the defendant from executing his part of the agreement by pleading that it was not in writing. * * * The court will interpose and grant relief, notwithstanding the statute, when the complaint shows a performance on his side, by which he would suffer an injury, amounting to fraud, by the refusal to execute the agreement on the part of the defendant" (citing numerous English authorities).

The chancellor further said:

"I cannot well imagine a stronger case for relief, on the ground of part performance than the present. The agreement having been made, Dean, in pursuance thereof, conveyed his estate * * * to Jackson, and Jackson * * * conveyed the ferry property to Anderson, after which Anderson, in fraud of his agreement, refused to execute the mortgage, and held the property which he had thus obtained. This refusal was, in my opinion, a gross and palpable fraud on Dean, and the case comes clearly and fully within the principle upon which the court relieves in cases of part performance. The complainant, relying on the agreement, parted with his estate * * * [to Jackson] and waived the security by mortgage which he was to have had on that property [in the original trade with Anderson]. He has therefore done an act in execution of the agreement by which he is greatly prejudiced, and is entitled to say that the nonexecution of the agreement by Anderson is a fraud on him. This case is strongly analogous to the one in the books, where there was a parol agreement for a mortgage, and a deed was to be executed and a defeasance, and, after executing the deed, the grantor refused to execute the defeasance, and, on a bill filed, relied on the statute of frauds, which was held to be no bar. 1 Eq. Cas. Ab., 20 Par. 5; S. C. Prec. in Cha. 526. This was a decree of Lord Nottingham, and is said to have been the first case, after the statute, in which relief was granted upon the ground of part performance." *Dean v. Anderson*, 34 N. J. Eq. 496.

The case of *Plumer & Crary v. Reed*, 2 Wright (88 Pa.) 46, will afford some analogy to the case here: One of the parties held an agreement for 116 acres of land, upon which he had only paid the sum of \$5, and his contract was liable to forfeiture. He surrendered his title to others, who brought in the whole title under a parol contract that 10 acres of the land should be conveyed to him as soon as the outstanding title was acquired. Also see *Beegle v. Wentz*, 55 Pa. St. 374, 93 Am. Dec. 762.

The case of *King v. Williams*, 66 Ark. 333, 50 S. W. 695, by the Supreme Court of Arkansas, was one to compel the performance of an oral contract to execute a mortgage in consideration of a release by the mortgagee upon other land. After the release was made the mortgagor sold the land, refused to execute the mortgage upon the other property, and moved upon such other property, occupying the same as a homestead. The court said the mortgagee was remediless if the mortgagor failed to execute.

The old English case referred to by the Maryland court, in the *Dean-Anderson Case*, supra, as having been decided by Lord Nottingham, where the mortgagor refused to execute the defeasance, is one we have often

observed, in our investigation, cited in matters of specific performance. It is to be noted that this decision was made at a time before the doctrine had developed in England in equity that a formal deed on its face being a conveyance of property, could be proven as a mortgage.

The record shows that the appellant Pipkin, at the time he traded with Lard, had a homestead in Roberts county upon land different from the two sections upon which the bank had the lien; that he thereafter also sold his Roberts county homestead and moved to Pampa, occupying the latter property as a homestead as soon as he could get possession. The testimony of the cashier of the bank is that he requested Pipkin, over the telephone, to execute the lien in accordance with his promise; that when the deed of trust was executed by Pipkin the bank had no knowledge that the homestead character had attached to the Pampa lots. The record also indicates that for the balance of the debt owing to the bank by Pipkin, the latter is remediless; and it is our conclusion that the fastening of the homestead character upon the Pampa lots, after the promise made to execute the mortgage, with a partial performance upon the part of the bank of this oral contract in releasing the vendors' lien, with the consequences to the bank, creates the equity in favor of the bank; and to use the statute of frauds in a case of this character is to use it as an instrument advancing instead of preventing fraud.

With reference to the ground upon which the original opinion was based, and the analogies attempted to be drawn from other cases cited in said opinion, upon additional consideration, we withdraw as the basis of the decision. It is inferable, however, from Lard's testimony that he understood, in consideration of the cancellation of the lien upon the property which he was to receive in the trade, Pipkin was to execute the mortgage on the Pampa property, to be conveyed by him in exchange; hence all parties understood the conditions of this trade. The Pampa property, which Pipkin agreed to give the lien upon, was produced in a sense by the cancellation of the mortgage lien upon the Roberts county property, which thereby, on account of it being unincumbered, gave it a value in the trade which it could not have possessed without the bank's relinquishment. While technically it may be said that Pipkin did not hold the mere title to the land in trust for the bank, still the bank in a sense agreed to exchange its lien for another lien upon the Pampa property, partially produced by the cancellation of the former lien. We are not sure that these two rights are not reciprocal, nor that the right to the lien on the Pampa property is not the representative of the former, and which latter is a right in the land, as se-

curity, produced by the relinquishment of a similar right in other land for the same purpose, and that a trust growing out of the contract, under such conditions, could not be evolved for the purpose of effectuating this right. We prefer, however, to rest the affirmance of the case upon the ground adduced in this opinion.

The motion for rehearing is overruled.

McGOUGH v. FINLEY. (No. 8217.)*

(Court of Civil Appeals of Texas. Ft. Worth. June 19, 1915. Rehearing Denied Oct. 18, 1915.)

1. HOMESTEAD §117—CONVEYANCE—CONSENT OF WIFE—STATUTE.

Under Rev. St. 1911, art. 1115, providing that the homestead of the family shall not be sold and conveyed by the owner, if a married man, without the consent of his wife, where two lots were the business homestead of one of the incorporators of a corporation, he agreeing to transfer them to the company in return for a portion of its stock, which was issued to him, neither the application for the charter nor the affidavit thereto being executed by the incorporator's wife, title to such lots did not pass from the incorporator to the company.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 191-202; Dec. Dig. §117.]

2. FRAUDS, STATUTE OF §69—CONVEYANCE OF LAND—NECESSITY FOR WRITING.

Under Rev. St. 1911, art. 1103, providing that no estate in land shall be conveyed unless the conveyance be declared by instrument in writing, where an incorporator orally agreed to transfer two lots to the company in return for a portion of its stock, which was issued to him, the lots not being designated either on the company's charter or the affidavit thereto, title to such lots did not pass from the incorporator to the company.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 111; Dec. Dig. §69.]

3. FRAUDULENT CONVEYANCES §295—CHARACTER AS SUCH—SUFFICIENCY OF EVIDENCE.

In trespass to try title, evidence held sufficient to justify jury's finding that the conveyance of the premises to defendant was fraudulent as to the grantor's creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 867-875; Dec. Dig. §295.]

Appeal from District Court, Stonewall County; John B. Thomas, Judge.

Suit by George P. Finley against J. M. McGough. Judgment for plaintiff, and defendant appeals. Affirmed.

C. P. Chastain, of Hamlin, and Jas. P. Kinnard and H. G. McConnell, both of Haskell, for appellant. W. R. Sawyer, J. M. Carter, of Aspermont, and Chapman & Coombes, of Anson, for appellee.

DUNKLIN, J. Geo. P. Finley instituted this suit in the form of trespass to try title against J. M. McGough, J. W. McGough, A. F. McGough, and Sam Rash, to recover a section of 640 acres of land situated in Stonewall county. All the defendants except J. M. McGough filed disclaimers, and from a

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Application for writ of error pending in Supreme Court.

judgment in favor of the plaintiff for the land, that defendant has appealed.

Plaintiff and J. M. McGough each claimed title through J. W. McGough as the common source; the plaintiff claiming under an execution sale against J. W. McGough, and J. M. McGough claiming title under a deed of conveyance from J. W. McGough antedating the execution sale. The sale to plaintiff was under and by virtue of an execution levied upon the property under a judgment in favor of August A. Busch & Co., dated June 23, 1909, rendered by the district court of Tarrant county, Tex., against J. W. McGough and others for the sum of \$575.91, with 6 per cent. interest and costs of suit. That sale was made February 4, 1913, the execution having been levied upon the property December 27, 1912. The deed from J. W. McGough to J. M. McGough, under which J. M. McGough claimed title, was dated December 2, 1910, and duly recorded in the deed records of Stonewall county on December 5, 1910. The consideration recited in that deed was as follows:

"One thousand (\$1,000.00) dollars, paid by J. M. McGough, receipt whereof is hereby acknowledged and fully confessed."

The conveyance to J. M. McGough by J. W. McGough was attacked by the plaintiff upon the ground that it was made for the purpose of defrauding the creditors of J. W. McGough, and therefore void, and that was the principal issue upon the trial. On January 22, 1910, J. W. McGough, J. M. McGough, A. F. McGough, and J. W. Reese applied for and obtained a charter for a private corporation under the name of the Hamlin Transfer Company. The business for which the corporation was formed was the establishment and maintenance of a line of stages, and its place of business was in Hamlin, Jones county, Tex. J. M. McGough and A. F. McGough were sons of J. W. McGough, and J. W. Reese his son-in-law, all of whom resided in Hamlin. The directors named in the charter were J. W. McGough, J. W. Reese, and J. M. McGough, and J. W. McGough was thereafter made president of the company. The charter of the corporation contains the following:

"The amount of capital stock is ten thousand (\$10,000) dollars, divided into one hundred (100) shares of one hundred (\$100.00) dollars each, all of which capital has been subscribed and 100 per cent. paid in, as per affidavit attached hereto."

The affidavit of J. W. McGough, J. M. McGough, A. F. McGough, and J. W. Reese, attached to the charter, contained the statement that the parties had subscribed for stock in the following amounts, to-wit:

J. W. McGough	\$5,000
J. W. Reese	1,700
J. M. McGough	1,700
A. F. McGough	1,600

—and that all of said stock had been fully paid in property; the subscription of J. W. McGough for \$5,000 being paid with lots 9

and 10, block 55, in the town of Hamlin, with barns, stall, sheds, and carriage houses, all valued at \$5,000; that the subscription of J. M. McGough was paid by lot 8, block 55, in the town of Hamlin, valued at \$1,700; and the subscriptions of J. W. Reese and A. F. McGough were paid with eight head of horses, valued at \$1,200, and three transfer busses and one transfer wagon and harness, all valued at \$2,100. At the time the parties applied for the charter of the Hamlin Transfer Company they were jointly engaged as partners in the transfer business in the town of Hamlin, and after the incorporation continued in the same business in the corporate name. The evidence shows that J. W. McGough was at that time a married man, the head of a family, residing in the town of Hamlin, and that lots 4 and 5 in the town of Hamlin constituted his business homestead; and according to the testimony of J. W. McGough those lots were the lots which J. W. McGough intended to convey to the corporation, instead of lots 9 and 10 in block 55, as described in the affidavit attached to the charter. Those lots and lot 8 in the same block, which according to the affidavit attached to the charter was conveyed to the corporation in payment of J. M. McGough's stock, were used by the incorporators in connection with the transfer business at the time they decided to incorporate the business. The horses, vehicles, and harness, referred to in the affidavit as transferred to the corporation in payment of the stock subscribed by J. W. Reese and A. F. McGough, had likewise been in use in the same business previously transacted by the partnership firm. After the incorporation, the Hamlin Transfer Company used the three lots and the other property mentioned in the affidavit in conducting its business. The only instrument of writing signed by J. W. McGough relating to or evidencing the supposed rights of the corporation in and to lots 9 and 10 was the application for the charter and the affidavit attached thereto. J. W. McGough testified that after the incorporation he worked for the company on a salary as its president, and was not engaged in any transfer or livery business upon his own individual account, and never intended to so engage in business after the incorporation of said company. The evidence further shows that J. W. McGough never at any time executed any deed of conveyance to the corporation transferring said lots 4 and 5, but, on the contrary, on December 2, 1910, the same day he conveyed the land in controversy to J. M. McGough, by warranty deed he conveyed those lots to his son, J. M. McGough, in which a consideration of \$1,000 was acknowledged; the deed being filed for record in Jones county on December 3, 1910, after being duly acknowledged. Those two deeds, if effective, operated to strip J. W. McGough of all his property subject to execution, except the stock he held in the Hamlin Transfer Company. On August 16, 1909, an abstract of the

judgment in favor of August A. Busch & Co. against J. W. McGough mentioned above was duly filed for record in the office of the county clerk of Jones county.

On September 30, 1912, J. M. McGough filed in the district court of Jones county a petition for the issuance of a writ of injunction to restrain the sheriff and constable of that county from selling lots 4 and 5 under execution, which, according to the allegations in the petition, had been duly issued on the judgment in favor of Busch & Co. against J. W. McGough and had been levied upon said lots 4 and 5. In that petition plaintiff further alleged that on the 2d day of December, 1910, the date of the deed from J. W. McGough to J. M. McGough, the said J. W. McGough was seised and possessed of said lots in fee-simple title; that at that time J. W. McGough resided in Hamlin, was the head of a family, and owned and claimed said lots as his business homestead; that he was then engaged in the livery business for hire as a means of livelihood, and controlled and managed the same; that said lots 4 and 5 were then exempt to him as a business homestead under the Constitution and laws of the state of Texas. The petition further alleged the filing of other abstracts of said judgment in Jones county, all of which cast a cloud upon the title of J. M. McGough, who had purchased the property on December 2, 1910, from J. W. McGough for the purpose of sale and exchange, paying a valuable consideration therefor. The petition was signed and sworn to by J. M. McGough; the affidavit signed by him containing the statement that the matters set forth in the petition were true. There was issued to J. W. McGough \$5,000 worth of the stock in the Hamlin Transfer Company, but he has never paid any consideration therefor, unless the company acquired title to lots 4 and 5 in the town of Hamlin under and by virtue of the statements contained in the charter, and in the affidavit attached thereto, all over the signature of J. W. McGough.

The trial was before a jury, to whom was submitted special issues. The findings of the jury were as follows:

(1) Just prior to the execution of the two deeds from J. W. McGough to J. M. McGough of date December 2, 1910, one conveying the survey of land in controversy in this suit, and the other conveying lots 4 and 5 in the town of Hamlin, J. W. McGough was indebted to J. M. McGough in the sum of \$800.

(2) On December 2, 1910, the reasonable cash market value of said lots 4 and 5 was \$2,000.

(3) On December 2, 1910, when J. W. McGough executed to J. M. McGough the deed to the section of land of 640 acres in controversy, the reasonable cash market value of that property was \$20 per acre.

The remaining issues submitted to the jury, together with the findings thereon, are as follows:

"Fourth Issue. On December 2, 1910, what was the indebtedness of J. W. McGough? In this connection you are instructed that in the amount you may find in answering this question

you will not include the claim of J. M. McGough against J. W. McGough. And you are instructed, further, that if you find from the evidence that in incorporating the Hamlin Transfer Company it was understood that J. W. McGough was to put in said transfer company the title to said lots 4 and 5 at a valuation of \$5,000, and that by reason thereof J. W. McGough was to receive \$5,000 worth of stock of the said Hamlin Transfer Company, then the court charges you as a matter of law that title to said lots did not reach the Hamlin Transfer Company, and thereby, if such were the facts, J. W. McGough on said date would be indebted to the Hamlin Transfer Company in the sum of \$5,000 unpaid subscription on his stock in said transfer company, and if the facts so be, in finding the amount of the indebtedness of J. W. McGough, you will include herein the said sum of \$5,000.

"Answer. Six thousand five hundred nine and $\frac{29}{100}$ dollars.

"Fifth Issue. On December 2, 1910, what was the reasonable cash market value of the property belonging to the Hamlin Transfer Company? In this connection you are instructed that said lots Nos. 4 and 5 were not the property of the Hamlin Transfer Company, and in determining this question you will not include the value of said lots Nos. 4 and 5. But you are further instructed that lot No. 6 referred to in the evidence was the property of the Hamlin Transfer Company, and in answering this you will include the value of said lot No. 6.

"Answer. Three thousand dollars.

"Sixth Issue. Our statute, in effect, provides that every gift, or conveyance, of property given or made with intent to delay, hinder, or defraud creditors shall be void. In this connection I charge you that the judgment in favor of August A. Busch & Co. was a valid claim and judgment against J. W. McGough, and that the transfer by J. W. McGough of the property belonging to him and subject to execution would delay and hinder said Busch & Co. in the collection of their said judgment, yet such conveyance would not be fraudulent unless in making such conveyance said J. W. McGough did so with intent to delay, hinder, or defraud his creditor or creditors, nor can you find such conveyance fraudulent unless you find from the evidence the existence of the following conditions, to wit: That in conveying said section of land in Stonewall county to J. M. McGough, J. W. McGough did so with intent to delay, hinder, or defraud his creditors, or to defraud said Busch & Co., and that J. M. McGough at the time of the conveyance of said section to him by the said J. W. McGough, had notice of such intent on the part of J. W. McGough, if such was his intent, or that J. M. McGough had knowledge of the facts and circumstances such as would have put an ordinarily prudent man upon inquiry, which, by the use of proper diligence on his part would have led to the knowledge of such intention on the part of J. W. McGough, if such was his intention. Now, bearing in mind the above essential conditions, you will answer by yes or no, as you may find from the evidence, the sixth special issue following: Was the conveyance of the section of land in Stonewall county by J. W. McGough to J. M. McGough a fraudulent conveyance?

"Answer. Yes.

"Seventh Issue. What was the consideration of the deed from J. W. McGough to J. M. McGough, conveying said lots 4 and 5?

"Answer. Four hundred dollars.

"Eighth Issue. What was the consideration for the deed made by J. W. McGough to J. M. McGough, conveying the section of land in Stonewall county?

"Answer. Four hundred dollars.

"Ninth Issue. Did J. M. McGough pay J. W. McGough a full valuable consideration for the conveyance of the Stonewall county land, and

after that conveyance was there left in the hands of the said J. W. McGough a sufficient amount of property subject to execution to satisfy his debts?

"Answer. No."

[1, 2] By different assignments of error the contention is made that the court erred in peremptorily instructing the jury that the title to lots 4 and 5 never passed from J. W. McGough to the Hamlin Transfer Company, and that McGough was still indebted to that company in the amount of his subscription for stock. The contention is based upon the proposition that title to lots 4 and 5 necessarily passed by reason of the fact that J. W. McGough, at the time of the incorporation of the Hamlin Transfer Company, intended no longer to occupy lots 4 and 5 as the place for continuing the livery business for his individual benefit, or for the benefit of the partnership firm of J. W. McGough & Sons; that he contracted to convey the property to the corporation, and after its incorporation he accepted stock from the corporation in the sum of \$5,000; that the corporation thereafter took charge of the said lots, occupying and using the same in its business, with said J. W. McGough acting as its president. Appellant insists that, at all events, the issue whether or not title passed to the Hamlin Transfer Company should have been submitted to the jury as a controverted issue, and should not have been determined by the court, as was done.

The evidence does not show, neither is it contended by appellant, that any improvements were ever placed upon the property by the Hamlin Transfer Company. It is also undisputed that lots 4 and 5, at the time of the incorporation of the Hamlin Transfer Company, were the business homestead of J. W. McGough, and that neither the application for the charter, nor the affidavit attached thereto, was executed by his wife, nor were said lots designated either in the charter or in the affidavit attached thereto. Under such circumstances we fail to understand how it can be said that title to lots 4 and 5 passed from J. W. McGough to the Hamlin Transfer Company, especially in view of the fact that several months after the stock in the Hamlin Transfer Company was issued to J. W. McGough he conveyed lots 4 and 5 to J. M. McGough, appellant herein, who afterwards sought to enjoin the sale thereof upon a petition, verified by him, alleging facts squarely contrary to the contention now made by him in the present suit, as noted above, and we are of the opinion that the trial court did not err in instructing the jury that title to those lots never passed to the Hamlin Transfer Company. Revised Statutes 1911, arts. 1103, 1115; *Altgelt v. Escalera*, 51 Tex. Civ. App. 108, 110 S. W. 989, and authorities there cited; 16 Cyc. 685.

[3] By another assignment appellant insists that there was no evidence to justify

the finding by the jury, in answer to the sixth special issue, in effect, that the conveyance of the land in controversy by J. W. McGough to J. M. McGough was fraudulent. Appellant insists that the evidence shows without controversy that at the time of the execution of that conveyance neither J. W. McGough nor J. M. McGough had any notice of the judgment in favor of August A. Busch & Co., nor of any other indebtedness then owing by J. W. McGough to any one, aside from his indebtedness to J. M. McGough, to satisfy which the deeds to the land in controversy and to lots 4 and 5 in the town of Hamlin were executed.

While the testimony of appellant and J. W. McGough was, in effect, that they knew nothing of any indebtedness then owing by J. W. McGough to any one, except his indebtedness to his son, J. M. McGough, yet the jury were not bound to accept such testimony as true. Notwithstanding such statements by those two witnesses, there were circumstances tending strongly to rebut it. We shall not undertake to refer to all of such circumstances, but will mention some of them. According to the undisputed evidence J. W. McGough, for a pre-existing debt of \$800, owing to his son, J. M. McGough, conveyed property of the value of \$14,800, thus stripping himself of all property subject to execution, except the \$5,000 worth of stock held by him in the Hamlin Transfer Company, for which he had never paid that company any consideration. The evidence further shows that J. M. McGough, who is a single man, had lived with his father in the town of Hamlin for several years, and had been associated with him in business. An abstract of judgment in favor of August A. Busch & Co. was duly filed for record in Jones county, where J. M. and J. W. McGough resided. J. M. McGough testified, in part, as follows:

"As to the children that J. W. McGough had on the 2d day of December, 1910, will say that he had five children, all married at that time, except me. * * * As to all the conversations that I have had with J. W. McGough concerning the deeds that he made to me on December 2, 1910, since that time, and as to what has been said about property, etc., will say that I could not say what all has been said between J. W. McGough and myself since that time, as we are together most of the time and talk about everything nearly that either one of us is interested in."

But he further stated in that connection as follows:

"I was figuring on leaving home at the time, and my father did not have the money to settle with me, and he and my mother wanted me to stay with them and told me that they would square up with me, and would give me the land and the lots, if I would stay with them, and help take care of them, and not leave home."

Plaintiff also introduced testimony showing the contents of a letter written by J. W. McGough to the tax assessor of Stonewall county, in which the land in controversy was situated, in effect, requesting the assessor to

put the land in controversy on the tax rolls for assessment for the year 1912. Appellant, J. M. McGough, testified that he had never rendered the land for taxes. J. W. McGough admitted on the stand that he was served with citation in the suit of Busch & Co., although he further testified that after receiving that citation he talked with G. W. Bills, the principal debtor defendant in that suit, who afterwards informed him that the suit had been settled, and that there never would be any judgment rendered against him, and that he did not know anything to the contrary until he saw Mr. Sawyer (attorney for Busch & Co.) in Hamlin in 1911. In addition to those circumstances, there was the further fact that J. M. McGough, with full knowledge that J. W. McGough never contemplated paying anything for his \$5,000 worth of stock in the Hamlin Transfer Company, except said lots 4 and 5, took a deed of conveyance to that property after the issuance of the stock, and asserted title under that deed adversely to the company. *Ullman v. Crenshaw* (Sup.) 16 S. W. 1012; *Brasher v. Jamison*, 75 Tex. 139, 12 S. W. 809.

The judgment is affirmed.

NAVARRO v. LAMANA. (No. 475.)

(Court of Civil Appeals of Texas. El Paso.
Oct. 21, 1915. Rehearing Denied
Nov. 18, 1915.)

1. PARTNERSHIP — 336 — ACCOUNTING — COMMINGLED FUNDS—BURDEN OF PROOF.

Where the partnership books were shown to have been incorrectly kept, and in such manner that it was impossible to determine the proportion in which partnership and personal funds had been commingled by defendant partner, sued for an accounting by plaintiff partner, it became incumbent upon defendant definitely to show the amount of the credit to which he was entitled as represented by personal funds.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 797; Dec. Dig. 336.]

2. EVIDENCE — 589 — DISREGARD OF PARTY'S TESTIMONY.

In an action between partners for an accounting, the court could refuse credence to defendant's statement, totally uncorroborated, that he made a disbursement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2438; Dec. Dig. 589.]

3. PARTNERSHIP — 346 — PARTNERSHIP ACCOUNTING—COSTS—STATUTE.

Under Rev. St. 1911, art. 2035, providing that the successful party to a suit shall recover of his adversary all costs, and article 2048, providing that the court may for good cause to be stated on the record adjudge the costs otherwise than as provided in preceding articles, where a partner, defendant in his partner's suit for an accounting, had kept the books of the firm, either fraudulently or negligently, in such manner that the appointment of an auditor was necessary to assist the court in ascertaining the amount of personal funds defendant had commingled with partnership funds, the court properly exercised its discretion in taxing all costs against him.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 820; Dec. Dig. 346.]

Appeal from District Court, Harris County; Wm. Masterson, Judge.

Action by M. Lamana against Joe Navarro. Judgment for plaintiff, and defendant appeals. Affirmed.

Cole & Cole and A. B. Wilson, all of Houston, for appellant. Atkinson, Graham & Atkinson, of Houston, for appellee.

HIGGINS, J. Navarro and Lamana were partners doing business under the firm name of Star Bottling Works, in which business appellant owned five-eighths interest, and appellee three-eighths interest. Appellee instituted this suit, seeking a dissolution of the partnership and accounting. An auditor was appointed, who made his report to the court. Exceptions to portions thereof were filed by appellant. Pending a hearing on the exceptions, the parties settled by agreement all their partnership affairs as to the assets and physical properties of the business, leaving only for settlement the matter of the cash balance for division between the partners, a few items of which only were in dispute, as raised by appellant's exceptions to the auditor's report.

The exceptions were passed upon by the court and judgment rendered in sum of \$504.33 against Navarro and in favor of Lamana. In arriving at judgment the court found that appellant owed the partnership firm \$779.90, of which he was due the appellee three-eighths as his part, or the sum of \$292.44; and, it appearing that appellee had already paid \$211.80 as his three-eighths of the fee of the auditor, in the sum of \$565, the court also rendered judgment against appellant requiring him to repay appellee the amount so expended by appellee, appellant and appellee having previously paid the auditor under an agreement that it would not prejudice either's rights as to the proper taxation of the costs thereof when it came on for hearing.

Navarro was the managing partner, drew all checks, had charge of the cash and bank account, and kept the books of the company, with the assistance of a bookkeeper. According to the auditor's report, there was a difference between the books of the company and the company's bank account of \$613.62, the bank account showing that much over and above what the books of the company showed the cash should have been, and there was an additional discrepancy between the receipts of the company as shown by its books and the bank deposits of \$772.29, that amount appearing to have been placed in the bank over and above the receipts as shown by the partnership books. The auditor charged Navarro up with these two items, but of the first item \$291.59 thereof was satisfactorily accounted for by Navarro, and the court allowed him credit therefor. It was also shown to the satisfaction of the court that the balance of the item mentioned and all

of the \$772.29 consisted of an overage in the bank deposits; that is, the bank deposits exceeded by these amounts the actual receipts of the business of the partnership. This overage in bank deposits, it was found by the lower court, arose in this manner: Navarro used the bank account of the partnership for his personal business transactions and for the partnership. He mingled his personal and the partnership monies in the partnership bank account. In so doing he relied upon the company's books to show how much belonged to the partnership and how much belonged to him personally. He was a man of considerable means, aside from his partnership interest. Part of the discrepancies indicated probably ocured by the practice of Navarro drawing the company's checks payable to cash with which he would pay his employees, and, when the check was surrendered by the bank, he would frequently destroy it, being under the erroneous impression that it would not affect the company's accounts, as he had already charged it to pay roll expense. This practice would show a disbursement by a debit against Navarro for the same amount represented by the check drawn on the bank. By this means the books of the company would show a double disbursement, when, in fact, only one had been made. The overage in the bank account was further augmented by the defendant's practice of crediting himself with \$12 weekly, according to partnership agreement, and frequently failing to withdraw it from the bank. He proceeded upon the theory that, upon settlement of the company's affairs, he would be responsible for everything its books showed had been received, and the balance left in the bank would be his property. The auditor charged him with all unidentified debits of the company; that is, he was charged with all money that went into and was withdrawn from the bank, whether or not there was anything to show that it was partnership funds, or was spent for its account. There was also on hand in the partnership cash drawer at the time the auditor took charge of the books the sum of \$130.75.

The court found that the items of \$613.62 and \$772.29 were overages in the partnership's bank account created in the manner indicated, and allowed defendant credit therefor. It was further found that the item of \$130.75 was not an overage, as were the other two items, and defendant was charged therewith. Complaint is here made of the refusal to allow credit for this item.

[1] It is asserted that in a suit between partners for accounting the account books, to which both partners have access, are prima facie evidence of the true account between the partners, and that in such accounting the result shown by the books must control, unless it is clearly shown that such books are incorrect. With this proposition as a premise, it is then insisted that, since it was not shown that the cash item in question was

received in payment for sales not reflected by the books, defendant should not be charged therewith, since to do so would be to hold him liable for all cash on hand, as well as all receipts on hand as shown by the books; that, if he is to be charged with all "shorts" in the way of unidentified debits of the business, he should be credited with all "overs" in the way of unidentified credits. And it is argued that the item of cash in the drawer occupied precisely the same status as the funds in the bank, and that, if the court allowed credit for the bank overage deposits, in like manner credit should be allowed for the overage in the cash drawer. To all this it may be replied, in the first place, that the books are shown to have been incorrectly kept, and in such a manner that it was impossible to determine therefrom the proportion in which partnership and personal funds had been commingled by Navarro. In such case it became incumbent upon him to definitely show the amount of credit to which he was entitled, as represented by personal funds. This he failed to do, and the court might properly have refused to allow him credit for any part of the overages, except above mentioned \$291.59, which it was shown consisted of four checks drawn, but which had not been cashed by payees upon the audit date. He has no just ground of complaint because the court did not extend its indulgence to cover the item in the cash drawer as well as the bank deposit overages.

[2] Error is also assigned to the refusal to allow a credit of \$75 claimed by defendant to have been paid to certain parties as a bonus to construct a soda water stand in the city park. The court found that no such sum was paid, and, if it was paid, it was an improper expenditure of partnership funds. In the condition of the record, the finding that such sum was not paid cannot be set aside. The auditor's report merely shows that it was a disbursement reported as made. Credit therefor was not allowed, for the assigned reason that there was no authority to make the disbursement. It is true Navarro testified he made the disbursement, but this testimony was not corroborated in any way, and, he being the defendant in the action, the court was authorized in refusing credence to his statement that he had made the disbursement. *Thomas v. Saunders*, 150 S. W. 769; *Gonzales v. Adoue*, 56 S. W. 543; *Turner v. Groge*, 24 Tex. Civ. App. 554, 59 S. W. 585; *Insurance Co. v. Villeneuve*, 29 Tex. Civ. App. 128, 68 S. W. 203; *Railway Co. v. Lucas*, 148 S. W. 1149.

[3] We are further of opinion that the trial court properly taxed the auditor's fee and all other costs against Navarro, and the assignment complaining of this phase of the case is overruled. Navarro fraudulently or negligently kept the books of the company in such a manner that the appointment of an auditor became necessary in order to assist the court in ascertaining the amount or per-

sonal funds he had mingled with partnership funds and in arriving at an intelligent accounting between the parties. His improper conduct occasioned the litigation and the necessity for appointment of auditor, and the court did not improperly exercise its discretion in taxing all costs against him. Upon the contrary, we think it most properly exercised articles 2035 and 2048, R. S.; 30 Cyc. 749.

Affirmed.

KINCHEM v. AUSTIN et al. (No. 8235.)
(Court of Civil Appeals of Texas. Ft. Worth.
July 8, 1915.)

CONTRACTS — 94 — ASSIGNMENT — RESCISSION
— FRAUD.

Defendant by assignment acquired a contract for the sale of land for \$3,500 payable in installments, which further provided that when one-fourth of such amount should be paid the vendor would execute a warranty deed to the premises, conveying them clear of all liens and incumbrances. Defendant sold such contract to plaintiff, informing him that the last provision in the contract would control and that upon payment of one-fourth of the sum mentioned the vendor would convey the land clear of all liens and incumbrances. He, however, did not tell plaintiff that there were any other conditions or understandings except what was in the written contract, and though he was an attorney he did not, in giving his opinion as to the effect of the contract, act or pretend to act as plaintiff's attorney, but did advise him to consult other attorneys, which plaintiff did. *Held*, that plaintiff was not entitled to rescind his contract with defendant, as defendant's statement was but the expression of an opinion on a question of law, and moreover plaintiff did not rely on such opinion.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430, 1160, 1164, 1165; Dec. Dig. § 94.]

Appeal from District Court, Tarrant County; J. W. Swayne, Judge.

Action by S. E. Austin against C. R. Kinchen and J. R. Blakney. Judgment for plaintiff, against defendant Kinchen and he appeals. Reversed and rendered.

Poulter & Johnson, of Ft. Worth, for appellant. Mays & Mays and Lattimore, Cummings, Doyle & Bouldin, all of Ft. Worth, for appellees.

DUNKLIN, J. J. R. Blakney and L. R. Whitley executed a contract in writing by use terms of which the former agreed to sell, and the latter agreed to buy, a certain lot in the city of Ft. Worth. Whitley assigned his interest in the contract to A. G. Baldwin, who in turn assigned his interest in it to C. R. Kinchen, and Kinchen assigned all his interest in the contract to S. E. Austin.

The original contract, together with said assignments, is as follows:

"The State of Texas, County of Tarrant.

"Know all men by these presents:

"That I, J. R. Blakney, have this day bargained sold and conveyed to L. R. Whitley the following lot or parcel of land, to wit; Lot 31,

in block 5, Goldsmith's subdivision of the W. P. Patillo's addition to Ft. Worth, Tarrant county, Texas.

"The said Whitley agrees to pay for said lot and premises the sum of \$3,250.00 with interest thereon at the rate of 8 per cent. per annum from date until paid, said payment to be made upon the following terms: The said Whitley agrees to pay to the said Blakney the sum of \$20.00 per month, said payment to be made on the first of each month, beginning with the first day of October, 1913.

"The said Blakney agrees with the said Whitley that whenever there shall be paid as much as one-fourth of the principal, to wit, \$3,250.00, that he will then and there, at the request of the said Whitley, execute a general warranty deed to said premises conveying the same to the said Whitley or to whomsoever he should direct, clear of all liens and incumbrances.

"Should the said Whitley fail to make his monthly payments, as above agreed, he agrees to deliver up said premises, and this contract shall become void.

"October 1, 1913.

"[Signed] John R. Blakney.
"L. H. Whitley."

(On back indorsed as follows:)

"I hereby assign and convey to A. G. Baldwin all my right, title and interest in and to the foregoing contract. I am to remain in possession of the premises until March 1st, 1914, payments to be made to J. R. Sandige at the Westbrook Hotel, Ft. Worth, Texas.

"L. H. Whitley.

"State of Texas, County of Tarrant.

"Before me, C. B. Ambrose, a notary public in and for Tarrant county, Texas, on this day personally appeared L. H. Whitley, known to me to be the person whose name is subscribed to the foregoing instrument and assignment thereof and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

"Given under my hand and seal of office this 5th day of February, A. D. 1914. [L. S.] C. B. Ambrose, Notary Public, Tarrant County, Texas.

"For and in consideration of the sum of \$1,000.00. I hereby assign, transfer and convey all my right, title and interest in and to the within and foregoing contract and the property therein described unto C. R. Kinchen. Witness my hand at Ft. Worth, Texas, this 17th day of February, 1914. A. G. Baldwin. Witnesses: R. N. Dean.

"For and in consideration of \$1,050.00 I hereby assign, transfer and convey to S. E. Austin, all my right, title and interest in and to the within and foregoing contract and the property therein described. Witness my hand at Ft. Worth, Texas, this the 15th day of May, 1914. C. R. Kinchen. Witness: W. E. Niel."

S. E. Austin instituted this suit against C. R. Kinchen and J. R. Blakney, alleging that under and by virtue of said contract Blakney contracted and became obligated to execute to plaintiff a warranty deed to the property described, free of all liens and incumbrances whenever as much as one-fourth of the purchase price of \$3,250, or \$812.50, had been paid to him, Blakney; that \$240.50 had been paid to Blakney on said contract, leaving a balance of \$572 of said \$812.50, which balance, less the sum of \$300, the amount of delinquent taxes due on the property, plaintiff had tendered to Blakney in connection with a demand for a deed from Blakney to said property free of all liens or

incumbrances thereon, and that said tender and demand had been refused. In his pleadings, plaintiff made the same tender upon the same conditions, and prayed for judgment against Blakney for title to the property free of any lien for the balance of the purchase price which Whitley agreed to pay for the property. Plaintiff further alleged that, in consideration for the assignment of the contract to him, he paid to Kinchen the sum of \$250, and conveyed to him another lot in Ft. Worth, known as lot 16, in block 83, on Lincoln avenue. According to further allegations in his petition, plaintiff was induced to make such purchase by certain false and fraudulent representations made to him by Kinchen which were pleaded as follows:

"That as soon as said plaintiff herein shall have paid under said contract the sum of one-fourth (1/4) of the said thirty-two hundred and fifty (\$3,250.00) dollars, that the said J. R. Blakney would make, execute and deliver to this plaintiff a general warranty deed to said property free of any and all liens and incumbrances and that all this plaintiff would have to pay for said property would be the said sum of eight hundred twelve and 50/100 (\$812.50) dollars to the owner of said contract, to wit, J. R. Blakney, and that said sum of two hundred and fifty (\$250.00) dollars so paid by him together with the sum of eight hundred twelve and 50/100 (\$812.50) dollars to be paid to the other party to said contract was all that said plaintiff herein would have to pay for said property."

Plaintiff's prayer for judgment was as follows:

"That he have judgment against all of the defendants forever quieting his title to the property in controversy upon payment of the said one-fourth of the \$3,200.00 to the said J. R. Blakney; or in case the court should hold that such was not the meaning of the contract between the parties originally, to wit, L. H. Whitley and J. R. Blakney, and that there was fraud, accident or mistake in the statement of the matter to this plaintiff, by the defendant C. R. Kinchen as above alleged, then he prays that the deed made by him to the lot 16 in block 83, of North Ft. Worth, Tarrant county, Texas, situated on Lincoln avenue, be canceled, set aside and for naught held, and that the legal and equitable title to same be declared to be in this plaintiff, and all cloud upon plaintiff's title by reason thereof be removed, that he have judgment against all of said defendants for the sum of money so paid to the said Kinchen. * * *"

In the same connection plaintiff tendered back to Kinchen the contract in suit and further offered to do such equity as the court might require as a predicate for the relief sought.

A trial of the case resulted in a judgment in favor of plaintiff Austin against Kinchen for a rescission of the trade between them, but denying plaintiff any recovery against defendant Blakney; and Kinchen has appealed.

Defendant Kinchen requested a peremptory instruction in his favor which was refused. He then requested the submission of 16 special issues, which were by the court given. The court also submitted to the jury 18 special issues and a general charge all re-

quested by plaintiff, the general charge following the special issues, and reading:

"In addition to the above findings, will you please find a general verdict for either the plaintiff, or defendant. If your verdict is for the plaintiff, the form of your verdict will be, 'We, the jury, find for the plaintiff.' If your verdict be for the defendant, the form of your verdict will be, 'We, the jury, find for the defendant.'"

The jury made findings on the entire 34 special issues, and also found a general verdict in favor of plaintiff. The record fails to indicate whether the judgment was predicated upon the general verdict, or upon the findings upon special issues. It is likely, however, that it was based upon the special findings, since from a general verdict in favor of plaintiff it could not be determined whether the jury sustained the first count in plaintiff's petition against Blakney for the recovery of the land free of incumbrance upon payment to him of \$572, or the second count against Kinchen alone for a rescission of the trade with him. Nor has appellant presented any assignment to the general instruction which gave the jury no legal guide for a determination of the respective rights of the parties but made the jury the exclusive judges of the law, as well as of the facts.

But appellant has assigned error to the action of the court in refusing his request for a peremptory instruction in his favor. We seriously question the sufficiency of the petition to support the judgment for rescission, a question raised by another assignment presented by appellant; but a determination of that question is unnecessary in view of the fact that the testimony of plaintiff himself upon that issue negatives any right to that relief. Plaintiff testified as follows, and no other testimony was introduced having a contrary meaning:

"Mr. Kinchen told me that when as much as one-fourth of the principal sum was paid Blakney would execute a general warranty deed to said premises and convey the same to Whitley, or to whom he should direct, clear of all liens and incumbrances, and that the bottom clause would control the top, and there was no doubt the deed would have to be made according to that clause. Said he would defend it, being a lawyer, and get the deed for me, when I completed that one-fourth of the payments."

He further testified that before making the trade with Kinchen he first inspected the property in controversy, and then went to Kinchen's office and had a talk with him, and in that conversation Kinchen—

"told me that he had no deed to the property, but that he had this contract and could get a deed on it. Q. He did tell you he did not have any deed to this property? A. He certainly did. He said he had this contract and showed it to me. I knew the contract was made to Whitley by Blakney. I took the contract and read it. I knew from the contract that when Blakney sold the property to Mr. Whitley the contract called for \$3,250. I knew the contract read for \$3,250, and I knew there had only been a few payments on the contract, it was plain to see from the back of it. * * * Of course I intended to buy the contract from Mr. Kinchen

when I took it. Mr. Kinchen did not tell me that there was anything else pertaining to the contract except just what was written in it. He did not say there were any other conditions or understandings between Mr. Blakney and Mr. Whitley, except what was written in the contract, but in his opinion the bottom clause would control the top, but said he was in the dark on it, that it was not real clear, but he believed it. He said it was a written contract between the two men. He did not tell me anything outside of the contract. He did not try to withhold the contract from me, but he read it to me and then gave it to me and told me to take it to my own lawyer and let them read it; that he was in the dark and he could not say; it was a little bit mixed up and might mean one thing and might mean another. But he told me positively that he could get me a deed when I paid one-fourth, and independent of that I did take it to other lawyers. He did not go with me, nor suggest what lawyer for me to go to. He told me to go to some lawyer of my own choice, and I went to two different firms.

* * * Mr. Kinchen went with me to see my property, and he said he would turn over the contract for my place and \$100, and he told me to take the contract to some lawyer of my own choice and have it passed on, and not take his word for it, and insisted that I take it to some other lawyer and have it construed, and I went to see Charles Mays first, of the firm of Mays & Mays. They are lawyers, and after that I went to see Judge McLain, of the firm of McLain, Scott, McLain & Bradley, and Judge McLain looked the contract over and said no one could lose except Mr. Blakney, the one who first sold the property. He made that statement to Walter Scott and then gave me his opinion that way.

* * * I talked with Charley Mays and had him to go with me down to see Mr. Kinchen before we closed the deal. Q. What was your purpose in seeing Mr. Mays before you closed the deal? A. As to the value of this contract? Q. You went to get his opinion on the contract, didn't you? A. I certainly did. Q. You were taking his opinion upon the very matters Mr. Kinchen had talked to you about? A. I don't remember all of it; I put it up to him—just submitted the contract to him for his examination. Q. Mr. Austin, why did you go to other lawyers? A. Because I wanted a lawyer's opinion on that contract. Q. Well, Mr. Kinchen was a lawyer, wasn't he? A. Yes, but I wanted some other lawyer's opinion besides Mr. Kinchen's. Q. And with that in view you went to see Mays & Mays, and Judge McLain, and they gave you their opinion, and then you closed the deal, didn't you? A. Charley Mays gave me an opinion, I don't know how, but he just looked at it; I don't think he understood it. Q. And it was after that you closed the deal, wasn't it? A. The same day; yes, sir."

Thus it clearly appears that the statement made by Kinchen, in effect, that Blakney could be compelled to execute to plaintiff a deed to the property whenever as much as one-fourth of the purchase price which Whitley had agreed to pay had been paid, was not a statement of fact, but the expression of opinion on a question of law, and was so understood by Austin. Furthermore, it is clear from the testimony quoted that, at all events, plaintiff did not rely upon Kinchen's opinion on that question alone, but consulted other attorneys in compliance with the suggestion of Kinchen so to do; and that after attorneys of his own selection inferentially, at least, had expressed the same opinion given by Kinchen relative to the proper legal

construction of the contract between Blakney and Whitley, plaintiff made the trade with Kinchen. The facts show that plaintiff and Kinchen were dealing at arm's length; that Kinchen concealed nothing from Austin; and that, in giving his opinion relative to the legal effect of the written contract between Blakney and Whitley, Kinchen was not acting, nor pretending to act, as attorney for Austin. Under those facts, it is clear that plaintiff showed no right to rescind the contract with Kinchen, and the court erred in refusing Kinchen's request for an instructed verdict in his favor. *Hawkins v. Wells*, 17 Tex. Civ. App. 360, 43 S. W. 516, and authorities there cited.

Accordingly, the judgment in favor of plaintiff against Kinchen is reversed, and judgment is here rendered that plaintiff take nothing of defendant Kinchen. The judgment denying plaintiff any relief against Blakney is undisturbed.

FIRE ASS'N OF PHILADELPHIA v. RICHARDS et al. (No. 8224.)

(Court of Civil Appeals of Texas. Ft. Worth. June 26, 1915.)

1. INSURANCE §533—FIRE INSURANCE—ACCRUAL OF LIABILITY.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4874, providing that a fire insurance policy, in case of a total loss of the property insured, shall be considered a liquidated demand against the company for the full amount thereof, such a liability accrues immediately after the occurrence of the fire, regardless of stipulations in the policy for notice and proof of loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1820; Dec. Dig. §533.]

2. INSURANCE §539—FIRE INSURANCE—LIMITATIONS AS TO NOTICE OF LOSS.

Stipulations in a fire insurance policy that proof of loss must be furnished to the company within 90 days after the fire were void under Vernon's Sayles' Ann. Civ. St. 1914, art. 5714, providing that no stipulation in any contract requiring notice to be given for any claim for damages shall be valid unless reasonable, and any such stipulation fixing the time within which such notice shall be given at a less period than 90 days shall be void.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. §539.]

3. INSURANCE §622—ACTION ON POLICY—LIMITATIONS.

A provision in a fire insurance policy that suit thereon should not be sustained unless commenced before the expiration of two years from the accrual of the cause of action was void under Vernon's Sayles' Ann. Civ. St. 1914, art. 5713, providing that no agreement limiting the time to sue to a shorter period than 2 years shall be valid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1540, 1544-1550; Dec. Dig. §622.]

4. INSURANCE §665—ACTION ON POLICY—SETTLEMENT.

In an action on a fire policy, wherein it was contended that a settlement was obtained

by duress, evidence held sufficient to sustain the plea thereof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. ☞ 665.]

5. TRIAL ☞ 296—ACTION ON FIRE POLICY—INSTRUCTION—CURE.

In an action on a fire insurance policy, wherein a contract of settlement was imposed as defense, an instruction ignoring such defense was erroneous, notwithstanding that other instructions recognizing the contract of settlement were also given, since it was impossible to determine which of the conflicting instructions were followed by the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. ☞ 296.]

Appeal from Stonewall County Court; R. S. Tillotson, Judge.

Action by L. F. Richards and others against the Fire Association of Philadelphia. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Crane & Crane, of Dallas, for appellant. Ernest Herring and J. M. Carter, both of Aspermont, for appellees.

DUNKLIN, J. The Fire Association of Philadelphia issued an insurance policy upon a house owned by L. F. Richards and wife, insuring the same against loss or damage by fire for a term of one year, beginning November 10, 1911, and ending November 10, 1912. The premium paid by L. F. Richards was \$3.87, and the amount of insurance was \$300. The policy also contained a provision that any loss or damage sustained and proven to be due under the policy should be payable to R. B. Spencer & Co. as their interest might appear, subject to the terms and conditions of the policy. The house insured was a one-story frame building occupied by L. F. Richards and wife as a dwelling and situated in the town of Aspermont, Tex. The house was wholly destroyed by fire on November 28, 1911. On December 20, 1911, Sam Bucklew, adjuster for the insurance company, reached an agreement with L. F. Richards for the settlement of the claim theretofore made by him for the loss of the house, and also for the loss of its contents, which were covered by another insurance policy for the sum of \$250, not litigated in this suit. By the terms of that agreement the adjuster, as the agent and representative of the insurance company, agreed to pay Richards, who agreed to accept, the sum of \$50 in full satisfaction of said policies. In pursuance of that agreement Bucklew executed and delivered to Richards a draft, drawn upon Trezevant & Cochran, general agents of the insurance company at Dallas, for the sum of \$50, payable to the order of L. F. Richards and R. B. Spencer & Co.; the draft containing the following stipulation:

"It is agreed that the indorsement and collection of this draft by the payee or payees shall constitute a receipt in full for all sums due by

reason of said loss under said policy, and by said payment the policies are canceled in full for the above amount, leaving no insurance thereunder whatever. Assured did this day surrender the above numbered policies to the insurance company. Assured further agrees that this draft shall be turned over to R. B. Spencer & Co."

At the same time L. F. Richards executed and delivered to Bucklew a receipt acknowledging the payment to him of said \$50 by the Fire Association and containing substantially the same stipulation above quoted from the draft. It seems that the draft was never collected by the payees. This suit was instituted to recover the amount stipulated in the policy; the plaintiffs in the case being L. F. Richards and wife, Mrs. M. A. Richards, and R. B. Spencer, H. S. Abott, and J. B. Lipscomb, composing the partnership firm of R. B. Spencer & Co., and the defendant being the Fire Association named.

In the petition the execution and delivery of the policy and the total destruction of the house by fire were alleged. It was further alleged that at the time of the issuance of the policy, and at the time of the fire, the house was the homestead of L. F. Richards and wife, who were indebted to the firm of R. B. Spencer & Co. in the sum of \$120, evidenced by their eight certain promissory notes in the sum of \$15 each, all dated December 1, 1909, which were given for material used in building said house, which said notes were secured by a furnisher's lien upon the house, fixed in accordance with the statutory provisions relating thereto. It was further alleged that Bucklew, defendant's adjuster, without the knowledge or consent of R. B. Spencer & Co., and by threats made to L. F. Richards to procure the indictment and conviction of his wife, Mrs. M. A. Richards, for burning the house, procured the contract of settlement from Richards referred to above. It was alleged that L. F. Richards did not willingly and freely enter into said contract of settlement, but that he was intimidated and coerced into agreeing to such settlement by the threats so made by Bucklew to prosecute and convict Mrs. M. A. Richards for burning said house, and that by reason of those facts the contract of settlement was invalid and of no force or effect. It was further alleged that plaintiffs had refused to accept the said draft in satisfaction of the said policy. It was further alleged that; as the house was totally destroyed, the policy became a liquidated demand against the defendant for its full amount; that notice of the loss was duly given by the plaintiff to the defendant, together with proper proof thereof.

In its answer the defendant denied that the settlement with L. F. Richards was procured by fraud, duress, or threats of any character, and alleged that the same was made willingly and freely on the part of L. F. Richards. Defendant further alleged that

Mrs. M. A. Richards was equally interested with her husband, L. F. Richards, in the property insured, which was community property of the two, and likewise equally interested in said policy as a cobeneficiary with her husband therein; that the fire which destroyed the building was due to the act or procurement of Mrs. M. A. Richards, who set fire thereto, or caused the same to be destroyed by fire, for the purpose of collecting the insurance upon the property, and hence the defendant was not liable thereon. It was further alleged that, while the policy contained provisions requiring plaintiffs to furnish to the defendant within 90 days after the fire proof of said loss, and that the policy would not be due and payable until 60 days after the furnishing of said proof of loss, that said provisions relative to the due date of payment are null and void by virtue of the statutes of Texas and the decisions thereunder, to the effect that, in the event of the total destruction of a building by fire, the policy of fire insurance thereon shall be considered a liquidated demand upon which suit may be instituted immediately after the fire. A further stipulation contained in the policy was also specially pleaded, reading:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within 2 years next after the fire."

Defendant alleged that the suit had been instituted more than 2 years after the fire, and pleaded the stipulation last mentioned as a bar to any recovery. A trial before a jury resulted in a verdict and judgment in favor of plaintiffs for the sum of \$300, with interest from date of suit, from which judgment the defendant has prosecuted this appeal.

As noted already, the fire which destroyed the house occurred on November 28, 1911. This suit was instituted December 29, 1913, more than 2 years after the date of the fire, and by different assignments of error appellant insists that the provision in the policy last quoted, to the effect that no suit or action on the policy for the recovery of any claim shall be sustainable in any court of law or equity, not commenced within 2 years next after the fire, was a complete bar to any recovery, and that the court erred in refusing a peremptory instruction in its favor as requested; also in refusing to sustain defendant's special exceptions to the petition, which exceptions presented the same defense, and in submitting any instruction to the jury which would permit a verdict in plaintiff's favor upon any theory.

Article 4874, 3 Vernon's Sayles' Tex. Civ. Stat., reads:

"A fire insurance policy, in case of a total loss by fire of property insured, shall be held and considered to be a liquidated demand against the company for the full amount of such policy: Provided, that the provisions of this article shall not apply to personal property."

Article 5713 of the Statutes reads:

"It shall be unlawful for any person, firm, corporation, association or combination of whatever kind to enter into any stipulation, contract, or agreement, by reason whereof the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract, or agreement for any such shorter limitation in which to sue shall ever be valid in this state."

Article 5714 reads, in part, as follows:

"No stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall ever be valid, unless such stipulation is reasonable; and any such stipulation fixing the time within which such notice shall be given at a less period than 90 days shall be void. * * *"

In the case of *Taber v. Western Union Tel. Co.*, 104 Tex. 272, 137 S. W. 106, 34 L. R. A. (N. S.) 185, the Telegraph Company, which was sued for damages for negligent delay in the transmission and delivery of a message, pleaded in bar of the action the failure of the sender of the message to comply with the following stipulation contained in the contract:

"All messages taken by this company are subject to the following terms: The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within 90 days after the message is filed with the company for transmission."

In that case our Supreme Court, referring to article 5714 of the Statutes, said:

"The statute is plain in its terms that 'any such stipulation fixing the time within which such notice shall be given at a less period than 90 days shall be void.' The provision in the contract requiring that notice shall be given within 90 days after the filing of the message we construe to mean that such notice shall be given before the expiration of 90 days after the filing of the message, and hence is void. The statute gives a claimant 90 full days as the shortest time to which he may be prescribed by contract in presenting his claim for damages, and any abridgment of that right annuls the contract. *The New York Court of Appeals, in Merchants' & Traders' Bank v. Mayor*, 97 N. Y. 361, in construing a city ordinance which provides for notice to be given 'at any time within 10 days after the completion' of certain work, held such ordinance to mean that notice must be given before the expiration of 10 days after the completion of the work. It is our opinion that, even if the stipulation was not repugnant to the provisions of the statute by requiring the notice to be given 'within 90 days,' the same is nevertheless void by virtue of the provision arbitrarily fixing the period from which the 90 days shall be computed at the time of filing the message, as contradistinguished from the time the cause of action arose as provided for in the statute as we construe its meaning."

T. & P. Ry. Co. v. Langbehn, 150 S. W. 1188, *Smith v. I. & G. N. Ry.*, 138 S. W. 1074, and *St. L. & S. W. Ry. v. Brass*, 133 S. W. 1075, are to the same effect.

In *Continental Insurance Co. v. Chase*, 33 S. W. 602, it was held that under the article of the statute now numbered 4874, providing that a fire insurance policy upon property other than personal property shall be considered a liquidated demand whenever the property is wholly destroyed by fire, no effect could be given to a provision in a policy

requiring the insured to furnish to the company proof of such loss within 60 days after fire, and further stipulating that no suit should be instituted upon the policy until such proof had been so furnished. In that connection the court said:

"If the amount due is fixed and settled, we cannot see how it can be open for adjustment, proof, or anything else but payment. The holder of the policy in such cases has nothing to do but to present his policy for payment, as he would a promissory note. It is due when the loss occurs, regardless of the stipulations in the contract to the effect that it shall be due so many days after proof of loss, for this statute has done away with proof of loss for any purpose whatever."

To the same effect are the following decisions: *Georgia Home Ins. Co. v. Leaverton*, 33 S. W. 579; *Hamburg-Bremen Ins. Co. v. Ruddell*, 37 Tex. Civ. App. 30, 82 S. W. 826; *Fire Association of Philadelphia v. Strayhorn*, 165 S. W. 901.

[1-3] Under those authorities we hold that if appellant was liable upon the policy in suit the amount of that liability was due immediately after the fire occurred, and that the stipulation contained in the policy for notice and proof of loss to be made as a prerequisite to the right to sue upon the policy was void, as alleged by appellant in its answer. In *Tex. & Pac. Ry. Co. v. Langbehn*, 158 S. W. 244, a stipulation in the bill of lading for goods shipped, and for the loss of which the suit was instituted, was invoked by the railway company as a bar to the action. That stipulation read:

"In no event shall any suit be sustained, unless the same shall be commenced before the expiration of 2 years from the date the cause of action accrued."

Article 5713 of the Statutes quoted above was invoked in reply to that contention. In that case the Court of Appeals at Galveston held that the stipulation in the bill of lading was in violation of that statute, and therefore invalid. The conclusion so reached was predicated upon the decision of our Supreme Court in *Taber v. Western Union*, supra. In other words, it was held that if a provision in a contract requiring notice of damages to be given within 90 days was in violation of article 5714, as decided in the *Taber* Case, then the provision in the bill of lading, requiring suit to be instituted before the expiration of 2 years from the date the cause of action accrued, fixed a period of limitation for the institution of the suit shorter than 2 years and was therefore in violation of article 5713 of the statute. In that case the majority of the court criticized the decision in the *Taber* Case, but felt constrained to follow it, and to hold that the principle was decisive of the question then determined.

The provision in the policy is substantially the same as the one noted in the bill of lading in the *Langbehn* Case last referred to. Article 5713 is one of the articles of title 87 upon the subject of limitation of actions, embracing all our statutes of limitation, all of which statutes require suits upon different

causes of action to be instituted "within" 1, 2, 3, 4, 5, and 10 "years," respectively. And while we have concluded to follow the opinion of the Court of Appeals for the First District in the *Langbehn* Case, for the reasons therein stated, yet, if the question were one of first impression, the majority at least would be inclined to hold that article 5713 should be construed as prohibiting a stipulation in any contract fixing a period of limitation for suit thereon to a period shorter than is fixed by the statute of limitation of 2 years, rather than as adding 1 day to that period.

The jury were instructed, in effect, that the contract of settlement was valid and binding upon the plaintiffs, unless the same was obtained through duress, as pleaded by them.

[4] Appellant earnestly insists that the evidence was insufficient to sustain the plea that the contract of settlement was procured through duress exerted upon Richards. Testimony at length is cited strongly tending to negative the truth of such finding by the jury. According to Bucklew's testimony, which was corroborated by other evidence, Bucklew procured the affidavits from several of the citizens residing at Aspermont relative to the origin of the fire. In a conversation with L. F. Richards, just before the settlement was agreed to, he submitted those affidavits to Richards, and at the time stated to him in substance that he believed Mrs. Richards set fire to the house, and that that belief was based upon the information contained in the affidavits. Bucklew further testified, in effect, that Richards took the affidavits with him and repaired to the office of his attorney for advice relative to the proposition already made by Bucklew to pay the sum of \$50 in full settlement of the two policies of insurance, one being upon the contents of the house, and the other being the policy in controversy in this suit upon the building; that, after consulting with his attorney, Richards freely and voluntarily agreed to the settlement; and that Bucklew at no time made any of the threats charged in plaintiffs' petition. But opposed to that testimony was the testimony of Richards himself, substantially that such threats were made by Bucklew, and that he was thereby coerced and intimidated to accept the proposition of settlement made by Bucklew. He further testified that after Bucklew submitted the proposition, and made the threats to send his wife to the penitentiary unless the proposition was accepted, he (Richards) did go out to consult his lawyer, who returned with him to Bucklew; that the attorney then requested of Bucklew to show him the affidavits upon which he based his opinion that Mrs. Richards had burned the house, but that this request was declined by Bucklew; that thereupon the attorney declined to advise Richards whether or not to accept the proposition, by reason of his ignorance of

the information upon which Bucklew's charge was based. Other evidence was introduced tending in some respects to corroborate the testimony of Richards. In view of such evidence on the part of plaintiffs, the assignment now under discussion must be overruled.

[5] Error has been assigned to the following instruction given by the court to the jury:

"If you believe from the evidence that defendant, after the destruction of said house above described, with knowledge thereof, denied its liability to plaintiffs and refused to pay plaintiffs the amount of said insurance, you will find in favor of plaintiffs, unless you further believe that said house was destroyed by the act or procurement of plaintiff Mrs. M. A. Richards, in which event you will find for the defendant."

The criticism of this instruction is that it ignores other issues under which the jury would be justified in finding for the defendant. The instruction clearly ignores and excludes any defense to the suit by reason of the contract of settlement. In effect, it is a peremptory instruction that the contract of settlement was invalid and of no binding force or effect.

Appellee insists that the error, if any, in the instruction, was harmless, in view of the fact that in other portions of the charge the jury were instructed, in effect, that the contract of settlement would preclude a recovery unless the plea of the plaintiffs that the same was executed under duress was sustained, and that the burden was upon plaintiffs to sustain that plea. It is impossible to determine which of these conflicting instructions were followed by the jury, and in the absence of any showing that the error in the instruction quoted did not influence the jury to the defendant's prejudice, the assignment of error now under discussion must be sustained. *Burgher v. Floore* (Sup.) 174 S. W. 819; *Railway Co. v. Sage*, 98 Tex. 438, 84 S. W. 814.

Reversed and remanded.

CHICAGO, R. I. & G. RY. CO. v. LOFTIS et ux. (No. 8249.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 30, 1915.)

1. RAILROADS \S 398—INJURY TO PERSON ON TRACKS—DISCOVERY OF PERIL BY TRAIN CREW—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for death of plaintiffs' minor son, struck by defendant's train while walking on the track, evidence held to authorize finding that defendant's engine crew discovered the child on the track, unaware of the approaching train, in time to have avoided the death.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1356, 1358-1363; Dec. Dig. \S 398.]

3. RAILROADS \S 390—INJURY TO PERSON ON TRACKS—CONTRIBUTORY NEGLIGENCE—IMMATERIALITY.

Where defendant railroad's engine crew was guilty of negligence, proximately resulting in the

death of one walking along the track, after their discovery of the peril, it was immaterial that such person was guilty of contributory negligence in entering upon the track.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1324, 1325; Dec. Dig. \S 390.]

3. RAILROADS \S 400—INJURY TO PERSON ON TRACKS—HIGH RATE OF SPEED OF ENGINE—QUESTION FOR JURY.

In an action against a railroad for the death of plaintiffs' minor son, struck by locomotive while walking on defendant's tracks, question whether defendant negligently operated its engine at a high rate of speed held for the jury under the evidence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1365-1381; Dec. Dig. \S 400.]

Appeal from District Court, Wise County; F. O. McKinsey, Judge.

Action by W. F. Loftis and wife against the Chicago, Rock Island & Gulf Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Lassiter, Harrison & Rowland, of Ft. Worth, and McMurray & Gettys, of Decatur, for appellant. R. E. Carswell, of Decatur, and H. E. Lobdell, of Bridgeport, for appellees.

CONNER, C. J. This suit was instituted by W. F. Loftis and May Loftis to recover damages for the death of their minor son, Denny Loftis, who it was alleged had been run over and killed by one of appellant's locomotive engines in August, 1912. On a former appeal judgment in appellees' favor was reversed, on the ground that the evidence was insufficient to warrant the submission of the issues of negligence in operating the engine at an excessive speed and without keeping a proper lookout. See *C. R. I. & G. Ry. Co. v. Loftis*, 168 S. W. 403. On the last trial the issue of a failure on the part of the operatives of the engine to keep a proper lookout was not submitted; the case being submitted on the issues of contributory negligence on the part of deceased, and of negligence on the part of appellant's servants in operating the engine at a dangerous rate of speed, and in failing to exercise due care to avoid injury after discovering that Denny Loftis was in a situation of peril. From a judgment on these issues in appellees' favor, appellant has again appealed.

As submitted to us for revision, only three contentions are made. They are, first, that there was no evidence to warrant the submission to the jury of the issue that the defendant negligently operated the engine at a high rate of speed; second, that the deceased was guilty of contributory negligence; and, third, that there is no evidence to warrant the submission to the jury of the issue of the defendant's negligence after the discovery of the peril of deceased. In the view we have taken of the case, the control

ling question relates to the issue of discovered peril, and we will therefore address ourselves to it first.

[1] In a general way the evidence shows that appellant's line of railway extends in a southeasterly and northwesterly direction through the town of Bridgeport, in Wise county. Bridgeport is a town of some 2,500 inhabitants, living on either side of the railway, and divided, as designated in the testimony, into East and West Bridgeport. There is a passenger depot about midway of the town, with crossings substantially at right angles with the railway, both north and south of the passenger depot. South of the passenger depot, several hundred feet, is situated a freight depot. From a point a short distance north of the upper or northern crossing, one or more switch tracks leading to the right diverge from the main line. It appears that on the day of the injury the deceased, who was about 13 years old, approached the railway tracks from the east and along the crossing south of the passenger depot. When he arrived upon the main track, the more easterly one, he turned south and continued to walk between the rails until he was overtaken by the engine that ran over him. The operatives of the engine had been engaged in some switching north of the crossing on the north side of the passenger depot, and the engine had been attached to some five or six heavily loaded cars, and was backing south along the main track at a speed of some 10 or 12 miles per hour. The engineer was on the east or right-hand side of the engine, with his face to the north, looking for signals from the conductor, located at a switch stand beyond him. The fireman was on the west or left-hand side of the engine, with his face to the south, looking, as he testified, for objects that might be upon the track.

There was evidence tending to show that, when the backing train reached a point about opposite the northern end of the passenger depot, the fireman saw the deceased approaching the track south of the passenger depot, and when but a few steps from it, with his head down and without apparent knowledge of the train's approach; that a moment later, as the deceased turned down the track, he called to the engineer to blow the whistle, as there was a man on the track; that the engineer, upon the first call, appeared not to understand what the fireman had said, but, on the call being repeated, the engineer immediately blew the whistle, this occurring at a point when the engine was about opposite the center of the passenger depot and from 130 to 200 feet from the point where the deceased was overtaken. The engineer and fireman both testified that immediately upon the blowing of the whistle the engineer reversed his engine and applied the air brakes thereon, with which alone the train was supplied, and did all that could be done in order to avoid the injury. There

was other testimony, however, from witnesses at near-by points, who were alarmed at the situation of the deceased and in a situation to observe, and who testified that they did observe, that there was no diminution or slackening of the train's speed until just before the tender of the engine struck the deceased. There was evidence further tending to show that the engine and train could have been stopped, at the rate of speed it was going, within a distance from 130 to 200 feet, but that it did not in fact stop until after it had gone about that distance after it struck the deceased.

From what the evidence shows that the fireman said and did, the outcries of alarm on the part of some sectionmen along the track just south of where the deceased was struck, and other circumstances, we think the jury were authorized to draw the conclusion that the operatives of appellant's engine discovered that the deceased was on the track, in a perilous situation and without a consciousness of the approaching train, in time in all probability to have avoided the serious consequences which resulted, had they in fact exercised that high degree of care which the law required of them under the circumstances. *Sanches v. Railway Co.*, 88 Tex. 117, 30 S. W. 431; *T. & P. Ry. Co. v. Breadow*, 90 Tex. 28, 36 S. W. 410. The evidence tends to further show that, when first struck, the deceased was not immediately killed, but either he or some part of his clothing caught upon some of the rods or projections of the tender, and that he was dragged along the track for some time before he finally fell and was run over, and as it seems to us in the interest of the preservation of human life we may lawfully draw the inference, as the jury may have done that, had the operatives of the engine in fact done all that they could have done to have stopped the train immediately upon the discovery of the deceased's peril, the final result would not have been the actual loss of life, though possibly it may have resulted in some injury. See *N. T. Traction Co. v. Mullins*, 44 Tex. Civ. App. 568, 99 S. W. 423, and cases there cited. On the whole, therefore, we are of the opinion that there was no error on the part of the court in submitting the issue of discovered peril, and that it cannot be said that the evidence is insufficient to sustain the verdict and judgment in appellees' favor on that issue. All assignments, therefore, presenting these questions, are overruled.

[2] The remaining questions, we think, may be briefly disposed of. If the operatives of appellant's locomotive engine were guilty of negligence proximately resulting in the death of Denny Loftis after the discovery of his peril, it is wholly immaterial, as has been often determined, that Denny Loftis was guilty of contributory negligence in entering upon the track. See *Sanches v. S. A. & A. P. Ry. Co.*, 88 Tex. 117, 30 S. W. 431;

M., K. & T. Ry. Co. v. Ferris, 23 Tex. Civ. App. 215, 55 S. W. 1119.

[3] To the remaining contention, raised in several forms by the assignments of error, to wit, "that there was no evidence to warrant the submission to the jury of the issue that the defendant negligently operated the engine at a high rate of speed," we cannot assent. In addition to what we have stated as to the situation of Bridgeport, the number of its inhabitants, the load of the train, the absence of brakes, except upon the engine, the hacking of the engine with the tender forward, etc., it was further shown that inhabitants of the town of Bridgeport habitually and frequently walked on and along the track of the railway hereinbefore described, and that the engine at the time was being propelled along a downgrade. In the light of all of these circumstances, we feel unable to say that there was "no evidence to warrant the submission of the issue," and this is the specific objection made.

All assignments, therefore, raising the question, are overruled, and the judgment is affirmed.

GONZALES v. GARCIA. (No. 5518.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 3, 1915.)

FRAUDS, STATUTE OF §23—PROMISE TO ANSWER FOR ANOTHER'S DEFAULT—ORIGINAL OR COLLATERAL PROMISE.

Where a Mexican colonel, desiring the services as soldier of a person under indictment, induced plaintiff to sign such person's bail bond as a surety, by promising to pay any sums for which plaintiff might become liable on account of the forfeiture of the bond, the contract was an original one, not within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 13, 19; Dec. Dig. §23.]

Appeal from District Court, Webb County; J. F. Mullally, Judge.

Action by Pilar Garcia against Clemente G. Gonzales. Judgment for plaintiff, and defendant appeals. Affirmed.

A. Winslow, of Laredo, for appellant. Wilmer Threadgill, of Laredo, for appellee.

FLY, C. J. This is a suit, instituted by appellee against appellant, for the recovery of \$278.40. The case was tried before the court without a jury, and judgment was rendered for appellee against appellant for the sum of \$253.48.

The only point in the case is as to whether appellant is responsible to appellee on an oral promise made by him to appellee to reimburse him for any sums that he might pay out on account of the forfeiture of a bail bond by Maximo Martinez, who was under indictment. Appellee was induced, by the promise of appellant to pay any sums for which he might become liable on account of the forfeiture of the bond, to sign the bond as a surety. The bond was forfeited, and ap-

pellee was compelled to pay the amount of it.

Appellant pleaded, among other things, the statute of frauds, in that the promise made by him to appellee was not in writing. The contract was an original one between appellant and appellee; the consideration being that appellant, who was a colonel among the Mexicans, desired Martinez's services in Mexico as a soldier. The contract did not come within the purview of the statute of frauds, and appellant, upon the forfeiture of the bond and the payment of the amount of it by appellee, was liable to him for that amount. *Porter v. Norman*, 136 S. W. 1173; *Spencer v. Nalle*, 143 S. W. 991; *Ferrell v. Millican*, 156 S. W. 230.

The judgment is affirmed.

McLAUGHLIN v. TERRELL BROS. (No. 474.)

(Court of Civil Appeals of Texas. El Paso. Oct. 28, 1915. Rehearing Denied Nov. 18, 1915.)

1. SALES §355—ACTION FOR PRICE—VARIANCE.

Where, in an action to recover for wood sold, the petition alleged in the first paragraph that defendant agreed to purchase from plaintiffs certain cars of wood, and in the second paragraph alleged that, in pursuance of the contract, plaintiffs sold and delivered to defendant 10 cars of wood, aggregating 185 cords, evidence that plaintiffs had contracted with defendant to ship him 450 cords of wood was not at variance with the contract pleaded.

[Ed. Note.—For other cases, see *Sales, Cent. Dig. §§ 1025-1043; Dec. Dig. §355.*]

2. SALES §181—ACTION FOR PRICE—EVIDENCE—IMMATERIALITY.

In an action to recover for certain cars of wood contracted by plaintiffs to be sold defendant f. o. b. A., the exclusion from evidence of freight bills of the railroad company, offered to show the number of cords of wood contained in each of the 10 cars received by defendant at H., was proper, in the absence of a denial of the allegation of the petition that delivery was to be made f. o. b. cars at A., it being immaterial what number of cords of wood were in the cars on their arrival at H.

[Ed. Note.—For other cases, see *Sales, Cent. Dig. §§ 473-491; Dec. Dig. §181.*]

3. EVIDENCE §318—MATERIALITY—BASIS OF PROBATIVE FORCE.

In an action for wood sold f. o. b. cars at A., in the absence of evidence as to the correctness of the statement in freight bills of the railroad as to the number of cords of wood on arrival at H., the exclusion of such bills was proper.

[Ed. Note.—For other cases, see *Evidence, Cent. Dig. §§ 1193-1200; Dec. Dig. §318.*]

4. EVIDENCE §158, 318—BEST EVIDENCE—HEARSAY—BOOK.

In an action for the price of certain cords of wood sold f. o. b. cars at A., and transported to the buyer at H., who claimed to have received less than plaintiffs sued to recover for, a copy of the American Railway Equipment Register, there being testimony that it was in general use among railways in the United States, as to the capacity of freight cars, supported by testimony of a witness of experience that he knew

that the facts stated in the journal were correct, was admissible in evidence to show the capacity of the 10 cars containing the wood.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 472, 473, 474½-504, 506-526, 1193-1200; Dec. Dig. ¶¶ 158, 818.]

5. EVIDENCE ¶818—HEARSAY—MEMORANDUM.

In an action to recover for cords of wood sold f. o. b. cars A. and delivered to defendant at H., where the American Railway Equipment Register was admissible to show the dimensions of the cars which contained the shipment, a memorandum, excerpting from such register the dimensions of the particular cars carrying the shipment, testified to be a copy of their dimensions as given in the register, was admissible in evidence to conserve time and to avoid looking up in the register the statement as to the capacity of each individual car.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1193-1200; Dec. Dig. ¶¶ 818.]

6. TRIAL ¶273—INSTRUCTIONS—OBJECTIONS.

Under Rev. St. 1911, art. 1971, as amended by Act 33d Leg. c. 59, providing that the charge shall be in writing, signed by the judge, and submitted to the parties for inspection, that objections thereto shall be presented to the court before the charge is read to the jury, and that all objections not so made and presented shall be considered waived, an objection to a paragraph of the charge, not made and presented to the court before the charge was read to the jury, was waived.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 680-682; Dec. Dig. ¶¶ 273.]

7. SALES ¶181—DELIVERY OF QUANTITY SPECIFIED—SUFFICIENCY OF EVIDENCE.

In an action to recover for a shipment of wood sold f. o. b. cars at A. and delivered at H., defendant claiming the shipment contained 132 cords only, plaintiffs claiming it contained 185, evidence on the point held sufficient to support verdict for plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. ¶¶ 181.]

Appeal from Harris County Court at Law; Clark C. Wren, Judge.

Action by Terrell Bros. against J. M. McLaughlin. Judgment for plaintiffs, and defendant appeals. Affirmed.

Geo. A. Byers and R. M. Love, both of Houston, for appellant. Hunt, Myer & Teagle and Rodman S. Cosby, all of Houston, for appellees.

WALTHALL, J. This is a suit brought by appellees, E. H. and A. P. Terrell, a copartnership firm of Terrell Bros., of Navasota, Grimes county, against J. M. McLaughlin, doing business as Texas Wood Company, at Houston, Tex. Plaintiffs alleged that on or about November 13, 1913, plaintiffs and defendant entered into a contract, by virtue of which defendant agreed to purchase from plaintiffs certain cars of wood f. o. b. cars Allenfarm, Tex., at the agreed price of \$2.75 per cord; that in pursuance of said contract, plaintiffs, within two or three weeks thereafter, sold and delivered to defendant 10 cars of wood, aggregating 185 cords at the agreed price per cord, amounting to \$508.75, more fully shown and set forth in the attached account, itemized and verified and made an ex-

hibit and part of the petition. Defendant answered by general and special demurrer, denied the correctness of each item of plaintiffs' itemized account, as to the amount of wood contained in each car, and attached to his answer an itemized account, which he alleged contained a true and correct statement of the number of cords of wood contained in each car, and further answered that, on the date alleged, the contract between plaintiffs and defendant was that plaintiffs agreed to ship him about 150 cords of dry wood and 300 cords of green wood, all to be first-class Brazos river bottom wood, for which he agreed to pay \$2.75 per cord. That the wood shipped by plaintiffs and received by him was not first-class, but instead was small, rotten, limby, trashy wood, and alleged the value of the wood shipped to him to be worth in the open market not more than \$1 per cord, which amount defendant in his answer tendered and offered to pay. Defendant alleged that the quantity of wood shipped to him under said contract was not 185 cords as alleged, but was 132 cords. Defendant alleged that by reason of the failure of plaintiffs to ship the grade of wood contracted, he had sustained damages to the extent of \$100, which he asked to be deducted from the amount admitted to be due for the wood received. Plaintiffs filed a supplemental petition containing a general and special demurrer to the answer, and specially denied the allegations contained in each paragraph of the answer. The court instructed the jury as follows:

"The plaintiffs are entitled to recover for so much wood as you may believe from a preponderance of the evidence was actually loaded into the 10 cars in controversy at Allenfarm, and delivered to the railroad for shipment to defendant at a price as follows:

"If you believe from a preponderance of the evidence that said wood was of the kind and grade which plaintiffs agreed to furnish to defendant, then the price which plaintiffs are to recover is the contract price, to wit, \$2.75 per cord.

"If you do not believe from a preponderance of the evidence that the wood was of the kind and grade which plaintiffs agreed to furnish to defendant, then the price which plaintiffs are to recover is the market value at Houston, Tex., of wood of the kind and grade which plaintiffs furnished defendant in said 10 cars."

The jury returned a general verdict in favor of the plaintiffs in the sum of \$500.50, on which the court rendered judgment for plaintiffs for the sum of \$500.50 and interest at the rate of 6 per cent per annum from the 30th day of July, 1913, and for costs of suit. Defendant filed a motion for a new trial, which the court overruled, and defendant gave notice and perfected his appeal.

[1] Defendant's first assignment of error is to the action of the court in overruling defendant's motion to strike out and exclude from the consideration of the jury the evidence of A. P. Terrell, to the effect that plaintiffs had contracted with defendant to

ship him 450 cords of first-class river bottom wood, on the ground that said evidence was at variance with the contract pleaded by plaintiffs. An inspection of the record fails to show a variance. The allegation in the first paragraph of the petition, as stated above, is that "defendant agreed to purchase from plaintiffs certain cars of wood" at the price and place named. In the second paragraph of the petition, in stating the quantity of wood delivered and for which they sue, plaintiffs allege:

"That in pursuance of said contract, plaintiffs * * * sold and delivered to said defendant 10 cars of wood, aggregating 185 cords."

The evidence offered and heard by the court on the part of plaintiffs as to the quantity of wood delivered would not be at variance with the contract pleaded. The assignment is overruled.

The proposition contained in the second assignment of error is that the court should have instructed a verdict for defendant on the ground that the plaintiffs pleaded a contract for the sale and purchase of 185 cords of wood at \$2.75 per cord, f. o. b. Allenfarm, whereas the evidence discloses a different contract. For the reasons stated in disposing of the first assignment, this assignment is overruled.

[2, 3] The trial court refused to admit as evidence, over objection, the original freight bills of the railroad company to show the number of cords of wood contained in each of the 10 cars received by the defendant, and this action of the court is made the grounds of appellant's third assignment of error. The court was not in error in excluding the freight bills as evidence of the number of cords of wood in the cars. It was immaterial what number of cords of wood were in the cars at Houston on a contract to deliver the wood at Allenfarm, in the absence of a denial of the allegation that the delivery was to be made f. o. b. cars at Allenfarm. *Richard Coker & Co. v. Big Muddy Coal & Iron Co.*, 155 S. W. 1019. Again, we think there was no error in excluding the freight bills in the absence of evidence as to the correctness of the statement in the freight bills as to the number of cords of wood in the cars. *A. B. Patterson & Co. v. Railway Co. et al.*, 128 S. W. 336. The assignment is overruled.

[4] We think there was no reversible error in admitting in evidence, over the objection that it was not the best evidence, was irrelevant, immaterial, and hearsay, a copy of the American Railway Equipment Register, a journal purporting to be published by authority of the Interstate Commerce Commission, and especially after the evidence of the witness Shepherd as to its general use among railways in the United States, as to the length, dimensions, and cubic capacity of freight cars used to transport freight, and after the evidence of said witness that from his own personal knowledge the facts stated in said journal were correct and true. The

measurement of the cars made by appellant show the capacity of the cars to be about of the same capacity as the register. The testimony amounts to no more than that the witness was testifying to things within his own knowledge. *Smithers v. Lowrance*, 35 Tex. Civ. App. 25, 79 S. W. 1088.

[5] The fifth assignment is to the admission of a memorandum as to the dimensions of the cars reflected by the American Railway Equipment Register. The witness Terrell testified:

"Myself and Roland Smith checked these figures as shown there as to the dimensions of the cars reflected by the register. The dimensions as shown by that register and the dimensions as shown by this memorandum are the same, that is, with the exception of one car [giving the number] which is an old series. I wrote to Mr. — in regard to the dimensions of this car."

The memorandum was identified by the witness and admitted in evidence. The contents of the memorandum was as to the initials on the 10 cars, their length, width, height, cubic capacity of the cars, as reflected by the register. If we are right in our conclusion that the contents of the register as to the capacity of the cars was admissible, we think that the admission as evidence of a memorandum made and its correctness, testified to by the witness as to the markings of the 10 cars, would not be error. The memorandum, as testified to, contained the same data as the equipment register, and was evidently admitted to conserve time, and to avoid looking up in the register the statement as to each individual car. The cases to which we are referred by appellant as sustaining his position, holding that the memorandum made was hearsay, are where the witness had no personal knowledge of the correctness of the entries made. Here the witness himself checked and testified to the correctness of the figures as shown by the register. It was simply a short and concise method of getting before the jury the statement contained in the register. The assignment is overruled.

The court was not in error in refusing to peremptorily instruct a verdict for the defendant, as claimed in the sixth assignment. This assignment is based on the statement that the contract was for the sale and delivery of 450 cords of wood, f. o. b. cars at Allenfarm, while the contract pleaded was for 185 cords. We have heretofore expressed the construction we place on the contract made and pleaded, and we need not again restate it. The assignment is overruled.

[6] Complaint is made in the seventh assignment to the third paragraph of the court's charge, in which the court instructed the jury as follows:

"If you do not believe from a preponderance of the evidence that the wood was of the kind and grade which plaintiffs agreed to furnish to defendant, then the price which plaintiffs are to recover is the market value at Houston, Tex., of wood of the kind and grade which plaintiffs furnished in said 10 cars."

The record does not show that objection was made and presented to the court, as required by article 1971, Rev. Stat. as amended by chapter 59, 33d Leg. p. 113. The assignment is overruled.

[7] In the eighth assignment, the appellant contends that the verdict of the jury is against the preponderance of the evidence, in that the testimony of the witness Terrell shows that the method by which the amount of wood shipped to appellant was by calculating the capacity of the cars from the American Railway Equipment Register, and estimating the quantity of wood therein, while the direct and positive testimony of appellant who measured the wood in the cars was that they contained 132 cords, and not 185 cords. The statement in the assignment as to the method of estimating the quantity of wood in the cars at Allenfarm, that is, by cubic capacity of the cars from the Equipment Register, is borne out by the statement of facts. The measurement of the wood in the cars by appellant was made at Houston. The defendant's answer nowhere denies that 185 cords of wood were placed in the cars at Allenfarm, nor that any measurement of the wood was made at Allenfarm, other than that estimated by the said register. The testimony of the witnesses who loaded the cars at Allenfarm is that the cars were loaded to their full capacity. We believe that the evidence is sufficient to establish the fact, at least prima facie, that 185 cords of wood were put in the cars at Allenfarm; and, conceding it to be a fact that only 132 cords were found in the cars at Houston would not be such preponderance of the evidence as should cause a reversal. The amount found by the jury does not show that their verdict was influenced by the remark of counsel, and we overrule the ninth assignment.

The error in the judgment as to interest was evidently clerical, and has been corrected and remittitur filed in the trial court, and requires no further mention.

Finding no reversible error, the judgment is affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS
et al. v. DALE BROS. LAND & CATTLE CO. (No. 8241.)

(Court of Civil Appeals of Texas. Ft. Worth.
Oct. 16, 1915.)

1. APPEAL AND ERROR—§366—HARMLESS ERROR—EVIDENCE—ADMISSIBILITY.

In an action for negligence in transporting live stock, the plaintiff's witness was permitted to say that he had never heard anything about the fact that a certain train did not run on Sunday. The defendants objected on the ground that the answer was immaterial. *Held*, that admission of the testimony was not prejudicial error, even if immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. §366.]

2. EVIDENCE—§366—GOVERNMENT REPORTS—LIVE STOCK—TABLE OF SHRINKAGE—AUTHENTICATION.

In an action for damages for negligent transportation of stock, it is not error to exclude tables of the Department of Agriculture and by the Texas Cattle Raisers' Association as to tests of shrinkage of stock in transportation, where there is nothing to show that they are accurate, authentic, or that the tests embraced therein were made under similar conditions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1521-1539; Dec. Dig. §366.]

3. EVIDENCE—§383—PUBLIC DOCUMENTS—WEIGHT.

A pamphlet or other document, purporting to have been used by the government or under the authority of some department of the government, has, prima facie, no more weight as evidence, nor greater authenticity or verity, than documents issued by other authority.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1860-1877; Dec. Dig. §383.]

4. CARRIERS—§228—CARRIAGE OF LIVE STOCK—EVIDENCE—SUFFICIENCY.

Evidence, in an action for damages for negligent delay in transportation of live stock, held sufficient to sustain a verdict for the plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. §228.]

Appeal from Clay County Court; W. T. Allen, Judge.

Action by the Dale Bros. Land & Cattle Company against the Missouri, Kansas & Texas Railway Company of Texas and others. From a judgment for plaintiff, defendants appeal. Affirmed.

C. C. Allen and Arnold & Taylor, of Henrietta, for appellants. Wantland & Parrish, of Henrietta, for appellees.

BUCK, J. Appellees, Dale Bros. Land & Cattle Company, filed this suit in the county court of Clay county against the appellants, Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company, alleging the shipment by the plaintiffs, over the defendant companies' lines, of 105 steers from Henrietta, Tex., to the National Stockyards, Ill., said shipment leaving its point of origin July 5, 1914, and reaching its destination on the morning of July 9th. Plaintiffs alleged injuries resulting from delay, rough handling, and failure of the cattle to reach their destination in time for the market of July 8th, alleging that the market for such character of cattle had declined on the 9th. Plaintiff further alleged that said cattle were, by reason of said alleged rough handling and delay, depreciated in marketable appearance and actually sold for 10 cents per hundredweight less than they would have sold for on said market but for such delay and rough handling, and a loss in weight of at least 40 pounds per head by reason of said alleged 24 hours delay. The total damages claimed aggregated \$457.67. The cause was submitted to the court without the aid of a jury,

and judgment rendered for \$265, from which judgment the defendants appealed.

Appellants' first assignment complains of the action of the court in permitting, over objection, one of the plaintiffs, J. E. Dale, to answer the following question propounded by his counsel, to wit:

"Mr. Dale, did you ever hear anything about this train, passing through Whitesboro at 12:10 a. m., not running on Sunday?"

To which the witness replied, "No, sir." Appellants urge that the answer of the witness was immaterial and irrelevant. The evidence shows that the cattle were loaded on the cars of the Southwestern Railway Company at Scotland, some 20 miles from Henrietta, at about 3 or 3:30 p. m. Sunday, July 5th, and reached Henrietta about 1½ hours later. They were there delivered to the defendant Missouri, Kansas & Texas Railway Company of Texas, about 15 or 20 minutes being required for the transfer. The train reached Whitesboro between 12:30 and 1 a. m. of the 6th. It appears there was a regular stock train from Ft. Worth through Whitesboro, with which this shipment would have made close connection had it run that night, but, as testified to by E. H. Smith, witness for the defendants:

"The regular stock train from Ft. Worth did not run that night. It is very seldom we have any stock on Sunday, and for this reason this train runs very infrequent on Sunday. There being no regular through stock train on this night, we handled this shipment of stock on a second class fast merchandise train out of Dallas at 10 p. m., due at Whitesboro at 3 a. m., and passed through on this night at 3:20 a. m. That was the only train we had passing west for the north that night, and this train picked up these cattle and carried them on to Denison."

Several witnesses for plaintiff, who had had experience in shipping cattle from Henrietta, Tex., to the National Stockyards, St. Louis, testified that, where such cattle were loaded on cars at Henrietta from 7 to 9 o'clock p. m., they would usually and customarily reach the stockyards early on the morning of the third day, and in time for the market of that day, and defendants introduced testimony as to the infrequent running of this Sunday night stock train from Ft. Worth in order to show that they were not negligent by reason of the delay at Whitesboro. In rebuttal plaintiff Dale testified in the language complained of.

[1] While in their statement under this assignment appellants have not complied strictly with the requirements of rule 31, governing Courts of Civil Appeals (142 S. W. xiii), which reads, in part, as follows:

"To each of said propositions there shall be subjoined a brief statement, in substance, of such proceedings, or part thereof, contained in the record, as will be necessary and sufficient to explain and support the proposition, with a reference to the pages of the record" (Emphasis ours)

—and, perhaps, we would be justified in sustaining appellees' objection to the consideration of this assignment (see *Laird v. Mur-*

ray, 111 S. W. 782; *Scanlon v. Railway Co.*, 45 Tex. Civ. App. 345, 100 S. W. 983; *Conn v. Rosamond*, 161 S. W. 73), yet out of an abundance of liberality we have given the assignment consideration. We do not believe that there is any prejudicial error in the court's permitting the answer complained of. At most, if it was immaterial, it does not appear to be injurious.

[2] Appellants' second assignment is directed to the action of the court in refusing to—

"permit the defendants to read in evidence the report made by the Agricultural Department of the United States government, showing various tests as to shrinkage of animals shipped from various points to the different markets, also the tests made by the Texas Cattle Raisers' Association showing the same facts, the same being objected to by counsel for plaintiffs as being irrelevant and immaterial."

[3] Appellants urge that this character of testimony was admissible in rebuttal of testimony offered by defendants as to the amount of shrinkage suffered by cattle while in shipment. Nothing is shown as to the contents of the bulletins offered as to whether the tests therein described were made under similar conditions to those existing in the shipment in question, and, moreover, appellants do not show in their bill of exceptions, or their statement under this assignment, or anywhere, that such bulletins were proved up, certified to, or in any legal way were such bulletins shown to contain a true record of the tests therein purported to be set out. We do not understand that a pamphlet or other document purporting to have been used by the government, or under the authority of some department of the government, has any more weight as evidence, or carries upon its face any stamp of greater authenticity or verity, than documents issued by any other authority. The case of *Railway Co. v. Graham & Price*, 174 S. W. 297, cited by appellants, by the Court of Civil Appeals for the Eighth District, does not, in our opinion, support the contention made, but is in opposition thereto. Judge Harper, in the opinion, speaks as follows:

"The third [assignment] charges error in refusing to allow the defendant to introduce in evidence United States government report of tests made of the shrinkage of other cattle under similar circumstances, issued in the form of a printed bulletin. The principle, as gathered from the authorities, is that wherever documents of a public nature would themselves be evidence if produced, and which could not, without inconvenience to the public interest, be removed from their place of custody, certified copies or copies verified by some person who has seen the original are admissible, and in the absence of such proof of correct copies are not admissible."

In the case of *Smithers v. Lowrance*, 100 Tex. 77, 93 S. W. 1004, Chief Justice Gaines, in passing upon the admissibility of parol testimony to establish the authenticity of a purported copy of certain records in the office of the land commissioner, held that such examined copies were admissible when proved

up by a witness, but quotes from 1 Greenleaf, Evidence, § 485, as follows:

"Where the proof is by copy, an examined copy, duly made and sworn to by any competent witness, is always admissible." Why not admissible? The evidence is as satisfactory certainly as a certified copy. In the latter case we depend upon the honor and integrity of an official, and in the former upon the oath of a competent witness. In either case, an error or a fraud is easily detectable. Probably, the reason why such a mode of proof has not been much known, if known at all, in our practice, is that it is cheaper and handier to produce copies, and if a witness comes instead, it is more satisfactory to have the officer who controls the records bring them into court."

But no such proof is shown to have been made in this case and, therefore, and further because the conditions were not shown to have been similar, the assignment is overruled.

[4] The third assignment alleges error in the judgment of the court as being contrary to the law and evidence. While it is true that defendants' witnesses testified to facts tending to show prompt delivery of the shipment in question, yet there were a number of cattle shippers, the plaintiff and others, who testified that, with an ordinary run and without unusual delays, the shipment in question should have reached its destination 24 hours earlier than it did, and such testimony is sufficient, in our opinion, to sustain the judgment. According to the testimony of the plaintiffs' witness Keechleer, who was the salesman who sold the cattle, they weighed at St. Louis 120,670 pounds. He testified that by reason of the 24 hours' delay in shipment the cattle would have lost at least 30 pounds per head, or 3,150 pounds, and if they had reached the market 24 hours earlier they would have sold for at least 10 cents per hundredweight more. This would make the loss sustained \$375.82. The judgment is for \$265, and we are unable to say that it is not sustained by the evidence.

The judgment is affirmed.

COMAN et al. v. BAKER. (No. 473.)
(Court of Civil Appeals of Texas. El Paso.
Nov. 4, 1915. Rehearing Denied
Nov. 18, 1915.)

1. NUISANCE §65—BAWDYHOUSES—INJUNCTION—RESTRICTED DISTRICTS.

Under Rev. St. 1911, art. 4689, providing that the use of any premises for the purpose of keeping a bawdyhouse shall be enjoined at the suit of the state or any citizen thereof, provided that the provisions of the statute shall not apply nor be construed so as to interfere with the control and regulation of bawds and bawdyhouses by ordinances of incorporated towns and cities acting under special charters, and where the same are actually confined by ordinance of such city within a designated district of such city, plaintiff is not entitled to maintain his action to enjoin disorderly houses in the city of Houston where bawdyhouses are restricted by ordinance to a certain locality.

[Ed. Note.—For other cases, see Nuisance. Cent. Dig. §§ 158-160, 170, 171; Dec. Dig. § 65.]

2. CONSTITUTIONAL LAW §63—DELEGATION OF POWER—REGULATION OF BAWDYHOUSES.

Although the Legislature may exempt portions of the state from the operation of a civil or penal statute, it cannot delegate that authority to any other body, so that an ordinance of a city attempting to except bawdyhouses from the provision of a general statute is void, although the Legislature has attempted to delegate the power to make the exception.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108-114; Dec. Dig. § 63.]

3. STATUTES §64—CONSTRUCTION—CIRCUMSTANCES OF PASSAGE.

Where a statute regulating bawdyhouses and exempting those in certain districts thus contains two provisions, and one of them is void, the circumstances of the passing of the act must be looked to to discover whether the Legislature would have passed one provision without the other, and, if it would not have passed one without the other, the courts cannot hold one invalid and one valid, since this would make a law which the Legislature did not make.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.]

4. NUISANCE §72—DISORDERLY HOUSES—RIGHT OF ACTION—SPECIAL DAMAGE—NECESSITY—"PREJUDICIAL."

Under Rev. St. 1911, art. 4643, authorizing an injunction where the applicant is entitled to the relief demanded, which requires the restraint of some act prejudicial to the applicant, "prejudicial" means harmful or injurious, and a private person cannot enjoin as a property holder the operation of disorderly houses in a nearby segregated district unless he shows special damage by decrease of value in his own property.

[Ed. Note.—For other cases, see Nuisance. Cent. Dig. §§ 164-169; Dec. Dig. § 72.]

For other definitions, see Words and Phrases, Second Series, Prejudicial.]

Appeal from District Court, Harris County; J. A. Read, Judge.

Action by J. W. Baker against Sadie Coman and others. From a judgment and order that injunction issue against defendants, the defendants, except the Mayor and Aldermen of the City of Houston, appeal. Reversed, and injunction dissolved.

S. B. Ehrenwerth, Campbell, Sewall & Myer, Hutcheson & Hutcheson, Hume & Hume, Kahn & Williams, Jno. M. Cobb, and Heidingsfelders, all of Houston, and Smith, Crawford & Sonfield, of Beaumont, for appellants. Kittrell & Kittrell, of Houston, for appellee.

HARPER, C. J. This was an action brought by appellee as a private citizen, against appellants as owners, lessees, and tenants seeking an injunction suppressing bawdyhouses, situated in what is known as the "Reservation," the district segregated by ordinance of the city of Houston, and against the mayor and aldermen of the city of Houston, seeking to enjoin the enforcement of the ordinance of segregation. Plaintiff pleaded section 16, art. 2, of the Charter of the City of Houston, providing, among other powers conferred, or attempted to be conferred, upon the city of Houston, "to prohibit and pun-

ish keepers and inmates of bawdyhouses and variety shows, prevent and suppress assignation houses and houses of ill fame, and to regulate, colonize and segregate the same, and to determine such inmates and keepers to be vagrants and provide for the punishment of such persons." Appellee further alleged that, acting under and by virtue of the powers conferred, or assumed to be conferred, upon it by said section, the city council of the city of Houston enacted an ordinance colonizing and segregating houses of ill fame and assignation houses; said ordinance being set out in full by appellee. Appellee alleged special injury through the maintenance of the said houses and the enforcement of said ordinance, and that, if not specially damaged thereby, he was entitled to the relief sought under the act of April 18, 1907 (Acts 30th Leg. p. 246); that while the law contains a proviso that it shall not apply to cities with special charters authorizing the setting apart of a "Reservation," yet, notwithstanding that provision, plaintiff has the right, as a citizen of Houston, to an injunction against the keeping of a bawdyhouse in said city. The mayor and aldermen of the city of Houston, and the appellants therein, admitted the passage of the ordinance, pleaded the actual segregation by ordinance of the bawdyhouses in a designated part of the city of Houston, and denied any special injury or damage to the appellee by reason of the existence of said houses. The court, under proper instructions, submitted to the jury the question whether or not appellee suffered special damage or injury by reason of the existence and maintenance of said bawdyhouses, and the jury answered that appellee suffered no special damage or injury thereby. The court entered a decree in favor of appellee, plaintiff below, but denied the injunction against the mayor and aldermen of the city of Houston to restrain the enforcement of the segregation ordinance. From this decree all defendants appealed, except the mayor and aldermen.

The appellants' assignments of error urge that the court erred in rendering judgment for plaintiff, granting an injunction, because plaintiff complaining of a public nuisance, and the jury having found that he suffered no special damage or injury by reason thereof, he was not entitled to the writ under the general principles of equity, and because the Legislature, by article 4689, R. S., exempted the district in question from the operation of the statute, appellee has no statutory remedy. On the other hand, the appellee contends that he is entitled to the relief asked regardless of whether he suffered special injury or not, first, under article 4643, R. S. 1911, which provides that parties shall have the injunction where it shall appear that the party applying is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant; second, under

article 4689, R. S. 1911, which provides for enjoining bawdy or disorderly houses as a nuisance.

Finding of Facts.

The city of Houston operates under special charter granted by the Legislature.

That section 16, art. 2, of said charter provides, among other powers conferred, that, "to prohibit and punish keepers and inmates of bawdyhouses * * * and to regulate, colonize and segregate same," etc.

That the city council passed an ordinance confining bawds and bawdyhouses to a designated district in said city; that plaintiff owns approximately a hundred acres of land in the city of Houston; that the reservation as established is six blocks from plaintiff's east line.

The only question or issue submitted by the court is:

"Has or has not the establishment and maintenance of the 'Reservation,' as located and situated under the city ordinance in question, resulted proximately in any special damage to plaintiff, by causing plaintiff's property to be substantially less in market value than it would be but for the establishment and maintenance of said reservation? Answer: We find it has not."

[1] Under this statement of facts, is the decree to be upheld under the act of April 18, 1907, providing for the enjoining of the habitual, actual, threatened, or contemplated use of any premises for the purpose of keeping or being interested in, aiding, or abetting the keeping of a bawdyhouse at the suit of either the state or any citizen and without reference to special injury? This act contains the following:

"* * * Providing that the provisions of this and the succeeding article shall not apply to, nor be so construed as to interfere with the control and regulation of bawds and bawdyhouses by ordinance of incorporated towns and cities, acting under special charters, and where the same are actually confined by ordinance of such city within a designated district of such city."

The pleadings and proof show Houston is a city acting under such special charter, and that all the bawds and bawdyhouses complained of, in plaintiffs' petition, are located in a district theretofore designated by the city council of said city. It is clear that the appellees are not entitled to their injunction under this statute, because it does not apply to such segregated districts.

[2] That the Legislature may exempt certain portions of the state from the operation of the provisions of either a civil or penal statute is not questioned. It is equally true that this authority of the Legislature of a state cannot be delegated to any other body, but the act of the city council defining and designating the district is in no sense an attempt to exempt such territory of the state from the operation or enforcement of any statute. The Legislature has done this. It follows that the Legislature could not delegate the authority to a city council to exempt those coming within the meaning of bawds, or keepers of bawdy houses, from

prosecution, and any ordinance passed to such effect would be void. *Brown v. City of Dallas*, 104 Tex. 290, 137 S. W. 342, Ann. Cas. 1914B, 504.

[3] But if we concede that the Legislature, in limiting the operation of this statute to all portions of the state not designated by ordinance for bawdyhouses, acted without constitutional authority—in other words, if there exists no constitutional authority to exempt such segregated districts from the operation of the act—we have no means of knowing that the Legislature would have passed such an act and made it applicable to cities operating under special charter granted by it, so to strike out this portion which appellee contends is unconstitutional, and at the same time hold the balance of the act valid, would be to make, by judicial construction, a law which the Legislature did not make. *A., T. & S. F. Ry. Co. v. Mills*, 49 Tex. Civ. App. 349, 108 S. W. 480.

But, on the other hand, we think the history of the enactment of the act in question, as revealed by the Senate and House Journals, shows conclusively that it would not have been passed but for the proviso exempting cities as it does.

There is another well-settled rule of law which interferes with appellee's right to claim under this statute, because of any unconstitutional feature of it, he must show that some right which he has is being or is about to be invaded by its enforcement. 6 Ruling Case Law, §§ 87-90; *Young v. City of Colorado*, 174 S. W. 994.

The Legislature has not by this act given appellee the remedy of injunction to suppress the persons named from committing the crimes charged; therefore the decree finds no support under it.

[4] This brings us to the real contention of the appellee that he is entitled to the relief asked, regardless of whether he had suffered special injury or not. If he has such remedy it is now by statute. The law in former times was that it was only where property or civil rights were involved and irreparable injury to such rights were threatened, or about to be committed, for which no adequate remedy existed at law, that the courts would interfere by injunction for the purpose of protecting such rights. But by article 4643, Rev. Civ. Stat. 1911, as construed by the courts, if a person shows himself entitled to the writ under the principles of equity, it will issue whether he have an adequate remedy or not. The portions of this act invoked by appellee are:

"That judges of the district courts shall either in term time or vacation, hear and determine all applications, and may grant writs of injunction, returnable to said courts in the following cases, where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant."

"Prejudicial," in the sense used, means injury or harm. The appellee has based his prayer for the writ upon the charge alone that his property lying adjacent to the reservation is thereby decreased in value. This question was submitted to the jury by the court as above quoted, and the jury found that his property was not so decreased in value. Notwithstanding this finding by the jury, the court entered a judgment for appellee, granting the writ of injunction. The view we take of the case is that, the appellee not having pleading and evidence to support the decree upon any other theory than that his property was injured in value, the court was not authorized to grant him the relief prayed for in the face of the verdict of the jury, but should have denied the writ.

Reversed and rendered, and the injunction dissolved.

CONTINENTAL TRUST CO. et al. v.

BROWN et al. (Nos. 5553, 5586.)

(Court of Civil Appeals of Texas. San Antonio.
Oct. 21, 1915. Rehearing Denied
Nov. 17, 1915.)

1. RECEIVERS — TITLE TO PROPERTY — RIGHT ACQUIRED BY RECEIVER.

Where a contract for the purchase of railroad stock is executory, and the purchaser merely has a right of completing his purchase by paying the price, a receiver appointed for the purchaser cannot obtain possession and title to the stock without first paying the purchase price, since a receiver takes no greater title to or right in property than the owner had prior to the receivership.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 124, 125; Dec. Dig. ¶ 69.]

2. CORPORATIONS — STOCK — TRANSFER — EFFECT.

The transfer of the capital stock of a railroad does not operate ipso facto as a transfer of the physical properties thereof.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 529, 532, 534, 536; Dec. Dig. ¶ 143.]

3. BANKS AND BANKING — POWERS — DISPOSITION OF CORPORATE STOCK.

While a bank ordinarily may not own a railroad, it may sell and dispose of its capital stock held by it as executor.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 227; Dec. Dig. ¶ 94.]

4. MINES AND MINERALS — MINING CORPORATIONS — POWERS — OPERATION OF RAILROADS.

Rev. St. 1911, tit. 25, c. 2, art. 1121, subd. 16, as amended by Acts 34th Leg. c. 144, giving private corporations power to contract for the lease and purchase of the right to prospect for, develop, and use gas, also erect, build, and own all necessary oil tanks, cars, and pipes necessary for the operation of the business of same, does not authorize a producing oil company organized under the laws of a foreign state to own and operate a railroad, although such railroad may be used in connection with its business.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 229, 229½; Dec. Dig. ¶ 105.]

5. RECEIVERS — POWERS — POSSESSION OF PROPERTY.

A receiver for a corporation cannot compel a vendor under an executory contract with the corporation for the sale of lands to give title and possession thereof, without the prior payment of the purchase price, where the contract so provides, and where the company had no such right.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 124, 125; Dec. Dig. ¶69.]

6. RECEIVERS — APPOINTMENT — GROUNDS.

A bill for the appointment of a receiver which alleges that the company is insolvent, but can make payment if it is allowed time, states no ground for the appointment of a receiver, since to do so would be equivalent to declaring a moratorium by judicial decision.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 45-50, 64; Dec. Dig. ¶82.]

7. RECEIVERS — APPOINTMENT — GROUNDS.

A bill which has for its sole object the appointment of a receiver will not be entertained; a receivership being ancillary to the main suit wherein a cause of action exists, and which must be asserted independently of the right to a receivership.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 3; Dec. Dig. ¶3.]

8. CORPORATIONS — APPOINTMENT OF RECEIVER — GROUNDS.

The mere fact that a corporation is insolvent is not sufficient ground for the appointment of a receiver therefor, without a showing of some equity in favor of complainants.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2201-2216; Dec. Dig. ¶553.]

9. CORPORATIONS — APPOINTMENT OF RECEIVER — GROUNDS.

The fact that the creditor of a corporation attempts to assert an unjust debt and to charge usury does not justify the appointment of a receiver, since ample protection may be afforded by injunction.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2201-2216; Dec. Dig. ¶553.]

Appeal from District Court, McMullen County; F. G. Chambliss, Judge.

Suit by Mrs. M. O. Brown and others against the Continental Trust Company and others. From two orders relating to the control of complainants' property by a receiver, in two cases tried together, defendants appeal. Reversed, and orders appointing receiver vacated.

McFarland & Lewright, of San Antonio, Beasley & Beasley and J. E. Daugherty, all of Beeville, and Lane, Wolters & Storey, and Paul Kayser, all of Houston, for appellants. A. J. Bell, W. W. Walling, Cobbs, Eskridge & Cobbs, and H. C. King, Jr., all of San Antonio, for appellees.

CARL, J. Appellees, Mrs. M. C. Brown, S. A. Hopkins, and the Boston & Texas Corporation, a South Dakota corporation, brought this suit in the district court of McMullen county against the Continental Trust Company, J. F. Saddler, Lee C. Ayars, the Guarantee Life Insurance Company, R. H. Brown, West Texas Bank & Trust Company, executor of the estate of C. F. Simmons, deceased; also against Kirby Lumber Company

and one A. Van Dressar. The petition, among other things, prayed for an injunction to restrain a sale of certain real estate alleged to belong to the Boston & Texas Corporation, under an order of sale issued out of the district court of McMullen county on a certain foreclosure judgment in favor of R. H. Brown and to restrain Lee C. Ayars, trustee in a deed of trust for the benefit of the Continental Trust Company, from selling about 7,000 acres of land in McMullen county by virtue of the powers conferred upon him in said deed of trust, which was given to secure the payment of a series of notes, all of which will more fully appear in the further statement of this case.

It is alleged that the Boston & Texas Corporation owned 7,000 acres of land in McMullen county and an oil lease on about 1,100 acres of land adjoining the 7,000-acre tract, and that this corporation owned another tract of land adjoining the first two, of about 11,360 acres, which was purchased by S. A. Hopkins from R. H. Brown. The allegation is that Hopkins, while he took this conveyance in his own name, in fact, bought and held it for the Boston & Texas Corporation, and he asked that title thereto be decreed out of him and into said corporation, subject to the payment of the vendor's lien notes upon which R. H. Brown foreclosed. It is further alleged that Hopkins has a contract to purchase the capital stock of the Artesian Belt Railroad, and that this contract is also for the use and benefit of the Boston & Texas Corporation, and Hopkins also asks that his rights under this contract of purchase be decreed to be in the Boston & Texas Corporation.

The Artesian Belt Railroad matter came about in this manner: H. E. Hildebrand, who has intervened in this suit, made a contract with the West Texas Bank & Trust Company, executor of the estate of C. F. Simmons, deceased, under order and approval of the probate court of Bexar county, whereby he agreed to purchase the capital stock of the Artesian Belt Railroad for the sum of \$200,000, the sum of \$25,000 having been paid in cash, and the remainder was on deferred payments, the bank, as such executor, holding the stock to secure the balance of the purchase money, amounting to \$175,000. This contract was sold by Hildebrand to Hopkins, as the latter and the Boston & Texas Corporation allege, for the use and benefit of this corporation; and Hopkins says he is willing that such purpose be made effective and consummated by the court decreeing his interest therein and thereunder to said corporation, subject to the payment of the balance of the purchase money.

The petition shows that the Boston & Texas Corporation is incorporated for \$300,000; that complainant M. O. Brown owns one share of the stock, and S. A. Hopkins

owns \$164,000; that in 1911, 1912, and 1913 the Boston & Texas Corporation made, executed, and delivered to M. C. Brown, complainant, as trustee for the benefit of the King-Crowther Corporation, promissory notes aggregating \$42,384.90, which notes were payable on demand to the said M. C. Brown, and, in addition, the Boston & Texas Corporation owes said M. C. Brown, as trustee for the King-Crowther Corporation, on open account, the sum of \$56,500, for money advanced during the years 1913 and 1914; that the King-Crowther Corporation was chartered under the laws of the state of Maine; the notes bear 7 per cent. interest; that \$25,000 of the money so borrowed by the Boston & Texas Corporation was used for the purchase of material, etc., that went into the construction of an extension of the Artesian Belt Railroad from the town of Christine, the terminus of the railroad, to Crowther, such money being so advanced upon the distinct understanding that the Artesian Belt Railroad was not to be responsible for any portion of said money so expended, and the King-Crowther Corporation expressly waived a lien on the railroad when the money was advanced. And it is claimed that said money is owing to the King-Crowther Corporation by the Boston & Texas Corporation.

The petition charges that the Boston & Texas Corporation was chartered for the purpose of owning and developing real estate for mineral purposes and for boring and drilling for oil, coal, kaolin, and other minerals, and for such other purposes as are germane and incident thereto; that on 1,100 acres leased the Boston & Texas Corporation has about 23 oil wells, all of which under proper care and attention would produce a large quantity of valuable lubricating oil; that on the 11,360 acre tract there is about 3,000 acres of proven oil land, the value of which, under proper development, would be materially increased; and that on the 7,000 acre tract there is about 4,000 acres of proven oil land. And it is alleged that the Boston & Texas Company has expended about \$400,000 in developing said oil field. It is further contended that these fertile oil fields are so remotely situated from railroad facilities that it is necessary to a full enjoyment of their hidden treasures that the Artesian Belt Railroad be extended into them, or to the thriving city of Crowther, in the midst of them, but that about one year before the suit was filed the West Texas Bank & Trust Company took said railroad away from H. E. Hildebrand, since which time the bank has been operating same through a manager, when Hopkins and Hildebrand are entitled to enjoy the luxuries of running the same; and, further, unmindful of the fact that the West Texas Bank, as executor, had taken said railroad out of the hands of Hildebrand and Hopkins, and was so operating said road, this bank has sued Hildebrand and Hop-

kins and E. O. Burton, R. R. Russell, and Emma Smith as sureties on a certain bond, and to foreclose for about \$225,000 on the stock of the Artesian Belt Railroad.

The petition also sets out that about January 23, 1912, the Boston & Texas Corporation executed and delivered to Lee C. Ayars a deed of trust on the 7,000 acres of land to secure the payment of thirty-four notes for the sum of \$5,000 each, or a total of \$170,000; twenty-six of which notes being payable to the order of the Continental Trust Company five years from their date, containing the customary default clauses in regard to the failure to pay interest, and the 10 per cent. attorney's fee clause, all payable at Houston, Tex., and eight notes for \$5,000 each, payable to the order of the maker, which said last notes were indorsed by said Boston Corporation, and delivered over to the Continental Trust Company. They were also indorsed in blank by S. A. Hopkins. These eight notes were payable three years from their date. These last notes, representing \$40,000, it is charged, were given as a bonus for the \$130,000, which the Boston & Texas Corporation really expected to obtain in said loan. But it is charged that only about \$64,700 was actually furnished the Boston Company by the Continental Trust Company, and that, if the remaining \$65,000 had been furnished as per agreement, the section of the road from Christine to Crowther could and would have been completed, thereby greatly enhancing the value of the oil land to such an extent that a large part of the land would have been worth \$1,000 per acre, and the other lands would be worth from \$25 to \$70 per acre; and if these things had all happened, the Boston & Texas Corporation would have been able to pay out and then have money. But they charge that the Continental Trust Company refused to furnish any more money after it had furnished the \$65,700. The 7,000 acres of land was the only land or property which the Boston & Texas Corporation had which was clear of liens, and, when it was mortgaged to secure the loan from the trust company, it could not get any more money with which to complete said railroad, and by the breach of its contract the trust company has prevented the completion of the railroad. The eight bonus notes above referred to are charged to be usury, and prayer is made that they be canceled.

The petition further states that, in addition to the \$65,000 advanced, the Continental Trust Company guaranteed the payment of about \$22,000 to the Kirby Lumber Company for ties and bridge material, but have refused to pay for same, and the lumber company has filed suit in the district court of Harris county against the Boston & Texas Corporation and Hopkins, which suit has embarrassed the defendants therein in developing their plans and in procuring finan-

cial aid. When Hopkins bought the 11,360 acres of land, he gave in part payment six notes for \$13,000 each, and these are the notes R. H. Brown declared due and obtained judgment on, mentioned above in this opinion. In the suit filed in Houston on the notes given the Continental Trust Company the petition names the Guarantee Life Insurance Company and James F. Saddler, Jr., as plaintiffs, but it is alleged here that, if those parties bought said notes, they did so with full notice of all the vice contained in the whole transaction. Further, in reference to the stock purchase of the Artesian Belt Railroad, it is alleged that, if complainants had obtained the same, they could have secured \$700,000 in bonds against said railroad, out of which they could have paid for the said stock, all of which was prevented by the failure of the trust company to furnish the balance of the money contracted to be furnished.

December 17, 1914, S. A. Hopkins gave a deed of trust on the Brown land to secure a large sum of money due the State Bank & Trust Company, and it is claimed that the bank or J. H. Halle was a necessary party to Brown's foreclosure suit; and that bank has filed suit to set aside and reopen said suit in which Brown foreclosed his vendor's lien and obtained a judgment for approximately \$94,000 against Hopkins and the Boston & Texas Corporation.

The Boston & Texas Corporation owes about \$650,000 including the claims set forth, but claims that it can pay out if it can get time to realize on its assets, which can be done by building said railroad, through loans it hopes to make, and if the Mexican and European wars do not last too long; but it says that it cannot pay said debts now on account of the financial stringency. Therefore it says it is insolvent and on account of the matters related its property and assets are in imminent peril of being dissipated. Therefore a receiver is prayed for to take charge of all the assets of the Boston & Texas Corporation, including the Artesian Belt Railroad, its stock and physical properties, as well as the lands mentioned, and for injunction to restrain the sale of or interference with any of said property, except under order of the court after application is made therefor.

The Continental Trust Company denied all the material allegations, and especially that it was insolvent, and that the eight notes were an usurious charge against the Boston & Texas Corporation, and tendered same up to be canceled.

The court issued the temporary injunction prayed for, and set the hearing for receiver for May 28, 1915, at Floresville. The defendants answered, and all demurred generally to the sufficiency of the application, denied the material allegations, and made special pleas, the nature of which will appear in the

further discussion of this case. At the hearing J. O. Terrell was appointed receiver—"of all the properties, rights, and franchises of the Boston & Texas Corporation and of the properties held by S. A. Hopkins as alleged in his petition for said company, including the tract of 11,360 acres described in the pleading and known as the Brown land, of every kind and character and description whatsoever and wheresoever situated, including the cars, locomotives, tools, machinery, movable effects, books, books of accounts, records, cash on hand and in banks, all rents, profits, issues, tolls, revenues, and income of the Artesian Belt Railroad, in equity, real or otherwise, wheresoever situated, whatsoever the said Boston & Texas Corporation, and to use the same and run and operate the same, and continue the operation and business thereof as a going concern, and to transact the business of said companies," etc.

The ordinary powers of a receiver are conferred in said order, and all parties are restrained from taking any further action in regard to said properties, except through the court appointing the receiver. The receiver was placed under a \$5,000 bond which he gave; but the order making such appointment contains this clause:

"It is further understood herein that the receiver at this time shall not take possession of or exercise control over the properties or capital stock of the Artesian Belt Railroad Company until further authorized by further order of this court."

This order was excepted to, and notice of appeal given, and is the order from which this appeal is perfected; and on July 10, 1915, the court entered an order directing the receiver to take charge of all the properties, and this order was appealed from. So the two cases stand upon our docket as No. 5553 and No. 5586, and will be treated both together in this opinion.

Hildebrand and the State Bank & Trust Company and J. H. Halle, as interveners, joined in the prayer for a receiver. No one asked for the dissolution of the Boston & Texas Corporation and that its affairs be wound up.

The pleadings in this case embrace 232 pages of the transcript, and, if we have been too brief in our statement, it is because of our desire to condense as much as we could, and yet omit nothing material.

First, let us analyze the issues and see just what is presented from a legal standpoint. Assuming the facts as pleaded, we find that S. A. Hopkins had a contract to purchase, through transfer from Hildebrand, the capital stock of the Artesian Belt Railroad; that \$175,000 of the purchase price had not been paid, and the West Texas Bank & Trust Company, as executor of the estate of C. F. Simmons, deceased, held that stock as security until that debt was paid. It is true that all of that stock except eight shares was held by the San Antonio Loan & Trust Company to secure a debt C. F. Simmons owed his former wife, but that is a matter of no consequence, because it would not change the legal title to the stock.

[1] This contract for the railroad stock

is executory, because the purchase price had not been paid, and the stock was not, and would not be, delivered until that sum was paid. Hopkins alleges that, while he made the contract of purchase for the stock in his own name, it was, in fact, made for the Boston & Texas Corporation. He claims no rights in it personally, and asks that same be decreed to the corporation. Since this stock contract is executory, whether it be Hildebrand, Hopkins, or the Boston & Texas Corporation, they neither had the legal title to the property, but only the right to complete the purchase by paying the price and then obtain a title. It is not different from a man who buys land, and the vendor's lien and superior title are reserved until the balance of the purchase money is paid. The title there remains in the seller; the purchaser only having the right to complete the purchase and obtain a title by paying the price. It would be a monstrous proposition of law if the purchaser of this stock could demand and receive the stock without first paying for same. And here payment of the \$175,000 is not even tendered; but it is proposed to do, through a receiver, what no one would contend that Hopkins or Hildebrand would have the right to do as individuals, namely, get possession of the stock without first paying for it. A receiver takes no greater title to or right in property than the owner had prior to the receivership. The appointment of a receiver does not do away with rights fixed by contract, and the very same contract under which right to the stock is here asserted provides that the executor should hold same until the purchase money should be paid.

[2] But it is asserted that under the contract of purchase of the railroad stock by Hildebrand, under order of the probate court of Bexar county, the physical properties of the railroad were to pass. To this we need only say that the probate court could only authorize the sale of the stock, because that is what C. F. Simmons owned. The fact that the stock represented practically the road—certainly the control—would not alter the situation. The road itself is controlled by a board of directors.

[3] We are told that, if the West Texas Bank & Trust Company could operate a railroad, then there is no reason why the Boston & Texas Corporation could not do the same; if one corporation could do it, another could. The bank, under its rights to act in a trust capacity, was acting as executor, and naturally voted the stock in the selection of directors who operated the road. Ordinarily, a bank probably could not own a railroad, but the handling of the stock as executor is quite a different matter.

[4] It is contended that the Boston & Texas Corporation could own the railroad, because, under an amendment, as passed by

the Thirty-Fourth Legislature (General Laws, p. 225), it is provided:

"That article 1121, subdivision 16 of title 25, chapter II, of the Revised Statutes of the state of Texas, 1911, be amended so as to hereafter read as follows:

"For the establishment and maintenance of oil companies with the authority to contract for the lease and purchase of the right to prospect for, develop and use coal and other minerals, petroleum and gas; also the right to erect, build and own all necessary oil tanks, cars and pipes necessary for the operation of the business of same."

"All private corporations heretofore created under the provisions of subdivision 16, article 1121, chapter II, title 25, Revised Statutes of Texas of 1911, shall, in addition to the powers therein enumerated, have the power to contract for the lease and purchase of the right to prospect for, develop and use gas; also erect, build and own all necessary oil tanks, cars and pipes necessary for the operation of the business of same."

This contention is made because of the provision that, among other things, they may own tank cars, ships, etc. And it is a matter of common knowledge that oil companies do own and operate tank cars; but that is a very different matter from owning and operating a railroad. Nearly every circus owns its private cars, but we have never known of a circus owning a railroad, nor do we believe that the mere fact that they own cars would give them the right to own a railroad.

The Boston & Texas Corporation is a producing oil company, organized under the laws of a foreign state, and is not a pipe line company; so that, when it comes into this state to do business under a permit, it could have no greater powers than is permitted to similar corporations under subdivision 16 of article 1121 of the Revised Statutes of this state. And the most liberal construction of this statute would not give this oil company the right to own this railroad, even if its contention be granted that the contract intended to convey the physical properties of the Artesian Belt Railroad; and if the corporation could not own the road, it could not do through a receiver what it could not do acting for itself under its own board of directors. So the railroad matter furnishes no ground for a receiver.

[5] And when we come to consider the 11,360 acres of land known as the Brown land, we find that this is also a purely executory contract for the sale of the land, because the vendor's lien and superior title were reserved until the notes, upon which foreclosure was obtained, should be paid. It has long been held in Texas that such a sale leaves the title in the vendor, and what the purchaser has in such case is the right to pay the debt and secure a title. Neither Hopkins nor the Boston & Texas Corporation had more than a right to pay for said land and thereby obtain a title. A receiver would have no greater right, and we find that no tender of the purchase money is made. On the contrary, that is precisely

what they are seeking to avoid. This land was constructively in the hands of the sheriff, who had seized the same under an order of sale, based on the foreclosure judgment, and neither Hopkins nor his corporation could take it away from him without paying that debt, and they did not need a receiver to do this.

[6] The fact of the business is this whole proceeding appears to be based upon the idea of gaining a little time until the hard times pass; for the applicants say in their bill:

"Complainants believe that this court should take judicial knowledge of the present financial condition now prevailing throughout this country on account of the Mexican war and great European war, that is now being felt in the whole financial world, and stay the hand that would take from the unfortunate debtor who is struggling to meet his obligations, as these complainants are, and even now at great sacrifice complainants are negotiating and have contracts which, if consummated, will enable them to pay all creditors who are pressing them. What these complainants most value, next to eternity, is a little time, and this they pray through the equity powers of this court. Poverty wants some things; luxury many; avarice all things. These complainants, though poor, want a little time; these creditors want all, that they may live in luxury; but this court has the equity power to stay their hands, and it is prayed."

We cannot but commend the candor of this fervent prayer of the able counsel, but at the same time it reminds us of that honest old lawyer who, in having his client swear to an application for a continuance, said:

"This application is not made for delay, but to gain time."

Hard times is not recognized in law as a ground for a receiver, nor had we ever supposed that a receiver was a panacea for the ills of a time of financial stringency. Indeed, if we were so to treat the matter, it would be equivalent to declaring a moratorium by judicial decision—a thing the Legislature of this state expressly declined to do.

[7] Hildebrand and Hopkins are not suing the Boston & Texas Corporation, except that they ask for a receiver. So, as to them, it is purely a suit for a receiver, and the courts of this state, as well as all other recognized authorities, have uniformly held that a bill which has for its sole object the appointment of a receiver will not be entertained. This court has only recently so held in an opinion written by its Chief Justice. *Toomey v. First Mortgage Trust Co.*, 177 S. W. 539. A receivership is ancillary to the main suit where a cause of action exists and is assert-

ed independent of such receivership, and the corporation, as such, has no right to ask for a receiver for itself.

[8] If it be conceded that this corporation is insolvent, that is not sufficient ground for the appointment of a receiver, without a showing of some equity in favor of the plaintiffs. First lien creditors will not be hindered or delayed in the collection of their debts, except upon a clear showing of some threatened illegal waste or destruction of the property, and that protection may be obtained by an injunction. It is urged that the wars in Mexico and in Europe have made it difficult to finance this undertaking, and if the court will appoint a receiver and build the railroad into these oil fields, the corporation will be able to realize large sums for its lands, and can pay out. As to how long these wars will last is not stated in the bill, and as to developing an oil field, this court knows of no more uncertain or speculative proposition. The bill admits that the parties themselves have been unable to carry through their plans successfully, and it is not made to appear how the receiver could do that which they have failed to do, unless it be that he could get possession of the railroad stock and land without paying what is admitted to be the purchase price. But we have seen that the receiver would have no greater rights than the parties themselves would have.

[9] As to the controversy with the Continental Trust Company, no ground for a receiver is there shown, because, if their debt is not just, and usury has been charged, the court could render ample protection against the sale by its injunction powers. The petition or bill shows that the trust company is a first lienholder on 7,000 acres of land owned by the Boston & Texas Corporation, but we are unable to see how the relief sought against the trust company demands the appointment of a receiver for the one seeking that relief.

We therefore conclude that the trial court was in error in appointing the receiver, and also in thereafter making an order placing him in charge of the properties.

So the judgments in causes No. 5553 and No. 5586 are reversed, and the orders appointing a receiver and placing him in charge are vacated, together with all other orders in connection with the receivership, and the receiver is discharged. The clerk of this court will accordingly so certify.

MASON et al. v. JAMES M. CARPENTER REALTY CO. (No. 14110.)

(St. Louis Court of Appeals. Missouri. Nov. 2, 1915. Rehearing Denied Nov. 23, 1915.)

1. BROKERS — 88—REAL ESTATE BROKERS—ACTION FOR COMMISSION—QUESTION FOR JURY.

In an action by a firm of real estate brokers for a commission, whether it or another agency was the efficient and procuring cause in effecting defendant's lease to a third party *held* for the jury.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121, 123-130; Dec. Dig. —88.]

2. BROKERS — 53—REAL ESTATE BROKERS—RIGHT TO COMMISSION.

Where the owner of realty placed it in the hands of two real estate firms to lease, and one of such firms was the efficient and procuring cause of effecting the lease, the other firm had no claim against the owner for a commission, even though its efforts aided to some extent the final consummation of the lease by the leasing firm.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 74; Dec. Dig. —53.]

Appeal from St. Louis Circuit Court; Wm. T. Jones, Judge.

"Not to be officially published."

Suit by C. Homer Mason and Martin F. Trepp, copartners doing business as the Mason-Trepp Real Estate Company, against the James M. Carpenter Realty Company. Judgment for plaintiffs, and defendant appeals. Reversed, and cause remanded.

E. W. Banister, of St. Louis, for appellant. Arnstein & Arnstein, of St. Louis, for respondents.

NORTONI, J. This is a suit by a real estate broker for commissions. Plaintiff recovered, and defendant prosecutes the appeal.

[1] Defendant, James M. Carpenter Realty Company, was preparing to erect a building at 312-314 North Sixth street in St. Louis and desired to procure a reliable tenant therefor. It is conceded that defendant employed plaintiffs to procure such tenant for it and it appears to be conceded, too, that it employed the Holbrook-Blackwelder Real Estate Trust Company to the same end. A commission was to be paid the broker in event a lease was effected. It appears that defendant furnished plans of its building to both plaintiffs, Mason and Trepp, copartners in the real estate business in St. Louis, and likewise furnished plans to the Holbrook-Blackwelder Real Estate Trust Company for the purpose of showing them to probable tenants. Both of these real estate agencies were engaged in an effort to lease the premises for defendant, and it seems that both were endeavoring to induce the Regal Shoe Company to enter into such lease, but neither knew of the activities of the other for a time. Finally the Regal Shoe Company leased the premises from defendant for a term of 20 years at a stipulated rental of \$270,000 for

the term, payable in monthly installments. The suit proceeds for a commission of one-half of 1 per cent. on the amount of rental thus reserved.

The evidence tends to prove that plaintiffs, acting through Mr. Trepp, visited Julius F. Schultz, the local manager of the Regal Shoe Company, a number of times and endeavored to persuade him to lease this property. There is evidence, too, that Mr. Martin and Mr. Breitt, representing the Holbrook-Blackwelder Real Estate Trust Company, visited Mr. Schultz a number of times, urging a lease of the same property. Schultz was the local manager of the Regal Shoe Company, but not authorized to enter into a contract of lease. It appears that Mr. Gould, the assistant treasurer of the shoe company, was in authority concerning such matters. Plaintiffs never, at any time, saw Mr. Gould concerning this matter, though it is clear that they negotiated with and submitted propositions to Schultz. Plaintiffs also introduced Mr. Carpenter, defendant's vice president, to Schultz and induced Mr. Carpenter to submit a written proposition to the Regal Shoe Company through Schultz. On the other hand, Martin and Breitt, acting for the Holbrook-Blackwelder Real Estate Trust Company, negotiated directly with Mr. Gould of the Regal Shoe Company. Finally, when the lease was negotiated, defendant paid the Holbrook-Blackwelder Real Estate Trust Company its commission in the view that such company, through Martin and Breitt, had effected the lease with Gould for the shoe company and declined to pay plaintiffs. It therefore appears that the evidence reveals conflicting claims on the part of the two real estate agencies as to which was the procuring cause of the lease. There is an abundance in the evidence tending to prove that the Holbrook-Blackwelder Real Estate Trust Company, acting through Martin and Breitt, effected the lease, and there is substantial evidence, too, tending to prove that the plaintiffs, Mason and Trepp, were the procuring cause. Although it be true that neither Mason nor Trepp ever met Gould, the officer of the Regal Shoe Company authorized to lease the property, the evidence tends to prove that their propositions were first submitted to Gould through the medium of Schultz, and it is quite clear that plaintiffs interested Schultz in the location and the building. It appears that Schultz, although local manager for the shoe company, was without authority to negotiate a lease but received proposals for the Regal Shoe Company and submitted them to his superior officer, Mr. Gould. Schultz was interested too, in the location of the business as he received, besides his salary, a commission on sales. We regard the question as to which one of these agencies was the efficient and procuring cause in effecting the lease as one for the jury, and it appears to be con-

ceded on the part of defendant that both agents were authorized by it to find a tenant on the terms prescribed. However, the commission was to be paid only to the broker who succeeded in effecting the lease. The central question in this case, as in all others wherein claims for commissions are presented by two different brokers on account of the same transaction, is: Which effected the lease? or, as the phrase goes, Which was the efficient and procuring cause in consummating it? See *Gamble v. Grether*, 108 Mo. App. 340, 83 S. W. 306. In this connection it is said the broker must be the procuring cause of the contract of sale or lease on which he depends for recovery. It will not suffice for his act to be one of a chain of causes producing the contract; it must be the procuring or inducing cause or, as has been said, it must be the causa causans. *Ramsey v. West*, 31 Mo. App. 676; *Mead v. Arnold*, 131 Mo. App. 214, 110 S. W. 656.

[2] It is argued that the court, through giving and refusing instructions, ignored this principle and treated the case as though it was no defense against the claim of the plaintiffs if the Holbrook-Blackwelder Real Estate Trust Company, through Martin and Breitt, procured the leasing of the property if the matter were aided, to some extent, by the efforts of plaintiff, and we are persuaded to this view. Obviously, if the Holbrook-Blackwelder Real Estate Trust Company, through Martin and Breitt, were the efficient and procuring cause of effecting the lease, then such was a valid defense against plaintiffs' claim, and this is true though their efforts in endeavoring to lease the premises to the same tenant aided the final consummation of the lease to some extent. See *Real Estate Co. v. Real Estate Co.*, 144 Mo. App. 620, 129 S. W. 419. Touching this matter, defendant requested the court to instruct the jury as follows:

"The court instructs you that the burden is on the plaintiffs to prove to your reasonable satisfaction by a preponderance of the evidence that they were the efficient and procuring cause of the lease from the James M. Carpenter Realty Company to said Regal Shoe Company, which has been read in evidence, and if you believe and find from the evidence that plaintiffs were not the efficient and procuring cause of said Regal Shoe Company leasing the property described in said lease, but that such leasing was brought about by Holbrook-Blackwelder Real Estate Trust Company through the efforts and exertions of the witnesses Martin and Breitt, or either of them, then your verdict must be for the defendants, even though you may believe and find from the evidence that the efforts of the plaintiff Trepp to interest the witness Schultz in said property and thereby induce said Regal Shoe Company to lease same, did to some extent aid in the leasing of said property."

The court refused this instruction as requested; also the court modified the instruction by eliminating therefrom the concluding words as follows:

"Efforts of the plaintiff Trepp to interest the witness Schultz in said property and thereby induce said Regal Shoe Company to lease same,

did to some extent aid in the leasing of said property"

—and substituted for these words the following:

"Plaintiff Trepp made efforts to interest the witness Schultz in said property and thereby to induce the Regal Shoe Company to lease same."

The instruction as requested properly declared the law of the case, for if the Holbrook-Blackwelder Real Estate Trust Company, through Martin and Breitt, were the procuring cause in effecting the lease, then the verdict should be for defendant, even though the efforts of plaintiff Trepp to interest Schultz and induce the Regal Shoe Company to take the property on the terms proposed did to some extent aid in the leasing of such property. Manifestly, this is true, for the mere aiding to some extent, without more, in the leasing of the property amounted to no more than a link in the chain of causation, while the central question on which the liability of defendant turns is as to who was the procuring and efficient cause. The instruction as given after modification by the court is as follows:

"The court instructs you that the burden is on the plaintiffs to prove to your reasonable satisfaction by a preponderance of the evidence that they are the efficient and procuring cause of the lease from the James M. Carpenter Realty Company to said Regal Shoe Company, which has been read in evidence, and if you believe and find from the evidence that plaintiffs were not the efficient and procuring cause of said Regal Shoe Company's leasing the property described in said lease, but that such leasing was brought about by the Holbrook-Blackwelder Real Estate Trust Company through the efforts and exertions of the witnesses Martin and Breitt, or either of them, then your verdict must be for the defendants, even though you may believe and find from the evidence that the plaintiff Trepp made efforts to interest the witness Schultz in said property and thereby to induce said Regal Shoe Company to lease same."

From the modification of the instruction, it appears the court entertained the view that it was a defense to the suit if the Holbrook-Blackwelder Real Estate Trust Company were the procuring cause of the lease only in event plaintiff Trepp made efforts to interest Schultz of the Regal Shoe Company in the property, and that such efforts did not go to the extent of aiding to some extent in the final consummation of the lease. Defendant was entitled to the proposition requested in the instruction to the effect that it was a valid defense to the action if the Holbrook-Blackwelder Real Estate Trust Company were the efficient and procuring cause of the lease, and this, too, even though the efforts of plaintiff to some extent aided in consummating the transaction.

Because of the error in refusing the instruction as requested, the judgment should be reversed and the cause remanded. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

GRAVES et al. v. METROPOLITAN LIFE INS. CO. (No. 14083.)

(St. Louis Court of Appeals. Missouri.
Nov. 2, 1915.)

1. JUSTICES OF THE PEACE — 98 — PLEADING — STATUTORY PROVISIONS — FILING COPY OF INSTRUMENT.

Under Rev. St. 1909, § 7413, providing relative to justice's court, that when a suit is founded upon any instrument of writing purporting to have been executed by defendant, and the debt or damage claimed may be ascertained by such instrument, it shall be filed with the justice, and no other statement or pleading shall be required, and section 7414, providing that, if such instrument be alleged to be lost or destroyed, it shall be sufficient for plaintiff to file the affidavit of himself or some other credible person, stating such loss or destruction, and setting forth the substance of such instrument, in an action on an insurance policy alleged to have been destroyed, there could be no recovery where no affidavit was filed; an insurance policy being such an instrument as is required to be filed.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 335; Dec. Dig. — 98.]

2. JUSTICES OF THE PEACE — 58 — JURISDICTION TO BE SHOWN BY THE RECORD.

The jurisdiction of a justice of the peace must appear affirmatively from the record.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 207-215; Dec. Dig. — 58.]

3. JUSTICES OF THE PEACE — 141 — APPEALS — JURISDICTION.

Where a justice of the peace had no jurisdiction, the circuit court had no jurisdiction on appeal, as its jurisdiction is derivative.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 467-476; Dec. Dig. — 141.]

Appeal from St. Louis Circuit Court; Wm. T. Jones, Judge.

"Not to be officially published."

Action by Emery Graves and others against Metropolitan Life Insurance Company. From a judgment for defendant, plaintiffs appeal. On rehearing. Reversed and remanded, with directions, and certified and transferred to the Supreme Court.

James J. O'Donohoe, of St. Louis, for appellants. Nathan Frank and Louis B. Sher, both of St. Louis, for respondent.

REYNOLDS, P. J. This case is before us on a rehearing.

A point briefed by counsel for respondent on the first hearing but not passed upon by us is again urged, and as it lies at the root of the case, we are bound to consider it.

[1] The action was commenced before a justice of the peace on an insurance policy alleged to have been destroyed. The statement filed before the justice is not in the abstract, but on appeal to the circuit court an amended statement was filed, including a new party and again averring that the policy in suit had been destroyed—burnt. This amended statement is not verified either by plaintiffs or by any one else—no affidavit

"stating such loss or destruction" is filed with it, and it seems to be conceded by counsel that no such affidavit was filed with the justice; in fact that counsel claims its filing is not jurisdictional. The objection to the lack of affidavit was made at the trial, is insisted on by briefs and is now relied upon for affirmance of the judgment.

Our statute, section 7413, Revised Statutes 1909, provides:

"When the suit is founded upon any instrument of writing purporting to have been executed by the defendant, and the debt or damages claimed may be ascertained by such instrument, the same shall be filed with the justice, and no other statement or pleading shall be required."

Section 7414, Revised Statutes 1909, provides:

"If such instrument be alleged to be lost or destroyed, it shall be sufficient for the plaintiff to file with the justice the affidavit of himself, or some other credible person, stating such loss or destruction, and setting forth the substance of such instrument."

Beyond question this action is on an instrument of writing—an insurance policy—purporting to have been executed by the defendant—one by which the amount of the debt or damages claimed may be ascertained from the policy. It is such an instrument as is required to be filed with the justice. If not filed because lost or destroyed, then plaintiff is required to file with the justice the affidavit of himself or some other credible person, stating such loss. That was not done here.

Our Supreme Court, in *Hudson v. Wright*, 204 Mo. 412, loc. cit. 431, 103 S. W. 8, 14, has distinctly held that a judgment rendered by a justice of the peace on a lost instrument is void unless it appears—in case of its loss—that the statutory affidavit was filed. Says Judge Lamm in that case and at that page:

"Now, in cases of lost notes, the justice either acquires jurisdiction by, or may not proceed to judgment without, the filing of such affidavit. * * * Hence, jurisdiction over the subject-matter, if not appearing in the judgment itself, should at least appear somewhere in the proceedings. * * * Absent jurisdiction, the judgment was void, and, therefore, subject to collateral attack."

But, says learned counsel for appellant, this decision applies alone to notes. That is not the statute. It applies to any instrument of writing purporting to have been executed by the defendant when the debt or damages claimed may be ascertained by such instrument.

[2, 3] It nowhere appears in this record that the statutory affidavit was filed before the justice and his jurisdiction must appear affirmatively; without that the circuit court has no jurisdiction of the cause, as its jurisdiction on appeal is derivative. As it had no power to hear and determine the case, plaintiff cannot recover, nor can the judgment in favor of defendant on the cause of action stand.

The judgment of the circuit court should therefore be reversed and the cause remanded with directions to the circuit court to allow plaintiff to take a nonsuit; or failing that, the court will enter an order dismissing the case. But as the Kansas City Court of Appeals, in *Mansur v. Linney*, 162 Mo. App. 260, 144 S. W. 872, as well as in *Watkins v. Brotherhood of American Yeomen*, 188 Mo. App. 626, 176 S. W. 516, decisions subsequent to that of the Supreme Court in *Hudson v. Wright*, supra, has, as we understand its decisions, held to the contrary, this cause, together with the original transcript therein must be and is hereby certified and transferred to the Supreme Court.

NORTONI and ALLEN, JJ., concur.

WALKER v. OZARK COOPERAGE & LUMBER CO. OF NEW JERSEY.
(No. 14063.)

(St. Louis Court of Appeals. Missouri. Nov. 2, 1915.)

1. COURTS ⇐231 — MISSOURI COURT OF APPEALS—JURISDICTION.

Where a creditor, who had obtained judgment against a Missouri corporation for \$1,600, sought to have a receiver appointed to take over the assets of the corporation and its successors, claiming that the corporate assets, which exceeded its liabilities by over \$50,000, had been fraudulently transferred to a second corporation, and by that to a third, the right involved is one involving a sum in excess of the jurisdiction of the Court of Appeals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-656, 661; Dec. Dig. ⇐231.]

2. COURTS ⇐487 — MISSOURI COURT OF APPEALS—TRANSFER OF CAUSES.

Where the sum involved appears to be in excess of its jurisdiction, the Court of Appeals should on its own motion transfer the cause to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 703, 1307-1315; Dec. Dig. ⇐487.]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by George W. Walker against the Ozark Cooperage & Lumber Company of New Jersey and others, dismissed except as to the named defendant. From a judgment for the named defendant, plaintiff appeals. Transferred to Supreme Court.

John A. Harrison, Henry B. Davis, and Erd & Massey, all of St. Louis, for appellant. George B. Webster, of St. Louis, for respondent.

ALLEN, J. This is a suit in equity. The court below sustained a demurrer to plaintiff's petition, and from final judgment entered upon such demurrer the plaintiff appealed to this court.

The petition, inter alia, alleges that plaintiff obtained a judgment in the United States Circuit Court for the Eastern Division of the Eastern District of Missouri in the sum of

\$1,646.01 against the Ozark Cooperage Company, a Missouri corporation. The petition does not disclose the date of the rendition of such judgment, though it is averred that the suit in which the same was rendered was instituted on February 23, 1905. It is averred that while plaintiff's aforesaid suit was pending in the United States Circuit Court, to wit, on April 20, 1905, the defendant therein, referred to in the petition as "Ozark Cooperage Company No. 1," transferred its assets to the Ozark Cooperage Company of St. Louis, Mo., referred to in the petition as "Ozark Cooperage Company No. 2," likewise a Missouri corporation; and it is alleged that there was a "pretended dissolution" of the original corporation. It is averred that the latter was "at the time of said pretended dissolution * * * a large and prosperous corporation having assets of more than fifty thousand dollars (\$50,000.00) over and above its liabilities." Further allegations are made with which we are not now concerned, and it is then alleged that later "Ozark Cooperage Company No. 2" transferred all of the assets obtained by it from "Ozark Cooperage Company No. 1" to "Ozark Cooperage & Lumber Company of New Jersey," a New Jersey corporation, which had been licensed to transact business in the state of Missouri. It appears that all of the said corporations were originally named as defendants, as well as certain individuals alleged to have been officers and directors of the three companies, but that the suit was dismissed as to all defendants, except the Ozark Cooperage & Lumber Company of New Jersey, respondent herein.

The petition charges that the transfers of the assets aforesaid were without consideration, and were fraudulently made by the officers and directors of said corporations for the purpose of hindering, delaying, and defrauding the plaintiff; and it is alleged that the assets of the two Missouri corporations have been fraudulently "intermingled and commingled," so that the same "cannot be disentangled, separated, reached, or set apart by the ordinary process of law," but that the sum of \$7,000 was on deposit in the National Bank of Commerce of St. Louis to the credit of the Ozark Cooperage & Lumber Company of New Jersey at the time of the filing of the petition. The prayer of the petition is as follows:

"Wherefore plaintiff prays that this court will order, decree, and appoint one receiver for said Ozark Cooperage Companies, Nos. One (1) and Two (2), respectively, and said Ozark Cooperage & Lumber Company of the State of New Jersey, to impound all the assets of said companies, and to disentangle all the assets of all of said companies, and take charge of the affairs of said three corporations, and apply out of the assets of said Ozark Cooperage Company No. One (1), now intermingled as aforesaid, so much thereof as will pay plaintiff's said judgment, with interest and costs; and that the defendant herein, the said Ozark Cooperage & Lumber

Company of New Jersey, be restrained and enjoined from drawing any check or checks upon the fund aforesaid, now on deposit in said National Bank of Commerce, in St. Louis, and that said bank be restrained and enjoined from paying out any moneys on said checks; and that the affairs of the said Ozark Cooperage & Lumber Company of New Jersey, said above-described fraudulent corporation, be wound up, and that it, and its officers and servants, be forever restrained and enjoined from further doing business in the state of Missouri. And that the affairs of said Ozark Cooperage Company No. One (1), and of said Ozark Cooperage Company of St. Louis, Missouri, being Company No. Two (2), be finally wound up by this court, and that plaintiff recover his claims out of said assets, and for such other and further and general relief, whether of the same or of a different nature, as to the court may seem meet and proper."

[1] It appears that the case is one without the appellate jurisdiction of this court. At any rate we have such great doubt as to our jurisdiction that we think it our duty to transfer the cause to the Supreme Court. While the amount of plaintiff's claim—i. e., the amount for which plaintiff obtained judgment against the original corporation—is within the pecuniary limit of our jurisdiction, the object of the suit is to have a receiver appointed to take charge of all of the aforesaid assets alleged to have been ultimately transferred to the respondent, the New Jersey corporation. It is alleged that the original Missouri corporation was "large and prosperous," having assets of more than \$50,000 over and above its liabilities. It is said that these assets were transferred to another Missouri corporation and by the latter conveyed to the respondent. The petition seeks the appointment of a receiver to take charge of such assets and administer the same. Thus it is sought to divest the respondent of title to assets which, according to the allegations of the petition, are presumptively of the value of \$50,000 or more. The petition prayed that all three corporations be finally wound up, but the only defendant now remaining, this respondent, is a foreign corporation. However, it appears that the monetary value of the right which would be lost by respondent in the event of the appointment of a receiver, whereby respondent would be divested of all of its property in this jurisdiction, is in excess of the pecuniary limit of our jurisdiction. See *State ex rel. Union Electric Light & Power Co. v. Reynolds et al.*, 256 Mo. 710, 185 S. W. 801, and authorities collated and discussed.

[2] It is true that our jurisdiction to hear and determine the appeal is not challenged, but it is our duty, *sua sponte*, to determine, in the first instance, the question of our own jurisdiction, that we may not assume to dispose of an appeal in a case wherein we are without jurisdiction and our acts therein coram non iudice and void. And as was said by Rombauer, P. J., in *Gartside v. Gartside*, 42 Mo. App. 513, quoted in *State ex rel. v. Reynolds*, supra:

"Our uniform practice has been to order the transfer to the Supreme Court of all causes wherein any reasonable doubt exists touching our jurisdiction. This enables the parties to have the question of jurisdiction set finally at rest in the particular case by filing a motion to remand, and obtaining the views of the Supreme Court on such motion."

It is therefore ordered that the cause be transferred to the Supreme Court, upon the ground that the amount involved is beyond our jurisdiction.

REYNOLDS, P. J., and NORTONI, J., concur.

PICKEL v. PICKEL. (No. 14750.)

(St. Louis Court of Appeals. Missouri.
Nov. 2, 1915.)

1. APPEAL AND ERROR ⇐936—REVIEW—PRESUMPTIONS.

The action of the trial court is always presumed correct, and the party assigning error must show it; hence an award of a lump sum for attorney's fees must, where there were numerous items, be presumed to have been only for those services for which compensation could be awarded.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3782, 3787; Dec. Dig. ⇐936.]

2. APPEAL AND ERROR ⇐846—REVIEW—ADMISSION OF EVIDENCE.

In an action tried to the court, the erroneous admission of evidence will be disregarded, unless it appears to have affected the decision.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3347-3362, 3366; Dec. Dig. ⇐846.]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

"Not to be officially published."

Action by Ella M. Pickel against Frederick J. Pickel. From a judgment awarding plaintiff expenses and suit money, defendant appeals. Affirmed.

Fauntleroy, Cullen & Hay, of St. Louis, for appellant. Randolph Laughlin, of St. Louis, for respondent.

REYNOLDS, P. J. From a judgment awarding plaintiff \$85.80 for expenses and \$400 "as additional suit money," a total of \$485.80, defendant has appealed.

The expenses and the "suit money" are said to have accrued and fallen due in the course of a long and varied litigation between plaintiff and defendant in named cases, and plaintiff on the one side and defendant and his father on the other, in two of the cases. The present proceeding is in the case of plaintiff Ella M. Pickel versus defendant Frederick J. Pickel (see 243 Mo. 641, 147 S. W. 1059), and is for additional services in that and three other cases, namely, *Ella M. Pickel v. William Pickel and Frederick J. Pickel*, 251 Mo. 197, 158 S. W. 8, *Ella Pickel v. William Pickel and Frederick J. Pickel*, 259 Mo. 202, 168 S. W. 609, and *Ella M. Pickel v. Frederick J. Pickel*, 176 Mo.

App. 673, 159 S. W. 774. Frederick J. Pickel is, as we gather, the defendant and appellant here. The issues involved in these several cases appear so fully in the reports that it is unnecessary to repeat them here. We refer to them as above reported.

[1] The value of these services is placed by plaintiff at \$882.50, and the amount of expense money is \$85.80. As stated, on a trial of this latest matter before the court, the court allowed all the expense money, but only \$400 on account of services in the case. The items of the expense account are set out and were all testified to as correct and made in the course of this long litigation referred to. There was testimony to the effect that the services were worth \$1,483, dividing and itemizing the amount of what would be a reasonable fee for the services in each of the cases. There was no contradiction of this valuation. Counsel for appellant made objection to allowance of fees in those cases on various grounds, among others that they had already been allowed, were voluntary or were not legal charges. Counsel for defendant cross-examined plaintiff's counsel, who was testifying to them at great length. The court, in the course of this examination, asked that counsel if it was possible for him to properly separate the work that he did in these several cases and counsel for plaintiff announced that he thought he could. The court thereupon suggested that the witness might read off separate for counsel for defendant or prepare a separate memorandum of each. Counsel for defendant objected to trying the case that way.

The assignments of error are on the allowance of these fees and also on overruling an objection to a question propounded to the attorney who testified as to the value of the services.

We have here a finding and judgment in a lump sum, that sum not quite one-half of the amount claimed. It is impossible to tell from this what items the court allowed and what ones he disallowed. The presumption always is for right action by the trial court and the party assigning error must show error.

Taking up the assignment that the plaintiff had split her account, we do not think it tenable. The services were rendered and had accrued, as we read the testimony, after the allowance for other services; nor can we say that the court allowed for these or for that matter any improper charges, the presumption being to the contrary if they were improper charges. Admitting that some of the charges were proper and that others may not have been, we cannot tell how much was allowed on any item; what items were rejected, what allowed.

In this view of the case we are unable to disturb the finding of the trial court, as all presumptions are in favor of its correctness.

[2] As to the assignment of error in over-

ruling defendant's objection to questions asked the attorney who was testifying for plaintiff, it is said he was permitted under those questions to testify as to the law and the necessity of prosecuting the appeal in one or more of the cases.

The trial was before the court. It is hardly possible that any such expression of opinion by an attorney as to the law controlled or even influenced the learned trial judge. He would naturally take any such opinion for what it was worth, and in his own mind and irrespective of it, determine the law. As to the testimony given on the necessity of taking an appeal, opinion evidence on that may possibly be a question of fact. At all events, when the case is tried before the court, the appellate tribunals usually review action on the admission of evidence only when it appears that improper evidence controlled the decision. We do not see that such was the case here.

Finding no reversible error, the judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

WRIGHT v. WRIGHT. (No. 14064.)

(St. Louis Court of Appeals. Missouri. Nov. 2, 1915.)

1. DIVORCE \Leftrightarrow 241 — ALIMONY — AWARD IN GROSS—PERIODICAL ALLOWANCE.

Under Rev. St. 1909, § 2376, providing that on a decree of divorce rendered in favor of the wife the court may in its discretion decree alimony in gross or from year to year, whether an award of alimony should be in gross rather than a periodical allowance out of the husband's income depends on the husband's financial ability to respond to an adequate award in gross when compared with his earnings out of which a periodical allowance may be made.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 679, 680, 690; Dec. Dig. \Leftrightarrow 241.]

2. DIVORCE \Leftrightarrow 241—ALIMONY—AWARD IN INSTALLMENTS—DISCRETION.

Where, in a wife's suit for divorce, it appeared that defendant possessed property to the value of only \$6,500 and that his income was \$340 per month, the action of the court in awarding alimony in monthly installments of \$100 as plaintiff desired, instead of in a gross sum equal to or exceeding the value of defendant's property, as he desired, was not an abuse of the discretion vested in the court by Rev. St. 1909, § 2376.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 679, 680, 690; Dec. Dig. \Leftrightarrow 241.]

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

Action by Frances G. Wright against Guy H. Wright. From judgment for plaintiff, defendant appeals. Affirmed.

Manton Davis and Chester H. Kern, both of St. Louis, for appellant. Morton Jordan, of St. Louis, for respondent.

ALLEN, J. This is a suit for divorce. The decree before was in favor of plaintiff,

the wife, upon the ground of indignities offered by defendant rendering her condition intolerable. Defendant made default, but his counsel appeared at the trial on the question of alimony. The trial court, after hearing the evidence adduced touching the matter, allowed plaintiff as alimony \$100 per month, payable monthly, allowing also attorneys' fees for plaintiff's counsel. Thereafter defendant filed a motion for new trial, the grounds thereof being that the allowance of alimony was excessive and that the allowance should have been in gross instead of in monthly installments. The motion being overruled, defendant appealed.

Plaintiff and defendant were married in 1900, and during all of their married life resided in the city of St. Louis. Approximately four years before the trial below there was a separation, which continued for some months, followed by a reconciliation. The parties then lived together until June 5, 1912. It is unnecessary to rehearse the evidence relative to the indignities constituting ground for the decree in plaintiff's favor. The record discloses that defendant's conduct toward plaintiff was characterized by extreme indifference and neglect; that he ceased to care for her and frankly so told her, remained away until late at night, and finally refused to eat any meals at home; while it appears that plaintiff was a devoted and faithful wife, who made every effort to retain her husband's affections. It was agreed in open court that defendant received a salary of \$340 per month, and that he was possessed of property of the value of \$6,500.

The proposition urged by defendant on his appeal is that the court should have awarded alimony in gross instead of alimony from month to month. One of the assignments of error is that the award as made is excessive, but this is not urged upon us. The contention is that under the circumstances alimony in gross should have been awarded, and that we, having plenary power to review the action of the trial court in the premises, should reverse the judgment and remand the cause with directions to enter a judgment for plaintiff for such alimony in gross as may appear to be proper. And though at the time of the trial below appellant was possessed of an estate of but \$6,500, his counsel now suggest to this court that the alimony accrued under the judgment, which it is said has been regularly paid by respondent in monthly installments, be considered alimony pendente lite, and that the decree below be modified, giving the wife \$7,500 in gross as permanent alimony.

[1] The argument of appellant's learned counsel is that, where practicable, alimony in gross should be awarded the wife, rather than an allowance of a monthly, quarterly, or annual stipend out of the husband's

income, where the divorce, as in our modern practice, is an absolute one—a vinculo—restoring the parties to the state of unmarried persons. That this is a sound and wholesome doctrine is beyond dispute; for, where the circumstances permit it will doubtless be conducive to the welfare and happiness of both parties, in a great majority of such cases, that the wronged wife be provided for out of the husband's estate at the time of the divorce decree, thereby becoming independent of her former spouse and not compelled to look to him for sustenance and perhaps to take future legal steps to secure a periodical stipend awarded her. As is well said by Commissioner Brown, in *Lemp v. Lemp*, 249 Mo. 311, 155 S. W. 1061, Ann. Cas. 1914D, 307:

"It is just and humane, and lies at the very foundation of the policy of absolute divorce, that the innocent and injured woman be delivered from the body of her dead injury, and not be required for life to live in its atmosphere and taste its flavor with her daily bread."

And, on the other hand, it may be assumed that such course, where practicable, will ordinarily be the better one so far as the husband is concerned, disposing of the matter of alimony once for all, rather than leaving it in the form of a periodical obligation pursuing him through life. Touching this question generally, see what is said in: *Green v. Green*, 152 Ky. 486, 153 S. W. 775; *Williams v. Williams*, 36 Wis. 362; *McGechie v. McGechie*, 43 Neb. 523, 61 N. W. 692; *DeRoche v. DeRoche*, 12 N. D. 17, 94 N. W. 767, 1 Ann. Cas. 221; 2 Nelson on D. & S. § 903; *Lemp v. Lemp*, supra.

But the doctrine invoked necessarily has its limitations, and its applicability or non-applicability must be determined by the facts of the particular case, having regard to the husband's financial ability to respond to an adequate award in gross, when compared to his earnings out of which a periodical allowance may properly be made.

"From this standpoint there are two elements which must be separately considered to insure complete justice. The obligation to support, maintain, and protect the wife often exists where no property interest is involved. By the marriage contract the husband pledges himself to do this, and, if he has no property, his future earning capacity must be utilized for that purpose. In such cases a judgment in gross might defeat the very object to be attained. For this reason it is often necessary that alimony should be paid from time to time to conserve the ability of the husband to meet the obligation." *Lemp v. Lemp*, supra, 249 Mo. loc. cit. 311, 155 S. W. 1061, Ann. Cas. 1914D, 307.

[2] Section 2376, Rev. Stat. 1909, provides that:

"Upon a decree of divorce in favor of the wife, the court may, in its discretion, decree alimony in gross or from year to year."

The form of the decree is a matter therefore resting in the sound judicial discretion of the court, and whether alimony in gross or a periodical stipend should be awarded must be determined by the circumstances of the case in hand. Where the husband is pos-

essed of sufficient means therefor, and an award in gross can be made to the wife which is commensurate with the provision which might properly be made for her through an allowance of alimony from year to year, payable on certain named dates, discretion would be wisely exercised in favor of an award of this character. Such was the case of *Lemp v. Lemp*, supra, cited and relied upon by both parties here, where the wife was awarded \$6,000 per year by the trial court, payable in quarterly installments of \$1,500 each, and she appealed. The Supreme Court held that, under the circumstances of the case, the husband being a man of large wealth, the wife should have been awarded alimony in gross, and accordingly directed an allowance to her of \$100,000. But the case is not persuasive in support of appellant's argument in the case before us. Appellant's income is \$340 per month, or \$4,080 per annum; out of this he is adjudged to pay the plaintiff \$100 per month, or \$1,200 per annum. On the other hand, the property which he possesses, even if all thereof were utilized therefor, would be insufficient to earn an income for plaintiff in any degree commensurate with defendant's ability to provide for her. Assuming that the sum of \$7,500 were awarded as alimony in gross, in accordance with appellant's suggestion in this court, this at 6 per cent. per annum would yield \$450 per year, or, "if allowance be made for taxes and a possible lower rate of interest, for safe investment" (*Viertel v. Viertel*, 212 Mo. loc. cit. 577, 111 S. W. 582), the income to be derived therefrom must be placed at a considerably lower figure. While it is true that plaintiff would then have the corpus of this little estate, the income available therefrom would be altogether disproportionate to the earnings of defendant, and his ability to provide for plaintiff in accordance with the obligation assumed by him by virtue of the marriage contract. In other words, the case is one where the earning ability of the defendant and his actual earnings are such as to make it possible, and altogether practicable, for a court to decree alimony from month to month in a sufficient amount to give plaintiff a reasonable income, in keeping with the station in life of the parties, while, on the other hand, the estate possessed by defendant is insufficient for such purpose. In this situation the trial court, in the exercise of the discretion reposed in it by law, adjudged it meet and proper to award plaintiff monthly alimony rather than in gross. No fault may be found with the amount of such award, considering the husband's income. And, under the circumstances, we take it that no appellate court can say that this discretion was not wisely and justly exercised.

Learned counsel for appellant say that we should not turn a deaf ear to an offer or sug-

gestion as liberal as that made by appellant in this court, viz., to turn over to respondent, as it is said; all that appellant possesses; both parties going their way and beginning life anew as it were. It is true that, as a suggestion or offer coming from a husband under such circumstances, it is out of the ordinary. But the wife has been awarded \$100 per month as alimony, an amount by no means disproportionate to defendant's earnings. It is impossible for any court out of the property possessed by appellant to make adequate provision for her, when all the circumstances are considered, and hence it follows that appellant's offer, though liberal for one of its nature, yet fails to meet the demands of the situation.

It is true that the allowance made plaintiff is under the control of the court below, and subject to future alteration should the circumstances warrant, and there is necessarily an element of uncertainty as to its duration. But under the circumstances proper provision for plaintiff by way of a present income can be made only by an allowance of this sort. And despite the objectionable feature of alimony of this character, the cast-off wife, insisting that her right to be maintained, which the law vouchsafes to her within the limits of the husband's ability, be not denied her, is here with able counsel bitterly contesting appellant's efforts to obtain a modification of the decree.

We think that the judgment ought not to be disturbed, and it is accordingly affirmed.

REYNOLDS, P. J., and NORTON, J., concur.

RIEPE v. VETTE. (No. 14122.)
(St. Louis Court of Appeals. Missouri. Nov. 2, 1915.)

1. USURY — 34 — USURIOUS TRANSACTIONS — STATUTORY PROVISIONS.

Under Rev. St. 1909, § 4571, making void any note and mortgage on household furniture given to secure a loan when the lender exacts or receives directly or indirectly as interest any sum in excess of 1 per cent. a month on the amount actually loaned, 15 notes for \$35 each with 8 per cent. interest, secured by a chattel mortgage on household furniture, given for a loan of \$350, are usurious, and the notes and mortgage may be canceled at the suit of the maker.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 83–89; Dec. Dig. — 34.]

2. PRINCIPAL AND AGENT — 23 — AGENCY — EVIDENCE.

Evidence held to justify a finding that a third person acted as agent for the payee of usurious notes secured by a mortgage on household furniture, authorizing the cancellation of the notes and mortgage at the suit of the maker.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. — 23.]

3. EVIDENCE — 129 — SIMILAR FACTS — AGENCY.

Where, in an action to cancel because of usury notes and a mortgage on furniture to se-

cure them, given by plaintiff to defendant, the issue was whether a third person negotiating the loan was defendant's agent, the testimony of a witness that shortly after the loan she applied to defendant for a loan on her household furniture, and he sent the third person to inspect her furniture as security and acted for defendant in the matter, was competent to prove the relation existing between defendant and the third person, though the testimony of the witness that she had negotiated a usurious loan from defendant was incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 451-457; Dec. Dig. ¶129.]

Appeal from St. Louis Circuit Court; Leo S. Rassieur, Judge.

"Not to be officially published."

Action by Jennie Riepe against J. H. Vette. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. Sacks, of St. Louis, for appellant. Bartley & Douglass, of St. Louis, for respondent.

NORTONI, J. This is a suit in equity to cancel certain notes and a mortgage because of usurious interest taken. The finding and decree were for plaintiff, and defendant prosecutes the appeal.

It appears that plaintiff desired to borrow \$350 on her household furniture and interviewed one H. C. Lunt concerning it. Lunt instructed her to return to his office in the Fullerton Building on the following morning, which she did. On appearing at Lunt's office the following day, July 29th, the lady in charge, Mrs. Lunt, told plaintiff that the loan would be made and thereupon drew up the notes and mortgage. Plaintiff executed 15 promissory notes, of \$35 each, for the sum total of \$525, which stipulated interest from date at the rate of 8 per cent. until paid. To secure these notes she executed a chattel mortgage on her household furniture and acknowledged the same before Ritta B. Lunt, notary public. The several notes and mortgage were executed in favor of defendant John H. Vette. Thereupon Miss Lunt—a sister of H. C. Lunt—accompanied plaintiff to the office of defendant John H. Vette where the money was procured. On entering Vette's office he drew his personal check for \$525, payable to plaintiff, and delivered the check to her. Plaintiff was instructed to indorse the check that it might be immediately cashed, but declined to do so for the reason, as she says, that she had no money in the bank and thought she ought not sign a check under such circumstances. But Miss Lunt instructed her that it was proper to indorse her name on the back of the check so as to receive the money on the loan, and hence she so indorsed it. On plaintiff's indorsing the check, defendant Vette handed Miss Lunt a package from his safe containing \$525, cash. Miss Lunt counted out \$350 in bills and passed it over to plaintiff but retained the balance. So it is that though plaintiff

executed her notes and mortgage, payable to Vette, for \$525, she received but \$350 thereon.

[1] The evidence is that the Lunts were formerly in the employ of Vette, and there is evidence, too, that H. C. Lunt—the husband of Mrs. Lunt and brother of Miss Lunt—was acting for Vette shortly after this loan was made, in that he inspected the security offered and negotiated a loan between him and one Mrs. Beeler. The suit proceeds under section 4571, R. S. 1909, to cancel the notes and the lien of the mortgage on the household furniture therein described because the transaction was a usurious one and impinged the provisions of the statute referred to. Section 4571, *supra*, denounces as void any note or notes and chattel mortgage on household furniture, as here, given to secure a loan of money not exceeding \$500 when the lender exacts or receives directly or indirectly as interest on the money loaned any sum in excess of 1 per cent. a month on the amount actually loaned. The several notes executed here—15 in number—stipulated on their face the rate of interest of 8 per cent. from date and fell due one each month for a period of 15 months. The 15 notes, of \$35 each, total the sum of \$525 on which plaintiff received \$350. The balance, \$175, was withheld from her though she executed notes for \$525. It is obvious that this transaction amounted to the taking of more than 1 per cent. a month, and if the evidence sustains the finding of the court that the loan was made by defendant Vette to plaintiff through his agents, the Lunts, the notes and mortgage were properly canceled as the court decreed.

[2] But it is argued the Lunts were the agents of plaintiff, and defendant Vette merely furnished the money or purchased the notes and mortgage from them, and the \$175 was, no doubt, retained by the Lunts as their commission on the loan. The court found the Lunts were the agents of defendant Vette and acted for him in the transaction. It is on this theory the cancellation was decreed. It is true there is no direct and positive evidence that the Lunts were the agents of Vette at the time, but the record abounds with facts and circumstances from which the court may find the Lunts acted for Vette rather than for plaintiff. It appears plaintiff applied to H. C. Lunt for a loan of \$350, and she was directed to return the following morning when the final answer would be given. On returning to Lunt's office she was directed by Mrs. Lunt, who appeared to know the purpose of her visit, to execute the papers which were promptly drawn up for her signature and acknowledged. This she did, and the notes and mortgage in the amount of \$525 were taken. Immediately she was accompanied to defendant Vette's office by Miss Lunt, and the evidence is that Vette seemed to be fully advised concerning it. The notes and mortgage were drawn in the

first instance, payable to John H. Vette as though he were the principal making the loan to plaintiff. He accepted the securities in the amount of \$525 and passed over to Miss Lunt a package containing that amount of money. She, it is said, in his presence, counted out \$350 to plaintiff and retained \$175. Before the money was delivered, however, by Vette to Miss Lunt, he drew a check for the amount of \$525, payable to plaintiff, and required her to indorse it. Although this check was cashed instantaneously by Vette in the presence of all the parties, it appears in evidence with the word "paid" perforated in it as though it had passed through the bank. Moreover, the name of H. C. Lunt, who was not present at the time, appears to be indorsed across the back of it, and this, together with the perforation of the word "paid" in the check, suggests that unusual precautions were taken for some reason in event it should be necessary to produce the check on some future occasion as was done here.

The evidence is—indeed, Vette admits—that the Lunts were formerly in his employ, though it is said not at this time. Moreover, there is evidence on the part of Mrs. Beeler that, when she negotiated a loan directly with Vette shortly after the loan in the instant case was made, H. C. Lunt came to her house as Vette's representative and inspected the furniture.

It was competent for the court to find from these facts and circumstances that the Lunts were acting for Vette in the matter and to charge him with their conduct on the theory of an agency for him. It is certain that direct evidence of a fact at issue is not essential. No one can doubt that such a fact—i. e., as that of the agency involved here—may be found by the court from other facts and circumstances in evidence which afford a reasonable inference tending to prove it. When it is remembered Vette was an entire stranger to plaintiff and that the notes and mortgage she executed at the instance of the Lunts were payable to John H. Vette, there appears to be an abundance in the case which tends to show they were acting for him and not for plaintiff. We are not disposed to disturb the finding of the court on this matter.

[3] Although it may be the evidence of Mrs. Beeler was incompetent in so far as it tended to prove that she had negotiated a loan with defendant for the amount of \$250 and executed notes for \$450 to him therefor, it was entirely competent on the issue of agency; for it appears the transaction was negotiated by Lunt as the agent of Vette, and this, too, at a time shortly after the loan in the instant case was made and when Vette said Lunt was no longer his representative in such matters. Mrs. Beeler says that she applied to Vette directly for a loan

of \$250 on her household furniture, and he sent Lunt to inspect her furniture as security, and he acted for Vette in the matter. In consummating this loan of \$250 for which notes for \$450 were given, she made no application to Lunt and, indeed, knew him only as the representative of Vette sent out by him to inspect her furniture and make the loan. This evidence was competent as tending to prove the relation existing between Vette and Lunt.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

STATE v. WILD. (No. 13680.)
(St. Louis Court of Appeals. Missouri. Nov. 2, 1915.)

COURTS \Leftarrow 231—MISSOURI COURT OF APPEALS
—JURISDICTION—CONSTITUTIONAL QUESTION.

A contention in the briefs that Rev. St. 1909, §§ 8315, 8320, were unconstitutional because defining three separate and distinct penalties for the same offense raised a constitutional question, so that the Court of Appeals was without jurisdiction to determine the same, and the case would be transferred to the Supreme Court for final determination.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. \Leftarrow 231.]

Appeal from St. Louis Court of Criminal Correction.

"Not to be officially published."

Franz Wild was convicted of practicing medicine without a license, and he appeals. Cause transferred to the Supreme Court for final determination.

W. A. Carter and Chas. J. Maurer, both of St. Louis, for appellant. Howard Sidener and S. S. Bass, both of St. Louis, for the State.

NORTONI, J. Defendant prosecutes this appeal from a judgment of conviction on a charge of practicing medicine without a license. It appears he was informed against and tried under the provisions of the statute (section 8315, R. S. 1909). He moved to quash the information on the grounds, among others, that the statute defines three distinct offenses and different penalties for the same offense when committed by different persons; also that it impinges section 28, art. 4, of the Constitution of Missouri. The court overruled the motion to quash, and defendant duly saved an exception to such ruling. After trial and conviction and within due time, defendant filed a motion for a new trial and one in arrest of judgment. The fourth ground set forth in the motion in arrest is as follows:

"The statutes relating to the practice of medicine, surgery, and midwifery, under which the information was issued, are unconstitutional and void because they define three separate and distinct penalties for the same act and offense,

and particularly when committed by different persons."

Sections 8315 and 8320, R. S. 1909, relate to the same subject and are parcel of the same act. Section 8315 denounces as an offense the act of practicing medicine without license from the state board of health, as therein contemplated, and section 8320 denounces the practice of midwifery in this state by one not licensed to do so. Section 8315, concerning the practice of medicine without a license, prescribes the punishment to be assessed in such cases at a fine of not less than \$50 nor more than \$500, or by imprisonment in the county jail for a period of not less than 30 days or more than 1 year, or by both such fine and imprisonment. Section 8320 provides that one practicing midwifery without license may be punished by a fine of not less than \$10 nor more than \$50, or by imprisonment in the county jail not more than 2 months nor less than 10 days. The motion in arrest of judgment, and also that to quash, questions the constitutionality of the enactment because of the discrepancies in the penalties provided in the two sections above referred to. An argument is directed in the briefs against the statute on the ground above referred to, and it appears a constitutional question is raised and pressed in the case.

As this court is without jurisdiction where the constitutionality of an act of the Legislature is called into question, the case should be transferred to the Supreme Court for final determination. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

ALBERT v. ST. LOUIS ELECTRIC TERMINAL RY. CO. (No. 14124.)

(St. Louis Court of Appeals. Missouri. Nov. 2, 1915. Rehearing Denied Nov. 23, 1915.)

1. NEGLIGENCE — INJURY ON TRACKS — IMPUTED NEGLIGENCE.

Where the father of a two year old girl was sitting on his front steps with the child, and, when he became engrossed in his newspaper, she left him and ran into the street, a neighbor calling to the father to look out for her just as a street car approached, whereupon he ran into the street, but too late to save the child, which was struck by the car, the father was not negligent, since an ordinarily prudent person might suffer such a lapse of attention under the circumstances for such an interval.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 157-161; Dec. Dig. ¶ 96.]

2. JURY — BIAS OF JUROR — CHALLENGE FOR CAUSE.

In action for death of a two year old girl, where a juror stated that his sympathy for the death of the child would probably influence him in favor of the plaintiff, if the evidence were evenly balanced, unless the court instructed otherwise, the court's action in declining to sustain defendant's challenge for cause to such juror was proper, since the mere fact that a juror answers that if the evidence were evenly

balanced he might incline through sympathy to favor plaintiff is not sufficient to render him incompetent on a challenge for cause.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 431-433, 435-437; Dec. Dig. ¶ 97.]

3. TRIAL — WRONGFUL DEATH — ACTION — INSTRUCTION.

In action for the wrongful death of plaintiff's two year old daughter under Rev. St. 1909, § 5425, authorizing recovery for an amount not less than \$2,000 and not exceeding \$10,000 for every such death contemplated therein, where the court charged that the jury might return a verdict, if for the plaintiff, in a sum not less than \$2,000 and not to exceed \$10,000, such instruction was not erroneous as omitting to inform the jury that plaintiff was not entitled to recover anything for loss of society or loss of services, except during the years of minority of the child, where no more definite charge was asked.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. ¶ 256.]

4. DEATH — DAMAGES.

In suit under the wrongful death statute for death of plaintiff's two year old daughter, a verdict exclusive of the \$2,000 penalty, of \$5,420 could not be declared excessive, since it could not be said that in no event might such child have yielded so much to her parents during the period of her minority, less the expense of care and education to them, while, with respect to an infant's death, the jury may fix the amount of recovery, utilizing their own knowledge and experience in the absence of direct evidence.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. ¶ 99.]

Appeal from St. Louis Circuit Court; Rhodes E. Cave, Judge.

Suit by Mary Albert against the St. Louis Electric Terminal Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones, Hocker, Hawes & Angert and Anderson, Gilbert & Levi, all of St. Louis, for appellant. S. P. Bond, of St. Louis, for respondent.

NORTONI, J. This is a suit for damages under the wrongful death statute. Plaintiff recovered, and defendant prosecutes the appeal.

Plaintiff's little girl, two years of age, was run upon and killed by one of defendant's street cars. The child was at play for the moment in Twelfth street in the city of St. Louis between Biddle and Carr streets, where defendant operates its car line. The evidence tends to prove that by due care defendant's motorman could have averted the catastrophe, but failed to do so. The petition counts upon the Vigilant Watch Ordinance.

[1] It is argued the court should have directed a verdict for defendant because of plaintiff's negligence in that Joseph Albert, the father of the child, permitted it to run upon defendant's tracks at the time, but we are not so persuaded. It appears that plaintiff's residence abutted closely upon Twelfth street, immediately adjacent to the point of

collision, and Joseph Albert, the father, was sitting on the third from the bottom of the front steps while the little girl was playing about him. But a moment before she was sitting beside her father on the step. The father was reading a newspaper, and it seems became engrossed in it when the little one, unnoticed by him, ran into the street near the car track. A neighbor called to him to look out for the baby just as the car approached. Thereupon Mr. Albert ran into the street, but the car had run upon the child before he reached it. We are unable to say, in these circumstances, that the negligence of the father should be declared as a matter of law. It seems that the father was exercising due care for the safety of the child, but it toddled into the street only a moment before, while his attention was engrossed in reading. It cannot be said that an ordinarily prudent person would not suffer a lapse of attention, under the circumstances, for so short an interval.

[2] It is argued that the court erred in declining to sustain defendant's challenge to Juror Byrne, for it is said that his examination revealed a bias against defendant. On the examination of this juror no admission appears tending to show that he was prejudiced or biased in any wise. It is true he stated that his sympathy for the death of the child would probably influence him in favor of plaintiff, if the evidence were evenly balanced, unless the court instructed otherwise. Touching this matter, the following questions and answers appear:

"Q. If the evidence in this case in your mind was evenly balanced, and the court had instructed you that it was the duty of the plaintiffs to make out their case by a greater weight of evidence, and in weighing the evidence in your own mind you felt that the evidence was about equal on both sides, would your sympathies influence you in deciding that case for the plaintiffs, in view of the instructions as given you by the court? A. No, sir. Q. Which way would you find if the evidence was about the same, or was the same on the part of the plaintiffs and the defendant, for whom could you find? A. Well, if I wasn't instructed otherwise, I would find in favor of the plaintiffs. Q. You would find in favor of the plaintiffs, if the evidence was equal on each side? A. If I wasn't instructed otherwise, I would. Q. This sympathy that you have expressed, would it tend or lead you to give more credence to the evidence offered by the plaintiffs than that offered by the defendant? A. No, sir; it would not."

There is, as above stated, no suggestion of bias or prejudice on the part of the juror. At most the question pertains to the sympathies which well from every human heart. It is said by Chief Justice Marshall in Burr's Case:

"That light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him."

This court has given expression to the same views heretofore, as will appear by reference to *McManama v. United Rys. Co.*, 175 Mo. App. 43, 49, 158 S. W. 442; *Billmeyer v. St. Louis Transit Co.*, 108 Mo. App. 6, 82 S. W. 536. Obviously the sympathies which one entertains for the loss of a child in such circumstances do not constitute a strong and deep impression which will close the mind against the testimony so as to resist its force and combat its effect. On the contrary, such sympathies are to be regarded in the category of light impressions which may fairly be supposed to yield to the testimony given in a case. The examination of the juror here discloses that his mind was open so as to enable him to return a proper verdict under the instructions of the court notwithstanding his natural sympathy. It is conclusively settled by the Supreme Court decisions that the mere fact that a juror answers that if the evidence were evenly balanced he might incline through sympathy to favor plaintiff is not sufficient to render him incompetent on a challenge for cause. If there is nothing more to indicate bias or prejudice, the juror is competent, for the law will not put him aside because, forsooth, he honestly answers concerning the sympathies which lie in every human heart. See *Keegan v. Kavanaugh*, 62 Mo. 230; *Hudson v. St. Louis, etc., Ry. Co.*, 53 Mo. 525, 537.

Plaintiff's principal instruction is criticized, but it is well enough, as will appear by reference to numerous cases cited in the brief which support and approve the language employed.

[3] The suit proceeds as for the wrongful death, under section 5425, R. S. 1909; i. e., the penal section. The statute authorizes a recovery for an amount not less than \$2,000 and not exceeding \$10,000 for every such death as therein contemplated. The court gave, at the instance of plaintiff, the following instruction on the measure of damages:

"The court instructs the jury that, if under the evidence and the other instructions given in this case, you decide to find a verdict for the plaintiffs, then you may return a verdict in a sum not less than \$2,000 and not to exceed \$10,000."

It is urged the court erred in this because the instruction omits to inform the jury plaintiff was not entitled to recover anything for the loss of society, nor on account of the loss of services, except during the years of minority, but the argument is not convincing, in view of the rule, which is now well established, concerning a general charge on the measure of damages. Generally speaking, an instruction on the measure of damages, in cases under the wrongful death statute, which is proper in its general scope and contains no element of misdirection, is regarded well enough in the view that mere nondirection is not reversible error. It is said that if defendant desires the right pertaining to

the amount of the recovery to be more clearly defined and limited, the duty devolves upon it to ask an instruction accordingly. See *Browning v. Wabash, etc., Ry. Co.*, 124 Mo. 55, 27 S. W. 644. See, also, for an application of the same rule in other cases, *King v. St. Louis*, 250 Mo. 501, 157 S. W. 498; *Smith v. Fordyce*, 190 Mo. 1, 30, 81, 88 S. W. 679; *State ex rel. v. Reynolds et al.*, 257 Mo. 19, 165 S. W. 729; *Nelson v. United Rys. Co.*, 176 Mo. App. 423, 158 S. W. 446; *Powell v. U. P. R. Co.*, 255 Mo. 420, 454-457, 164 S. W. 628. The mere facts that the recovery in the instant case pertains to the death of a minor on which no compensation is to be made for the loss of society and none given on account of the loss of service beyond the age of maturity are of no avail to change the rule, for that the principle remains the same at all events. In either case the question presents one of nondirection only. And it is certain that such is not error. The point of the matter is that a general instruction of the character of that above copied will suffice if no element of misdirection concerning the element of damage is incorporated therein. Omitting the misdirection, the subject-matter is remitted to be disposed of as are other similar questions on the grounds of nondirection. Touching this the principle is the same in either case. See *Dudley v. Wabash R. Co.*, 167 Mo. App. 647, 673, 150 S. W. 737.

[4] It is argued the verdict is excessive, and that this we should declare as a matter of law. The amount of the verdict as approved by the trial court is \$7,420. The suit proceeds, as above stated, under section 5425, R. S. 1909, which authorizes a recovery of not less than \$2,000 nor exceeding \$10,000 for every such death. According to the construction placed upon this statute by the Supreme Court in *Boyd v. Mo. Pac. R. Co.*, 249 Mo. 110, 155 S. W. 13, Ann. Cas. 1914D, 37, \$2,000 of the recovery authorized is penalty while the amount above that is to be regarded as compensatory damages. This being true, of course, the amount of \$2,000 is to be set aside as a penal sum, and therefore not considered in connection with the argument that the verdict is excessive. In this view, the recovery as compensatory damages is to be treated as if for \$5,420; that is to say, after deducting the amount of the penalty. This amount, \$5,420, we are urged to peremptorily declare, is an excessive recovery for the loss of a female child because it is said in no event may she yield this much during the period of her minority, less the expense of care and education to the parents. But, how are we to ascertain this to be true? There is no evidence in the record, either pro or con, tending to throw light upon the probable earning capacity of this infant in after years. Of course, the law requires none in such cases. Indeed, it is the accepted rule of decision that where this subject-matter

comes in question with respect to the death of an infant, the jury may fix the amount of the recovery, without evidence thereon, through utilizing their own knowledge and experience, presumptively possessed by them in common with mankind in general. This is the rule announced under the third section of the damage act; i. e., the compensatory section. See *Nagel v. Mo. Pac. R. Co.*, 75 Mo. 653, 42 Am. Rep. 418. When, therefore, it is remembered that this is a question which our law remits to the jury to be disposed of without evidence by resorting to their knowledge and experience as men, the argument advanced suggests the plain proposition that the appellate court should declare, as a matter of law, no child may yield the amount of \$5,420 to the parents during the years of its minority. This we are unable to declare, for it is beyond the ken of man. Under this same section of the statute, our Supreme Court approved a verdict of \$8,000 given on account of the death of a 15 year old boy in *Ellis v. Metropolitan St. R. Co.*, 234 Mo. 657, 138 S. W. 23, but it may be in the view that the entire sum was penalty, for such appears to be the view of the court at that time touching this statute. See *Young v. St. Louis, etc., R. Co.*, 227 Mo. 307, 127 S. W. 19. But be this as it may, the proposition remains that we are urged to declare, as a matter of law without evidence thereon, a recovery of \$5,420 compensatory damages is excessive for the loss of an infant daughter two years old, and this involves the notion that no infant female child of that age may yield so much to the parents during her minority. We are not prepared to so say.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

ASSMAN v. ASSMAN. (No. 13805.)
(St. Louis Court of Appeals. Missouri. Nov. 2, 1915.)

1. PARENT AND CHILD — 3 — SUPPORT OF CHILD — FATHER'S DUTY.

Where a father is at fault in abandoning his home, his wife may recover from him for necessities which she has furnished the minor children during his absence, even though such husband be divorced from the wife in a foreign state, and the decree does not purport to award the custody of the children to either party, since primarily the obligation to support minor children rests upon the father, and on his failure to furnish necessities to the child, according to his station in life, one who has done so may recover therefor from him.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-62; Dec. Dig. § 3.]

2. PARENT AND CHILD — 3 — SUPPORT OF CHILD — LIABILITY OF FATHER.

Where a wife left her husband, who was without fault, and went to New York state, where she remained five years, returning temporarily and inducing her minor child to return to New York with her, without the knowledge or consent of the husband, he was not liable at

such wife's suit for the support of the child by her, in the absence of any showing that the child would suffer otherwise; for unless a father is at fault in some way he is entitled to the care and custody of minor children at his home, and a parent who is willing to support his children at home is not bound to provide for them elsewhere, except where he has wrongfully driven them away, or at least assented to another's taking or keeping them.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-62; Dec. Dig. ¶3.]

3. PARENT AND CHILD ¶3—SUPPORT OF CHILD—LIABILITY FOR NECESSITIES.

Where a mother abandoned her husband without cause, and after several years returned and carried off their son to another state without its father's knowledge or consent, the mere fact that the father shortly thereafter sent the boy's clothes, with a letter to the boy advising him to be good to his mother, did not show that he consented to withholding the boy from him, since he was not bound to go into a foreign jurisdiction to assert his rights.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-62; Dec. Dig. ¶3.]

Appeal from St. Louis Circuit Court; W. B. Homer, Judge.

Suit by Matilda Assman against William S. Assman. Judgment for defendant on direct-verdict, and plaintiff appeals. Affirmed.

Charles Fensky and Grant Gillespie, both of St. Louis, for appellant. Campbell Allison, H. S. Caulfield and Jesse McDonald, all of St. Louis, for respondent.

NORTONI, J. This is a suit to recover the amount expended for the care, keep, and education of defendant's minor son. At the conclusion of the evidence the court directed a verdict for defendant, and plaintiff prosecutes the appeal.

The parties are husband and wife. It appears they were married August 14, 1890, and separated May 15, 1900. They resided as husband and wife in St. Louis, Mo., prior to their separation. It does not appear what occasioned the separation, but, at any rate, plaintiff removed to the state of New York May 27, 1901, where she has since resided. At that time the minor son, Harry Robert, was about seven years of age. He resided at all times with defendant, his father, and in his home in the city of St. Louis. Although plaintiff and her husband remained separate, no divorce was ever granted either party. About February, 1906, when the minor son was aged 13 years, plaintiff returned to St. Louis from New York and induced him to accompany her to that state. It appears that defendant was not consulted concerning this matter, and plaintiff admits in her testimony that she took the minor son into her custody without the knowledge or consent of defendant, his father, although a week later defendant sent the clothing of the boy to him to Brooklyn, N. Y., and wrote a letter urging him to be good to his mother. After having supported the minor son for several years in New York, plaintiff instituted this suit to recover from defendant, the

father, the amount expended in his care, keep, and education.

[1] The court directed a verdict for defendant in the view that, though the obligation to support the son devolved upon defendant, the father, in the first instance, it was not enforceable in the circumstances of the case at the suit of the mother who was undivorced, for that she had voluntarily taken the child into her custody and removed him to a foreign state without the knowledge or consent of the husband, and we are persuaded that the ruling was a proper one on the facts. There can be no doubt that primarily the obligation to support the minor child rests upon the father, and, on his failure or neglect to furnish necessities for the support of the child according to the station in life, one who has done so may recover from the father accordingly. So it is that, where the father is at fault as by abandoning the home, the wife may recover from him for such necessities as she has furnished the minor children during his absence, and this is true though he be divorced from her in a foreign state, even though the decree does not purport to award the custody of the children to either party. See Rankin v. Rankin, 83 Mo. App. 335; McCloskey v. McCloskey, 98 Mo. App. 393, 87 S. W. 669.

[2] But here it does not appear that defendant father was at fault in the matter at all, and, indeed, no decree of divorce has been given either party. Presumptively, the defendant furnished a good home and all necessities to the minor son. The parties stand as husband and wife, and while the primary duty of support rests upon the husband, as a corollary thereto, he is entitled to the custody and earnings of the minor children as well at common law. Moreover, under our statute (section 403, R. S. 1909) then in force, the father was the natural guardian of the child and entitled to its care and custody and to direct its education, though it may be otherwise now under the amendment. See Laws of Missouri 1913, p. 92. It is therefore clear enough that, unless the father is at fault in some way, he is entitled to the care and custody of the minor children at his home, and a parent who is willing to support his children at home is not bound to provide for them elsewhere, except where he has wrongfully driven them away or at least assented to the mother's taking or keeping them. See Spencer's Domestic Relations, § 493; 29 Cyc. 1610. Here it appears the father was furnishing the support to his minor son at his home in St. Louis—i. e., was performing the full measure of his obligation with respect to this child when the plaintiff mother, after an absence of about five years, came on the scene unexpectedly and spirited the child away to a foreign state without the knowledge and against the consent of the father. In such circumstances she must be deemed to have

voluntarily assumed the burden of its support, for defendant was in no wise at fault. *Glynn v. Glynn*, 94 Me. 465, 48 Atl. 105; *Fittler v. Fittler*, 33 Pa. 50.

[3] The mere fact that defendant sent forward the clothing of his child a week after he was taken to New York by the mother and wrote him a letter containing good advice is of no avail to show that he consented to the child's being withheld from him, for, while the law presumes the father will assert his right to the custody of his child in the courts, it does not require that he shall pursue it into a foreign jurisdiction for that purpose. Neither does the fact that the father saw the child and talked to him on the street in Brooklyn, N. Y., avail anything here on that score. There is no evidence tending to show that the boy's necessities were not supplied by his mother, and there is nothing to indicate that the child would suffer if the father were not required to compensate this claim. Although the father is frequently required to compensate the wife for the support of the child while in her custody rather than his, an implied assent to the mother's withholding the child is usually found and asserted on the ground that the father might invoke his remedy in the courts and obtain the custody of the child if he is a proper person to have it. *McCloskey v. McCloskey*, 93 Mo. App. 393, 67 S. W. 669. But manifestly this doctrine is beside the instant case, for here, after an absence of about five years, the mother returned and took the child without the father's knowledge or consent and bore it away to a distant state beyond the jurisdiction in which he resided and whose courts were immediately available to him. To permit the mother to recover in such circumstances without at least showing some special ground—i. e., as if the child were in want or likely to suffer for necessities in the future—would be awarding an advantage to her which accrued because of her own wrongful act.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

LEMAIRE v. STRASSBERGER CONSERVATORIES OF MUSIC CO.
(No. 14087.)

(St. Louis Court of Appeals. Missouri. Nov. 2, 1915.)

1. MASTER AND SERVANT §48—SERVICES—CONSTRUCTION OF CONTRACT.

Under a contract of employment as instructor in the vocal department of defendant's conservatories, by which plaintiff agreed to serve on "about" four days each week, "as and when required," and defendant agreed to pay her at the rate of \$2 per hour "for actual services performed," defendant was not bound to assign to plaintiff any particular number of pupils or hours of instruction, nor to compensate

plaintiff, except for the actual number of hours employed, as and when defendant might direct. [Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §62; Dec. Dig. §48.]

2. CONTRACTS §169—CONSTRUCTION—SURROUNDING CIRCUMSTANCES.

A contract is to be read in the light of the surrounding circumstances in order, if necessary, to more perfectly arrive at the understanding and intention of the parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §752; Dec. Dig. §169.]

3. MASTER AND SERVANT §31—SERVICES—DISCHARGE—LIABILITY.

Plaintiff, employed under a contract as instructor in the vocal department of defendant's conservatories, and entitled thereunder to employment to some extent on approximately four days per week during the term of one year, but who, after demands upon defendant not justified by the contract, told defendant that she would not continue teaching until she had a written answer to her letter refusing to continue in her employment unless such unwarranted demands were met, and who, after notice to appear the following day intentionally, and without any excuse absented herself for several days, during which her pupils were given to another instructor, could not recover damages as for a wrongful discharge.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §37; Dec. Dig. §31.]

4. COSTS §42—OFFER OF JUDGMENT—EFFECT.

Under the statute, offer of judgment in an action for breach of a contract for services in an amount equal to that recovered stopped the running of costs against defendant from the time of the offer.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§137-164; Dec. Dig. §42.]

Appeal from St. Louis Circuit Court; Wm. T. Jones, Judge.

"Not to be officially published."

Action by Agnes W. Lemaire against the Strassberger Conservatories of Music Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Kortjohn & Kortjohn and Kurt Von Repert, all of St. Louis, for appellant. Marshall & Henderson, of St. Louis, for respondent.

ALLEN, J. This is an action for damages for the alleged breach by defendant of a contract of employment. The trial below, before the court and a jury, resulted in a verdict and judgment for plaintiff, and the case is here on defendant's appeal.

The petition is in four counts. The first count charges that on April 7, 1910, the defendant corporation entered into a written contract with plaintiff, whereby defendant employed plaintiff for a term of one year beginning August 15, 1910, and ending August 15, 1911, in the capacity of instructor in the vocal department of certain conservatories conducted by the defendant; that the contract provided that plaintiff should receive \$2 per hour for actual services performed by her, and that such contract should in all particulars be a continuance of a previous contract, dated August 1, 1909, except as to the

compensation per hour to be paid for plaintiff's services. Other provisions of the last-mentioned contract are set up which it is unnecessary to here notice.

It is alleged that, while the contract specified the number of days per week that plaintiff should be employed and should serve, and her compensation per hour, it did not specify the number of hours per day that she would be required to serve; that said contract of August 1, 1909, was entered into by the parties thereto after plaintiff had served in a similar capacity in the same institution from September, 1908, to August 1, 1909, receiving a salary of \$100 per month, during which time she had been required to serve on an average of 5 hours per day, and that during the first year's operation under the contract of August 1, 1909, she was required to serve on an average of 5 hours per day for 4 days per week; that it was the custom with said conservatories of defendant, as well as of other similar institutions in the city of St. Louis and elsewhere, that instructors should serve on an average of 5 hours per day, which custom was general, notorious, and uniform among persons engaged in this character of work, and was known, recognized, and acted upon by the parties. And it is alleged that defendant breached its contract of April 7, 1910, in that defendant failed and refused to give plaintiff employment thereunder for an average of 5 hours per day on 4 days of each week from August 15, 1910, to January 31, 1911, though plaintiff was ready, willing, and able to perform the contract on her part, but permitted plaintiff to serve during said time but 207½ hours, to plaintiff's damage in the sum of \$515.

The second count of the petition alleges that during the month of February, 1911, defendant gave plaintiff employment for but 23 hours, refusing to permit plaintiff to perform further services, whereas plaintiff was entitled to be employed during said month for 10 days of five hours each at the rate of \$2 per hour; and judgment is prayed on this count for \$100.

The third count charges that on February 20, 1911, the defendant wrongfully refused to allow plaintiff to continue to render any further services under the contract and seeks damages in the sum of \$900 for the alleged wrongful discharge of plaintiff by defendant.

By the fourth count a recovery of \$46 is sought for 23 hours of service rendered by plaintiff, during the month of February, 1911, at the contract price of \$2 per hour.

It is unnecessary to further notice the pleadings. The evidence discloses that plaintiff was first employed by Clemens C. Strassberger, "proprietor of the Strassberger Conservatories of Music," under a written contract of date June 2, 1908, whereby plaintiff agreed to serve, as required, "on an average of at least eighteen hours, and not to exceed twenty-eight hours, per week," for a

period of five years commencing September 1, 1908, and ending August 31, 1913, with a vacation of one month each year; plaintiff to devote her exclusive time and attention to such employment. For such services plaintiff was to receive \$100 per month. Plaintiff worked one year under said contract.

On August 1, 1909, the following contract was entered into between the plaintiff and Clemens Strassberger, "president of the Strassberger Conservatories of Music Company," viz.:

"This agreement made and entered into this first day of August, 1909, by and between Clemens Strassberger, president of the Strassberger Conservatories of Music Company, party of the first part, and Agnes Whitehead Lemaire, of the city of St. Louis, Missouri, party of the second part, witnesseth:

"That the said first party has employed and hereby does employ the said Agnes Whitehead Lemaire in the capacity of instructor in single and class lessons in the vocal department at the North and South Side Conservatories of said first party in the city of St. Louis, and the said party of the second part agrees to serve the said Strassberger in said capacity about four days a week, which shall be divided into the North and South Side Conservatories, as and when required by said first party during the entire period of one year commencing September 1, 1909, and ending August 15, 1910.

"For the services so to be performed by the said second party, said Strassberger agrees to pay her at the rate of one dollar and seventy-five cents (\$1.75) per hour for actual service performed by said Agnes Whitehead Lemaire at the Strassberger Conservatories of the city of St. Louis.

"It is further agreed that said party of the second part is not allowed to teach in any other conservatory, institution, or school during the period of this agreement, but shall have the privilege to teach some pupils of her own, in her own studio or pupils' residences, as long as it don't interfere with her duties at said conservatories as above agreed in this agreement.

"It is also agreed that when requested by the first party that the party of the second part shall participate in teacher recitals, annual examination, or assist in such recitals in which any of her pupils participate, such time shall be served by the party of the second part without any further compensation.

"It is also agreed by the party of the first part that said Agnes Whitehead Lemaire is released of all duties mentioned and agreed to in the agreement made and entered into the 2d day of June, 1908, and that said agreement is called void, and that both parties have agreed to acknowledge this agreement, which shall be in force from the first day of September, 1909.

"It is further agreed that all negotiations for a renewal of this contract or for the continuation of the services of the said A. Whitehead Lemaire after the expiration hereof, shall take place on or before February 1, 1910."

Plaintiff served under this contract for a period of one year. On April 17, 1910, the following was indorsed upon the contract of August 1, 1909, signed by plaintiff and defendant corporation, viz.:

"The foregoing contract between Clemens Strassberger and Agnes Whitehead Lemaire, which expires on the 15th day of August, 1910, is hereby continued for the period of one year from and after the said 15th day of August, 1910. It is clearly understood, however, that the contracting parties shall be the Strassberger Conservatories of Music Company on the one

hand, and Agnes Whitehead Lemaire on the other. This contract shall in all particulars be a continuation of the foregoing one and identical with the same, with only this exception: That for the term beginning on the 15th day of August, 1910, Agnes Whitehead Lemaire shall receive for actual services performed two (\$2.00) dollars per hour."

Under this contract, of date April 17, 1910, which covered a term of one year beginning August 15, 1910, and for the said alleged breach of which this suit is prosecuted, plaintiff performed services, of the character therein contemplated, from September 1, 1910, to to February 17, 1911. Said services were rendered on Monday, Tuesday, Thursday, and Friday of each week, for such hours as defendant directed; plaintiff, with defendant's consent, reserving Wednesday and Saturday of each week exclusively for other engagements. Plaintiff, however, soon began to complain to defendant that she was not being called upon to serve a sufficient number of hours per day, demanding that more pupils be assigned to her; and on November 19, 1910, she wrote a letter to defendant reiterating this demand, and also demanding compensation for the loss alleged thus to have been sustained by her from and after September 1, 1910. To all such demands by plaintiff defendant's reply was that plaintiff misconceived the nature of her contract, and that defendant was not bound to provide plaintiff with employment for any particular number of hours per day.

There is testimony adduced by defendant to the effect that on or about February 18, 1910, plaintiff refused to continue teaching unless more pupils were assigned to her. And on February 20, 1911, plaintiff again wrote defendant, asserting that defendant had breached the contract, and offering to take \$300 for the loss alleged to have been sustained by her to that date, provided she were given a guaranty that she would not receive less than \$150 per month thereafter to June 1, 1911. The letter stated that, if this were done, plaintiff would continue teaching; otherwise she would place the matter in the hands of an attorney. And plaintiff admits that she told defendant's president that she would not continue to teach until she had an answer thereto.

In reply to plaintiff's last-mentioned letter, defendant's attorneys, on the same day, wrote plaintiff a letter, and caused the same to be delivered to her that night, which contained the following:

"If you will read your contract carefully, you will find that you are to be paid two dollars per hour only for the time when actually engaged in your work for the company. There is nothing in the contract guaranteeing that you shall be employed for any given number of hours, and we cannot understand what complaint you can possibly have, or what claim you can possibly make under your contract, either against the company or Mr. Strassberger. We are also informed by Mr. Bruno Strassberger that you have told him that you would not continue teaching until you received the answer of the

company. Under your contract it is your duty to attend at the South Side Conservatory at 9 o'clock a. m. tomorrow, Tuesday morning, and if you fail to appear there is nothing left to our client but to turn over the scholars that you ought to instruct to another instructor."

Plaintiff admits that she failed to appear for duty on Tuesday, February 21, 1911, stating that she absented herself in order to consult counsel. It appears that, without authority, she telephoned, so far as possible, all of defendant's pupils who were to report to her for instruction on that day, telling them not to appear. She had no pupils on Wednesday, February 22d; and she testified that she had learned that the only pupil whom she was expected to teach on Thursday, February 23d, would not be present. Plaintiff did not report for duty until Friday, February 24th, when she was told that her pupils had been assigned to another teacher, by whom they would be instructed provided they remained in the school.

Plaintiff's testimony in chief is to the effect that she served about five hours a day, for four days a week, for the first year, under the contract of date August 1, 1909, but that under this same contract, as continued by these parties for the year commencing August 15, 1910, she was permitted to serve but two hours per day, "on some days, and half an hour on others." In the course of her cross-examination, however, defendant's counsel had her identify written monthly statements handed in by her to the defendant each month, containing her own record of the number of hours which she had served and which afforded a basis for her monthly pay checks. The amount thus shown to be due her each month beginning September, 1909, and ending with the month of January, 1911, had been paid her, and she had receipted these various statements. The latter show that in the first year during which plaintiff worked under this contract of August 1, 1909, the amount of time per day which she had been required by defendant to teach, on four days of each week, varied from one to six hours, averaging approximately three and one-half hours per day. Similar statements for the months of September, October, November, and December, 1910, for January, 1911, and to February 17, 1911, showed that plaintiff had likewise been called upon to work from one to six hours a day, for four days in each week, and that during this period the average was slightly more than three hours per day. These statements show no uniformity whatsoever in the number of hours which plaintiff was called upon to devote to defendant's work, either during the first year's operation under the contract of August 1, 1909, or during that portion of the term here involved prior to the termination of the employment. It appears that a lesson ordinarily consisted of a period of thirty minutes, and that plaintiff always served at least one hour per day,

sometimes two, three, four, or five, and occasionally six hours. Her schedules were arranged for her in advance, and, as she stated, she would be notified by telephone "if expected half an hour earlier or later."

Shortly prior to trial below, to wit, on February 26, 1913, defendant duly made offer to permit plaintiff to take judgment for \$51.52, being the amount, with accrued interest, due plaintiff for services actually rendered during February, 1911, for which she had not been paid, and being the subject-matter of the fourth count of the petition. This offer plaintiff declined.

At the close of plaintiff's case, and again at the close of the entire evidence, the defendant interposed demurrers to the evidence adduced in support of the first three counts of plaintiff's petition. These were overruled, and the case was sent to the jury under instructions which need not be here set out at length. The jury returned a verdict for plaintiff on all of the counts of her petition: On the first for \$371.80; on the second for \$49.28; on the third for \$789.98; on the fourth for \$51.52—the total being \$1,262.62. Judgment was entered upon the verdict, but thereafter, compelled by the ruling of the trial court in passing upon defendant's motion for a new trial and its motion in arrest of judgment, plaintiff remitted \$500.42 of this verdict, and a new judgment was entered in favor of plaintiff for the sum of \$762.20, from which the appeal is prosecuted.

There is no evidence in the record to establish the existence of a custom such as is alleged in the petition, though the court permitted plaintiff to undertake to make proof thereof; and in any event no custom of this character would be here available to plaintiff.

The case was submitted to the jury upon the theory that defendant was bound, under the contract, to give plaintiff employment for a reasonable number of hours per day, on about four days each week. At the instance of plaintiff the court so instructed the jury, and charged that in determining what would be a reasonable amount of time per day during the year beginning August 15, 1910, the jury might take into consideration the amount of time per day the defendant permitted plaintiff to serve during the previous year. The record shows that the trial court proceeded upon the theory that by the contract defendant employed plaintiff for about four days per week, and, since the number of hours per day was not mentioned, the law would imply a reasonable number, and that defendant was, in any event, obligated to pay plaintiff, at the rate of \$2 per hour, for a reasonable number of hours, on four days each week, regardless of the amount of time which plaintiff actually served. How the jury arrived at what would be a reasonable number of hours we know not, since there was nothing before the jury touching this question, except the evidence

relative to the number of hours per day which plaintiff had served during the previous year. This, as we have said, averaged approximately three and one-half hours per day, while during the term here in controversy it averaged slightly more than three hours per day, at increased compensation, a difference which may readily have been caused by a slight change in the number of pupils requiring instruction of this character, and which, according to defendant's evidence, was so caused.

[1, 2] But it is clear that in so construing the contract the court erred. By the contract defendant did not bind itself to compensate plaintiff for any time except such as it might call upon her to devote to the work in question. It is true that it contemplates an employment of plaintiff by defendant as an instructor in defendant's school, but plaintiff agreed to so serve, on "about" four days each week, as and when required by defendant, and defendant agreed to pay plaintiff, at the rate of \$2 per hour, for actual services performed. No doubt may be entertained as to the meaning of the language of the contract respecting the obligation assumed by defendant thereunder. Defendant did not bind itself to assign to plaintiff any particular number of pupils or hours of instruction, nor to compensate plaintiff except for the actual number of hours devoted by plaintiff to instruction, as and when defendant might direct.

The legal questions involved are elementary. It is not the province of the courts to make contracts for parties, but to enforce those which the parties have seen fit to make. This contract cannot be said to be ambiguous. Its language is not of uncertain or doubtful import. There is nothing upon its face calling for explanation by parol evidence. The true intention of the parties is, we think, readily discernible from the language which they employed to portray it. It is to be read, however, in the light of the surrounding circumstances, in order, if need be, to more perfectly arrive at the understanding and intention of the parties. *Williams v. Railway Co.*, 153 Mo. loc. cit. 534, 54 S. W. 689; *Laclede Construction Co. v. T. J. Moss Tie Co.*, 185 Mo. 25, 84 S. W. 76; *Pulitzer Publishing Co. v. McNichols*, 170 Mo. App. 709, 153 S. W. 562.

But the evidence respecting the surrounding circumstances, the relation of the parties, and their acts and conduct in the premises, in no wise tends to support plaintiff's theory as to the construction of the contract. The evidence is that plaintiff was first employed under a contract whereby she was paid \$100 per month for devoting her entire time and attention to the employment. Within a year this contract, however, was abrogated by the parties, and a new contract, to wit, that of August 1, 1909, was entered into. Throughout the whole of the first year's operation under this contract it

is clear that both parties construed it to mean that defendant had the right to call upon plaintiff to render such services as defendant might require during four days of each week, paying plaintiff therefor at the rate of \$1.75 per hour for services actually rendered. This contract was renewed for the following year, with increased compensation per hour, and plaintiff was called upon to serve nearly, though not quite, so many hours per day as during the previous year. The contract of 1908 specified a maximum and minimum number of hours per week for plaintiff to serve, as and when required by defendant, while that of August 1, 1909, which abrogates the former contract, makes no mention of the number of hours of service, per day or per week, but provides that plaintiff shall serve, for four days per week, as and when required by defendant, and that the defendant shall pay her \$2 per hour for services actually rendered. It is to be assumed that in entering into the latter contract the parties intentionally omitted to specify any minimum number of hours for plaintiff to serve.

Learned counsel for respondent urge that it would be unreasonable and unconscionable to interpret this contract to mean that the plaintiff was required to hold herself in readiness during four days each week to serve at defendant's beck and call, and be compelled to accept merely compensation for actual services rendered, though defendant did not see fit on certain dates to call upon plaintiff to put in more than one hour. A sufficient answer to this is that the contract is one which the parties saw fit to make, and it is not to be tortured into something inconsistent with their evident expressed intention. However, as plaintiff taught pupils of her own, for aught that appears, a contract of this character may have been, or may have appeared to be, to plaintiff's advantage, at the time of the making thereof. Indeed, she voluntarily abrogated the first contract, under the terms of which she was compensated at the rate of \$100 per month, in order to enter into a contract of this character. In any event it is certain that no court can properly say that the defendant should be required to pay for services not rendered by plaintiff, in the face of the explicit provisions of the contract limiting defendant's liability to its agreement to pay \$2 per hour for services actually rendered. This agreement defendant kept and performed to the end of January, 1911, paying plaintiff the amount shown to be due her by her own statements. It had therefore acquitted its obligation to plaintiff up to the time of the termination of the employment, except for the payment to plaintiff of the sum of \$46 due her for services performed in the month of February, 1911, for which it appears that plaintiff rendered no statement to defendant.

It follows that plaintiff was not entitled to

recover on the first and second counts of her petition, and that the court should have peremptorily directed a verdict for defendant on each thereof.

[3] II. Nor can a verdict on the third count of plaintiff's petition stand. As said above, this count seeks damages for the alleged breach of the contract by defendant in wrongfully discharging plaintiff before the end of the term. Considering this phase of the case, we may assume, without deciding, that defendant was bound to give plaintiff employment, to some extent, on approximately four days per week during the stipulated term, provided plaintiff kept and performed the contract on her part. So considering the matter, it is clear that the evidence fails to substantiate plaintiff's claim for an alleged wrongful discharge. Plaintiff admits that, after making demands upon the defendant, which, under the contract, she was not justified in making, she stated to defendant's representative that she would not continue teaching until she had a written answer to her letter of February 20th. Defendant's evidence is that plaintiff also said that "under the present conditions she would not continue." But we shall look alone to the showing made by plaintiff. Plaintiff's letter constituted a refusal to continue in the employment unless her unwarranted demands were met. This was answered by the letter of defendant's attorneys of the same date, notifying plaintiff that, if she did not appear upon the following day to meet her pupils, they would be given to another instructor. In the face of this plaintiff, without lawful excuse, purposely absented herself on the following day, and did not appear until three days later, to wit, February 24, 1911, when she found that her pupils had, in fact, been assigned to another instructor. There can be no doubt that defendant acted fully within its rights under the circumstances, and that plaintiff can have no possible claim on the ground of a wrongful discharge.

[4] III. The verdict upon the fourth count, to wit, for \$51.52, is for precisely the amount for which defendant, on February 26, 1913, offered to permit plaintiff to take judgment, being the \$46 due plaintiff for services rendered in February, with interest. So much of the judgment may stand, but under the statute the offer, of course, stops the running of costs against defendant after the time of the making thereof.

The judgment will therefore be reversed, and the cause remanded, with directions to the circuit court to enter judgment for plaintiff for the sum of \$51.52, together with costs accrued to February 26, 1913; the costs after said date, and of this appeal, to be assessed against plaintiff.

It is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

STATE ex rel. GARDINER v. WURDEMAN,
Circuit Judge. (No. 14902.)

(St. Louis Court of Appeals. Missouri. Nov. 2, 1915.)

1. PROHIBITION ¶18—ISSUANCE OF WRIT—TIME.

Where the circuit court, on motion therefor, ordered a justice of the peace to correct the entries of judgments rendered by his predecessor, to conform to the transcript certified by his predecessor, such order was an assertion of its jurisdiction and authority to issue a rule upon the justice, so that, if the court was without jurisdiction to issue a final order against the justice, a preliminary rule in prohibition was not prematurely issued.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 67; Dec. Dig. ¶18.]

2. JUSTICES OF THE PEACE ¶126 — JUDGMENTS — CORRECTION BY CIRCUIT COURT — STATUTES.

Rev. St. 1909, § 7528, providing that from the time of the filing of a transcript of a judgment of the justice of the peace in the office of the circuit court it shall be under the control of the court where the transcript is filed, could not apply to a so-called transcript of a justice's judgment which was not a true transcript of the docket entries, since there can be no transcript of a judgment which has never been entered; and Const. art. 6, § 23, and Rev. St. 1909, § 3956, giving circuit courts superintending control over justices of the peace, not confined within narrow limits, did not empower a circuit court to order a justice of the peace to make a correction or amendment of his predecessor's entries of judgment to conform to the judgment as rendered, or to the so-called transcript thereof.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 400, 464; Dec. Dig. ¶126.]

3. JUSTICES OF THE PEACE ¶119 — JUDGMENTS—VERITY.

Judgments of a justice of the peace as entered speak for themselves and import verity.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 864; Dec. Dig. ¶119.]

4. JUSTICES OF THE PEACE ¶126—JUDGMENT—AMENDMENT—AMOUNT.

To insert in the judgment of a justice of the peace an amount in dollars and cents in place of the blank left therein would be to amend or correct the judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 400, 464; Dec. Dig. ¶126.]

Original proceeding in prohibition by the State of Missouri, on the relation of William W. Gardiner, against Gustavus A. Wurdeman, Circuit Judge, etc. Preliminary rule in prohibition made absolute, and writ awarded.

Philip Haberman, of St. Louis, for relator. R. H. Stevens and Jos. C. McAtee, both of Clayton, for respondent.

ALLEN, J. This is an original proceeding in this court, in prohibition, the object thereof being to prohibit the respondent, Hon. Gustavus A. Wurdeman, judge of division No. 2 of the circuit court of the county of St. Louis, from proceeding further with a certain matter pending before said court, upon the ground that respondent, as such

judge, is therein undertaking to act in excess of his jurisdiction in the premises.

On June 9, 1915, the St. Louis & San Francisco Railway Company filed a motion in the office of the clerk of the circuit court in St. Louis county, which was assigned to said division No. 2 of said circuit court, presided over by the respondent herein. This motion sets up that on August 10, 1910, the St. Louis & San Francisco Railway Company instituted against relator and one Olive Gardiner three suits before one A. H. Werremeyer, then a justice of the peace in and for Central township of St. Louis county, each founded upon a promissory note, for the sum of \$300, executed by the defendants therein, said suits being numbered 126, 127, and 128, respectively, on the justice's docket; that on October 18, 1910, the said railway company filed a fourth suit before said justice of the peace against the same defendants, on a like promissory note for \$300, being numbered 202 on the justice's docket; that thereafter judgment was rendered against the defendants in each of said suits by default, for the sum of \$300 and certain accrued interest—i. e., that in suit No. 126 judgment was rendered for \$312, in suit No. 127 for \$309, in suit No. 128 for \$306, in suit No. 202 for \$302. The motion then avers, as to each of said suits, that "said justice failed to enter in his docket the judgment so rendered, all of which will appear by a transcript of said docket herewith filed;" "that plaintiff ordered the said A. H. Werremeyer to file a transcript of said judgment in the office of the clerk of the circuit court of St. Louis county, which he did, showing the full amount of said judgment, with interest included and costs, * * * and did thereafter at the request of plaintiff issue execution on said judgment, showing therein the amount found to be due to plaintiff in the sum of three hundred (\$300.00) dollars, and accrued interest and costs as hereinbefore stated." And it is averred that the term of A. H. Werremeyer, as justice of the peace, "expired at the general election of 1914, and L. F. Matthews was duly qualified as his successor, and has since qualified and is now acting as such, and has succeeded in charge of the docket of said Werremeyer and of the records in this case."

The transcript of the proceedings before the justice, attached to the motion aforesaid, show the judgments in said suits actually entered by the justice on his docket. In the first three, Nos. 126, 127, and 128, the judgments were entered on September 3, 1910, while in the suit last filed, No. 202, the judgment was entered on November 1, 1910. In suit No. 126, the justice's entry of judgment recited that he found for plaintiff "in the sum of \$3 interest included," and that it was thereupon adjudged that the plaintiff recover of the defendant "the said sum of \$3 so

found to be due as aforesaid, together with certain costs herein expended and taxed at \$3 .” In suit No. 127 the justice’s entry of judgment likewise recited that he found for plaintiff “in the sum of \$3 interest included,” but that it was adjudged that the plaintiff recover of the defendants “the said sum of \$30 so found to be due as aforesaid,” with its costs “taxed at \$.” In suit No. 128 the justice’s entry of judgment recited that he found for the plaintiff “in the sum of \$,” and that it was adjudged that the plaintiff recover of the defendants “the said sum of \$ so found to be due as aforesaid,” together with its costs “taxed at \$.” In suit No. 202, the entry of judgment recited that the justice found “for the plaintiff in the sum of \$ interest accrued,” and that it was adjudged “that the plaintiff recover of the defendants the said sum of \$3 , so found to be due as aforesaid,” together with costs taxed at \$7.15.”

As to each of the judgments, separately, the motion prays for a rule on said L. F. Matthews, as justice of the peace, and as the successor in office of the said Werremeyer, “ordering him to correct and enter said judgment, rendered by said A. H. Werremeyer, justice as aforesaid, as by the statute in such cases made and provided, and to conform to the transcript certified by the said A. H. Werremeyer and filed in the office of the clerk of the circuit court of St. Louis county, Missouri.” This motion coming on to be heard, respondent, in the capacity of judge as aforesaid, ordered that the same be “sustained,” and issued an order upon Justice Matthews to appear in court on a day named, and then and there show cause, if any he had, “why the docket entries of his immediate predecessor in office, A. H. Werremeyer, in cases Nos. 126, 127, 128, and 202, should not be corrected so as to show the judgments actually rendered by said justice.” Thereupon relator applied to this court and was granted a preliminary rule in prohibition directed to respondent.

It is unnecessary to notice the pleadings further than to say that the return, *inter alia*, avers that the motion in question had not been acted upon by respondent judge, “further than presentation of the motion and the issuance of an order upon said L. F. Matthews to show cause at a specified time fixed in said order,” and that under and by virtue of the Constitution and statutes of this state respondent is vested with and possessed of full and complete jurisdiction to hear and determine the motion.

[1] I. The argument that the circuit court had not proceeded sufficiently far in the premises to warrant the issuance of our writ of prohibition cannot be sustained. The court’s order constituted an assertion of jurisdiction and authority on its part to issue a rule upon Justice Matthews commanding him to “correct” the judgments as prayed. There can be no doubt that the court assert-

ed jurisdiction in the premises, and was proceeding to grant the relief prayed for in the motion; and if the court was without jurisdiction to issue a final order upon the justice as prayed, our preliminary rule in prohibition was not prematurely issued.

[2, 3] II. Learned counsel for respondent invokes section 23, art 6, of the Constitution, and section 3956, Rev. Stat. 1909, giving circuit courts “superintending control” over justices of the peace, in support of the contention that the circuit court was here vested with jurisdiction to grant the prayer of the motion. Respondent also relies upon section 7528, Rev. Stat. 1909, which provides that, from the time of the filing of a transcript of a judgment of a justice of the peace in the office of the circuit clerk, the same shall be a lien upon the real estate of the defendant situated in the county, “and shall be under the control of the court where the transcript is filed”; but this section, in our judgment, can have no influence here, for the reason that no transcripts of the judgments appear to have been filed, within the meaning of this section. The transcripts said to have been filed by Werremeyer, at the instance of the plaintiff in the actions, are not true transcripts of the justice’s docket entries, as appears by the allegations of the motion. It is averred that these transcripts show the full amounts of the judgments which it is claimed were rendered, but not entered; i. e., \$300, with interest and costs; and costs in each case. Section 7528 contemplates the filing of a transcript of the entries of the justice. Manifestly there can be no such thing as a “transcript” of a judgment which has never been entered, and which therefore cannot be transcribed.

While circuit courts, by virtue of the constitutional provisions aforesaid, possess a certain superintending control over justices of the peace, and over other inferior tribunals as well, we have been pointed to no authority which, in our opinion, sustains the position of respondent herein. While this court has sanctioned the view that this superintending control is not confined within narrow limits (see *Carter v. Exposition Co.*, 124 Mo. App. 530, 102 S. W. 6), we cannot believe that a circuit court is thereby vested with power to order a justice of the peace to make such a correction or amendment of his entry of judgment as is prayed for by this motion. In the case last cited it was held that the circuit court had power to correct a judgment of a justice of the peace in an action of replevin, in order to make the judgment conform to the form prescribed by statute in such cases. The judgment had been inadvertently entered by the justice’s clerk in a form other than that definitely prescribed by law for such judgments; and it was held that under the superintending power, and the control over the judgment given by section 7528, *supra*, a transcript thereof having been filed in the circuit clerk’s office, the

circuit court could cause the judgment to be amended, to make it conform to the law. Neither that case nor those cited in support of the conclusions there reached can be said to be authority for contention of respondent's counsel herein. And in the Carter Case, it is said by Goode, J.:

"No one will contend that the circuit court, as a superintending tribunal, can either direct the decisions of a justice of the peace, or make him alter his docket to show a judgment was given which had not been given, and possibly he could not be ordered to change a docket entry showing a judgment which might properly have been given, on proof, in pais, that the one actually given was different."

In *Taylor v. Larkin*, 12 Mo. 103, 49 Am. Dec. 119, cited by counsel for respondent, the judgment entered by the justice was ambiguous on its face; i. e., as to whether it was a judgment for defendant on the merits or one of nonsuit. In a subsequent action by plaintiff on the same demand, wherein the former judgment was pleaded in bar, it was held that the judgment could be explained by extrinsic evidence. That case is not here in point; for there is no question here as to the character of the judgments entered. And see *Garnett v. Stacy*, 17 Mo. 601.

In *Drake v. Bagley*, 69 Mo. App. 39, it was held that a justice could enter a judgment more than two years after the rendition thereof, though his term had expired; he having been re-elected to the same office. The evidence was that the justice had rendered judgment, making a memorandum thereof upon an envelope inclosing the papers in the case, but failed to make any formal entry thereof at the time. This, it was held, he could do after the lapse of more than two years, if no one was prejudiced by the delay. We are not called upon to express an opinion as to the correctness of the conclusion reached. The case before us is not one where the justice failed to enter a judgment in his docket. Judgments were in fact entered, and it is now sought to have the record entries thereof altered to conform to a "transcript" subsequently filed in the office of the clerk of the circuit court, purporting to show the judgments rendered.

The case is one in truth where judgments were entered by a justice of the peace nearly five years prior to the commencement of the proceeding sought to be prohibited. The judgments in fact have never been revived, but that is not material here. These judgments are for certain specified amounts, with the exception of one wherein the amount is left in blank. It is true that in the justice's docket spaces occur following the amounts named in the three judgments wherein amounts appear; and it is argued that the justice actually rendered judgment in each case for more than \$300, and left these spaces in which to insert the true amount when the interest had been properly computed.

But, be this as it may, these judgments, as entered, speak for themselves and import verity. The doctrine asserted to the effect that the circuit court may now order them to be tampered with, upon the theory that the justice intended to enter judgment in amounts different from those appearing on the face of the record entries, or to make them conform to "transcripts" purporting to show that different judgments were in fact rendered, is a most pernicious and dangerous one. As is said in *Garnett v. Stacy*, supra:

"To permit a party, at any length of time after a trial, and when no appeal has been taken, to contradict the entries on a justice's docket, would be a very dangerous practice, and would destroy all confidence in the trials before those officers."

[4] It is argued that the St. Louis & San Francisco Railway Company is not seeking to have the judgments amended, but to have judgments entered which were in fact rendered at the time, but which the justice failed to enter. But this theory is not tenable under the record before us, showing that judgments were actually entered in the cases in question. Had no judgments been entered, a different case would be presented; one as to which we now express no opinion. It is true that in one of these judgments the amount is left in blank. But to now insert therein an amount in dollars and cents would be to amend or correct the judgment. *Williams v. Walton*, 84 Mo. App. 433.

The circuit court could not alter a judgment of its own, after the lapse of the term, upon evidence in pais. And to say that as a superintending tribunal it may order the amounts of these judgments to be changed, upon proof that the justice intended to enter different judgments, after the lapse of nearly five years, and this, too, after the term of the justice had expired, by a rule upon his successor in office, would be to announce a most extraordinary doctrine, and one to which we are unwilling to lend our sanction. The cases in question were within the jurisdiction of the justice of the peace. The judgments rendered are neither in form nor substance contrary to law, as in *Carter v. Exposition Co.*, supra, and cases there relied upon. The only change sought to be made in them is in respect to the amount of each judgment. We are of the opinion that the respondent is without jurisdiction to make an order requiring them to be so altered. Though the plaintiff in these actions suffer loss by the neglect of the justice to enter such judgments as he should have entered, rules of law designed for the security and protection of the rights of litigants in general cannot, on this account, be sacrificed or distorted.

Our preliminary rule in prohibition will therefore be made absolute, and writ awarded accordingly. It is so ordered.

REYNOLDS, P. J., and NORTON, J., concur.

BRINSMADE v. JOHNSON. (No. 14066.)
(St. Louis Court of Appeals. Missouri. Nov. 2, 1915.)

1. LIMITATION OF ACTIONS — 46 — MATURITY OF BOND — REFERENCE TO MORTGAGE.

Where a corporate bond, one of a series securing the company's mortgage, aptly referred thereto, incorporating its provision that the debt should mature at the option of the trustee in case default should be made in the payment of interest, the provision of the mortgage precipitating the maturity of the debt was effective to control the due date of the face of the bond which became due upon the trustee's declaration of the maturity of the debt, so that the statute of limitations began to run from such time against a contract of guaranty of payment of the bond.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240-253; Dec. Dig. 46.]

2. LIMITATION OF ACTIONS — 46 — STATUTE OF LIMITATIONS — MATURITY OF BOND — REFERENCE TO MORTGAGE.

The provision of the mortgage, likewise aptly incorporated in the bond, that upon sale of the property by the trustee under power conferred the debt should become mature, operated to mature the bond prior to its due date; the trustee having sold the property, so that the statute of limitations began to run thereon.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240-253; Dec. Dig. 46.]

3. CORPORATIONS — 480½ — BOND SECURING MORTGAGE — NOTICE OF PROVISION OF MORTGAGE.

Where a corporate bond securing a mortgage aptly incorporated its provision regarding acceleration of the maturity of the debt at the trustee's election for default in the payment of interest, a purchaser of such bond took with notice of the provisions of the mortgage duly recorded.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1874, 1875; Dec. Dig. 480½.]

4. CORPORATIONS — 482 — BOND AND MORTGAGE — MATURITY — ACCELERATION.

Where a negotiable bond or promissory note securing a deed of trust makes no reference thereto to incorporate its provisions, the provisions of the deed authorizing foreclosure for default in the payment of interest, etc., mature the indebtedness only to effectuate the security through foreclosure and sale, and do not mature the note, though the specified due date of a note or bond may be accelerated by a provision that the entire sum shall become due on a contingency.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877-1888; Dec. Dig. 482.]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Suit by Hobart Brinsmade against James Brooks Johnson. Judgment for plaintiff, and defendant appeals. Reversed.

George B. Webster, of St. Louis, for appellant. Roland M. Homer, of St. Louis, for respondent.

NORTONI, J. This is a suit on a contract of guaranty assuring the payment of a number of coupons. Plaintiff recovered, and defendant prosecutes the appeal.

The petition in as many counts declares upon 20 separate coupons which were originally parcel of bond No. 445 of the Consolidated Elevator Company, duly secured by mortgage on its properties. Defendant admits that he sold the bond with coupons attached to plaintiff and guaranteed payment, but pleads the statute of limitations in defense in the view that the maturity of the debt was accelerated by virtue of the precipitation clause contained in the mortgage and aptly referred to in the bond. It therefore appears that the important question for consideration relates to the force and effect to be given the provision of the mortgage by which the maturity of the bond is precipitated prior to the due date on the face because of default stipulated in the mortgage when it appears on the face of the bond that such provisions are called for therein.

It appears that on September 30, 1897, the Consolidated Elevator Company, a Missouri corporation, executed a series of mortgage bonds in the aggregate sum of \$950,000 with appropriate interest coupons falling due semiannually, stipulating the payment of interest at 5 per cent. on said bonds. On the same day the elevator company executed a mortgage, or deed of trust, with power of sale, on all of its properties in Missouri and elsewhere to Julius S. Walsh, trustee, for the benefit of the bondholders and to secure the payment of such bonds. This mortgage was duly recorded in St. Louis, Mo., and defendant became the owner of bond No. 445 thereunder. This bond, with others of the series, bore 40 separate interest coupons of \$25 each maturing, according to the face, every six months, the first of which became due and payable on the 1st day of July, 1897, and the second on January 1, 1898, and so on thereafter on the 1st days of January and July of each year until the maturity of the bond on January 1, 1917. The bond provides on its face that:

"This is one of a series of bonds of like tenor and date * * * aggregating the sum of \$950,000.00, duly and legally issued under the authority of the vote of the stockholders of said Elevator Company, at an election held for that purpose, on the 23d day of September, 1897, and equally secured by and subject to all of the terms of the mortgage or deed of trust dated September 30, 1897, executed by said Elevator Company to Julius S. Walsh as trustee, conveying the property of said Elevator Company, etc."

By article 7 of the mortgage, it is stipulated that in case default shall be made in the payment of any interest accruing upon any one or more of the bonds hereby secured according to the terms thereof on any day when the same shall become due, and such default shall continue for six months or in case the elevator company shall neglect to pay any tax or assessment levied against its property for a period of six months after the same shall have fallen into arrears, or shall fail to keep its property insured against loss

by fire, or shall fail to pay the rent of any leasehold property conveyed in accordance with article 3 of the mortgage, then, and in any such case, the trustee may enter and take possession, etc. By article 8 of the mortgage it is provided that if any such continuous or other default on the part of the elevator company as mentioned in article 7 thereof or in case the elevator company shall make default in performance of any of the provisions of the indenture, then, and in any such case, if the holders of the majority in amount of the then outstanding bonds secured so elect and shall notify the trustee in writing of such election, "the whole of the principal of all bonds hereby secured or intended so to be and then outstanding shall forthwith be declared by the trustee to be and it shall immediately thereupon become due and payable, anything herein or in said bonds to the contrary notwithstanding." Article 8 of the mortgage further provides:

"Upon any sale being made of the premises and property hereby conveyed or intended so to be, either by the trustee under the express power herein conferred or under any judgment or decree for the foreclosure of this indenture, the principal of all the bonds secured hereby or intended so to be then outstanding, if not already due and payable, shall at once become and be due and payable."

On the 10th day of December, 1897, defendant sold to plaintiff bond No. 445 of the series with coupons then attached, and as part of the consideration executed and delivered to plaintiff contemporaneously therewith his personal contract of guaranty as follows:

"For value received, I hereby guarantee payment in full at maturity of bond No. 445 of the Consolidated Elevator Company (first mortgage bonds), including coupons, beginning with the one due and payable July 1st, 1899, as they become due. J. B. Johnson.

"December 10, 1897."

It seems the coupons of 1897 and those falling due July 1, 1899, were detached at the time of the sale of the bond by defendant to plaintiff, for the contract of guaranty in so far as the coupons are concerned began with that payable July 1, 1899. Plaintiff duly presented the coupon due July 1, 1899, to the Mississippi Valley Trust Company in St. Louis, financial agent of the elevator company, for payment, and it was paid. The coupons due and payable respectively January 1, 1900, and July 1, 1900, were duly presented to the Mississippi Valley Trust Company for payment, and payment thereon was declined, for the Consolidated Elevator Company was then and thereafter insolvent, and it failed to pay any of the coupons thereafter. Indeed, on the 26th day of August, 1899, the elevator company had for a period of more than six months been in default in performance of the covenants of the mortgage as to taxes, insurance, and the payment of interest coupons, and the trustee at the request of the majority in amount of all the bondholders on that date declared all of the bonds

and coupons due and payable. On the 24th day of October of the same year, the trustee, after advertisement in accordance with the requirements, sold all of the property described in the mortgage deed of trust at public auction and distributed the proceeds among the holders of the bonds and coupons thereby secured. Plaintiff, however, presented the two coupons due and payable respectively January 1, 1900, and July 1, 1900, the payment of which had been declined by the Mississippi Valley Trust Company, to defendant, and defendant paid the same. None of the coupons thereafter falling due have been paid, and defendant, on demand, declined to pay them.

The suit here declares upon the coupons due and payable respectively January 1, 1901, July 1, 1901, January 1, 1902, July 1, 1902, January 1, 1903, July 1, 1903, January 1, 1904, July 1, 1904, January 1, 1905, July 1, 1905, January 1, 1906, July 1, 1906, January 1, 1907, July 1, 1907, January 1, 1908, July 1, 1908, January 1, 1909, July 1, 1909, January 1, 1910, July 1, 1910, inclusive, all of which are past due and unpaid. Plaintiff instituted this suit on December 31, 1910, on these 20 coupons maturing according to their face January 1, 1901, to July 1, 1910, and defendant in his answer invokes the 10-year statute of limitations against a recovery, asserting the cause of action on the principal debt accrued on August 26, 1899, when the trustee declared the entire indebtedness due because of the several defaults provided in the mortgage and that a recovery of the interest thereon is therefore barred. The court gave judgment for plaintiff in the view that, although the bond on its face recites it is subject to all of the terms of the mortgage and thus called into it the provision of the mortgage respecting the precipitation of maturity because of default, the bond and coupons nevertheless fell due according to the dates specified on the face and the recovery is not barred by the statute.

[1-3] It is argued that, though such may be the law touching the case of an ordinary promissory note containing no reference on its face to the deed of trust by which it is secured, it is not so with respect to the bond in suit here, which by its very terms imports the provisions of the mortgage accelerating maturity for default into its body. There can be no doubt that the obligation of the defendant guarantor is secondary in character and attached on the failure of the elevator company to pay at maturity. It is equally clear that the cause of action on the contract of guaranty accrued when the indebtedness became enforceable by suit at law against the elevator company. See *Phelps v. Sargent*, 69 Minn. 118, 71 N. W. 927. The proposition that the cause of action accrues when the right to institute suit looking to its enforcement arises is neither gainsaid or denied. Neither is that that the statute of

limitations, if not tolled, commences to run at that time. But it is urged the bond becomes due, according to the date stipulated on its face, in 1917, and the coupons on the 1st days of January and July during the years above mentioned. In reference to these defendant's contract of guaranty says:

"I hereby guarantee payment in full at maturity of bond No. 445 of the Consolidated Elevator Company (first mortgage bonds), including coupons, beginning with the one due and payable July 1, 1899, as they become due."

Much stress is laid on the wording of the guaranty concerning the coupons "beginning with the one due and payable July 1, 1899, as they become due"; but it is clear these words are to be considered in connection with the word "maturity" employed in the body of the writing. The substance of defendant's undertaking is that he guaranteed the payment of the bond and coupons at maturity, and that this guaranty in so far as the coupons are concerned attached first to the coupon due July 1, 1899, and those thereafter falling due, according to the terms of the bond as to maturity. What then are the terms of the bond as to maturity? Although it be true the bond says on its face it shall become due January 1, 1917, it is true, too, that it provides on its face it is one of a series of bonds of like tenor and date aggregating in all \$950,000, and that it, along with the others, is subject to all of the terms of a mortgage or deed of trust dated September 30, 1897. By these apt words of reference the provisions of the mortgage designed to accelerate enforcement through precipitating maturity of the principal debt on the default stipulated after six months' time are imported therein so as to mature the entire principal of the bond on the trustee's declaring such when moved by two-thirds in amount of the bondholders. Moreover, there was an actual foreclosure of the deed of trust and sale of the property under this mortgage in accordance with the maturity of the indebtedness declared by the trustee on August 26, 1899. This sale was had October 24, 1899, at the instance of more than two-thirds in amount of the bondholders. A second provision of the mortgage is to the effect that, upon a sale of the property hereby conveyed being made by the trustee under the power conferred, the principal of the bonds secured in the mortgage, if not already due and payable, shall at once become due and payable. When corporate bonds of the character here involved thus aptly refer to the deed of trust and recite that they are subject to its terms, they are treated as thus having imported into the bond all of the relevant provisions of the deed of trust or mortgage so as to accelerate an enforcement of the indebtedness for all purposes through precipitating its maturity with a view of closing up the whole matter at once. The authorities declare in such cases that the bond and mortgage so executed contemporaneously are to be read

together and enforced accordingly when it appears, as here, that the bond by apt words refers to the mortgage securing it and calls such provisions into it. See *Detweiler v. Breckenkamp*, 83 Mo. 45; *New York Security, etc., Co. v. Lombard Inv. Co.* (C. C.) 73 Fed. 537; *Dougan v. Evansville, etc., R. Co.*, 15 App. Div. 483, 44 N. Y. Supp. 503. Therefore it is said:

"The principal may become due before the time named for its payment under provisions making the principal payable after a specified default in the payment of interest." See *Jones on Corporate Bonds & Mortgages* (3d Ed.) § 54.

In such cases, where the provisions of the mortgage are imported into it by apt reference, the purchaser of the bond is deemed to take with notice of such provisions of the mortgage duly recorded, and not as an innocent purchaser of an ordinary promissory note secured by deed of trust which contains no such provision in the face of the note. The authorities seem to rule that, if the terms of the mortgage are not called into it through apt reference as by reciting that it is subject thereto or other equivalent words, the bond may not be declared due and thus rendered suable by a mere provision in the mortgage alone to that effect; that is, the bonds are not due for all purposes. See *Am. Nat. Bank v. Am. Wood Paper Co.*, 19 R. I. 149, 32 Atl. 305, 29 L. R. A. 103, 61 Am. St. Rep. 746; *Mallory v. West Shore, etc., R. Co.*, 35 N. Y. Super. Ct. 174.

[4] In cases of this character—that is, where no reference touching the matter is to be found in the bond and the mortgage provision alone appears, such is to be treated with only for the purpose of foreclosure and sale and does not operate to mature the debt for all purposes. See *Jones on Corporate Bonds* (3d Ed.) § 56, and authorities supra. Also, *Jones on Mortgages* (6th Ed.) § 1183. The same is true with respect to an ordinary promissory note secured by a deed of trust which later contains provisions authorizing foreclosure for default in the payment of interest, but where the note itself makes no reference to the deed of trust as by calling for and importing the provisions of the deed of trust accelerating maturity of the debt into it. In cases of this character it is now the accepted rule of decision in this state that the provisions of the deed of trust under consideration is designed to mature the indebtedness for the purpose only of effectuating the security through foreclosure and sale and not for all purposes. Although the rule was formerly otherwise here, the Supreme Court repudiated the prior doctrine and ruled the question last above stated anew on the ground that a promissory note, though secured by a deed of trust containing a precipitation clause accelerating maturity not referred to in the face of the note, was to be treated as a "courier without luggage," for it is said the maturity expressly stipulated in the face of the note is not to be accelerated

by provisions in the mortgage wholly apart therefrom. See *Owings v. McKenzie*, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154; *Westminster College v. Peirsol*, 161 Mo. 270, 61 S. W. 811; *Curry v. La Fon*, 155 Mo. App. 678, 135 S. W. 511. But, notwithstanding the due date specified even in a negotiable promissory note, its maturity may be and frequently is accelerated so as to authorize suit thereon at an earlier date by a competent provision therein to the effect that the entire sum stipulated shall become due on default of the payment of an installment of interest. See *Boyd v. Buchanan*, 176 Mo. App. 56, 162 S. W. 1075, and the rule obtains, too, with like effect against the guarantor. See *Phelps v. Sargent*, 69 Minn. 118, 71 N. W. 927. The recent case of *Binz v. Hyatt*, 200 Mo. 299, 98 S. W. 637, while not in point because it proceeds in part on the Iowa statute and, furthermore, relates to the breach of a guaranty to attend a sale, nevertheless recognizes and points out the distinction in a case such as this one where the bond aptly calls for the provisions of a deed of trust from one presenting the features of a promissory note secured by deed of trust, which note on its face contains no such provision, and therefore passes as a "courier without luggage," whose maturity is therefore to be determined alone by reference to the time named therein. We conclude that, as the bond under consideration expressly recites it is subject to the terms of the mortgage, and the mortgage contains a provision to the effect that it along with the entire indebtedness should become due after the default above referred to and the declaration of the trustee to that effect or the actual sale of the property, such bond became then due accordingly for all purposes in 1899. Such was maturity within the contemplation of the parties as revealed in the bond, and the guaranty contract of defendant became effective and enforceable accordingly. Of course, if the bond matured at that time for the purposes of suit, as we hold it did, in 1899, then the statute of limitations attached immediately and bars the right of recovery for the interest sued for in this suit, instituted December 31, 1910.

The judgment should be reversed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

MOSER v. RENNER et al. (No. 14118.)
(St. Louis Court of Appeals. Missouri.
Nov. 2, 1915. Rehearing Denied
Nov. 23, 1915.)

1. JURY \S 14—NATURE OF ACTION.

A petition, alleging that a corporation owned a stock of drugs, fixtures, etc.; that defendant and his wife owned all its capital stock; that plaintiff, then a minor, contracted to buy the stock for \$4,000, \$2,000 payable in cash and the balance by notes each for \$100, secured by a chattel mortgage; that the stock, etc., was

conveyed to plaintiff, who also paid four of the notes and replaced the stock as sold; that upon attaining his majority he elected to rescind the transaction, and so notified the defendants, who refused to receive back the property, and demanded payment of the other notes, and that he offered to reconvey the merchandise and capital stock on repayment of \$2,400; and that defendants were insolvent; and asking the court to decree a return of the amount paid, or appoint a receiver—showed a cause of action in equity, rather than for the jury; as Rev. St. 1909, \S 2786, providing that no action shall be maintained on a deed contracted during infancy, unless it shall have been ratified after becoming of age, applies when the party sued pleads minority as a defense, and does not interfere with the jurisdiction of equity over suit to annul contracts made during minority, especially when part of the instruments are negotiable notes.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. \S 40-60, 66-83; Dec. Dig. \S 14.]

2. INFANTS \S 58—DISAFFIRMANCE—ACTION.

In such case the action, commenced within a proper time, was in itself a disaffirmance of the contract.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. \S 149-160; Dec. Dig. \S 58.]

3. INFANTS \S 58—RESCISSION OF CONTRACT MADE IN MINORITY — MULTIPLICITY OF SUITS.

Such action might be brought for the plaintiff's own protection on the theory that it would avoid a multiplicity of suits on the several notes given to defendants and coming into the hands of different parties.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. \S 149-160; Dec. Dig. \S 58.]

4. RECEIVERS \S 24—GROUNDS—RESCISSION OF INFANT'S CONTRACT.

On such facts the plaintiff had a right to apply for the appointment of a receiver.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. \S 32; Dec. Dig. \S 24.]

5. EQUITY \S 39—JURISDICTION—DISPOSITION OF ALL QUESTIONS INVOLVED.

In such case equity, having jurisdiction, had power to dispose of all questions involved and to do all things necessary to secure complete equity between the parties, including the entry of a money judgment.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. \S 104-114; Dec. Dig. \S 39.]

6. INFANTS \S 57—CONTRACTS—RATIFICATION.

Where an infant entered into a contract for the purchase of a stock of drugs, fixtures, etc., and for the capital stock of the drug company, giving his notes and a chattel mortgage and replacing the stock as sold, and, on the day after his majority elected to disaffirm, and so notified defendant, his subsequent act in selling or trading a lot of bandages valued at \$5, and his retention of the store down to the time of the trial, did not amount to a ratification under the statute, since he had done all that he could, and, after defendant's refusal to accept tender, continued in possession as a bailee.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. \S 136-148, 151; Dec. Dig. \S 57.]

7. INFANTS \S 58—DISAFFIRMANCE OF CONTRACT—TENDER.

In such case, where it appeared that the capital stock of the corporation which plaintiff had purchased with its drug business belonged to defendants individually, so that they had absolute control of the corporation, plaintiff, nominally the owner of such stock, was not required to tender it to himself as representing

the corporation, but his tender to defendants as the real parties in interest was sufficient.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 149-160; Dec. Dig. ¶58.]

8. APPEAL AND ERROR ¶1144—REMAND—RECEIVER.

Where the judgment, in an action to rescind a contract for the purchase of a stock of drugs, etc., entered into while plaintiff was a minor, provided for the appointment of a receiver if the money awarded plaintiff was not repaid to him by defendants, the Supreme Court, affirming on appeal, would remand it to the circuit court for the adjustment of its order to meet the situation as changed by the appeal, with power to appoint a receiver, if necessary.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4479; Dec. Dig. ¶1144.]

Appeal from St. Louis Circuit Court; Rhodes E. Cave, Judge.

"Not to be officially published."

Action by Otto J. Moser against Charles Renner and others. Judgment for plaintiff, and defendants appeal. Affirmed, and cause remanded for further proceedings.

Henry G. Trieseler, of St. Louis, for appellants. Collins, Barker & Britton and B. B. Watkins, all of St. Louis, for respondent.

REYNOLDS, P. J. Plaintiff, in his petition, filed September 20th, 1912, avers that on March 20th, 1911, the Kaltwasser Drug Company, a corporation, was the owner of a stock of drugs and merchandise and of the furniture and fixtures on premises described in the city of St. Louis, and that the defendant Charles Renner and Elizabeth Renner, husband and wife owned all of the capital stock of that company; that at the date above mentioned plaintiff was a minor, not having attained his majority until August 21st, 1912; that on that date, plaintiff and these defendants entered into an agreement by which the stock of drugs and merchandise and furniture and fixtures was sold by the Kaltwasser Drug Company to plaintiff for \$4,000, \$2,000 to be paid in cash, plaintiff to give his 20 negotiable promissory notes, each in the sum of \$100, payable monthly, beginning June 1st, 1911, for the balance, the notes to be secured by a chattel mortgage on all of the drugs, merchandise, furniture and fixtures then in the drugstore of that company, the cash to be paid and the notes to be delivered to defendants. As part of this transaction defendants were also to transfer to plaintiff or his nominees all of the capital stock of the Kaltwasser Drug Company. It is averred that this agreement was consummated, plaintiff paying them the cash, executing his notes and the chattel mortgage, and the defendants causing the Kaltwasser Drug Company to execute and deliver to plaintiff its bill of sale conveying all of the merchandise contained in the drugstore as well as all its furniture and fixtures to plaintiff, and placing plaintiff in possession thereof. It is further averred that it was a part of this agreement

that plaintiff was to withhold the delivery of the notes until a later date and until he should become satisfied that the defendants had paid all of the debts and obligations of the company; that pursuant to this agreement plaintiff retained the notes and mortgage until the spring of 1912, when, still a minor, he delivered them, together with the mortgage to the defendants, excepting the four of the notes first maturing, which, prior to that time, had been paid to the defendants by the plaintiff; that the remaining 16 notes delivered to defendants by plaintiff bore date March 21st, 1911, and upon the direction of both defendants were made payable to the defendant Elizabeth Renner; that defendants are now the owners and holders of these notes and that plaintiff has been continuously, since March 21st, 1911, and now is, the owner and in possession of all of the stock of drugs, merchandise, furniture and fixtures so conveyed to them, except such of the stock of drugs and merchandise sold by him in the usual course of business, and that the portion of such stock of drugs and merchandise so sold by him has been for the most part replaced by him with other similar merchandise, purchased in the usual course of business; that some other drugs and merchandise have been added to the stock, so that the same is at this time appreciably of the same value as when purchased by him. The petition further avers that immediately upon attaining his majority, plaintiff elected to rescind the transaction above set out with defendants and so notified them and offered to reconvey and deliver back to them all of the stock of goods, merchandise and furniture so conveyed to him in the transaction and to return the stock of the corporation and to place defendants in statu quo as far as possible and demanded of defendants that they would repay him the amount of \$2,400 in cash paid by him to them on account of the purchase price thereof, which demand was refused, defendants declining and refusing to rescind the transaction, or to receive back the property, and on the other hand demanding the payment of such of the notes as are now due. It is further averred, on information and belief, that the defendants have no property which can be subjected to an execution upon a judgment that may be secured by him against them for the \$2,400. The premises considered, offering to reconvey the property to defendants or to the Kaltwasser Drug Company as they may desire and to transfer to defendants all of the capital stock of the company upon repayment to him of the \$2,400, plaintiff prays for a judgment and decree of the court rescinding the transaction cancelling the notes and mortgage to secure the latter, and that defendants be required to surrender the same into court for that purpose, as also for a judgment against

the defendants for the \$2,400, and that the judgment provide that upon the payment of the \$2,400, plaintiff shall convey and deliver back to defendants all of the stock of drugs and merchandise, fixtures and furniture and the capital stock of the Kaltwasser Drug Company, or, if the court shall deem it meet and proper, that a receiver be appointed by the court to take charge of the stock of drugs, merchandise, fixtures and furniture for the purpose of holding and preserving the same and to sell and dispose of it under the direction of the court, applying the proceeds to payment of the judgment and the costs of this action, as far as necessary, paying any balance left over to defendants, and for general relief.

The answer, after a general denial, avers that every contract so entered into by plaintiff as a party thereto during his minority and before he attained the age of 21 years, has been fully ratified and affirmed by plaintiff after he attained his majority and after the institution of this suit, by plaintiff disposing of part of the property and by exercising acts of ownership thereover and by conducting the business after he attained his majority and continuing in the sale of the goods and commodities in the business and disposing of such parts of the same as he has sold since he attained his majority on August 21st, 1912, such property sold and disposed of by plaintiff being the same property received by him from these defendants during the period of his minority and before he attained the age of 21 years.

To this a reply, denying the averments of new matter, was filed.

When the cause was called for trial, counsel for defendants stated that he considered the case one for the jury and made formal objection to the setting of the case for trial as one in equity, for the reason that it is not a case in equity, and that defendants' constitutional rights to a trial by jury have not been waived and consequently they are entitled to a jury. The court announced that it would proceed and hear the testimony and pass on the question of whether or not defendants were entitled to a jury later. Defendant excepting to this, the trial proceeded before the court.

It was further objected that the petition set out no cause of action for equitable relief.

At the conclusion of it the court entered up its judgment as follows:

"Now this cause having come on to be heard upon the petition, answer and reply, and the proof taken therein, and having been argued by counsel for the respective parties and submitted to the court, and the court having duly considered the same, doth find:

"That the allegations of the plaintiff's petition herein, are true, and that plaintiff is entitled to the relief prayed for in his petition, and the court doth specifically find:

"That on or about the 20th day of March, 1911, plaintiff and defendants entered into an agreement by which a stock of drugs, merchan-

dise, furniture and fixtures and the capital stock of the Kaltwasser Drug Company, a corporation, organized under the laws of Missouri (the merchandise, stock, furniture and fixtures being located at and the corporation conducting business at 1924 Pestalozzi street in the city of St. Louis, Missouri), was sold to plaintiff in consideration of the sum of four thousand dollars (\$4,000); that plaintiff paid to defendants the sum of two thousand dollars (\$2,000) in cash, and gave to them twenty (20) of his negotiable promissory notes for one hundred dollars (\$100) each, dated March 21st, 1911, payable monthly, beginning June 1st, 1911, which notes were secured by a chattel mortgage on all of the said drugs, merchandise, furniture and fixtures, the mortgage being dated March 21st, 1911.

"That pursuant to an agreement between the parties and in accordance therewith, four of the notes were paid by plaintiff to the defendants and defendants now have in their possession the remaining sixteen (16) notes and the chattel mortgage securing the same.

"The court further finds that on March 20th, 1911, and at the time of the payment of said four (4) notes, plaintiff was a minor and attained his legal majority on August 21st, 1912; that on August 22nd, 1912, plaintiff gave to defendants a notice, in writing, that he elected to rescind said purchase and tendered to them all of the merchandise, furniture, fixtures and other property received from defendants; that since attaining his majority, plaintiff has not, in any way, ratified said purchase; and that defendants are now insolvent.

"And the court doth thereupon order, adjudge and decree that the entire transaction between plaintiff and the defendants shall be, and is hereby, set aside and for naught held; that the remaining sixteen (16) notes, and chattel mortgages securing the same, now in possession of defendants shall be surrendered by defendants to the clerk of this court, within ten (10) days from this date, and shall be cancelled by the clerk and delivered to plaintiff; that the capital stock of the Kaltwasser Drug Company, now in the possession of the plaintiff, within ten (10) days from this date shall be surrendered by plaintiff to the clerk of this court, for the use of defendants, and it is considered and adjudged by the court that plaintiff recover of defendants, the sum of twenty-four hundred dollars (\$2,400), together with his costs and charges in this behalf expended and have execution therefor.

"And the court further orders and decrees that upon the payment of defendants to plaintiff of the above sum of twenty-four hundred (\$2,400) dollars, together with the costs of this proceeding, plaintiff shall surrender to defendants, all the merchandise, drugs, furniture and fixtures now located in said drug store and the court further orders and decrees that if defendants, within ten days from this date, shall fail to fully comply with this judgment and decree, a receiver will be appointed by the court for the purpose of taking charge of the drugs, merchandise, furniture and fixtures located at 1924 Pestalozzi street, in the city of St. Louis, Missouri, and disposing of the same and applying the proceeds, first, to the payment of the costs of the receivership, then to the payment of the above judgment for twenty-four hundred dollars (\$2,400) and the balance, if any, to be paid to defendants. Said receiver to give bond in the sum of ——— dollars, with surety or sureties to be approved by the clerk of this court."

Filing a motion for new trial and excepting to the action of the court in overruling it, defendants have duly appealed.

Here the learned counsel for appellants make nine assignments of error.

First, to the denial of the demand for a trial by jury.

Second, error in admitting illegal and improper testimony offered by plaintiff.

Third, error in applying the law of the case to the facts in evidence.

Fourth, fifth, sixth and seventh, that the finding and judgment is against the law and the evidence, against the weight of the evidence, and erroneous under the evidence in the case and in decreeing and ordering a surrender and cancellation of the notes and chattel mortgage, and in setting aside the contracts embodied in the transaction in the case.

Eighth, that the court erred in ordering the appointment of a receiver.

Ninth, that the court erred in its finding and judgment which it is claimed should have been for defendant.

[1-5] As to the first assignment of error, that this was a case for the jury and not in equity, and along with that that an equitable cause of action was not set out in the petition, we do not think either position maintainable. In support of the first, learned counsel for appellants rely upon section 2786, Revised Statutes 1909. This is not an action whereby it is sought to charge a minor upon a debt contracted during infancy, and it is to such actions that section 2786 refers. The statute is applicable when the party sued pleads minority or infancy as a defense. In the case at bar, however, having disaffirmed the contract immediately upon attaining majority, first, by notice to defendants, second, by this very suit, which was commenced within 30 days after he attained his majority, the infant here disaffirmed. Assuming, as contended by counsel for defendants, that the notice served on the defendants of the disaffirmance was insufficient, in that it was not signed and did not specifically offer the return of the certificates of stock, this action itself, commenced within proper time, is in itself a disaffirmance. We do not understand that section 2786 in any manner interferes with the ancient jurisdiction of chancery courts to entertain suits for the annulment of contracts entered into during minority, especially when part of those instruments, as here, are negotiable promissory notes. The plaintiff here was not bound to wait until these defendants, or parties to whom they may have negotiated these instruments and along with them the chattel mortgages, saw fit to bring an action on them, but for his own protection and even on the theory that this action by him might avoid a multiplicity of suits, if these notes fell into the hands of different parties, he undoubtedly had a right to appeal to a court of equity to cancel the notes and the chattel mortgage. Furthermore, under the facts in this case, he had a right to apply for the appointment of a receiver on the contingency named in the petition. This latter undoubtedly pertains to a court of equity. The fact that that court in the course of its disposition of the case, a case in which it had jurisdiction,

should also enter up a money judgment, in no manner changes the character of the action, nor was it beyond the power of the court, having possession of the cause as a cause in equity on the chancery side of the court, to dispose of all the questions involved. It was within the power of that court to do all things necessary to secure complete equity between the parties and to put them in the position to which, on principles of equity, they were entitled. These propositions may be said to be truisms, so ancient as to require no illustration by authority; text-books and our reports afford full warrant for such a proceeding.

The cases principally relied upon by learned counsel for appellant are *Koerner v. Wilkinson*, 96 Mo. App. 510, 70 S. W. 509, and *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464.

Koerner v. Wilkinson merely decides that in an action against one on a contract, if infancy is pleaded in bar, this defense is triable as at law, and that our statute, now section 2786, supra, is exclusive as to what amounts to acts of ratification.

A careful reading of the opinion in *Ridgeway v. Herbert*, supra, does not warrant the conclusion drawn from it by the learned counsel. There, an action in ejectment, the defense set up in the first count of the answer, was minority of the defendant at the time he executed the instrument under which plaintiff claimed. By cross-bill defendant set up not only minority when that instrument was executed but fraud practiced upon him in obtaining it. The parties tried the whole case as in an action at law and the court held that while that was improper as to matters at issue under the cross-bill, the parties were estopped by their action to now make the point that the issue presented by the cross-bill should have been tried as in equity. Very clearly the defense against the instruments, there a lease and assignment of it, on the ground of minority, presented an issue at law for the determination of the jury. But it is not clear from anything said in *Ridgeway v. Herbert* that the issues presented by the cross-bill were separable. That cross-bill asked for an injunction against the prosecution of suits on the alleged instruments and also prayed that the cloud which that lease casts over the title of plaintiff be removed. Both fraud in obtaining the lease and minority were alleged. The Supreme Court reversed the decree which the circuit court had entered and directed it to enter judgment for the defendant according to the verdict of the jury on plaintiff's cause of action, and also cancelling the assignment of the lease to plaintiff and another, declaring the instruments involved were clouds on defendant's title which should be cancelled. So we find nothing in the case before the court which warrants the conclusion which learned counsel for appellant draws, that it was error to cancel these va-

rious instruments on account of the minority of the defendant in the case. But that was not all that was asked. A receiver was also prayed for and that pertained to the chancery side of the court.

[6] On a careful reading of all the testimony in this case at bar we see no ground to arrive at a conclusion other than that arrived at by the learned trial judge and set out by him in the judgment rendered. The acts of ratification relied on are sales from the stock in the drugstore by plaintiff and retention of the proceeds after he attained his majority. The preponderance of the evidence is that these sales that he made of the old stock were made before he arrived at his majority, with one possible exception, and that was a lot of bandages of the probable value of \$5. There was testimony that these bandages were disposed of by trading them for other articles, by the plaintiff after he arrived at his majority. But this was after plaintiff had disaffirmed by his notice to the defendants and after he had brought this action. As said by our Supreme Court in *Ridgeway v. Herbert*, supra, 150 Mo. loc. cit. 616, 51 S. W. 1040, 73 Am. St. Rep. 464, defendants could not possibly have been misled by any such act into believing that the plaintiff had withdrawn his disaffirmance. But it is said that plaintiff retained the drugstore which had been sold to him during his minority after he arrived at age and even down to the time of the trial of this suit. We do not think that this amounts to a ratification under the statute. The plaintiff had done all that he could. He had promptly, on arriving at his majority, offered to return the certificates of stock and this store with all that it contained, including also new goods that he had himself bought and with which he had replaced old goods sold during his minority, and he again offers in his petition in this case to turn these over as well as the stock certificates, together with the new goods which he has since put into the store. As is said by the Kansas City Court of Appeals in *Tower Doyle Com. Co. v. Smith*, 86 Mo. App. 490, loc. cit. 494, the contract of an infant when repudiated by him leaves the parties without a contract and the infant therefore has such rights as would exist had there been no contract. In that case plaintiff had in effect turned over the possession of the cattle to the defendant there without a contract of sale and mortgage for the purchase money and defendant had fed and cared for them for plaintiff's benefit. The court held he was therefore entitled to a lien for this under the general statute (section 4228, Revised Statutes 1899), providing for liens where animals are boarded and cared for.

The plaintiff here is claiming no lien or reimbursement of any kind for moneys paid out by him in the care of the property. All

he claims is a return of the money which he had paid out for this invalid sale. When the defendants refused to accept the tender of this property made to them by plaintiff, it was the duty of plaintiff to take all proper care of it, prevent it from being damaged and protect it from loss, and he appears to have done that very effectually; in point of fact, according to the testimony in the case, instead of its depreciating in value in his hands, he has added considerably to it, at least has kept it up to the value that it had when he received it from defendants. In a way, after repudiating his contract and being left in possession of the property by defendants' refusal to take charge of it, the plaintiff became a bailee.

[7] It is true that the plaintiff acquired this stock of goods from the corporation, when he purchased all of the capital stock in that corporation, but all of that capital stock at the time belonged to these defendants, who, in fact, were the corporation. Indeed, the deal for the purchase of this store was entirely on the theory that it belonged to these defendants. They owned all the capital stock and through that ownership had absolute control over the corporation. *Jones v. Williams*, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436. At the time plaintiff disaffirmed his contract and tendered back the drugs, fixtures and furniture and stock, he was nominally the owner, either through himself or a trustee, of all the shares, was the president and treasurer of the company. Surely a tender to himself, as representing the corporation, would have been a senseless and meaningless performance. He made the tender to the real parties in interest—these defendants—and according to the allegations in his petition and according to the evidence in the case has at all times stood ready to turn everything over to these defendants.

Our conclusion on the evidence in the case is that the judgment and finding of the circuit court is sustained by ample evidence and is right under the law and that evidence and should be affirmed.

[8] Inasmuch, however, as that judgment is an open one in that it provides for the appointment of a receiver, in the event that the money awarded plaintiff is not repaid to him by the defendants, the case is remanded to the circuit court to the end that that court may adjust its order to meet the situation as changed by the appeal, with power in that court to appoint a receiver, if necessary.

The judgment is accordingly affirmed and the cause remanded for such further proceedings as may be necessary and as herein indicated.

NORTONI and ALLEN, JJ., concur.

FRANCIS v. FRANCIS. (No. 14082.)

(St. Louis Court of Appeals. Missouri. Nov. 2, 1915. Rehearing Denied Nov. 23, 1915.)

1. CONSTITUTIONAL LAW — 83 — IMPRISONMENT FOR DEBT—JUDGMENT FOR ALIMONY—“DEBT.”

A judgment for alimony is a debt barring imprisonment for nonpayment thereof.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 150-151½; Dec. Dig. ¶ 83.]

For other definitions, see Words and Phrases, First and Second Series, Debt.]

2. DIVORCE — 236 — ALIMONY—MODIFICATION—POWER OF COURT.

Under Rev. St. 1909, § 2375, authorizing the court, on the application of either party, to make any alteration as to alimony and maintenance as may be proper, a judgment awarding alimony is changeable at any time, but until changed it is enforceable, as other debts, by execution, and, the court awarding alimony is vested with power to control it at any time and in any manner, and an agreement between parties to commute arrears of alimony at a fixed sum and for a change of alimony is binding, in the absence of any fraud or imposition, and the court may enforce it.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 666, 667; Dec. Dig. ¶ 236.]

3. EXECUTION — 12 — ANNULMENT OF JUDGMENT—EFFECT.

Where the judgment on which an execution rests is annulled, the execution falls.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 30; Dec. Dig. ¶ 12.]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Ida B. Francis against Richard I. Francis. From an order, modifying alimony allowed plaintiff and quashing an execution and writ of garnishment to enforce the alimony originally awarded, plaintiff appeals. Affirmed.

On June 2nd, 1903, a judgment was entered in the circuit court of the city of St. Louis, divorcing the plaintiff, Ida B. Francis, from the defendant, Richard I. Francis, awarding plaintiff alimony in the sum of \$40 per month, payable on the first of each and every month “until the further orders of this court,” awarding her the care and custody of the children of the parties, and adjudging costs in favor of plaintiff and against defendant. No execution appears to have issued on this until June 13th, 1912, when an execution, numbered 33, to the October, 1912, term, was issued in favor of plaintiff and against defendant for the sum of \$6984.84, that being the amount of alimony which had accrued and was unpaid at that date. Under this execution the interest of defendant in certain realty appears to have been levied upon, an employer of defendant summoned as garnishee. Thereafter, as appears by stipulation on file, and on August 20th, 1912, plaintiff and defendant entered into an agreement in writing and entitled in the cause in which it is set out that defendant had paid plaintiff six hundred (\$600)

dollars, and that in consideration thereof, the court,

“by consent of the plaintiff and defendant in the above-entitled cause shall render a judgment, order or decree discontinuing the accrual of alimony in said cause and ordering that said defendant, Richard I. Francis, pay said plaintiff, Ida B. Francis, the sum of one dollar (\$1.00) alimony in gross, the said Ida B. Francis hereby acknowledged that the said six hundred dollars (\$600) and the one dollar (\$1.00) so received by her are accepted in full payment and satisfaction of all sums of alimony that have accrued or may hereafter accrue, either as alimony pendente lite, suit money, attorneys’ fees, or temporary or permanent alimony from month to month or alimony in gross.”

The agreement further provided that Ida B. Francis would appear in the court where in the order was obtained on September 26th, 1912, or as soon thereafter as may be convenient to the court, and acknowledge satisfaction of the judgment and cause satisfaction to be entered of record on the minutes thereof and properly signed by her, attested by the clerk.

It was further agreed between the parties that any and all executions heretofore issued in the cause shall be quashed and held for naught and the garnishment proceeding brought by plaintiff in the cause against the garnishee named, garnisheeing the wages of Richard I. Francis, should be “and are hereby dismissed,” and the garnishee authorized to pay Richard I. Francis any and all sums of money now due him from it, and the levy or levies under the execution on any and all real estate in the city of St. Louis “are hereby released.” This is signed by plaintiff and defendant and acknowledged by Ida B. Francis and Richard I. Francis before a notary public August 20th, 1912. On the same date, that is, August 20th, Ida B. Francis executed another instrument, reciting the obtaining of the decree of divorce and that it awarded alimony and suit money, the alimony at the rate of \$40 per month, beginning June 2nd, 1903, and setting out that the parties “are desirous of settling in full all claims for alimony, past, present and future, as also suit money,” it was agreed that in consideration of the premises and of the payment of \$600, “the receipt of which is acknowledged,” Ida B. Francis releases and discharges Richard I. Francis from any and all claims she may have upon him by way of alimony, past, present or future, or otherwise, or for suit money, and further agrees to satisfy or cause to be satisfied the decree and judgment for alimony or suit money, the satisfaction to be of record and in full payment and satisfaction thereof, and that in default thereof Ida B. Francis authorized an attorney at law named to satisfy the judgment in full for all alimony, past, present and future, and suit money at any time after fifteen days had elapsed from September 25th, 1912. This was acknowledged before a notary public by Ida

B. Francis. Following this and on September 12th, 1912, Ida B. Francis caused a notice to be served on the attorney named, on the clerk of the circuit court and on Richard I. Francis, to the effect that she had revoked "and do hereby revoke" all power and authority conferred upon the attorney by virtue of the instrument of August 20th, notifying the clerk that she had revoked it, and that he (the clerk) was not to enter of record or in court any satisfaction or attempted satisfaction of the judgment, and notifying Richard I. Francis that the stipulation entered into between her and him, of August 20th, "being void in law, I hereby withdraw my consent thereto."

We gather from the abstract, although that is not distinctly set out, that after service of these notices another execution, also numbered 33, was issued on the order of the then attorney for plaintiff on the judgment of June 2nd, 1903, for the accrued alimony specified in that decree. It also seems that a new levy on real estate was made under this last execution and process of garnishment sued out and served on the same party summoned under the former execution. The date of the issue of the second execution is not stated but it is referred to in the judgment of the court as execution No. 33, also returnable to the October, 1912, term of the court.

Afterwards, and on October 5th, 1912, and during the October term of the court, the stipulations which had been signed by the parties were filed and thereafter and at that term defendant filed a motion to quash the execution and to release the garnishee from the summons. This motion sets out the judgment for alimony of date June 2nd, 1903, and that the plaintiff by and through her attorney named had issued an execution for the collection of the accrued alimony; that that attorney had had a summons issued against the party named as garnishee of the defendant and had ordered a levy upon the real estate standing in the name of the defendant. The motion further set out that as a result of this garnishment proceeding, evidently referring to that under the first execution, defendant had sought out plaintiff and her attorney, and in good faith agreed and contracted with plaintiff as above set out; that thereupon defendant had borrowed \$601, the amount necessary to pay plaintiff in accordance with these agreements and did pay her the sum of \$601, but as the court was not in session at the time, it was provided, as set out in these agreements, that proper orders should be entered of record as soon as the court could convene and the parties could be heard; that in pursuance of the agreement plaintiff had released the garnishee from this summons and had released the real estate levied upon under the execution theretofore issued in the cause. It is further averred that defendant had paid the sheriff the costs of the execution, and that plaintiff had contracted, in good faith, to

appear in court and enter satisfaction of the judgment in pursuance of the contracts and agreements entered into as above set out. Averring that in violation of the agreement and contract entered into and partially performed by plaintiff, another attorney acting in the name of plaintiff has caused to be issued a summons to the garnishee named, returnable to the December term, which summons and the execution then issued, defendant moves the court to set aside and quash. This motion was signed and sworn to, as we gather by defendant. On the same day defendant filed a further motion in the cause, moving the court to enter an order,

"setting aside the order heretofore made and entered for alimony and maintenance of the plaintiff (the former wife of defendant), and to enter an order of record allowing plaintiff the sum of \$1.00 for alimony in gross."

The reasons assigned are a repetition of the agreements between the parties as before set out. It is further again averred, in this latter motion, that defendant had paid plaintiff the \$601 on August 20th, and that in execution and performance of her part of the contract plaintiff had released the garnishment proceedings and the execution levied on the real estate of defendant. The motion concludes with a prayer that the court enter of record an order to the effect that by consent of the parties the allowance heretofore made plaintiff be set aside and alimony in gross in lieu of that theretofore allowed, be now awarded plaintiff in the sum of \$1.00.

The cause came on for hearing on these motions on December 2nd, 1912, the parties appearing by their respective attorneys and the court proceeded to hear them on a stipulation which embraced the agreements above set out as well as the revocation of them by the plaintiff; found that plaintiff, in the stipulations and agreements "and from admissions of plaintiff's counsel made in open court, freely executed, stipulated and agreed that the court should modify, by the consent of both parties hereto, the former allowance of alimony, and the plaintiff further duly acknowledged the execution of said stipulations and agreements before a notary public on, to-wit, August 20th, 1912;" that both parties had agreed and consented to the modification of the allowance for alimony as set forth in the stipulations and agreements, and the court accordingly found that the order of alimony entered on June 2nd, 1903, should be modified as follows:

"It is therefore considered and adjudged by the court that the order of June 2nd, 1903, wherein plaintiff was allowed the sum of \$40 per month alimony, be and the same is hereby modified to read as follows:

"That plaintiff do have and recover of defendant the sum of one dollar (\$1.00) as alimony in gross."

The court further sustained the motion of defendant to set aside and quash the execution issued in the cause under and by which a writ of garnishment had been issued

against the garnishees, the judgment again reciting that the court had heard the same "and statements and arguments of counsel for plaintiff and defendant and reviewing the stipulations and agreements heretofore made and entered into by and between the parties hereto, as hereinbefore set forth, the court finds that the executions issued herein, being executions No. 33, June term, 1912, and No. 33, October term, 1912, should be set aside and for naught held."

This was followed by a formal order, setting aside and quashing these executions "and any and all writs and levies or orders therein or thereunder."

Plaintiff filed written exceptions to this and these being overruled has duly appealed.

Thomas H. Sprinkle and James T. Roberts, both of St. Louis, for appellant. Eugene S. Wilson and Nagel & Kirby, all of St. Louis, for respondent.

REYNOLDS, P. J. (after stating the facts as above). Learned counsel for appellant assign four grounds for reversal of the judgment herein:

First, lack of consideration for the agreement between the parties; that an agreement between a debtor and a creditor whereby the latter agrees to discharge the former on the payment of a less sum than the debt, is void for lack of consideration, and that the payment of the less sum operates only as a discharge pro tanto.

Second: That an acceptance of a tender of part of a liquidated indebtedness, qualified by the debtor by condition that the acceptance shall be in full satisfaction, does not discharge the balance unpaid or bar an action therefor, unless there is a dispute in good faith as to the sum due, otherwise there is no consideration for the acceptance of the lesser for the greater amount.

Third: An agreement by a creditor to take less than what is due, there being no dispute as to the amount due, in payment of his debt, is without consideration and not binding.

Fourth: An execution can only be quashed for error on the face of the judgment or execution.

It is obvious that the first three points made by counsel are sound in law: their application to this case on its facts, and on consideration of the nature of a judgment awarding alimony, is another matter.

[1] That a judgment for alimony is so far a debt, under our system, as to bar imprisonment for its non-payment, is settled in our state. Our court in the case *In re Kinsolving*, 135 Mo. App. 631, 116 S. W. 1068, following the holding of our Supreme Court in *Coughlin v. Ehlert*, 39 Mo. 285, so held, holding that the husband could not be imprisoned as for contempt of court for its non-payment. The question of the power of the court over a judgment for alimony after its rendition, was not there before us and not considered in any manner whatever.

In *Dreyer v. Dickman*, 131 Mo. App. 660, 111 S. W. 616, it is held that a judgment for permanent alimony to be paid in continuous monthly installments, was subject to the same incidents as any other judgment and that the statute of limitations of actions on judgments applied to such judgment, so that execution could not issue on it after the expiration of ten years. That is all that was in decision in that case. The control of the court over the judgment, even after the expiration of ten years was in no manner in issue or determined in that case.

These are the cases chiefly relied upon by learned counsel for appellant in support of their contention that this judgment awarding alimony, is so far a fixed debt, that it is beyond the control of the court to change or modify it so as to affect alimony which, up to the time of the issue of the execution, had accrued, and that nothing but full payment would discharge it, there being no controversy in good faith as to its being due and unpaid.

It is said by Mr. Bishop (vol. 2, § 840), in his work on *Marriage, Divorce & Separation*, that divorce litigation is in its nature exceptional, rendering it as to alimony or the support of the wife never at an end during the joint lives of the parties,

"and such was the law which traveled to this country from England, to become common law here. For the course in the ecclesiastical courts, followed afterward by the Divorce Court, was, not only to receive applications to vary the alimony at times and terms of the court however remote after the granting of the divorce, but if the question of alimony was not passed upon before the divorce sentence was entered and the court adjourned, to entertain in the same cause, an original petition for it at any subsequent time or term."

Cooke v. Cooke, 2 Phillim. 40, 1 Eng. Ec. 178, and *Covell v. Covell*, Law Rep. 2 P. & D. 411, are cited *inter alia* in support of this.

So too, our courts have, in effect, held under our statute. See *Meyers v. Meyers*, 91 Mo. App. 151, when the motion to change the amount of alimony was filed over four years after the award and after the decree for divorce had been rendered. See, also, *Libbe v. Libbe*, 166 Mo. App. 240, 148 S. W. 460, where the motion for alimony was made after the divorce part of the cause had ended, alimony not having even been prayed for by the wife in her cross-bill.

Unlike the practice in England and in some of our states, we generally reach these judgments in divorce proceedings—when it is sought to change them as to alimony and the custody of children, by motion, not by bill of review, although section 2331, Revised Statutes 1909, does provide for a review of the orders touching alimony and the custody of children.

Mr. Bishop (supra), § 1077, says that an application to increase or decrease alimony, may be made either by motion or by new process.

[2] Turning to our own statutes concerning divorce and alimony, we have these:

Section 2375, Revised Statutes 1909, provides:

"When a divorce shall be adjudged, the court shall make such order touching the alimony and maintenance of the wife, and the care, custody and maintenance of the children, or any of them, as, from the circumstances of the parties and the nature of the case, shall be reasonable. * * * *The court, on the application of either party, may make such alteration, from time to time, as to the allowance of alimony and maintenance, as may be proper,*" etc.

Section 2381 provides:

"No petition for review of any judgment for divorce, rendered in any case arising under this article, shall be allowed, any law or statute to the contrary notwithstanding; but there may be a review of any order or judgment touching the alimony and maintenance of the wife, and the care, custody and maintenance of the children, or any of them, as in other cases."

In *Dorrance v. Dorrance*, 257 Mo. 317, 165 S. W. 783, it is said that the first clause of this section 2381 is unconstitutional, if it is held to deprive a court of equity of power to set aside a divorce for fraud. While in *Dorrance v. Dorrance*, 242 Mo. 625, 148 S. W. 94, it is held that such an attack is not a "bill of review" and hence not within the prohibition of this clause of the statute.

Mr. Bishop (*supra*), § 847, has said:

"But an alimony decree has in most of our states only a sort of interlocutory force, is liable to be varied from time to time by the court which pronounced it, and is enforceable only on process issued from such court."

In those jurisdictions in which actions for divorce are heard on the equity side of the court as cases in chancery or as formerly by the ecclesiastical courts of England, the right of the court to alter the order for alimony has been recognized and exercised in very many cases. Judge Johnson, speaking for the Kansas City Court of Appeals, has said, in *Libbe v. Libbe*, *supra*, 166 Mo. App. loc. cit. 247, 148 S. W. 463:

"Our statutes relating to alimony * * * and suit money are but a modern adaptation of the rules and practices of the ecclesiastical law."

A reference to these decisions of other courts in detail would serve no useful purpose. A leading case in which the judgment was rendered by Dr. Lushington, in the ecclesiastical court of England, is that of *De Blaquiére v. De Blaquiére*, 3 Haggard's Ecc. Rep. 322. In that case the right of the court to remit past due and unpaid alimony was exercised as an undoubted right. There both parties had long abstained from applying to the court for a change of the alimony first awarded, the husband, who had been divorced a mensa et thoro on account of his adultery, applying for a reduction of alimony allowed but largely in arrears, the wife on the other hand then applying to enforce its payment. The court held that it would not enforce the arrears nor inquire as to the sums paid by the husband for his wife's debts incurred by reason of non-payment of that alimony, nor would it reduce ali-

mony on account of an express waiver of a part thereof by the wife. The decree of separation was entered in May, 1820. From that time until his application for the reduction of the amount allowed and for the greater part of which he was in arrears, the husband had not filed any application for the reduction until February, 1829. The court held that it was open to the wife to have made the application to enforce payment of the allowance at any time during the interval and as she had failed to do so until her husband had taken steps to have the amount reduced, it affirmed the decree for the amount of alimony allowed but declined to enforce payment of that part of it due prior to the commencing of the last quarter of the time in which the proceedings for its alteration had been filed. That is to say the court, long after the alimony had been fixed, remitted the payment of all of it in arrears, except for the one year commencing with the quarter preceding the application to the court.

In *Linton v. Linton*, 15 Q. B. Div. 239 (Law Rep. 1884-1886), it was held that if circumstances had changed in the pecuniary ability of the husband to pay alimony awarded so that what was previously a fair amount of alimony is not a fair amount now, he is at liberty to apply to the judge of the divorce court for an alteration in the amount of the alimony. It was said by Cave, J., in the lower court, that alimony, by agreement of the parties, was fixed by the court at a certain sum, payable at stated times. The husband fell in arrears for the payment of certain installments and the wife proved up the amount of arrears as a debt. The husband appealed from the allowance and on its affirmation by the court, appealed to the Court of Appeals. There Sir Richard Baggallay, L. J., said (*loc. cit.* 245):

"An order for the payment of alimony may be varied from time to time according to the means of the husband; there is, therefore, no means of putting a value upon the future payments for the purpose of a proof in bankruptcy."

Lord Justice Bowen said (*loc. cit.* 246), that while it might be that arrears of alimony are a debt within the provision of the bankrupt law, they do not constitute a debt at law: a peculiarity of a judgment awarding alimony, distinguishing it from other judgments is, that in a sense, it is not final.

So it was held by the Supreme Court of New Jersey in *Van Buskirk v. Mulock*, 18 N. J. Law, 184.

In *Audubon v. Shufeldt*, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009, it is said by Mr. Justice Gray, who delivered the opinion for the court:

"Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require. The decree of a court of one state,

indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another state, and may therefore be there enforced by suit. *Barber v. Barber* (1858) 21 How. 582 [16 L. Ed. 226]; *Lynde v. Lynde* (1801) 181 U. S. 183 [21 Sup. Ct. 555, 45 L. Ed. 810]. But its obligation in that respect does not affect its nature."

Mr. Justice Gray, in his opinion in the above case, quotes approvingly from *Tolman v. Leonard* (1895) 6 App. D. C. 224, loc. cit. 233:

"The allowance of alimony is not in the nature of an absolute debt. It is not unconditional and unchangeable. It may be changed in amount, even when in arrears, upon good cause shown to the court having jurisdiction. The fact that such a decree may be sued upon under certain circumstances, or enforced, as is the case in some jurisdictions, by either execution or attachment of the person, or both, does not, in our opinion, change its essential character."

Alexander v. Alexander, 13 App. D. C. 334, 45 L. R. A. 806, is also cited by Mr. Justice Gray approvingly. In that case the decree of divorce from the bonds of matrimony had been awarded in favor of the wife against the husband, adjudging alimony at the rate of \$50 per month. This decree was rendered July 11th, 1877. In February, 1878, the alimony being in arrears and unpaid, the wife petitioned the court for an order to compel its payment. This order was made. Various steps and proceedings followed, the court finally reducing the alimony, both that in arrears and that to accrue. From this the husband, not satisfied with the reduction, appealed. The wife subsequently filed a bill of review, setting out the facts as to the reduction of alimony in arrears and to be paid, alleging in her bill that all the orders and decrees passed in the case subsequent to the original decree of July 8th, 1877, which in any way altered or affected the original decree were, so far as they reduced the alimony allowed by the original decree, null and void on the ground, as claimed, that the original decree had become an absolute finality beyond the power of the court to change in any manner except upon the petition of the complainant to increase the amount of the alimony. This bill of review was demurred to and pleas filed to it and on hearing the bill of review was dismissed. On appeal, after considering other phases of the case, the Court of Appeals of the District of Columbia, in an exhaustive opinion, in which the nature of alimony and the control of the court over it, are reviewed held, to quote the syllabus, which we find sustained by the opinion:

"Where a decree for divorce a vinculo, at the suit of the wife, allows the wife a certain fixed monthly sum as alimony, and reserves to her the right to apply at any time for an increase, but contains no reservation to the husband for leave to apply for a reduction, the court may nevertheless at any time thereafter entertain an application on his part for a reduction, and upon a proper showing grant it."

We are met with no such question over the omission from the decree before us of any reservation of a right to change the de-

creed, for as we have seen, our statute gives that right—a right, as we shall hereafter see, often exercised by our courts.

The effect of our law, and so the decisions in other jurisdictions hold, and as stated by Mr. Bishop hereinbefore quoted, is that the judgment awarding alimony is in a manner an interlocutory judgment, changeable at any time. Until changed it is enforceable as other debts, by execution, but this in no degree lessens the power of the court to change it from time to time.

In *Schmidt v. Schmidt*, 26 Mo. 235, loc. cit. 236, an action for divorce, the decree went in favor of the wife, who was also awarded the custody of the child and allowed \$150 for her support for one year, payable in quarterly installments. Said Judge Scott:

"All that portion of the decree which relates to the subject of alimony, is subject to the future control of the court."

In *Meyers v. Meyers*, supra, 91 Mo. App. 155, 156, a decree was entered granting plaintiff an absolute divorce from her husband and awarding her the custody of her minor children. It was further ordered and adjudged that defendant pay plaintiff, by way of alimony and in addition to suit money and other payments, \$30 per month to be paid on the 15th day of each month "until the further order of this court." This decree was entered in the circuit court in July, 1896, that is to say during the June term of the circuit court of the city of St. Louis. At the October, 1900, term of that court, plaintiff filed her motion for an increase of monthly alimony on the ground that her former husband's income and ability to pay had been increased and that plaintiff was unable to support herself and minor children on \$30 per month. It was in evidence that the allowance of alimony as entered in the decree for divorce was made by the court in pursuance of an agreement touching that made by the parties after the court had announced that it would grant a divorce to the wife, as was also the order awarding her the custody of her five minor children. After hearing the motion for increase of allowance, the trial court overruled it, and the case was appealed to our court. Here, in the opinion by Judge Bland, he states:

"We agree with the respondent's learned counsel that so far as the alimony, in gross, is concerned, consisting of an award of specific property to plaintiff, the judgment is final; but it is not final as to the stipendiary alimony of thirty dollars per month. Both by the judgment and by the statute (section 2923, R. S. 1899), the order for monthly alimony is left open subject to the further, that is, future, orders of the court and is subject to such modifications from time to time as the changed condition of the parties in the future might justify."

Referring again to this section of the statute of 1899, now section 2375, which authorized the court, on the application of either party to "make such alteration from time to time as to the allowance of alimony

and maintenance as may be proper," the learned judge says:

"This section seems to us to authorize the court to modify an order for maintenance of the children as well as the order for the maintenance of the wife."

The order of the circuit court overruling the motion was affirmed, all the members of the court concurring in that result, but two of them expressing no opinion as to the intimation thrown out by the Presiding Judge as to future applications which might be made for the support of the minor children, leave to make such amendment being granted.

"There can be no doubt that, under this statute (section 2381, R. S. 1909), the court granting the divorce retains jurisdiction as to the modification of the judgment or decree touching the maintenance of the wife and the custody of the children." Norton, J., in *Wald v. Wald*, 168 Mo. App. 377, loc. cit. 383, 151 S. W. 786, 788.

"A judgment for divorce, so far as alimony and the support and custody of children are concerned, is not a closed incident like other judgments. As to these matters it can accomplish its true end only by remaining perpetually open for variations to be made from time to time as the changed circumstances of the parties and the children may require (1 Bishop on Marriage, Divorce & Separation, § 822). As respects the custody of the children, a divorce suit can in its nature terminate only with their majority. *Id.*, § 826. And, in addition to this, our statute gives the court power to modify the judgment as to such matters. Section 2381, R. S. Mo. 1909." Trimble, J., in *Phipps v. Phipps*, 168 Mo. App. 697, loc. cit. 700, 154 S. W. 825, 826.

To sum up the matter, our conclusion is that a judgment for alimony, while a judgment and a fixed debt, unless and until altered, is more in the nature of an interlocutory judgment. The court that rendered it has power to alter it. So says our statute; so the English Ecclesiastical, as well as the Chancery Courts, the courts of other states and our own courts hold. The power conferred over judgments allowing alimony is not restricted in any way in its operation. There are no words of restriction confining it to alimony to accrue. It covers the whole subject of alimony and vests the court in which it was awarded with power to control it at any time and in any manner. That being so, when these parties here entered into an agreement to commute the arrears at a fixed sum and to have the order of alimony changed so as to award alimony in gross in the sum of \$1.00, they were doing what they had a right to do and what the court could have done for them without their consent. It required no consideration, valuable or otherwise to sustain an agreement to change or an order making the change. It lay in the discretion of the court, on consideration of the facts and circumstances in the case, to change it. In the case at bar we have the fact of the plaintiff here, by a solemn covenant and agreement in writing, acknowledged by her before a public official, agreeing to accept \$600 in satisfaction of the accrued install-

ments, to have the former order or judgment changed accordingly by the court, and to accept \$1.00 in lieu of alimony in gross. The money was paid over to her by plaintiff. That he borrowed the money is not material; that would only be material if the lender was here seeking the aid of the court. There is no pretence that any fraud or imposition was practiced upon the plaintiff. She made the agreement with the aid of counsel she had chosen, and as far as it was then possible, she had carried out her part of the agreement by withdrawing the execution and releasing the garnishment. Here in point of fact was a valid executed contract, which plaintiff could not rescind. When the court enforced it, it did no more than what it had a right to do, independent of the agreement, and as we have said, simply enforced and carried out the contract that the parties had made. Under such circumstances we do not think that the case presented is one of the discharge of a fixed debt for a sum less than that debt or that it is the release of a fixed obligation or debt for a smaller amount.

[3] Touching the final point as to quashing the execution, it is sufficient to say that the judgment upon which it purported to rest, having been annulled, the execution fell with it.

We find no reversible error in the action of the trial court and its judgment is affirmed.

NORTONI and ALLEN, JJ., concur.

WATKINS et al. v. DONNELL et al.
(No. 14119.)

(St. Louis Court of Appeals. Missouri. Nov. 2, 1915.)

1. PRINCIPAL AND AGENT ~~§~~3—CREATION OF RELATION—CONTRACT.

Where a manufacturing company contracted with a resident of South Carolina that the latter, for a fixed salary and 5 per cent. commission on sales, should conduct an agency for the sale of the company's goods, keeping on hand a certain stock, which would be billed to him at a discount and returnable by him at the price, the company agreeing to fit up the office at its own expense for carrying on the business, and the contract requiring the person employed "in the capacity of sales agent" to devote his entire time to the business and deal honorably with the company and the public, also limiting the terms on which he might sell goods by requiring him to sell for cash or on 30 days' time, moreover, fixing the price for the goods to different classes of persons, and requiring the agent to furnish the company with daily, weekly, and monthly reports of business done, and expenditures, and, at the end of the month, after deducting from receipts his compensation and the expense of the office, to remit the balance to the company, such contract created the relation of principal and agent between the parties, and did not effectuate a mere sale of the goods.

[Ed. Note.—For other cases, see Principal and Agent, Cent.Dig. §§ 8-9, 11, 12; Dec.Dig. ~~§~~3.]

2. CORPORATIONS **642**—**FOREIGN CORPORATIONS—DOING BUSINESS.**

Where a person in South Carolina acted as an agent of a Missouri manufacturing corporation in conducting its sales agency in South Carolina, the business being the company's and not the agent's it was unlawful for such agent to continue to conduct the business as agent in South Carolina, without compliance by the Missouri corporation with the laws of South Carolina relative to the doing of business by foreign corporations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. **642**.]

3. COMMERCE **40**—**INTERSTATE COMMERCE—SALE OF GOODS.**

Where a Missouri corporation sold goods to a person resident in South Carolina, so that the title to them as shipped vested in him, the business conducted by him being his own business, and not that of the corporation, though he was called its agent, the corporation was engaged in interstate commerce, and could not be required to comply with South Carolina law regulating the doing of business by a foreign corporation.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. **40**.]

4. CONTRACTS **147** — **CONSTRUCTION AS WHOLE.**

A contract must be construed as a whole, regarding its general tenure and purpose, and giving rational effect, if possible, to all of its provisions.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. **147**.]

5. EVIDENCE **462**—**AMBIGUITY—EXPLANATION OF CONTRACT.**

Where a contract between a resident of South Carolina and a Missouri manufacturing corporation contained apparently contradictory provisions as to whether it was intended to appoint the South Carolina resident as sales agent of the company or to sell him goods outright, the contemporaneous acts and declarations of the parties, defendant's advertisement for an agent, and the correspondence leading up to the contract, could be looked to to resolve the ambiguity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2134-2139; Dec. Dig. **462**.]

6. CORPORATIONS **657**—**FOREIGN CORPORATIONS—CONTRACTS—ILLEGALITY.**

Where a Missouri manufacturing company appointed a sales agent to conduct its agency in South Carolina, the company's subsequent failure to comply with the laws of that state relative to the doing of business by foreign corporations did not render the contract appointing the agent void ab initio.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536-2541, 2550, 2552-2554; Dec. Dig. **657**.]

7. CORPORATIONS **642**—**FOREIGN CORPORATIONS—DOING BUSINESS.**

A Missouri corporation could make a contract in Missouri appointing an agent for the transaction of its business in South Carolina, without complying with the laws of that state relative to the doing of business by foreign corporations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. **642**.]

8. CORPORATIONS **657**—**FOREIGN CORPORATION—BREACH OF CONTRACT—SUBSEQUENT ILLEGALITY OF PERFORMANCE.**

Where a Missouri corporation appointed a resident of South Carolina its sales agent, and thereafter failed to comply with the laws of South Carolina relative to the doing of business by foreign corporations, the company, which thus rendered the contract impossible of legal

performance by the agent, became liable to him for its breach.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536-2541, 2550, 2552-2554; Dec. Dig. **657**.]

9. MASTER AND SERVANT **41** — **BREACH OF CONTRACT—DAMAGES.**

In an action against a manufacturing company by its sales agent for breach of the contract of employment, plaintiff's measure of damages was the amount of salary earned, plus expenses, and a sum deposited by him with the company to cover the price of goods delivered to him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 50-53; Dec. Dig. **41**.]

10. CORPORATIONS **565**—**RECEIVERS—CLAIM AGAINST—FORM.**

The sales agent of a corporation sued it for breach of his contract of employment. Pending suit, a receiver for defendant was appointed, and the agent filed with him a claim, verified by oath, to which was attached a copy of the petition filed in the original suit, averring that the contract, by defendant's acts, became "impossible to perform, inoperative, and void," while the claim itself stated that the demand was based on the contract filed with the original petition. The alleged impossibility of performance consisted in the fact that the defendant, a Missouri corporation, appointed the agent to conduct a sales agency in South Carolina, and thereafter failed to comply with the laws of such state relative to the doing of business by foreign corporations. Held, that whether the contract, strictly speaking, became void or not, the claim against the receiver, averring that it was void, was yet sufficient, since the rules of pleading do not apply with their original strictness to proceedings against receivers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. **565**.]

Appeal from St. Louis Circuit Court; Leo S. Rassieur, Judge.

Action was instituted by James A. Watkins and others against John W. Donnell and others, doing business as the Donnell Manufacturing Company, and pending suit a receiver was appointed for defendants. R. L. Zeigler filed with him a claim based upon his alleged cause of action. The matter was referred to a referee. From overruling by the circuit court of claimant's exceptions to the referee's report, claimant appeals. Reversed and remanded, with directions.

See, also, 189 Mo. App. 617, 175 S. W. 280.

T. M. Pierce and S. P. McChesney, both of St. Louis, for appellant. Fred Armstrong, Jr., of St. Louis, for receiver.

ALLEN, J. In 1907 the appellant, R. L. Zeigler, instituted in the circuit court of the city of St. Louis an action against the Donnell Manufacturing Company, a corporation. During the pendency of this suit a receiver was appointed for said corporation, and on April 9, 1910, appellant filed with the receiver a claim based upon his said alleged cause of action. The matter was referred to a referee, who in due course made report of his findings, recommending that the claim

be disallowed. The claimant's exceptions to the referee's report were overruled by the circuit court, and the cause is here on his appeal.

In February, 1907, appellant, a resident of South Carolina, having seen an advertisement of the Donnell Manufacturing Company, of St. Louis, whereby the latter advertised for a man to manage a branch wholesale business, at a salary of \$1,800 per year, wrote said company, making application for the position. The company promptly replied, and further correspondence was had between the parties. Appellant furnished "references," to whom the company wrote, receiving satisfactory replies. On or about March 21st appellant, at the company's suggestion, and it paying one-half of his expenses, came to the city of St. Louis for a "personal interview," and on the following day a written contract was entered into between him and said company in terms as follows:

"This agreement, made and entered into this 22d day of March, 1907, by and between the Donnell Manufacturing Company, of the city of St. Louis, and state of Missouri, party of the first part, and R. L. Zeigler, party of the second part, of the city of Allendale, state of South Carolina, witnesseth:

"That the parties hereto, after a personal interview and examination by said second party of the goods manufactured and sold by said first party, have embodied the result of all previous and present negotiations, representations, and understandings into this writing; said agreement being as follows, to wit:

"(1) That said first party engages the said second party in the capacity of sales agent, to conduct a sales agency for the sale of its goods and specialties in the city of Columbia, state of South Carolina, for a period of two (2) years—that is to say, twenty-four (24) months—from the date that the sales office is opened for the second party, as hereinafter provided for; and for and in consideration of the faithful performance and fulfillment by said second party of each and all of the several agreements hereinafter contained and agreed to between the parties, said first party agrees to pay to the party of the second part one hundred fifty dollars (\$150.00) per month, payable as hereinafter provided, and five per cent. (5%) additional commission on all sales of said office during the continuance of this contract.

"(2) The party of the first part further agrees at its own expense to open and fit up an office or sales room for the use of the second party at said city, in which the party of the second part shall carry on said business as herein provided for, and the party of the first part further agrees to sell and deliver to said second party, such stock of goods as it manufactures and sells, as the trade of the said office may require from time to time at forty per cent. (40%) discount from retail prices, and to supply merchandise at the same rate to the party of the second part for all moneys received from said second party, and to instruct said second party in the details of handling the business so far as is necessary in the estimation of the said first party. At the expiration of the term as above and fulfillment of this agreement by said second party, the party of the first part further agrees to repurchase from said second party all stock that he may have on hand and which was purchased from said first party, paying therefor in case the same prices as originally charged him, said stock to be in fairly good condition.

"In consideration of the foregoing and subse-

quent agreements herein, the said second party agrees to the following:

"(1) The said party of the second part will and does hereby engage and agree to become sales agent for the goods manufactured and sold by the party of the first part, as heretofore stipulated, for a term of two (2) years, and that he will devote his whole time and best efforts to advancing the success of the business and to satisfactorily perform the duties herein required of him, dealing honorably with the party of the first part, the public, and all persons with whom he may have business relations.

"(2) That the second party will supply no stock purchased or furnished him by the first party to agents, dealers, or other purchasers from him at other than the prices and on the terms, from time to time, agreed upon between the parties hereto, and only for cash with orders or on thirty (30) days' time, if secured by the endorsement of some financially responsible party or on satisfactory letters of credit. All sales to be made by the second party to agents at a discount of thirty-three and one-third per cent. (33 $\frac{1}{3}$ %), and to dealers at twenty-five per cent. (25%) from retail prices. The said party of the second part is to use his due care and diligence in looking up the standing of people to whom goods are sold on credit and then, if any losses arise, these losses are to be charged as an item of expense to the business.

"(3) Said second party further agrees to carry at the agency aforesaid a stock of merchandise manufactured or sold by the party of the first part, amounting to one thousand six hundred and sixty-six and two-thirds dollars (\$1,666.66) at retail prices, which shall be an assortment to be selected by the party of the first part or jointly selected by the parties hereto, and to be billed to said second party at forty per cent. (40%) discount from retail prices, amounting to one thousand dollars (\$1,000.00) net. The said party of the first part is to carry all additional stock necessary for the proper handling of the business, based upon sales and reports of demonstrators and sales people.

"(4) The party of the second part further agrees to furnish the said party of the first part with daily and weekly reports, and at the end of each month to forward to the party of the first part a report of all business done during said month, giving the names and address of any and all agents appointed, a full and accurate statement of expenditures, amount of goods sold, of money collected, and any other information regarding the business that may be requested by the party of the first part.

"(5) As the permanent success of this business will depend upon a reasonable amount of merchandise being sold, it is understood and agreed that the sales of each month shall amount to six hundred dollars (\$600.00), which shall be considered the minimum amount of business necessary to constitute the fulfillment of this contract, and when the term 'minimum amount' is herein used, it will be held to mean six hundred dollars (\$600.00). If the sales of any month shall not amount to this minimum amount, and during the succeeding month sales are in excess of the minimum amount required to make up an average of six hundred dollars (\$600.00) a month, this contract will hereby be fulfilled in this respect by the party of the second part. If the sales at the end of the first year shall not have averaged six hundred dollars (\$600.00) per month, the party of the first part reserves the right to cancel this contract if it so desires, and upon such cancellation shall repurchase from said second party all stock that he may have on hand, purchased from said first party, paying therefor in cash the same prices as originally charged him, said stock to be in fairly good condition.

"(6) It is mutually understood and agreed between the parties hereto that the said second party shall have the right and authority to collect all money for business done through said

office, and that at the end of each month, after deducting from the receipts of said office the amount of his own remuneration, to wit, one hundred and fifty dollars (\$150.00) and necessary expenses such as rent, office help, postage, advertising matter, office sundries and commissions, etc., all other expenses and those herein mentioned being subject to the approval in writing by the party of the first part, he shall remit with his monthly account the balance to said party of the first part, at its office in the city of St. Louis. When such remittance is received, the party of the first part will then replace, as herein provided for, the stock sold during the previous month by the party of the second part; and in case the minimum amount of business required has been transacted and shall not be sufficient to pay the expenses of the office, as herein provided for, cost of replacing stock sold, etc., such deficiency shall be made good by the party of the first part at the end of each month.

"(7) It is further mutually agreed by both parties hereto that the said party of the second part shall have the right to renew this contract at its expiration for such further term as may be then mutually agreed upon, it being understood by both parties that the expenses incident to the opening of said office constitute the necessity of a permanent arrangement.

"In further consideration of the foregoing covenants and agreements to be kept and performed by the party of the first part, the party of the second part has this day paid to the party of the first part one thousand dollars (\$1,000.00), receipt whereof is hereby acknowledged in payment of stock of goods to be furnished as herein provided.

"In witness whereof," etc.

Upon the execution of this contract appellant paid the Donnell Company \$500, and shortly thereafter paid it a like sum, making a total of \$1,000 provided by the contract to be paid by appellant. Appellant thereupon went to Columbia, S. C., where he met a representative of the company, who there rented and furnished an office for the carrying on of said business. The company furnished appellant with goods in accordance with the contract, and appellant conducted the said business for a period of about two months. The Donnell Company, however, did not comply with the laws of South Carolina relating to foreign corporations, and appellant, upon advice of counsel, refused to further continue carrying on the business, and demanded of the company the return of the \$1,000 deposited with it, together with the sum of \$300 as compensation for his services and \$26 for expenses alleged to have been incurred by him, offering to return the stock of goods on hand. The company refused appellant's demands, and declined to receive back the goods, whereupon appellant instituted his suit.

The learned referee found that the foregoing contract was not one of agency, but that by its terms appellant had agreed to purchase certain goods from the Donnell Manufacturing Company; that under the contract the title thereto vested in appellant as purchaser upon his receipt of the goods, and that in selling the same he was selling his own property, and not that of the Donnell Company; that the Donnell Manufacturing Company was therefore not doing business

in the state of South Carolina, but doing an interstate commerce business, and was not required to comply with the laws of said state as a foreign corporation; and that the company's failure in this respect did not prevent appellant from carrying out the terms and provisions of the contract on his part, or render it void or impossible of performance.

[1-4] But we find ourselves unable to sanction the view taken by the referee respecting the construction of the contract. In our judgment it is one of agency, creating the relation of principal and agent between the parties. This is the crucial question involved, upon the determination of which the case before us turns. The laws of South Carolina regarding the doing of business within that state by foreign corporations were put in evidence and are before us. It is unnecessary to here set out these statutory provisions. It is sufficient to say that, if appellant was acting as an agent of the Donnell Company in conducting the aforesaid business, the business being that company's business, and not appellant's, it was unlawful for appellant, as such agent, to continue the conduct thereof in the state of South Carolina without compliance by the corporation with the laws aforesaid. On the other hand, if the contract was one of sale, whereby the title to the goods shipped vested in appellant as purchaser, the business conducted by him being his own business and not that of the corporation, as the referee found, then the corporation's part of the transaction as a whole was an interstate commerce business, and it could not be required to comply with the laws of South Carolina as a foreign corporation.

The contract begins by providing that the company "engages" appellant "in the capacity of sales agent" to conduct "a sales agency" in Columbia, S. C., agreeing to pay appellant \$150 per month and in addition thereto 5 per cent. commission on all sales. The company agrees to open and fit up an office at its own expense for the carrying on of such business. The contract requires appellant to devote his entire time to the business, and to deal honorably, not only with the company, but with "the public and all persons with whom he may have business relations." Appellant is required to sell for cash, or "on thirty (30) days' time, if secured by the indorsement of some financially responsible party, or on satisfactory letters of credit," to sell goods at certain designated prices and to use care and diligence in ascertaining the standing of people to whom goods are sold on credit. He is required to furnish the company with daily, weekly, and monthly reports, to give a full and accurate statement of expenditures, the amount of goods sold, money collected, etc., and at the end of each month, after deducting from the receipts his compensation and the expenses of

the office, to remit the balance to the company.

On the other hand, the contract provides that the company shall sell and deliver to appellant goods at 40 per cent. discount from retail prices, and, upon the expiration of the term of the contract, "repurchase" from appellant stock remaining on hand; and there is a recital that appellant has paid to the company \$1,000, "in payment of stock of goods to be furnished him as herein provided." It is true that the mere use of the terms "sales agent" and "sales agency" does not necessarily render the contract one of agency. But neither does the presence of the words "sell and deliver," or the recital that appellant's \$1,000 is received "in payment of stock of goods," necessarily make it a contract of sale. The contract is to be construed as a whole, with regard to its general tenor and purpose, giving, however, rational effect, if possible, to all of its provisions. It is quite evident that it contemplates the transaction of business at Columbia, S. C., as the company's business, and not as the business of appellant. This appears from the fact that appellant is engaged as a sales agent to conduct a sales agency, at an agreed compensation, the company to fit up the offices therefor at its own expense; that appellant is not permitted to conduct the business as he chooses, but is instructed in regard to the prices at which he is to sell goods, and is required to take certain precautions in the matter of extending credit; and that he must make daily reports to the company, and certain weekly and monthly reports as well, and remit monthly all receipts remaining after deducting expenses including his own compensation. Aside from the use of the terms "sales agent," and "sales agency," these important provisions, indicating the relation sought to be established between the parties, are utterly incompatible with any theory other than that appellant became the company's agent to conduct a branch of its business in South Carolina.

That the contract provided that the goods supplied appellant were sold to him, the company agreeing to "repurchase," at the same price, whatever might remain on hand at the expiration of the term of the contract, if in fairly good condition, ought not to be regarded as controlling on the question in hand, in view of the provision discussed above. When we come to consider the agreement to repurchase, at the same price at which the goods were billed to appellant, it makes the so-called sale of these goods appear to be merely an arrangement whereby the company was to supply appellant with a stock of goods and replenish the same from time to time, retaining in the meantime appellant's \$1,000 and making him responsible for the return of goods unsold; the value of such goods being placed at 40 per cent. of the retail price thereof. That not only the original stock, representing appel-

lant's \$1,000, but future shipments, were to be billed to appellant at 40 per cent. reduction from retail price, is not inconsistent with this view, for the company was to get all of the net receipts arising from the sale of goods from which to replenish the stock as needed.

The contract provides that, in addition to the stock represented by appellant's \$1,000, the company will "carry all additional stock necessary for the proper handling of the business;" and the company agrees, upon receiving remittance of the net receipts each month, to replace the stock sold during the previous month. Had the contract been fully performed, and the stock kept replenished, the company would have been obligated in the end to take back the stock remaining on hand, if in fairly good condition, crediting appellant with all thereof at the prices mentioned. While an ulterior motive and purpose may have lurked behind the entering into of this contract by the Donnell Company, a matter not here in question, if carried out in good faith according to what, in spite of its apparent contradictions, must be regarded as the true intent and spirit thereof, appellant, as we view the matter, would have been conducting all the while defendant's business as its agent, for a stated remuneration, having \$1,000 invested therein; defendant receiving the net profits, if any, and being liable for appellant's salary and commissions, as well as other expenses. It is certain that appellant could make no profit out of the business beyond his salary and commission; but as the company received all moneys arising from the sale of goods, after deducting expenses, it presumably would be enabled to make a profit upon its goods, if the volume of business was sufficiently great. This, of course, must have been the company's object, if there was any good faith on its part in the transaction. In this view of the contract, there can be no doubt that in operating thereunder the corporation was doing business in the state of South Carolina, and that the conducting of such business, without a license so to do, was illegal, subjecting the offender to the penalties prescribed by the laws of that state for such offense.

It is useless to discuss the cases cited and relied upon in the briefs, since the contracts involved differ materially from that before us. But see what is said by Mr. Justice Harlan, in holding a contract under consideration to be one of agency, in *Wilcox & Gibbs Co. v. Ewing*, 141 U. S. 636, 12 Sup. Ct. 94, 35 L. Ed. 882, from which we quoted in *Haudan-Buck Mfg. Co. v. Stave Electrical Co.*, 184 Mo. App. 247, 168 S. W. 785. Learned counsel for the receiver, in support of his contention that the contract is one for the sale of goods, contemplating an interstate commerce business, and that consequently the company could not be required to comply with the laws of South Carolina as a foreign corpora-

tion, cites *Henry Bill Pub. Co. v. Durgin*, 101 Mich. 458, 59 N. W. 812; *Arbuckle Bros. v. Kirkpatrick*, 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854; *Conn v. Chambers*, 123 App. Div. 298, 107 N. Y. Supp. 976; *Snelling v. Arbuckle Bros.*, 104 Ga. 362, 30 S. E. 863; *Arbuckle Bros. v. Gates*, 95 Va. 802, 80 S. E. 496; *Standard Fashion Co. v. Cummings* (Mich.) 153 N. W. 814. But upon the facts involved in each of those cases the conclusions reached therein afford no persuasive authority for the said contention of counsel.

[8] We have reached the conclusion above expressed from a consideration of the provisions of the contract alone. But if the contract can be said to be ambiguous, by reason of its apparently contradictory provisions, rendering obscure the true intent and purpose thereof, then the contemporaneous acts and declarations of the parties—defendant's advertisement and the correspondence leading up to the contract—may be looked to to resolve such ambiguity. *Laclede Construction Co. v. Moss Tie Co.*, 185 Mo. 25, 84 S. W. 76. And, if necessary to resort to evidence aliunde to explain the contract, this rule is in no wise affected by the declaration in the contract itself that it embodies all prior negotiations, etc. This is nothing more than that which the law presumes as to all written contracts that are definite and clear; but it does not prevent resort to extrinsic evidence of the proper sort, where by such means alone doubt may be removed as to the meaning of terms employed in the writing.

The company advertised for a man to manage a "branch wholesale business," and wrote appellant that it was its intention to open a branch business from which to distribute its goods, using the office in South Carolina as a "distributing depot" for that territory. It further wrote appellant that the latter's \$1,000 would be "perfectly secure," being "always represented either by merchandise on hand or cash for the same," and would be returned to appellant upon his return of goods on hand. We think the writing, considered alone, is susceptible of but one rational interpretation. However, any doubt that may come from the use of certain terms employed therein is readily dispelled when the contract is read in the light of the acts and declarations of the company leading up to its execution.

[8-9] It is true that the company's subsequent failure to comply with the laws of South Carolina did not render the contract void ab initio. It was competent for the company to contract in this state with an agent looking to the transaction of business in the state of South Carolina. *Hogan v. City of St. Louis*, 176 Mo. 149, 75 S. W. 604. But the company, by its own act in failing to seasonably comply with the laws of the

foreign state, rendered the contract impossible of lawful performance. Appellant conducted the business for a period of about two months. This, perhaps, could be lawfully done (see South Carolina Code 1902, vol. 1, chapter 44, p. 680 et seq.); but we need not so decide. In any event, it was unlawful for appellant to continue to conduct the business beyond a period of 60 days; and the corporation, having thus rendered the contract impossible of performance, became liable as for a breach thereof. And we think that appellant was thereupon entitled to tender back the goods and recover, as damages for the breach, his \$1,000, salary earned, and expenses.

[10] But it is argued that appellant is not proceeding on the contract, and is not entitled to recover on the theory that the corporation was guilty of a breach thereof in the manner mentioned. The appellant filed with the referee a "claim," verified by oath, to which was attached a copy of the second count of the petition filed in the original suit. The latter, *inter alia*, avers that the contract, by defendant's alleged acts, became "impossible to perform, inoperative, and void." The claim itself states that the demand is based on the contract filed with the original petition as an exhibit. The ordinary rules of pleading do not apply with strictness to such proceedings as these. And we see no objection to granting appellant the relief to which he appears to be entitled. The contract, strictly speaking, was not void. It could have been performed, had the company taken the requisite steps in the premises; but by its own act it rendered it impossible for appellant to lawfully perform his part thereof, whereby it became liable as upon a breach of its undertaking.

There is no evidence in the record in proof of the amount, if any, of the expenses claimed to have been incurred by appellant in undertaking to perform the contract. The judgment will accordingly be reversed, and the cause remanded, with directions to the circuit court to order the allowance of appellant's claim for \$1,800.

It is so ordered.

NORTONI, J., concurs. REYNOLDS, P. J., not sitting.

EAKER v. HARVEY. (No. 14081.)

(St. Louis Court of Appeals. Missouri. Nov. 2, 1915. Rehearing Denied Nov. 23, 1915.)

1. GUARDIAN AND WARD §77 — SALE OF PROPERTY—POWER OF COURT.

Probate courts have no power to authorize the sale or incumbrance of the property of minor wards, except for their education, support, and maintenance or investment, so that a deed of trust from the guardian and curator of minors to secure a fee of an attorney engaged in litigation involving their property was void.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 87-90; Dec. Dig. §77.]

2. ESTOPPEL ¶38—AFTER-ACQUIRED PROPERTY—BREACH OF COVENANT.

Defendant, in an action for damages for breach of covenants of title contained in his general warranty deed, who had acquired title by enforcement of a void deed of trust executed to him by the guardian of certain infant heirs, who afterwards demanded possession of plaintiff and to whom he surrendered possession, was estopped to deny that such heirs were the holders of the paramount title, in the absence of evidence tending to show a valid conveyance by such parties of their title since the date of the deed under which he claimed title.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 90-107; Dec. Dig. ¶38.]

3. NAMES ¶14—IDENTITY OF PERSON.

Identity of name, in the absence of proof to the contrary, is identity of person.

[Ed. Note.—For other cases, see Names, Cent. Dig. § 10; Dec. Dig. ¶14.]

4. COVENANTS ¶121—JUDGMENT—CONCLUSIVENESS—EJECTMENT.

A judgment in ejectment against the terre tenant, when the covenantor in the deed is made party to the suit, is to be received in evidence as concluding the question of paramount title.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 221-223; Dec. Dig. ¶121.]

5. COVENANTS ¶101—BREACH—SURRENDER TO PARAMOUNT TITLE.

A covenantee whose title has failed, though there has been no judgment in ejectment against him, may recover of the covenantor for breach by showing a surrender to a paramount title.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 147, 156; Dec. Dig. ¶101.]

6. COVENANTS ¶101—ACTION FOR BREACH OF COVENANT—OUSTER BY PARAMOUNT TITLE—JUDGMENT.

A grantee under a general warranty deed of a lot which defendant, the grantor, had acquired by foreclosure of a deed of trust, executed by the guardian of certain infant heirs under order of the Probate Court but void because beyond the power of the court, against whom the minor heirs afterwards made demand of possession and obtained a judgment in ejectment defended by the defendant herein, and who upon the sheriff's writ of execution or restitution turned over their possession to him, without notice from the defendant of any error in the form of judgment, showed an ouster of her possession of the property by paramount title, and could not be held to have surrendered voluntarily; especially in view of Rev. St. 1909, § 2082, providing that the Courts of Appeal shall not reverse unless for error materially affecting the merits of the action.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 147, 156; Dec. Dig. ¶101.]

7. EJECTMENT ¶122—JUDGMENT—ORDER OF RESTITUTION.

A judgment in an action of ejectment omitting any description of the premises would not sustain an order of restitution for the lot involved or for any lot, though it was not void and might have been amended.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 419-430; Dec. Dig. ¶122.]

Appeal from St. Louis Circuit Court; George H. Shields, Judge.

Action by Alice M. Eaker against Thomas B. Harvey. Judgment for plaintiff, and defendant appeals. Affirmed.

R. P. & C. B. Williams, of St. Louis, for appellant. Felix Cornitius and Grant & Grant, all of St. Louis, for respondent.

REYNOLDS, P. J. Respondent, plaintiff below, brought her action against the defendant, now appellant, to recover damages for breach of covenants of warranty of title to a certain lot in Malden, Dunklin county, this state, known as the east half of outlet number 20, in that city, conveyed to her and her husband by defendant by a general warranty deed. Averring that her husband had since died and that the title had vested in plaintiff, she avers that she had entered into possession of the premises, and in June, 1907, had relinquished possession thereof to certain parties, here, for brevity, designated as "the Haynes heirs," they claiming by an older and better title and on which, on April 1st, 1906, they had brought an action in ejectment against this plaintiff to recover possession of the lot, of which action defendant here had due notice and opportunity to defend and did in fact enter his appearance for the purpose of defending, but had failed and neglected to make any defense therein; that the Haynes heirs, having a better title to the premises, thereupon lawfully entered into the possession thereof; that on January 10th, 1906, and ever since that time these parties had and have continued to have the lawful right to the premises by an elder and better title; that the costs in the action amounted to \$14, which plaintiff has been compelled to pay and that by reason of the premises plaintiff has been damaged in the sum of \$400, for which she prays judgment.

The answer, after a general denial, pleads the three-year and five-year statute of limitations.

The fact of filing the action in ejectment by the Haynes heirs against the plaintiff, as alleged, was in evidence, the petition describing the lot and asking for possession and damages. It was in evidence that defendant had been notified of the pendency of the action and had employed the counsel who conducted the defense therein in the name of Mrs. Eaker, and while it was conceded that judgment had been rendered against this plaintiff in that action, it appeared that the judgment omitted any description of the premises. It is also in evidence that purporting to act under an execution or writ of restitution which was issued in the action of ejectment in favor of the plaintiffs therein and against this plaintiff, the sheriff of the county, some time in June, 1907, with the execution or writ of restitution which had been issued under that purported judgment, had gone to this plaintiff and demanded possession of the premises in behalf of the Haynes heirs, plaintiffs in the ejectment, and that thereupon plaintiff had surrendered the possession of it to him and that the Haynes

heirs had been in possession of it until they subsequently sold it to another party and that plaintiff in this action had never been in possession of it since June, 1907. It was also in evidence that the defendant herein, an attorney at law, had, in connection with another attorney, rendered services for the Haynes heirs and possibly their father, in the United States Circuit Court, as it then was, for which a fee was due, and that to secure the payment of this fee the guardian and curator of the Haynes heirs, who were then minors, had, under the purported authority of the probate court of Dunklin county, made a note for \$300 in favor of Mr. Harvey, the defendant here, and to secure it, had executed a deed of trust upon the lot in question; that note not being paid when due, the trustee, acting under the provisions of the deed of trust, had sold the lot and defendant purchased it, the trustee executing a deed to him, and that Mr. Harvey had thereupon conveyed the lot described to plaintiff and her husband by a statutory general warranty deed, of date January 10th, 1908, in consideration of \$400.

The records of the probate court authorizing the guardian and curator of the Haynes heirs to make the note and deed of trust were in evidence.

It is recited by the guardian and curator in the petition on which the above order was made by the probate court, that there was pending in the United States Circuit Court an action in attachment against all the real estate of the minors, seeking to subject it to alleged indebtedness of their father; that unless that action was properly defended the property of the minors would be sacrificed; that Thomas B. Harvey, an attorney, had been retained to defend the litigation and the fee agreed to be paid him was \$300; that this attorney demanded that the payment of this fee be secured by deed of trust upon the east half of out-lot number 20 in the city of Malden; that the curator believed and is advised that the interests of the minors (Haynes heirs) require that such deed of trust be executed and he prayed for an order of court authorizing and empowering him to execute a note in the sum of \$300, payable to the order of Harvey, due twelve months after date and for an order empowering him to execute and deliver to Harvey a deed of trust on the lot securing payment thereof. Afterwards alleging that a mistake had been made as to the amount of the fee, the guardian and curator asked that he be empowered to make an additional note for \$200. No order appears to have been made on this application for power to make a second note, and, as said, the deed of trust secures only a \$300 note. The probate court thereupon made an order authorizing the guardian and curator "to borrow the sum of \$300 for the purpose of carrying on the litigation and to execute as security therefor

a deed of trust" on the lot described. It was under this order that the deed of trust was made by the guardian and curator of the Haynes heirs, and at a sale thereunder Harvey purchased.

It was also in evidence that after Mrs. Eaker had been dispossessed or had surrendered possession of the premises, Mr. R. P. Williams, who was the attorney associated with Mr. Harvey in the suit in the United States Court, and who, representing Mr. Harvey, had employed the firm of attorneys who defended the action of ejectment, went to the county seat of Dunklin county and examined the record and files in the ejectment action and then discovered the form of the judgment which had been rendered in that action, and returning to St. Louis advised Mr. Harvey that in his opinion that judgment was void.

This is practically all the material evidence in the case.

At the conclusion of the trial, which was before the court, a jury having been waived, the court, at the instance of plaintiff, gave three declarations of law.

It also gave three declarations of law at the instance of the defendant.

We do not think it necessary to set out any of these here, but shall hereafter set out the substance of the third declaration given at the instance of plaintiff, upon which defendant particularly assigns error.

Defendant also asked a declaration of law to the effect that if the court, sitting as a jury, found from the evidence that at the time plaintiff delivered possession of the property described in the deed from defendant to plaintiff and her husband, to the Haynes heirs, that the Haynes heirs were not the owners of a superior or paramount title, the plaintiff cannot recover.

Defendant further asked the court to declare as a matter of law that under the evidence in the case, the verdict and judgment should be for defendant. These were refused.

Defendant objected and excepted to the refusal of these declarations and to the giving of those asked by plaintiff.

The court found for plaintiff and entered up a judgment in her favor in the sum of \$400, with interest from January 3rd, 1908, amounting to \$238.40, an aggregate of \$638.40. From this the defendant, his motion for a new trial overruled, duly appealed.

Learned counsel for appellant assign four grounds why this judgment should be reversed and judgment be here entered for defendant.

First, that this being a suit for breach of covenant of warranty and plaintiff having been put in possession by defendant, she could not voluntarily yield up the possession to the detriment of the defendant without legal claim or demand therefor.

Second, the judgment in the action in ejectment being void, no right of any character could be based thereon; that the sheriff

himself, who had made the demand of possession of plaintiff, was a trespasser if he at the time had an execution or writ of restitution upon the void judgment.

Third, that it devolved upon plaintiff to show an ouster for possession of the property turned over to her by defendant; that this is a prerequisite for the right to sue for breach of the covenant of warranty unless the owner and holder of paramount title has made demand for possession of the property. In such case proof of ownership at the time of the party to whom possession was delivered is incumbent upon the grantee.

Fourth, that defendant is not estopped to deny the title of parties who executed the deed of trust to him after sale and purchase under the deed of trust, and that this being true there is a total failure of proof as to paramount title in the parties to whom the possession was given; there is no proof that they ever had any title to the property; there is no proof that they have title to the property to-day; there is no proof that they are the same parties who claimed the property at the time the deed of trust was executed.

[1] We may remark, before considering these assignments, that it is rightly conceded that the deed of trust from the guardian and curator of the Haynes children was absolutely void. The probate courts of our state have no power to authorize the sale or incumbrance of the property of minor wards except for the education, support and maintenance of the minor or for investment. So our Supreme Court held in *Capen v. Garrison*, 193 Mo. 335, loc. cit. 348 et seq., 92 S. W. 368, 5 L. R. A. (N. S.) 838, and so our court held in *Leet v. Gratz*, 92 Mo. App. 422, loc. cit. 436, and following.

[2, 3] Notwithstanding that, all the title which the defendant here had to this lot, so far as appears, came through this deed, and that title was that of the Haynes heirs, acting or assuming to act through their guardian and curator. So they stood as grantors of defendant: he acquired all the title he had through a purchase at a sale under the deed of trust made by the trustee. With this fact in evidence the court at the instance of plaintiff gave the third declaration of law in which it declared that

"If the parties from whom defendant derived title or claimed to derive title * * * are the same parties as those who demanded possession and to whom possession was given by plaintiff of the premises in question, then defendant is estopped to deny that they (were) the holders of the paramount title in the absence of evidence tending to show valid conveyance by these parties of their title since the date of the deed under which the defendant claimed or claims title."

We are referred to no case that precisely covers this. It is true that in *Cutter v. Waddingham*, 33 Mo. 269, loc. cit. 282, our Supreme Court held

"That a vendee holding by deed, holds adversely to his vendor, and is not estopped to deny his vendor's title."

The cases referred to in the *Cutter Case* as settling this in our state are *Macklot v. Dubreuil*, 9 Mo. 477, 43 Am. Dec. 550; *Joeckel v. Easton*, 11 Mo. 118, 47 Am. Dec. 142; *Landes et al. v. Perkins*, 12 Mo. 238; and *Blair v. Smith*, 16 Mo. 273. In every one of these, as well as in *Cutter v. Waddingham*, supra, the vendee either relied upon adverse possession, or showed a title superior to that of his vendor. That did not occur here. This defendant showed no outstanding title to defeat that of his grantors. That those grantors were the same persons to whom the plaintiff here, through the sheriff, surrendered possession, is not disputed: they were the Haynes heirs. Identity of name, in the absence of proof to the contrary, is identity of person.

In *Steele v. Culver*, 158 Mo. 136, loc. cit. 138, 59 S. W. 67, it is said that

"It requires no citation of authority to show that a man cannot question a title given by himself or hold possession of the land in the face of his own deed."

In *State Bank of West Union v. Keeney*, 134 Mo. App. 74, loc. cit. 79, 114 S. W. 553, 555, it is said quoting from *Adams v. Wilder*, 107 Mass. 123:

"A vendor is estopped from setting up title in a third party, where the assertion of such title is equivalent to the admission of the breach on his part of an implied warranty of title. * * * In a contest between himself and his vendee, he should not now be heard to say that he had no title at the date of the sale, although at that date he asserted to his vendee that he had a good title."

We see no error in this third declaration.

[4] A judgment in ejectment against the terre tenant when the covenantor in the deed is made party to the suit is to be received in evidence as concluding the question of paramount title. It is competent for that purpose.

[5] On the other hand, when no such judgment is given, the covenantee whose title has failed may nevertheless recover for the breach from the covenantor by showing a surrender to a paramount title. As we shall hereafter see, we think that in this case there was enough shown to disclose that plaintiff surrendered to a paramount title and that the judgment may be irregular is unimportant. In other words, plaintiff's right of recovery is sufficiently made to appear by showing that Harvey's title was derived from the Haynes heirs through the void proceeding in the probate court; hence it follows that he is estopped from denying in this suit by his grantee against him for failure of title the validity of the title of his immediate grantor. Harvey cannot dispute that the title he tried to convey to this plaintiff is good; that that is the paramount and the only title, that title under a void proceeding in the probate court.

[6, 7] But it is said that plaintiff here has failed to show ouster of her possession of the property. This on the ground that any execution or writ of restitution which may

have been in the hands of the sheriff when he demanded possession was void, as no valid writ could issue on what is claimed to be a void judgment rendered in the action in ejectment.

The judgment in that action in which the Haynes heirs were plaintiffs and this plaintiff defendant, after the title of the cause, and setting out that the parties appeared by their respective attorneys and announced themselves ready for trial, waiving a jury, recites that the evidence being produced, the court finds that defendant (plaintiff here) is indebted to the plaintiffs (the Haynes heirs) "in the sum of two hundred sixteen dollars (\$216), month's rent and profits to the amount of \$600 and possession," and it proceeds to adjudge that

"Plaintiffs have and recover of and from the defendant the sum of two hundred sixteen dollars (\$216), month's rent and profits \$600 and possession and the cost of the proceeding and execution issue therefor."

No lot is described of which possession is awarded. What form of execution issued under this judgment is not in evidence. Concededly this judgment would not, in its shape as entered, sustain an order of restitution for the lot involved, or for any lot, but we do not think it is void: it could have been amended. *Howell v. Sherwood*, 242 Mo. 513, loc. cit. 546, 147 S. W. 810; *Id.*, 213 Mo. 565, 112 S. W. 50. Notwithstanding this form of judgment, the sheriff of the county, purporting to have in his hands an execution issued in the cause, and in law acting for the plaintiffs in the execution, the Haynes heirs, demanded the possession of the property, and the plaintiff here turned over that possession to him, presumably for the Haynes heirs, who thereupon entered into possession and so held possession until they subsequently sold it to a third party. Beyond doubt this plaintiff surrendered possession under the belief that she was doing so in compliance of the judgment of the court in the action of ejectment. She was a party to it; she knew that it had gone against her and that the Haynes heirs had prevailed, and when the sheriff demanded possession ostensibly under a writ issued in that case, ignorant of the facts, she surrendered possession. Under this state of facts we think that this plaintiff was authorized and warranted in yielding possession to the sheriff as for the Haynes heirs as lawfully entitled to possession, and that it sufficiently appears that at that time the Haynes heirs held the paramount title.

Mrs. Eaker had, so far as the evidence here discloses, never employed any attorney to defend that action. The attorneys who did defend it were employed by Mr. Harvey. It does not appear that those attorneys gave her any notice of any defect in the judgment; she was notified by the sheriff, with the execution in his hand, that judgment had gone against her. That judgment, however informal, certainly established the fact that the defense to the action of ejectment was

unavailing and that the Haynes heirs had prevailed. All in issue there, outside of monthly rents and damages, was the right of the Haynes heirs as holders of a title paramount to that which Mrs. Eaker held under Mr. Harvey, to the right of possession. The error in entry of the judgment, a misprision of the clerk, surely ought not to foreclose the claim of Mrs. Eaker to the protection of the judgment. She had every reason to believe that it was a judgment, the effect of which was to dispossess her. There is no suggestion that the attorneys in that action, and who were those employed by Mr. Harvey, ever notified her that the judgment was defective and did not warrant her eviction. It is doubtful whether they knew it themselves, or whether any one knew it until Mr. Williams, acting for Mr. Harvey and himself, discovered its defect, and that was after Mrs. Eaker had surrendered possession under, as she supposed, and had every reason to suppose, a judgment of the court ousting her.

It was the undoubted duty of the attorneys in the case employed by and in fact representing Mr. Harvey, to have watched the entry of that judgment and if not one authorizing surrender of possession, it was their duty to have notified Mrs. Eaker of the defect. They gave her no such notice. It is a question which we, however, do not decide, whether, even with that defect in the entry of the judgment, Mrs. Eaker could not have waived it. She knew what was in issue in the action of ejectment. The sheriff coming to her with what purported to be an execution dispossessing her, was notice to her of how the case had ended; that is, in favor of the Haynes heirs and against her, and to avoid further expense and litigation, it may be that she could waive the defect. Parties are not bound to make useless defenses. It is sufficient to say that acting on the belief of the sufficiency of the judgment, she did surrender possession, and to those then holding paramount title.

Under such a state of facts it would be highly unjust to hold that the surrender of possession by Mrs. Eaker was voluntary. Such a holding would be so technical as to lose sight of the very right of a case and sacrifice that right to a quibble, relegating us to the days when courts were more concerned with forms than substance. Our statutes, Revised Statutes 1909, § 2082, forbids this, and our courts are always, in a proper case, glad to obey it.

We see no error in the action of the court in giving the two other declarations of law asked by plaintiff, nor in its refusal to give those asked by defendant; it gave three which covered the view of defendant but found against him on the facts.

Our conclusion on the case is, that the judgment of the trial court is for the right party. That judgment is affirmed.

NORTONI and ALLEN, JJ., concur.

RIVERS v. NORMAN. (No. 14090.)

(St. Louis Court of Appeals. Missouri. Nov. 2, 1915.)

1. PLEADING ⚡433—PETITION—AIDER BY VERDICT.

In an action for malicious prosecution of a civil action, the petition averred that defendant conveyed to plaintiff by warranty deed, duly executed and delivered, certain real estate; that defendant thereafter, with evil and malicious intent and without cause, to injure, cheat, and defraud plaintiff of the property, instituted against him a civil action secretly to deprive him of his title in the realty deeded to him by defendant; that in connection with the action defendant filed with the recorder of deeds a notice of lis pendens depriving plaintiff of the power to transfer good title to the realty until the action should be determined and the title adjudged to be in the plaintiff; and that, because of the institution of the suit, plaintiff was forced to defend his title to the land. Defendant contended that the petition was fatally defective as failing to aver that plaintiff was the owner of the land or had some interest therein at the time of the alleged institution of suit against him by defendant. *Held*, that such contention was unsound, since the petition clearly proceeded upon the theory that plaintiff was the owner of the land at the time, which appeared by reasonable and fair implication and intentment, though not directly alleged, while where a petition is assailed after verdict it is to be liberally construed and given the benefit of every inference fairly and reasonably to be drawn from the facts pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. ⚡433; Malicious Prosecution, Cent. Dig. § 111.]

2. PLEADING ⚡433—WAIVER OF DEFECT BY ANSWER—AIDER BY VERDICT.

Where a petition utterly fails to state facts, either directly or inferentially, sufficient to constitute a cause of action, it is open to attack in the appellate court, since such a pleading is insufficient to give the trial court jurisdiction, and the defect is not waived by answer nor cured by verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. ⚡433; Malicious Prosecution, Cent. Dig. § 111.]

3. MALICIOUS PROSECUTION ⚡68—ACTION—PUNITIVE DAMAGES.

Punitive damages are allowable in a suit for the malicious prosecution of a civil action.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 157; Dec. Dig. ⚡68.]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

"Not to be officially published."

Action by Julian H. Rivers against William W. Norman. Judgment for plaintiff, and defendant appeals. Affirmed.

J. L. Fort, of Dexter, and Hope, Seibert & Reeder, of St. Louis, for appellant. Cleveland A. Newton and Rippey & Kingsland, all of St. Louis, for respondent.

ALIEN, J. This is an action whereby plaintiff seeks to recover damages, compensatory and punitive, for the alleged malicious institution and prosecution of a civil action against him by the defendant. There was a verdict below for plaintiff for \$1,100 actual damages and \$1,000 punitive damages, and

from a judgment entered upon such verdict the defendant appealed. Appellant, however, has brought here only the record proper, and the appeal involves merely the sufficiency of the petition to sustain the verdict and judgment. The petition is as follows:

"Plaintiff states that on the 17th day of August, 1908, defendant granted, bargained and sold, conveyed and transferred, unto plaintiff, by warranty deed duly executed and delivered, certain lots, tracts, and parcels of land or real estate lying, being, and situate in Stoddard county, Missouri, and described as follows: The southwest quarter ($\frac{1}{4}$) of section thirty-five (35), township twenty-four (24), range twelve (12) east, containing one hundred and sixty (160) acres.

"Plaintiff states: That on the 3d day of January, 1910, defendant with evil and malicious intent and without cause, contriving and intending to injure, cheat, and defraud plaintiff, did institute against plaintiff in the circuit court of Stoddard county, Mo., a certain civil action, the purpose of which was secretly, surreptitiously, and without direct notice to deprive plaintiff of his title and interest in and to said land or real estate, deeded to him by defendant as aforesaid. That a petition was filed in said action in which defendant Norman (who was plaintiff in said action) stated that he was the owner of said land or real estate, but that plaintiff Rivers (who was defendant in said action) was claiming some right, title, or interest in and to said land or real estate, the nature of which was unknown to said defendant Norman, except that it was adverse to him, the said Norman. That in connection with said action said Norman filed with the recorder of deeds of Stoddard county, Mo., affecting said land or real estate, a notice of lis pendens, depriving plaintiff of the power to transfer with good title the said land or real estate until said action should be determined and the title to said land or real estate adjudged to be in the plaintiff herein. That defendant Norman prayed the court to quiet the title to said land or real estate and to adjudge and decree the title to be vested in him, and not in plaintiff, and for such other relief, orders, and decrees against plaintiff herein as to the court should seem meet and just, and that the costs in said action be adjudged against said Rivers, the plaintiff herein. That in instituting and maintaining said action, and filing said notice of lis pendens, defendant evilly, maliciously and wickedly, wrongfully and illegally, abused the process of the court and damaged and wronged this plaintiff.

"Plaintiff states: That the said statements made in said petition were false, and were known so to be by defendant at the time said action was filed, and at the time said notice of lis pendens was filed, and all the time during the pendency of said action. That no ground existed for filing of said action or said notice of lis pendens, and that defendant had no probable cause to believe that any such ground existed, and that said action was instituted and said notice of lis pendens was filed by defendant willfully, wrongfully, and with evil and malicious intent. That no direct notice of the filing of said action, and no notice of the filing of said notice of lis pendens, was served upon plaintiff, but that defendant obtained only constructive service upon plaintiff by publication, although plaintiff was and still is a resident of this city and state.

"Plaintiff states: That he was forced to defend his title to said land or real estate, and that said action was, by order of court, finally dismissed on April 28, 1911, after plaintiff had discovered that said action had been brought and had entered his appearance to contest the same. That he was put to expense in the sum

of \$250 in defending said action, brought by defendant with evil, malicious, and wicked intent and without cause as aforesaid, and was damaged in the sum of \$1,000.

"Wherefore plaintiff prays judgment against defendant in the sum of \$1,250 actual damages and \$1,000 punitive or exemplary damages, and costs of this action."

[1] Appellant's contention is that the petition is fatally defective for the failure of the pleader to aver that plaintiff was the owner of the land in question, or had some interest therein, at the time of the alleged institution of the suit by defendant against plaintiff in the circuit court of Stoddard county. It is urged that such allegation of ownership on the part of plaintiff is essential to the statement of the cause of action attempted to be alleged, and that the defect is one going to the court's jurisdiction and which cannot be cured by verdict. But we regard appellant's contention unsound, for the reason that, while the petition does not in direct terms aver that plaintiff was the owner of the land at the time of the alleged institution by defendant of the said suit in Stoddard county, it does contain averments from which this may be readily inferred—averments, in fact, which appear to necessarily imply that plaintiff had title to the land at the time in question.

The petition alleges that on August 17, 1908, defendant sold the land to plaintiff, by warranty deed; that the defendant instituted a suit in Stoddard county, "the purpose of which was secretly, surreptitiously, and without direct notice to deprive plaintiff of his title and interest in and to said land or real estate, deeded to him by defendant as aforesaid." It is then alleged that, in connection with such action, defendant filed in the office of the recorder of deeds of Stoddard county a notice of lis pendens affecting such lands, "depriving plaintiff of the power to transfer with good title his said land until said action should be determined." It is further alleged that because of the institution of the suit in Stoddard county plaintiff "was forced to defend his title to said land." In other words, the petition clearly proceeds upon the theory that plaintiff was the owner of the land at the time of the institution of the action aforesaid by defendant; and while it does not allege this in direct, positive terms, it does so by reasonable and fair implication and intendment. The purpose of the suit instituted by defendant could not

have been to deprive plaintiff "of his title and interest in and to said land," as alleged, if he had no title thereto at the time; nor could the filing of a notice of lis pendens have deprived plaintiff of his power to transfer the land, "with good title," unless the title thereto were in plaintiff; nor could plaintiff have been required to defend his title to the land if he had none. Such allegations necessarily imply ownership of the land by plaintiff, and after verdict the petition should not be held to be fatally defective for want of a positive averment to this effect.

The rule is that where a petition, as here, is assailed after verdict, it is to be liberally construed in favor of the pleader, giving the latter the benefit of every inference which may be fairly and reasonably drawn from the facts pleaded. And it is to be held good against such attack if merely by reasonable intendment and fair implication it states a cause of action, though it may have been subject to attack below, at the proper time, for imperfections which the verdict served to cure. See *Thomasson v. Insurance Co.*, 217 Mo. 485, 116 S. W. 1092; *Nolan v. Railroad*, 250 Mo. 614, 615, 157 S. W. 637; *Munchow v. Munchow*, 96 Mo. App. 553, 70 S. W. 386; *Finer v. Nichols*, 175 Mo. App. 525, 157 S. W. 1023.

[2] It is true that our courts hold that, where a petition utterly fails to either directly or inferentially state facts sufficient to constitute a cause of action, it is open to attack even in the appellate court. In such case the pleading is regarded as insufficient to give the trial court jurisdiction over the subject-matter of the action, and the defect is held to be one which is not waived by answer nor cured by verdict. But this rule has no application to the case in hand. If, as here, a material matter is not expressly averred in the petition, but is necessarily implied by what is stated, the defect is cured by the verdict.

[3] The point made by appellant that punitive damages are not allowable in a case of this character is clearly devoid of merit. The amount of the verdict is a matter not before us, since the evidence has not been brought up.

The judgment should be affirmed, and it is so ordered.

REYNOLDS, P. J., and NORTON, J., concur.

COPELAND v. PYRTLE. (No. 1538.)

(Springfield Court of Appeals. Missouri. Nov. 18, 1915.)

HIGHWAYS — 68 — ENCROACHMENT — EVIDENCE — ESTABLISHMENT.

In an action for encroachment upon a public highway by the construction of a fence across the road, evidence held not sufficient to show such an expenditure of public money or labor as to vest title to the road in the county, under Rev. St. 1909, § 10446, providing that all roads opened by order of the county court that have been used as a public highway by the traveling public for ten years or more and roads that have been used for such period and upon which public money or labor has been expended shall be deemed legally established roads.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 226-233; Dec. Dig. 68.]

Error to Circuit Court, Shannon County; W. N. Evans, Judge.

Suit by A. D. Copeland, Road Overseer District No. 2, Pike Creek Township, Shannon County, Mo., against W. W. Pyrtle. Decree for complainant, and defendant brings error. Reversed.

S. A. Cunningham and G. S. Sizemore, both of Eminence, and S. L. Clark, of Van Buren, for plaintiff in error.

ROBERTSON, P. J. The petition alleges the encroachment of the defendant with his fence on the Winona, Low Wassie, and Van Buren public road, in Shannon county, "at and near the line between the north half of the southwest quarter and the south half of the southwest quarter of section 24," township 27, range 3. It is alleged that this road was established about May 1, 1914, and that for more than ten years prior thereto said road had been worked annually, and public money spent thereon to keep the same in repair. The prayer of the petition is that defendant be ejected, that the nuisance be abated, and that defendant be forever enjoined from having and maintaining said fence across said road. The defendant owns the disputed portion of the land inclosed within his fence, unless the title thereto is vested in the county.

At the trial the testimony disclosed that the portion of the road upon which defendant's fence encroached had been used by the public as a highway since 1902, but there is no evidence of such expenditure of public money or labor thereon prior to 1906, as required to vest title in the county under section 10446, R. S. 1909; section 9472 and 9694, R. S. 1899. The first witness for the plaintiff (Coker) testified that he did some work for the railroad in 1902, putting in a crossing for this road, and fencing up a portion of the railroad right of way, which resulted in a change of the travel from the old public road running in a southerly direction, as then located, to an easterly direction and to its present location. Another witness (Polk) testified that he helped build the railroad crossing. This witness testified that he had furnished a man to work the road, but could not say that the road had been worked; neither did he say that he furnished this man to work on the particular portion of the road in controversy. A witness by the name of Allen, who stated that he had always been blind, testified that, "to the best of his knowledge, the road had been worked since 1902." Witness Sartin could not say whether that part of the road in question was worked in 1903 and 1904. J. E. Norton, road overseer in 1902, testified that he worked to this disputed portion of the road, and quit by order of the commissioner. Several witnesses testified positively in behalf of defendant that no work was done on the disputed portion of the road prior to 1906.

The trial court found that the defendant willfully obstructed the road by building a fence across the same and entered a decree ordering the sheriff of the county to go with the road overseer of said district and remove such obstruction, and also forever enjoin and restrain defendant from further obstructing said road.

The judgment of the trial court is reversed.

FARRINGTON and STURGIS, JJ., concur.

— For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

STOUT v. MISSOURI FIDELITY & CASUALTY CO. (No. 14108.)

(St. Louis Court of Appeals. Missouri. Nov. 2, 1915. Rehearing Denied Nov. 23, 1915.)

1. INSURANCE —146—CONSTRUCTION IN FAVOR OF INSURED.

All doubts appearing on the face of the contract should be resolved in favor of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. —146.]

2. CONTRACTS —317—CONSTRUCTION AGAINST FORFEITURE.

Forfeitures are not favored, and are to be avoided, rather than created by construction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1508-1527; Dec. Dig. —317.]

3. INSURANCE —349—ACCIDENT INSURANCE —CONSTRUCTION—TERM.

Insured took out an accident policy on June 4, 1912, providing that after payment of premium it should take effect at noon of that date, and continue in force only so long as the premiums were paid in advance, and that insured would pay a monthly premium of \$2.40, the next premium being payable July 1, 1912, and that the policy, unless renewed by the payment of the premiums in advance, would expire July 1, 1912, at 12 noon. Insured paid the second premium on July 1, the third on August 1, and, the fourth premium not having paid, was accidentally killed September 4, 1912, at 12:30 a. m. *Held*, that each premium purchased one month's insurance, so that the last premium continued the policy in force until September 4th at noon, and the beneficiary might recover.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 891, 895-902, 913; Dec. Dig. —349.]

Appeal from St. Louis Circuit Court; William T. Jones, Judge.

"Not to be officially published."

Action by Cora A. Stout against the Missouri Fidelity & Casualty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

R. M. Sheppard, of Joplin, and John P. McCammon, of St. Louis, for appellant. Rodgers & Koerner, of St. Louis, for respondent.

NORTONI, J. This is a suit on a policy of accident insurance. Plaintiff recovered, and defendant prosecutes the appeal. Plaintiff is the mother of the insured, Edwin A. Stout, who came to his death by accidental means through the overturning of an automobile about 12:30 o'clock a. m. September 4, 1912.

But one question is for consideration here, and that relates to a construction of the policy. It is asserted on the part of defendant it had lapsed by its terms at the time of the accident, while plaintiff insists to the contrary. The policy is in amount of \$1,700. It was issued to Edwin A. Stout June 4, 1912, and by its terms made payable to plaintiff, his mother, in event of the accidental death of the insured. The policy stipulates for the payment of a monthly premium of \$2.40 per

month. It stipulates, too, that it shall take effect at 12 o'clock noon on the date of its delivery to the insured. Such delivery, as above stated, was made to the insured on June 4, 1912. Another provision is to the effect that it shall continue in force only so long as the premiums required are paid when due in advance. It provides, too, that it may be consecutively renewed from term to term, subject to its conditions by the payment of the premiums in advance, but, if not so renewed, will expire on July 1, 1912, at 12 o'clock noon. The first premium was paid on June 4th. The second premium was paid on July 1st. The third premium was paid on August 1st. But the fourth premium of \$2.40 was not paid at the time the insured came to his death by the accidental overturning of an automobile, which as above stated, was about 12:30 o'clock on the morning of September 4, 1912. If the policy is to be construed as taking effect on the 4th day of June at noon—i. e., on the day of its issue—as it stipulates, and each renewal taken is to continue it for 30 days, then, of course, it was in force at 12:30 o'clock on the morning of September 4th when the insured came to his death, and would continue in force until 12 o'clock noon of that day. On the other hand, if the policy lapsed on the 1st day of September, 1912, for the nonpayment of premium on that day, of course, no recovery may be had thereon. The several provisions of the policy which are relevant here are as follows:

The provision as to when the policy should go into effect is as follows:

"*When Effective.* (15) This policy, providing the policy fee has been paid to the company, or its duly authorized agent, shall take effect as to 'such injury' at noon, standard time, of the place of residence of the insured, of the date hereof, and shall continue in force only so long as the premiums required hereon are paid when due in advance (without notice) to the company at its home office in Springfield, Missouri, or to the person designated in writing by the company to receive them."

The amount of the premium is stipulated as follows:

"I further agree to pay to the company, or to such other person as it may direct, the monthly premium of two and 40/100 dollars, in advance, without notice."

Concerning the payment of future premiums, the schedule of warranties contains the following stipulation:

"This policy may be consecutively renewed from term to term subject to all its conditions, by the payment of the premium in advance, but, if not so renewed, will expire on July 1, 1912, at 12 o'clock noon (standard time) at place where countersigned."

Indorsed on the back of the policy is the following provision:

"Notice. Premium is \$2.40 per month. Payable in advance without notice. The next premium on this policy will be due and payable on or before the 1st day of July, A. D. 1912."

The italics are our own.

[1, 2] From these it appears to be entirely clear that the insured agreed to pay a monthly premium of \$2.40 per month, and that such payments were to become due and payable on the 1st day of each month, but, if the provisions of the policy are at all doubtful, they are to be construed so as to effectuate the insurance and not to defeat it. Indeed, the rule of construction which obtains in insurance law is to the effect that all doubts appearing on the face of the contract shall be resolved in favor of the insured. And forfeitures are not favored; in other words, a forfeiture is to be avoided, rather than created by construction. See *Stix v. Travelers' Indemnity Co.*, etc., 175 Mo. App. 171, 157 S. W. 870; *Mathews v. Modern Woodmen of America*, 236 Mo. 326, 139 S. W. 151, Ann. Cas. 1912D, 483.

[3] Here it appears to be clear enough that the insured negotiated the indemnity vouchsafed in this policy on the 4th day of June, 1912, to be paid for monthly, in consideration of which monthly payments of premium he was to have one month's insurance. It is true the policy provides for consecutive renewals, and stipulates that, if the second premium is not paid in advance, it will expire on July 1, 1912, at 12 o'clock noon. It provides, too, that the policy shall continue in force only so long as the premiums required hereon are paid when due in advance. But it appears the premium in August was promptly paid. The policy was not issued

nor delivered to the insured until the 4th day of June. It took effect on the 4th day of June at noon. He was entitled to one month's insurance because he paid on that day one month's premium. It is true his next premium was due on the 1st day of July; the next on the 1st day of August; and the next on the 1st day of September. But, though such be true, the premium paid on the 4th day of June purchased one month's insurance—i. e., insurance until noon on the 4th day of July—for the policy designates it a monthly premium. So, too, the premium paid on the 1st of July purchased one month's insurance, or continued the policy in force from July 4th to August 4th at noon, and the premium paid August 1st continued the policy in force from August 4th until September 4th at noon; otherwise the payment of one month's premium would purchase for the insured but 26 days' insurance. The courts frown upon a construction of ambiguous terms in insurance contracts which would tend to defeat the very object for which the insurance was negotiated. Therefore the words "monthly premium of \$2.40" must be given effect. The case of *Halsey v. American Cent. Life Ins. Co.*, 258 Mo. 659, 167 S. W. 951, is in point and controls the construction of the contract in judgment here.

The judgment should be affirmed.

It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

**HAYLEY BEINE & CO., Limited, v.
THWEATT. (No. 206.)**

(Supreme Court of Arkansas. Nov. 1, 1915.)

HOESTEAD — 162—ABANDONMENT—INTENT.

Where, after death of his wife, the owner of a homestead continued to live in the house with his minor son, part of the time as sole occupant, part of the time after he had rented the house, reserving a room in which to keep his furniture and for occupancy of himself and son, until he got a job on a boat requiring his presence at night, and later work in the country, at all times reserving the room and keeping his furniture there, intending to return and live there, the son being still in his care, but staying with his married sister when the father made boat trips, but with the latter on his return, there was no abandonment of his homestead by the father.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 315-319; Dec. Dig. § 162.]

Appeal from Circuit Court, Prairie County; Thos. O. Trimble, Judge.

Action by Hayley Beine & Co., Limited, against A. Thweatt. There was judgment for plaintiff, upon which an execution was issued. Defendant filed a schedule claiming personal property as exempt and certain realty as a homestead. Plaintiff filed exceptions to the schedule, which were overruled, and a supersedeas issued. Plaintiff's motion to quash was overruled on appeal to the circuit court, and judgment rendered against him, from which he appeals. Affirmed.

This appeal involves the question of abandonment of a homestead, the appellant in October, 1913, recovered judgment against A. Thweatt, the appellee, upon which an execution was issued in May, 1914. Appellee in July, 1914, filed a schedule, claiming his personal property exempt and two acres of ground, with the residence and improvements thereon, situated about a quarter of a mile west of Des Arc, as a homestead. Appellant filed exceptions to the schedules, denying that appellee was at the head of the family, his right to claim the land as a homestead, and alleged that he had abandoned it. The exceptions were overruled, and a supersedeas issued; and upon appeal to the circuit court, appellant's motion to quash was overruled, and judgment rendered against him, from which this appeal is prosecuted.

Thomas & Lee, of Clarendon, for appellant. Thweatt & Thweatt, of De Valls Bluff, for appellee.

KIRBY, J. (after stating the facts as above). Appellee lived in his home on the land with his wife and children until the death of his wife in 1911. His daughter was then sent away to school, and he had a family to live in the home with him and his son who was 16 years old. Upon the return of his daughter in July, 1912, they continued to live in the house until her marriage in September, and he and his son until January, 1913, when appellee rented the house as

a tenant, reserving one room in which to keep his furniture and for occupancy of himself and of his son until August, 1913, when he got a job on a boat that required his presence at night and later work in the country at another place near, but all the time reserved the room and kept his furniture in the house, intending to return and live there, and testified he had no intention whatever of abandoning his homestead. The son is still in his care, but stays with his sister when the father is on the boat making trips, but with the father upon his return.

The abandonment of a homestead is virtually a question of intent, to be determined from the facts and circumstances attendant upon each case. In *Stewart v. Pritchard*, 101 Ark. 103, 141 S. W. 505, 37 L. R. A. (N. S.) 807, the court said:

"The mere removal of the owner with his family from the homestead will not constitute such an abandonment. It is well settled that a temporary absence from the land, where there is a fixed and abiding intent to return to it, will not occasion an abandonment of it as a homestead. It has been frequently held that if a removal from a homestead is caused by necessity, or for business purposes, or for any other reason which requires the temporary absence of the owner, who at the time has and retains a fixed and unqualified intention to preserve it as a homestead and to return to it, this will not result in an abandonment of the land as a homestead. *Tumlinson v. Swinney*, 22 Ark. 400 [76 Am. Dec. 432]; *Euper v. Alkire*, 37 Ark. 283; *Brown v. Watson*, 41 Ark. 309; *Gates v. Steele*, 48 Ark. 539 [4 S. W. 53]; *Robinson v. Swearingen*, 55 Ark. 55 [17 S. W. 385]; *Wilks v. Vaughan*, 73 Ark. 174 [83 S. W. 913]."

There was no long-protracted absence of the debtor from his homestead shown, nor that he had acquired another home, and such facts, although they tend to show an abandonment, do not necessarily constitute one. The testimony at most shows but a temporary removal and change of residence by the father in seeking employment for the support of himself and son dependent upon him, without any intention of abandonment, and with a fixed and definite purpose of returning to and preserving the home, and such absence and removal was not such an abandonment as forfeited appellee's homestead right.

The judgment is affirmed.

COUCH v. STARKS. (No. 205.)

(Supreme Court of Arkansas. Nov. 1, 1915.)

1. REPLEVIN — 72—VERDICT—SUFFICIENCY OF EVIDENCE.

Evidence in replevin for mules held sufficient to sustain a verdict for defendant.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 292-295; Dec. Dig. § 72.]

2. REPLEVIN — 89—ISSUES—DEFENDANT'S LIABILITY AS INDORSER.

In replevin for mules, where it appeared that they were sold by plaintiff to one who gave his note for the purchase money, in which title was reserved until payment thereof, and that on the buyer's own failure to pay he procured defendant to indorse a note, the question of de-

defendant's liability as indorser of the note could not be determined.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 257-279; Dec. Dig. ¶69.]

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by W. J. Couch against V. Starks. Judgment for defendant, and plaintiff appeals. Affirmed.

A. J. Newman, of Little Rock, for appellant. Jones & Owens, of Little Rock, for appellee.

KIRBY, J. This case was reversed on a former appeal because Starks was denied a trial by a jury. *Stark v. Couch*, 109 Ark. 534, 160 S. W. 853.

Upon the trial anew there was testimony tending to show that the property in controversy had been in the possession and under the control of the appellee, Starks. The mules were sold by appellant to one W. M. Hutchinson, who gave his note for the purchase money in which the title was expressly retained until the payment of the note. Upon Hutchinson's failure to pay the note, Couch demanded the return of the mules and Hutchinson procured appellee, V. Starks, to indorse the note, and appellant states that he at that time delivered the mules to Starks and that he would not have parted with the possession of them, but for his indorsement of the note. He also stated that the appellee upon the demand of payment of the note asked for further time until he could sell some cattle and procure the money with which to pay it. Appellee admitted signing the note as indorser, but denied that the mules were ever delivered to him, or that he had ever had them in his possession. Other witnesses testified supporting his statement that he had never had them in his possession, and there was some testimony tending to show that they had been in his possession; but the jury found in his favor upon this point.

Appellant has no ground for complaint of the instructions given by the court, which were more favorable than he was entitled to. This is an action of replevin, in which the question of the liability of Starks as the indorser upon the Hutchinson note could not be determined.

There was no error committed in the trial, and the evidence is sufficient to sustain the verdict.

The judgment is affirmed.

USSERY v. USSERY et al. (No. 209.)

(Supreme Court of Arkansas. Nov. 1, 1915.)

APPEAL AND ERROR ¶766—RECORD ON APPEAL—BRIEFS AND ABSTRACTS.

Where a brief on appeal fails to abstract the complaint sufficiently to show whether a demurrer was properly sustained or not, under Supreme Court rule 9, requiring appellant to file

an abstract or abridgment of the transcript, setting forth the material parts of the pleadings upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions for review, the decree of the court below, disposing of the case on demurrer, will be affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3101, 3126; Dec. Dig. ¶766.]

Appeal from Garland Chancery Court; Jethro P. Henderson, Chancellor.

Suit by Stella Ussery against Jim Ussery and others. Decree for defendants, and plaintiff appeals. Affirmed.

See, also, 113 Ark. 36, 166 S. W. 946.

Davies & Davies, of Hot Springs, for appellant. A. Curl, of Hot Springs, for appellees.

SMITH, J. Appellant states that she was the plaintiff in the complaint filed in the chancery court, which she denominated a "bill of review." It is stated in the brief that:

"And upon the presentation of plaintiff's bill of review the court finds as matters of law that the same does not contain facts sufficient to constitute a cause of action against either of the defendants, and as to the defendant or intervenor A. Curl it shows on its face that there is no cause of action against him."

It is not entirely clear from this recital of the court's finding whether the cause was disposed of on demurrer in the court below or not, as the brief does not contain an abstract of any evidence. Assuming, however, that the case was disposed of on demurrer, the fact remains that the complaint is not sufficiently abstracted for us to determine whether this action was proper or not. Rule 9 of this court requires that the appellant shall file an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts, and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all the questions presented to this court for decision. Appellant's brief does not meet this requirement. *Foster v. Luck*, 112 Ark. 118, 165 S. W. 267; *Reisinger v. Johnson*, 110 Ark. 7, 160 S. W. 893; *Queen of Ark. Ins. Co. v. Royal*, 102 Ark. 96, 143 S. W. 596; *Springfield v. Steen*, 99 Ark. 242, 138 S. W. 453; *Files v. Tebbs*, 101 Ark. 207, 142 S. W. 159.

It follows, therefore, that the decree of the court below must be affirmed.

BOTTOMS et al. v. BORAH. (No. 199.)

(Supreme Court of Arkansas. Nov. 1, 1915.)

1. COURTS ¶116—RECORDS—AMENDMENT NUNC PRO TUNC—ORAL TESTIMONY.

A court may amend its record nunc pro tunc at a subsequent term upon oral testimony alone, but in such case the evidence must be clear and convincing.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 369, 371-373; Dec. Dig. ¶116.]

2. DRAINS \Leftrightarrow 82—REVIEW—NUNC PRO TUNC ORDER—SUFFICIENCY OF EVIDENCE.

On evidence in a proceeding for a nunc pro tunc order with reference to the assessments of benefits for the construction of a ditch, made more than eight years before, *held*, that the court could not say that the trial court erred in refusing to treat it as establishing with sufficient certainty the fact that the orders had been made as claimed by the petitioners.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 81, 83-87; Dec. Dig. \Leftrightarrow 82.]

8. COURTS \Leftrightarrow 184—COUNTY COURT—JURISDICTION.

A county court could only make a valid order in term time at the county seat, so that no order could be made at another point in the county where the court was not legally in session.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 409; Dec. Dig. \Leftrightarrow 184.]

Appeal from Circuit Court, Lawrence County; Jno. W. Meeks, Judge.

Proceeding by C. L. Bottoms and others against J. J. Borah. Judgment for defendant in county court was affirmed by the circuit court, and plaintiffs appeal. Affirmed.

H. L. Ponder, of Walnut Ridge, for appellants. W. A. Cunningham, of Walnut Ridge, and Horace Sloan, of Jonesboro, for appellees.

McCULLOCH, O. J. The present proceedings originated in the county court of Lawrence county on petitions of the appellants to that court to make orders amending former orders nunc pro tunc, with reference to the assessment of benefits on the lands of appellants for the construction of a ditch. The county court, on the hearing of the petitions, refused to make the orders, as did the circuit court on appeal, and an appeal has been duly prosecuted to this court.

The case was heard by the circuit court upon oral testimony. It appears that in the year 1906 a certain drainage district was formed in Lawrence county for the construction of what is known as the Borah ditch. Petitioners, Bottoms, Less, and Richardson, owned lands found to be affected by the ditch and which were duly assessed by the viewers to pay for the improvement. After the assessments were made and report filed with the county court, notice was given for a hearing at the October term of the court, and it is alleged in the petitions that at that time the petitioners appeared and that the court amended the report by striking out the lands of appellant Bottoms altogether and by reducing the assessments on the lands of the appellants Less and Richardson. Richardson has since that time acquired the title to the Less lands. It is claimed that the county judge gave a hearing at the courthouse at Powhatan, the county seat of Lawrence county, and there made an order that the lands of Bottoms be stricken out and relieved altogether of the assessment; that on a subsequent day there was a hearing at Walnut Ridge, for convenience of the parties,

concerning the Less and Richardson lands; and that after the hearing was ended, and after the return of the county judge to Powhatan, he announced the judgment and order of the court reducing the assessments on those lands. It is alleged that the orders were made on October 3, 1906, and the petitions of appellants were filed on July 6, 1914—a lapse of time of nearly eight years.

We have a finding of the trial judge upon oral testimony to the effect that the orders changing the assessments on the lands of appellants had never been made, and we feel bound by that finding of the circuit judge unless we conclude that there is no testimony to support it.

[1] It is the established rule in this state that a court may amend its record nunc pro tunc at a subsequent term upon oral testimony alone. *Bobo v. State*, 40 Ark. 224.

[2, 3] After a careful consideration of the evidence in this case, our conclusion is that there is enough conflict and doubt to prevent us from saying that the testimony is undisputed. Appellants, it is true, introduced a number of witnesses whose testimony tended very strongly to show that the orders excluding the lands of Bottoms and reducing the assessments on the other lands had been made. The county judge who served in 1906 was put on the stand as a witness, and he stated that he had a distinct recollection that he had made an order excluding the Bottoms lands from the assessments, and his testimony also tended to establish the contention that the assessments on the Less and Richardson lands had been reduced, though his testimony as to those lands is not quite as clear as that relating to the Bottoms lands. Attorneys who were present at the time the court is said to have passed upon those matters also testified, and their statements tend to support the contention that the orders were made. All of those gentlemen testified very candidly, and there is not the slightest ground to believe that either of them intended to misstate the facts within their recollection. But it must be remembered that this testimony was all given nearly eight years after the occurrence, and the testimony of each of the witnesses shows some obscurity as to the occurrences of that day. There is also some conflict in the testimony which shows that the witnesses were mistaken as to many of the details. The county judge stated that, according to his recollection, Mr. Bottoms came in without being represented by an attorney, and that he put him on the stand and examined him, and told him to go on home, that he would make the order excluding his lands from the assessment of benefits. He declares that he intended to, and did, announce the judgment of the court to that effect. His testimony is corroborated by that of Mr. Bottoms himself. Another witness who was present said that the county judge told Mr. Bottoms to go out with the

commissioners, who were present in court at the time, and see if they could not agree upon some solution of the matter, and that the parties came back in a little while and reported that they had decided to leave Bottoms' land out of the assessment, and that the court thereupon made an order accordingly. The same witness testified that this occurred with reference to the assessments on the Less and Richardson lands, but the testimony of the commissioners is to the effect that they made no such agreement, and that no order was made at that time either striking out the Bottoms lands or reducing the assessments on the Less and Richardson lands. Nor is it entirely clear, even from the testimony of appellant Bottoms himself, that the court actually made an order. He says that the county judge told him to go on home, that he would take the assessment off; but this statement does not make it clear that the court was pronouncing judgment in the matter, but merely promised to take some favorable action later. There is still more doubt whether or not the court took any action on the Less and Richardson assessments, for the testimony in that case was heard at Walnut Ridge, and it is only claimed that the order was made at some subsequent time. The testimony of the county judge shows that he intended at the hearing at Walnut Ridge to make an order reducing those assessments, but it is by no means clear that he ever pronounced the order when he got back to Powhatan and held the court there. Of course, no order could be made at Walnut Ridge, for the court was not legally in session there, and in order to show a valid order it must appear that the order was made in term time at Powhatan. *Belford v. State*, 98 Ark. 278, 131 S. W. 953. The county judge very frankly stated that, while he had intended to make an order when he got back to Powhatan, it was evident that he did not do so, or, at any rate, that it was not put on record.

There is also a conflict in the testimony of the witnesses as to the amount of reduction on the Less and Richardson lands, several of them agreeing that the assessments on the two tracts were to be reduced to an aggregate of \$300, while another witness stated that the assessment on one tract should be stricken off entirely. The testimony of that witness tended to show that the assessment on one tract was \$250, and on the other \$150, and that one of the assessments (which one it was not being specified in the testimony) was stricken out. Even if we should conclude that the evidence shows with sufficient certainty that an order was made, still it was not clear what the order was as to the amount of reduction.

The clerk of the court testified that he was present at the hearings and took down on a certain yellow sheet of paper the minutes of the findings of the court as announced, and

that he took that paper back to Powhatan with him and filed it, but that he had not been able to find it.

The records of the county court show that the assessments made by the viewers were approved and the proper allotments were made covering the cost of the ditch. There is not a thing on the record or among the files of the court to support the contention that any order was made with respect to the assessments on these lands other than the general order approving the report of the viewers. No exceptions to the report were filed by either of the appellants, and no docket entries made by the judge, and there is no memoranda of the clerk or judge showing that the report was changed with respect to these lands. The statute (section 1428, Kirby's Dig.) seems to provide that written exceptions should be filed, and it expressly provides that the person or persons making exceptions to the report shall file a bond to be approved by the court. Whether or not it is essential to the jurisdiction of the county court that the exceptions be made in writing and the bond filed we need not determine now; but, in testing the sufficiency of the evidence in the case, it is very important to consider that no writing at all was filed so as to leave on the record a trace of the proceedings which appellants now contend they inaugurated and prosecuted to a successful conclusion in having the assessments on their lands corrected. In this state of the proof, we are unwilling to say that the trial court erred in refusing to treat this testimony as establishing with sufficient certainty the fact that the orders had been made as contended for by appellants. In order to correct the record upon oral testimony alone, the evidence should be clear and convincing. *McDonald v. Watkins*, 4 Ark. 629; *Bobo v. State*, supra. Any other rule would place the solemn records of a court upon too insecure a foundation.

Affirmed.

CHICAGO MILL & LUMBER CO. v. DRAIN- AGE DIST. NO. 16. (No. 200.)

(Supreme Court of Arkansas. Nov. 1, 1915.)

1. COURTS \S 185—CIRCUIT COURTS—JURIS- DICTION.

Under Acts 1901, p. 143, dividing a county into two judicial districts, in one of which was located the county seat, where was held the county court, and giving appeals from the county court to the circuit court of the district in which the county court was held, appeals from the county court lie only to the circuit court in which the county seat is situated, and the other circuit court has no jurisdiction thereof.

[Ed. Note.—For other cases, see Courts, Dec. Dig. \S 185; Appeal and Error, Cent. Dig. \S 102, 3377, 3627.]

2. APPEAL AND ERROR \S 185 — QUESTIONS REVIEWABLE—JURISDICTION.

While the general rule is that an appellate court with jurisdiction to review errors at law can only review such questions as have been

raised and excepted to in the lower court, yet jurisdiction is an open question until the case is finally disposed of, and may be raised for the first time in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166-1176, 1375; Dec. Dig. ¶185.]

Appeal from Circuit Court, Mississippi County, Chickasawba District; J. F. Gautney, Judge.

Proceeding for the establishment of Drainage District No. 16, in which the Chicago Mill & Lumber Company remonstrated. Judgment affirming an order establishing the district, and the remonstrator appeals. Dismissed.

Coleman, Lewis & Cunningham, of Blytheville, for appellant. R. A. Nelson, of Blytheville, and J. T. Coston, of Osceola, for appellee.

HART, J. This is an appeal from the circuit court of the Chickasawba district of Mississippi county establishing drainage district No. 16 in that county. The cause originated in the county court, where a petition in due form was filed by landowners asking that the district be established. Certain landowners within the proposed district then filed a remonstrance, in which they set up that the improvements contemplated were impracticable. The county court, after hearing the evidence introduced by both parties, made an order establishing the district. The remonstrators prayed an appeal to the circuit court, and this was granted by the county court. The appeal was heard and determined by the Mississippi circuit court for the Chickasawba district, and the judgment of the county court establishing the district was affirmed. The remonstrators have duly prosecuted an appeal to this court.

[1] The circuit court of Mississippi county for the Chickasawba district had no jurisdiction to hear and determine the appeal from the county court. Mississippi county was divided into two judicial districts by the Legislature of 1901. See Acts 1901, p. 143. These districts are the Osceola district and the Chickasawba district. Osceola, situated in the Osceola district, is the county seat, and the county court is held there. By the terms of the act appeals from the county court lie to the circuit court of the district in which the county court is held. The provisions of the act in regard to the establishment of the courts and taking appeals is essentially the same as the act creating two judicial districts in Clay county, and in construing that act this court, in the case of *Belford v. State*, 96 Ark. 274, 181 S. W. 933, held that appeals from the county court lie to the circuit court in which the county seat is situated, and in which the county court is held.

[2] No objection, however, was made to the jurisdiction in the lower court, and this

brings us to the question whether objection to the jurisdiction can be made here for the first time. The general rule is that, when the appellate court only possesses jurisdiction to review and reconsider errors of law, it can only review such questions as have been raised and excepted to in the lower court, unless the error relates to the jurisdiction of the lower court to hear the cause or to determine the question in controversy. When such question appears, and the lower court has no jurisdiction over the subject-matter, the appellate court will dismiss the appeal and cause as one improvidently commenced. *Brown on Jurisdiction* (2d Ed.) § 21a. See, also, *Ayers v. Anderson-Tully Co.*, 89 Ark. 160, 116 S. W. 199. Thus it will be seen that the question of jurisdiction of the subject-matter is an open one until the case is finally disposed of. To hold that the question of the jurisdiction of the trial court could not be raised in the appellate court for the first time would be, in effect, to hold that consent could give jurisdiction and would result in the affirmance of a judgment which the trial court had no authority to enter. *South & W. Ry. Co. v. Commonwealth*, 104 Va. 314, 51 S. E. 824.

Though the act in question created two judicial districts in Mississippi county and defined the power and jurisdiction of the courts therein created, it did not attempt to create two separate and distinct county courts. Osceola remained the county seat and was situated in the Osceola district. The act provided that appeals from the county court should be taken to the circuit court in the district where the county seat was located and the county court held. It follows that the circuit court for the Chickasawba district of Mississippi county had no jurisdiction to hear and determine appeals taken from the county court.

The appeal will therefore be dismissed.

VEHICLE SUPPLY CO. et al. v. McINTURFF et al. (No. 201.)

(Supreme Court of Arkansas. Nov. 1, 1915.)

1. TROVER AND CONVERSION ¶40—VERDICT —SUFFICIENCY OF EVIDENCE.

Evidence, in an action against a partnership for the conversion of goods delivered to it by a railroad, without payment of plaintiff's, the consignor's, draft, held to sustain a verdict for plaintiff on the issue whether the consignor consented to the delivery as made.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 120-122; Dec. Dig. ¶40.]

2. CARRIERS ¶58—BILL OF LADING—DELIVERY.

A bill of lading is regarded as the symbol of the property described therein, and its delivery by the holder and consignor to a bank with draft attached is equivalent to a delivery of the property so far as they are concerned.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. ¶58.]

3. CARRIERS \Leftrightarrow 58—BILL OF LADING—DELIVERY—SET-OFF.

Where plaintiff shipped goods to his own order and delivered the bill of lading, with draft attached, to a bank, with directions to deliver the goods on payment of the draft, defendant who, after notice of arrival, had wrongfully received and converted the goods, could not apply the proceeds thereof to the payment of the plaintiff's indebtedness to it without direction from the plaintiff, and could not stand in the position of a third person acquiring rights without notice as against the bank.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. \Leftrightarrow 58.]

Appeal from Circuit Court, Chicot County; Turner Rutler, Judge.

Action by S. J. McInturff and another against the Vehicle Supply Company and another. Judgment for plaintiffs against the defendant Vehicle Supply Company, and it appeals. Affirmed.

B. F. Merritt, of Lake Village, for appellant. J. C. Gillison, of Lake Village, for appellees.

HART, J. On the 8th day of January, 1915, S. J. McInturff and the Chicot Bank & Trust Company instituted an action against the Vehicle Supply Company, a partnership composed of M. S. and C. C. Carter, doing a vehicle supply business in the city of Cairo, Ill., and against the St. Louis, Iron Mountain & Southern Railway Company, for the recovery of \$1,331.26 alleged to be the value of three car loads of axles wrongfully delivered by the railway company to its co-defendant and converted by it to its own use. One of the partners came to Chicot county, and service was had upon him there. The defendants answered.

The facts are as follows: S. J. McInturff was in the employment of the Vehicle Supply Company in connection with the business at Cairo, Ill. He found some timber near Lake Village, Ark., out of which he thought he could make some money, and the Vehicle Supply Company, desiring the lumber, agreed to lend him \$1,000 on which to operate. He gave the Vehicle Supply Company a mortgage on some land in Oklahoma as security and also agreed to pay the firm out of the proceeds of lumber shipped to it. He established a sawmill at Lake Village, Ark., and on the 8d day of June, 1914, executed a mortgage to the Chicot Bank & Trust Company on all the manufactured lumber in his mill yard at Lake Village, Ark., to secure the sum of \$650 and future advances. In September, 1914, McInturff shipped to himself at Cairo, Ill., three car loads of axles of the value of \$1,331.26 and gave the Chicot Bank & Trust Company a draft for the proceeds of the cars of lumber and attached it to the bills of lading. The bills of lading with the draft attached were delivered to the Chicot Bank & Trust Company and by it forwarded to the bank at Cairo, Ill., with directions to deliver the bills of lading to

McInturff or order upon the full payment of the draft. The railroad company delivered the three cars of axles to the Vehicle Supply Company, and the members who composed that firm applied the proceeds to the payment of the debt due the firm by McInturff and refused to account to the Chicot Bank & Trust Company for the proceeds.

The railroad agent at Lake Village testified that he had a message from the railroad agent at Cairo, Ill., stating that the cars were on hand and asking for a disposition of the axles; that he called up McInturff and asked for a disposition of the axles; and that McInturff told him that the Vehicle Supply Company knew that the cars were there and would take them up; and that he then told McInturff that he would wire the agent at Cairo to notify the Vehicle Supply Company, and that McInturff replied that that would be all right.

The agent of the railway company at Cairo, Ill., testified that the bills of lading for the cars in question were what the Interstate Commerce Commission approved as being a straight bill of lading, and that they are not negotiable documents, and that there was a form prepared and approved by the commission called an uniform order bill of lading which was for the purpose of enabling shippers to draw on the goods shipped, and that this bill of lading was negotiable.

Evidence also was adduced by the defendant tending to show that the axles contained in the three cars did not amount to the value of \$1,331.26. On the other hand, McInturff testified that he inspected the cars shipped by him, that he picked out No. 1 stock, and that the timber was worth the amount sued for by him and the bank. He also testified that he remembered the railroad agent at Lake Village calling him up with reference to the shipment, and says that he told the agent that the goods were consigned to himself, and that he had made a sight draft on the Vehicle Supply Company, and that if the Vehicle Supply Company wanted the cars it must pay the draft and take up the bills of lading.

The cashier of the bank testified that he had furnished McInturff the sum sued for in this action, and that the amount was due and unpaid, but that McInturff had paid the bank all other sums due under the mortgage except the sum sued for in this action.

The jury returned a verdict in favor of the plaintiffs against the Vehicle Supply Company for the amount sued for, and from the judgment rendered the Vehicle Supply Company has duly prosecuted an appeal to this court.

It is the contention of the Vehicle Supply Company that, because the mortgagee consented to the mortgagor removing the mortgaged property from the state, it waived its

lien as against the Vehicle Supply Company.

This court has not decided as to whether or not the mortgagee's consent to the removal of mortgaged property from the state will affect his lien. *F. H. Creelman Lumber Co. v. Lesh*, 73 Ark. 16, 83 S. W. 320, 8 Ann. Cas. 108. The authorities on the question are divided, and extensive case notes will be found in connection with the following cases: *Snyder v. Yates*, 64 L. R. A. 353; *Jones v. North Pacific Fish & Oil Co.*, 6 L. R. A. (N. S.) 940; *Farmers' & Merchants' Bank v. Sutherland*, 93 Neb. 707, 141 N. W. 827, Ann. Cas. 1914B, 1250.

The views, however, which we shall hereinafter express, render it unnecessary for us to review the authorities or determine the question and we shall not attempt to do so.

[1] The court submitted to the jury, under proper instructions, the question of whether or not the railroad company wrongfully delivered the property to the Vehicle Supply Company, and whether or not the firm converted the three car loads of axles to its own use. The jury found against the Vehicle Supply Company on this question, and there is evidence to support the verdict. It is true the railroad agent testified that McInturff directed him to have the cars of axles turned over to the Vehicle Supply Company, but in this McInturff flatly contradicts him. McInturff testified positively that he told the agent not to turn over the three cars unless the supply company paid the amount of the draft which he had drawn in favor of the Chicot Bank & Trust Company. The Vehicle Supply Company failed to pay this draft, but took possession of the three cars of axles and converted them to its own use. The cars were consigned by McInturff to himself, and he delivered the bills of lading therefor with draft attached to the Chicot Bank & Trust Company.

[2] It is true the railroad agent says that the bills of lading were not negotiable; but, be that as it may, the bill of lading is regarded as a symbol of the property described therein, and its delivery by McInturff to the bank was equivalent to a delivery of the property as far as they were concerned. No rights of third parties have intervened. According to the testimony of McInturff, the railway company wrongfully delivered the cars of axles to the Vehicle Supply Company and the firm converted the axles to its own use. As we have already seen, this question was submitted to the jury under proper instructions, and the jury has found against the Vehicle Supply Company.

[3] The case then stands as if the Vehicle Supply Company had wrongfully received the three car loads of axles and converted them to its own use, by applying the proceeds of the car to the debt due it by McInturff. It had no right to apply the proceeds of these three cars to the payment of its debt unless

directed to do so by McInturff. The cars were consigned to him and were subject to his order. They never rightfully came into the possession of the Vehicle Supply Company, and for that reason it did not stand in the position of a third person acquiring rights without notice as against the bank.

It is urged by counsel for the Vehicle Supply Company that the court erred in refusing certain instructions asked by it. But, without setting these instructions out in detail, it is sufficient to say that they are contrary to the principles of law just announced.

The judgment will be affirmed.

MILLER v. STATE. (No. 204.)

(Supreme Court of Arkansas. Nov. 1, 1915.)

1. CRIMINAL LAW — 722 — TRIAL — ARGUMENT OF PROSECUTING ATTORNEY.

In a prosecution for the theft of a horse, where defendant proved his good reputation by many witnesses, and the proof as to his guilt was inconclusive, the district attorney's closing argument, to the effect that it had been shown that defendant was an honest, hard-working negro, owning his own home, but that he wished to call attention to the fact that his deed, which was in evidence, showed that he only paid \$21 for his home, and that his policy, also in evidence, showed insurance for \$200, and that he did not know what defendant was preparing for, but that the jury were judges of that, which the court refused to withdraw from consideration, was reversible error, as tending to impute criminal intent, and destroy the effect of proof of good reputation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1674; Dec. Dig. — 722.]

2. CRIMINAL LAW — 369 — EVIDENCE — OTHER OFFENSES.

Evidence of the commission of one offense is not admissible to establish the guilt of defendant, charged with an entirely independent crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. — 369.]

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Wiley Miller was convicted of grand larceny, and he appeals. Reversed, and cause remanded for new trial.

Brundidge & Neelly, of Searcy, for appellant. Wallace Davis, Atty. Gen., and John P. Streepey, Asst. Atty. Gen., for the State.

KIRBY, J. Appellant brings this appeal from a judgment of conviction for grand larceny for the theft of a horse, the property of one Jerome Jarard.

It appears from the testimony that the horse was taken from Bald Knob about February 27, 1913, and was traced from there and found in the possession of one Hodges, in Jackson county, who also had in his possession an overcoat and some papers, insurance policies, tax receipts, and a deed to Wiley Miller. Several witnesses testified that they saw a man riding a horse of the description

of the stolen one the day after the alleged theft, and identified the defendant as the man.

Defendant denied having stolen the horse, or ever having had it in his possession, and introduced proof strongly supporting his defense of an alibi. He admitted that the coat and the papers in the pockets found in the possession of Hodges, who had the stolen horse, were his, and explained that the coat had been stolen from him out of the station at Hoxie, where he had left it upon going out for a sandwich. He said upon his return he saw a negro running away with the coat, and chased him for some distance down the railroad, but was not able to overtake him; that he had taken his papers to Hoxie, with the expectation of borrowing some money. Another witness, who did not know defendant, testified that the negro who was supposed to have stolen the horse jumped out of a wagon near Newport, leaving an overcoat with the papers in the pocket that belonged to Wiley Miller.

[1, 2] The good reputation of defendant was proved by many witnesses. The prosecuting attorney, in his closing argument to the jury, over the objection of defendant, made the following statement:

"They have shown that the defendant is the owner of a home, and that he is an honest and hard-working negro; but I want to call your attention to the fact that this deed shows that he only paid \$21 for the home, and that his insurance policy shows that he had it insured for \$200. I do not know what he was preparing for them, but you are to be the judges of that."

His counsel asked the court to tell the jury that it was improper argument, outside of the record, and should not be considered by them, which the court refused to do, and thereby omitted an error in the opinion of the majority of this court. The insurance policy and the deed had not been read in evidence, although they had been exhibited to the jury and admitted by the defendant to be his papers. Evidence of the commission of one offense is not admissible to establish the guilt of a defendant, charged with another and entirely independent crime, and the prosecuting attorney should not have been permitted to argue this extraneous testimony, and suggest to the jury as a fact that the deed showed defendant had paid but \$21 for his home, and that he had insured it for \$200, preparatory to burning the property and defrauding the insurance company, and its prejudicial effect was not removed by the prosecutor stating:

"I do not know what he was preparing for them, but you are to be the judges of that."

It was his evident purpose, in making the argument founded upon the facts apparently disclosed by the deed and insurance policy, to disparage the reputation of the defendant and destroy the effect of the proof of his good character, and, appearing to have the

sanction of the court, who would not require it withdrawn, especially prejudicial under the circumstances of this case, wherein the proof was by no means conclusive of the guilt of the defendant, although it was sufficient to sustain the verdict.

For the error committed, the judgment is reversed, and the cause remanded for a new trial.

CHICOT COUNTY v. MATTHEWS, Sheriff.
SAME v. ALCORN, Clerk.
(No. 203.)

(Supreme Court of Arkansas. Nov. 1, 1915.)

COUNTIES ~~139~~ — PROSECUTIONS — COSTS — STATUTES.

Acts 1911, p. 11, requires railroads to maintain sufficient switch lights in towns and imposes a penalty for their failure to do so, recoverable in a civil action in the name of the state. Kirby's Dig. § 990, provides that, when a county has any demand against any person or corporation, suit may be brought in the name of the state for the use of the county, and that all costs and expenses not recovered from the defendant shall be paid by the county. Section 7183 provides that all penalties imposed by any court, except mayors' courts, etc., shall be paid into the county treasury. The prosecuting attorney began numerous suits in the name of the state to recover penalties under the act, and, following a former decision holding that only one penalty could be recovered for all suits prior to the commencement of the suit, the circuit court rendered judgment in one case and dismissed the remaining cases. Held, that the county was not liable to the sheriff and the circuit clerk for the costs of mileage service, clerk's fees, etc., since it was not a party to the suit, and, in the absence of statute making it liable for costs, could not be properly taxed therewith.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 207; Dec. Dig. ~~139~~.]

Appeal from Circuit Court, Chicot County; Turner Butler, Judge.

Action by C. M. Matthews, Sheriff of Chicot County, and by R. E. Alcorn, Circuit Clerk of the County, against Chicot County. Judgment for plaintiffs, and plaintiff Matthews appeals, and the County appeals in both cases; Chicot County being here designated appellant. Judgments reversed, and causes of action dismissed.

E. L. Compere, of Hamburg, and Harry E. Cook, of Lake Village, for appellant. J. R. Parker and N. B. Scott, both of Lake Village, for appellees.

HART, J. The question involved in both these appeals is whether or not Chicot county is liable to the sheriff and circuit clerk of said county for the costs in certain cases brought by the state against the St. Louis, Iron Mountain & Southern Railway Company for failing to comply with Act No. 23 of the General Acts of 1911. Separate suits were instituted by the sheriff and clerk against the county, but one opinion will settle the issues involved.

The facts are as follows:

The prosecuting attorney instituted 362 suits in the name of the state against the St. Louis, Iron Mountain & Southern Railway Company to recover a penalty for the failure of the railway company to maintain sufficient street lights at the town of Dermott during the nights specified in the complaint. Similar suits had been instituted in Bradley county, and this court held that an action against the railway company for failure to maintain the lights as provided in the act was a civil action in which a penalty was collected in the name of the state, and that the act did not create a public nuisance. It was further held that the statute did not authorize the recovery of accumulated penalties, and that but one penalty could be recovered for all the acts prior to the commencement of the suit. *St. L., I. M. & S. Ry. Co. v. State*, 107 Ark. 450, 155 S. W. 517. Following that decision the circuit court rendered judgment in one case, and the remaining 361 cases against the railroad company were dismissed.

C. M. Matthews was the sheriff of Chicot county, and served the summons upon the railway agent at Dermott. He charged mileage from the county seat to Dermott, and also a fee for service in each case. The total amounted to \$1,201.20. The county court denied his claim in toto, and he appealed to the circuit court. The circuit court refused to allow him mileage, but allowed him 50 cents in each case for serving summons, and 10 cents for calling each case, making a total of \$217.20.

From the judgment rendered both the county and the sheriff have prosecuted an appeal to this court.

The clerk presented to the county court a claim for \$4.60 in each case, or a total of \$1,665.20 in the 362 cases. The county court disallowed his claim and he appealed to the circuit court. The circuit court allowed him fees in the sum of \$868.80 and Chicot county has prosecuted an appeal to reverse the judgment in his favor for this amount.

The statement of facts raises the question of whether or not costs can be taxed against the county in cases of failure in the prosecution of suits by the state against railroad companies for failure to maintain sufficient lights during the nighttime on all their main line switches as prescribed by Act No. 23 of the General Acts of 1911. It may be stated here that the statute does not provide in terms who shall pay the costs. It is contended by counsel for the sheriff and clerk that the county is liable under section 990 of Kirby's Digest. This section provides, in effect, that when a county has any demand against any person or corporation, suit may be brought in the name of the state for the use of the county, and that all costs and expenses not recovered from the defendant shall be paid by the county. We do not think

that section has any application to suits like the one under consideration. The act in question provides that the penalties established by the act shall be recovered in a civil action in the name of the state. *St. L., I. M. & S. Ry. Co. v. State*, 107 Ark. 450, 155 S. W. 517.

The suits in which the sheriff and clerk claim costs were brought in the name of the state. It is true that the complaints state that the suits are brought for the benefit and use of Chicot county, but this is a mere conclusion of the pleader. There is no provision in the act itself which makes the county liable for the costs, and we do not think that such liability can be sustained under the general statute just referred to. The county was not a party to the suit, and, in the absence of a statute making it liable for costs, it could not be properly taxed with the costs.

In the case of *State v. Blackburn*, 61 Ark. 407, 33 S. W. 529, the court held that the costs in a bastardy proceeding could not be charged against the county where the defendant was acquitted. The court further held that bastardy is a subject of civil proceedings, and in discussing whether the costs could be taxed against the county in case of failure in the prosecution, said:

"Our conclusion is that no one is bound for costs, unless rendered so by some positive provision of law, or as a necessary implication from provisions of law, and that neither the state nor the county is bound even by legal provisions, unless it is specifically or by necessary implication named or referred to therein."

Section 7183 of Kirby's Digest provides that all fines, penalties, and forfeitures imposed by any court, except those imposed by mayors' or police courts in any city or town, shall be paid into the county treasury for county purposes. So it will be seen that the fines and penalties in all criminal cases go to the county. Prosecutions therefor are in the name of the state; but the counties are not liable for the costs in the absence of a statute making them liable.

In *Stalcup v. Greenwood District*, 41 Ark. 31, and *Craighead County v. Cross County*, 50 Ark. 431, 8 S. W. 183, it was held that counties are not liable for costs in misdemeanors or felonies where a nolle prosequi had been entered. The reason assigned is that the liability of counties for costs in criminal proceedings rested alone upon the statute.

The next General Assembly meeting after the decision in the case last mentioned enacted a statute so as to make cases dismissed by nolle prosequi on the same basis as cases tried and resulting in an acquittal. In the case last mentioned the court said that officers are frequently called upon to render services for which no specific compensation has been provided by law, and that this is especially true of services rendered to the state or to a county. The performance of such services without pay is an incident of the

office. There being no provision in the act itself which makes the county liable for costs, nor any general statute under which such a liability can be sustained, it may not be lawfully done.

It follows that the judgment of the circuit court was wrong in both cases.

The judgments will therefore be reversed, and the causes of action of both the clerk and sheriff will be dismissed.

HALLIDAY v. STATE. (No. 198.)

(Supreme Court of Arkansas. Nov. 1, 1915.)

INFANTS \S 13—POOL ROOM—ALLOWING MINOR TO ENTER—STATUTE—"FREQUENT"—"CONGREGATE."

Under Acts 1911, p. 63, § 1, providing that it shall be unlawful for the owner or keeper of any pool room to permit any person, under the age of 18 to play pool or any other game, or to frequent or congregate in such pool room, where a father, who owned pool tables and paraphernalia, turned the same over to his son, a minor under 15 years, to operate, under an agreement whereby the boy took half the earnings of the tables, which were operated by him, the father having nothing to do with the operation, the room being left to the exclusive management of the boy, he taking entire charge of it, the father was not guilty of a violation of the act, since his son played neither pool nor billiards, but was merely employed in the establishment to operate it, while the act neither prohibits the leasing of a pool room to a minor nor employing a minor in such a place; the term "frequent," when used in connection with the word "congregate," implying the permission of visits to a pool room and not the mere giving of employment at such a place.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 14; Dec. Dig. \S 13.]

For other definitions, see *Words and Phrases*, First and Second Series, *Frequent*; *Congregate*.]

Appeal from Circuit Court, Sevier County; Jeff. T. Cowling, Judge.

S. R. Halliday was convicted of an offense, and he appeals. Judgment reversed, and cause dismissed.

Steel, Lake & Head, of Texarkana, for appellant. Wallace Davis, Atty. Gen., and John P. Streepey, Asst. Atty. Gen., for the State.

MCCULLOCH, C. J. This is an appeal from a judgment of conviction under a statute enacted by the Legislature at the session of 1911 which provides as follows:

"It shall be unlawful for the owner or keeper of any pool room, or pool hall or pool parlor or any employé of such owner or keeper to permit any person or persons under the age of eighteen (18) years, to play pool, billiards, or any other game, or frequent or congregate in such pool room or pool parlor or pool hall, or any department thereof." Acts 1911, p. 63, § 1.

The case was tried on the following agreed statement of facts:

"It is agreed by and between counsel for plaintiff and counsel for defendant that on or about the time alleged in the information in this case the defendant, S. R. Halliday, was the owner of pool tables and paraphernalia for a pool hall

in the town of Horatio, Sevier county, Ark.; that after acquiring said pool hall he turned the same over to his son, George Halliday, a minor under the age of 15 years, to operate under an agreement or understanding that the boy should have half the proceeds or earnings from the tables; that the tables were operated by the said minor son under this agreement or understanding, and all moneys received were deposited in the bank by him and were checked out by him; that the defendant himself had nothing to do with the operation of the tables; being a carpenter, he was employed at his work, and the said pool hall was left to the exclusive management of the said minor; that said minor took charge of said pool hall, roomed in it, and conducted it with the consent and approval of the defendant."

We are of the opinion that the facts do not bring the case within the operation of the statute. Appellant's son did not play either of the games mentioned in the statute, but was merely employed in the establishment to operate it. The statute neither prohibits leasing of a pool hall to a minor nor employing a minor in such a place. If the lawmakers had intended to give that effect to the statute, it could easily have been so expressed. The language of the act is that it shall be unlawful for the owner to permit any person under the age of 18 years to "frequent or congregate in such pool room." It is unnecessary for us to enter into any discussion as to the full meaning which the lawmakers intended to give to this language, but it is certain that no such meaning was intended as would bring this case within the operation of the statute. There is little, if any, difference in the definitions by the lexicographers of the word "frequent." According to the Century Dictionary it is defined thus: "To visit often; resort to habitually." Another dictionary (New Standard) gives this definition: "To visit or repair to often; resort to habitually."

When considering this word in connection with the word "congregate," which follows, some difficulty may be found in determining with what degree of frequency visits to a pool room by a person within the prohibited age must occur in order to constitute the offense; but we readily reach the conclusion that the term used implies the permission of visits to a pool room, and not mere giving employment to a minor at such a place. Giving employment to a minor at such a place is not permitting the minor to visit or to frequent or congregate with others there.

The judgment is therefore reversed, and the cause dismissed.

DICKINSON, Auditor, v. PAGE, Commissioner, etc. (Nos. 172, 230.)

(Supreme Court of Arkansas. Oct. 18, 1915.)

1. STATUTES \S 32—ENACTMENT—VETO BY GOVERNOR.

Const. art. 6, § 15, declares that if any bill shall not be returned by the Governor within 5 days after presentation, it shall be a law as if signed, unless the General Assembly, by

adjournment, prevent its return, in which case it shall become a law unless he shall file it with his objections in the office of the secretary of state and give notice thereof by a public proclamation within 20 days after adjournment. Section 17 declares that the Governor shall have power to disapprove any item or items in any appropriation bill embracing distinct items, and such parts shall be void unless repassed according to the rules prescribed for passage of other bills over the executive veto. An appropriation bill containing several items was presented to the Governor after the adjournment of the General Assembly. *Held*, that in disapproving particular items he is bound to comply with the provisions of section 15 requiring the filing of objections with the bill and the giving notice thereof by public proclamation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 35; Dec. Dig. § 32.]

2. STATUTES § 32 — ENACTMENT — VETO BY GOVERNOR.

Where the Governor, who wrote "vetoed and disapproved" across items of an appropriation bill, signed the entire bill with a notation, "approved except as to items above vetoed and disapproved," and then filed it, there was a sufficient filing of his objections thereto, there being no requirement in section 15 that the objections be written separately or upon a different instrument.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 35; Dec. Dig. § 32.]

3. STATUTES § 33 — ENACTMENT — VETO BY GOVERNOR—"PROCLAMATION."

As the word "proclamation" used in section 15 means the act of proclaiming or publishing, a formal declaration, an avowal, as well as an official public notification by some executive authority of an event of importance to the public, the filing of such appropriation bill with the secretary of state where it was accessible to the public, was a sufficient proclamation of the veto of the separate items.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 36; Dec. Dig. § 33.]

For other definitions, see Words and Phrases, First and Second Series, Proclamation.]

Hart and Smith, JJ., dissenting in part.

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Action by John H. Page, Commissioner of Mines, Manufacture and Agriculture, against M. F. Dickinson, Auditor. From a judgment for petitioner, defendant appeals. Reversed and remanded.

Wallace Davis, Atty. Gen., and W. J. Terry, of Little Rock, for appellant. Mehaffy, Reid & Mehaffy and Hal L. Norwood, all of Little Rock, for appellee.

KIRBY, J. This appeal challenges the validity of the veto of the Governor of certain separate items in Act No. 277 of the General Assembly of 1915, appropriating funds for the maintenance of the office of the commissioner of mines, manufactures and agriculture. The bill as passed contained the following:

"Item No. 10. For postage and express \$2,000."

The bill, including said item, was presented to the Governor for his approval on March 18, 1915, 7 days after the adjournment of the General Assembly, and on March 25, 1915,

the Governor disapproved said item, writing across it the words, "vetoed and disapproved," and on the same day the bill was signed by the Governor following the notation "approved, except as to the items above vetoed and disapproved." The bill as signed was on the 27th day of March, 1915, filed in the office of the secretary of state.

It is contended for appellant that the action of the Governor in disapproving the separate items appropriated in the act, met the constitutional requirements, and that the bill as signed became the law, excluding the items of appropriation disapproved which became void. The appellee, on the other hand, contends that the attempted disapproval and veto of the distinct item of appropriation was ineffectual because of the alleged failure of the Governor to file the bill with his objections in the office of the secretary of state and give notice thereof by public proclamation within 20 days after the adjournment of the General Assembly.

Article 6, sections 16 and 17, of the present Constitution of 1874, provide the procedure required for the approval and disapproval by the Governor of bills passed by the General Assembly. Section 15 requires a bill passed by the General Assembly "shall be presented to the Governor; if he approve it, he shall sign it; but if he shall not approve it, he shall return it, with his objections, to the house in which it originated" for reconsideration there, provides for the passage of the bill over his objections and further as follows:

"If any bill shall not be returned by the Governor within five days, Sunday excepted, after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the General Assembly, by their adjournment, prevent its return, in which case it shall become a law, unless he shall file the same, with his objections, in the office of the secretary of state and give notice thereof by public proclamation within twenty days after such adjournment."

"Section 17. The Governor shall have power to disapprove any item or items of any bill making appropriation of money, embracing distinct items; and the part or parts of the bill approved shall be the law, and the item or items of appropriations disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the executive veto."

The said section 17 gives the Governor power to disapprove any item or items of any bill making appropriation of money, embracing distinct items, and declares that the part or parts of the bill approved shall be the law, and the item or items of appropriation disapproved shall be void unless repassed according to the rules and limitations prescribed for the passage of other bills over the executive veto; while by section 15 every bill presented to the Governor after the adjournment of the General Assembly becomes a law whether approved and signed by the Governor or not, "unless he shall file the same,

with his objections, in the office of the secretary of state and give notice thereof by public proclamation within twenty days after such adjournment."

There is a wide difference, in the opinion of the writer, between the provisions of the Constitution relative to the disapproval of a bill and the disapproval of a distinct item in an appropriation bill. In the first instance the Governor must take the affirmative action prescribed to prevent the bill becoming a law, while in the latter the part of the bill approved becomes the law and the item of appropriation disapproved is void unless repassed by the Legislature. There is no provision in said section 17 which authorizes the Governor to disapprove a distinct item in an appropriation bill, requiring him to file his objections with the bill in the office of the secretary of state and give notice thereof by public proclamation. The provision herein, merely because the Legislature was adjourned and there could be no repassing of the disapproved item over the Governor's veto, does not require that in order to make effectual the disapproval of any such item of the bill that the Governor shall follow the procedure laid down in said section for the veto of bills. In other words, the writer is of opinion that the Governor is authorized by said section 17 to disapprove any item or items of an appropriation bill embracing distinct items, thereby rendering them void, and that only that part of the bill approved becomes the law, excluding from it, necessarily, the items disapproved, and this without any further action taken by him whatever.

[1] The majority of the court, however, is of opinion that the provisions of said section 15 of the Constitution requiring the filing of objections with the bill and the giving notice thereof by public proclamation are applicable and to be complied with in the disapproval of a distinct item of appropriation in an appropriation bill, and also that the Governor's action in writing "Disapproved and vetoed" across the face of the said item of appropriation, and signing the bill after the notation "Approved, except as to the above items disapproved and vetoed," and filing the same in the secretary of state's office, was a substantial compliance therewith.

[2] The filing of the bill with said notation written across the face of the item disapproved was a sufficient statement of his objections thereto, and there is no requirement that the objections shall be written separately or upon a different instrument.

[3] Now as to the giving of notice by public proclamation. The word "proclamation" is to be given its usual and ordinary meaning, it not having been apparently used otherwise. It is defined by the New Standard Dictionary (Funk & Wagnalls) as follows:

"(1) The act of proclaiming or publishing. (2) That which is proclaimed or published, especially by authority; any announcement made in a public manner. (3) Law. (a) An official

public notification by some executive authority of the occurrence of an event important to the public, or of command, caution, or warning in relation to a matter impending, as, a proclamation of peace. (b) An announcement made by a ministerial officer of a court of something to be done, as that court is about to open or adjourn, or a prisoner to be discharged. (4) A formal declaration; an avowal."

See, also, Webster's Dictionary.

In *Lapeyre v. United States*, 19 Wall. (U. S.) 191, 21 L. Ed. 606, a proclamation of the President relieving certain persons from penalties and removing all restrictions from commerce and trade in certain sections of the United States, executed or made on June 24, 1865, but not published in the newspapers until the 27th of June, nor published or promulgated anywhere or in any form before the 27th, "unless its being sealed with the seal of the United States in the Department of State was a publication or promulgation thereof" was held valid and effectual and published as of the day of its date.

In *Wolsey v. Chapman*, 101 U. S. 755, 25 L. Ed. 915, the language of the act under consideration was:

"Any public land, except such as is or may be reserved from sale by any law of Congress or proclamation of the President of the United States."

And the court held an order sent by the head of one of the executive departments to the Commissioner of the General Land Office directing it, effectual to reserve the land from sale as a proclamation of the President saying:

"A proclamation by the President, reserving lands from sale, is his official public announcement of an order to that effect. No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained. If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we cannot doubt that the lands would have been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily from the decision in *Wilcox v. Jackson* that such an order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect. It was, therefore, as we think, such a proclamation by the President reserving the lands from sale as was contemplated by the act."

This language was approved in *Wood v. Beach*, 156 U. S. 550, 15 Sup. Ct. 410, 39 L. Ed. 528. A verbal announcement by the circuit clerk was held the proclamation of the result of an election in *Mackin v. State*, 62 Md. 244, and the posting of a notice of meeting on the door of the council chamber and sending a copy thereof by mail to the members of the council by the mayor, a compliance with a statute authorizing the mayor to convene the council in special session by proclamation in *Cushing v. Hartwig*, 138 Mo. App. 114, 120 S. W. 109.

No particular form of proclamation is prescribed or indicated by the Constitution, but only that "notice thereof be given by public

proclamation," and from the authorities it appears that a proclamation is public when made and sufficient if it has such publicity, or accomplishes the end to be attained. Here the bill was returned with his objections by the Governor to the office of the secretary of state where it was accessible and open to inspection of the public with his signature, showing that the bill was approved, "except as to the items above disapproved and vetoed." The secretary of state, the officer required by law to publish the acts and resolutions of the General Assembly, was thus informed that the distinct items of appropriation across which had been written "disapproved and vetoed" were void and not to be included in the publication of the law approved. The public notice by the proper officer was therefore sufficient to accomplish the end to be attained, and the constitutional requirements were substantially complied with. It follows that the veto or disapproval was effectual and the items so disapproved void.

The court therefore erred in sustaining the demurrer to the answer, and its judgment is reversed and the cause remanded, with instructions to overrule it.

SMITH, J. (dissenting). This case has been decided upon a question which was not raised or discussed in the briefs. It was argued by counsel for appellant that the method of vetoing, in toto, the bills referred to in section 15, article 6, of the Constitution is entirely distinct and different from the method of disapproving, or vetoing, an item or items of a bill making appropriations of money, referred to in section 17 of article 6. It was contended that section 17 conferred the right of vetoing items of an appropriation bill, without defining how that right was to be exercised, and that the provisions of section 15 could not be looked to for directions on that subject, because that section related to the approval or disapproval of bills in toto; and that, therefore, the provisions of section 15, requiring notice of the disapproval of a bill to be given by public proclamation did not apply, when the veto power had been exercised as to items of an appropriation bill. It was not contended that the provisions of section 15 had been complied with. It was not urged that any proclamation had issued. It was only insisted, but very earnestly insisted, that no proclamation was necessary, under the circumstances of this case. This view was accepted by the member of the court, who wrote the opinion for the majority, and it occurs to us that this was the real question in the case.

Upon the question of the necessity for a proclamation our views accord with those of the majority of the court. Section 15 of article 6 provides that when the Governor approves a bill he shall sign it. This signature is made the evidence of executive approval. If he disapproves a bill, while the

Legislature is in session, he returns it with his objections to the house in which it originated. If the General Assembly by their adjournment prevent the return of the bill, and it does not meet with the approval of the Governor, he is required to file it, with his objections, in the office of the secretary of state, and give notice thereof by public proclamation. The objections of the Governor are required to be filed with the bill, and his proclamation is issued as the evidence of his disapproval. When these provisions have been complied with, the record is made which furnishes the evidence of the action of the Governor, and unless these provisions are complied with there is no such record as the Constitution contemplated should be made to evidence the executive action. It is not denied that if the Governor should disapprove a bill after the adjournment of the Legislature, he would have to give notice by public proclamation. This would be true even though the bill were an appropriation bill, which consisted of a single item. Then why should not a proclamation be necessary if one or more of several items were disapproved? There appears to be no reason for this formality in the one case, which is not equally applicable to the other.

We think the purpose of section 17 was to confer upon the Governor the power to disapprove any particular item or items of an appropriation bill, without rendering other parts thereof void, but this power, of course, should be exercised in the manner provided by the Constitution for approving or disapproving bills, and section 15 must be looked to for these directions. If this be true, then it must necessarily follow that where the General Assembly by its adjournment has prevented the return of the bill to the house in which it originated, the Governor must file the bill, with his objections, in the office of the secretary of state and give notice by public proclamation, if he wishes to veto some item of it.

Was a proclamation made? The majority has answered in the affirmative. But we submit this is ipse dixit. Cases cited in the majority opinion give no support to the view that the notation made by the Governor on the bill is a proclamation, and after a somewhat diligent search of the authorities we have failed to find any case supporting that holding. Cases cited in the majority opinion deal with the question of the promulgation of proclamations. We have no such question here. We insist that the Governor made no proclamation, and therefore none could have been promulgated.

Section 15 deals with a subject of the highest importance, and its provisions are necessarily mandatory. The makers of the Constitution had some purpose in mind in requiring the Governor to give notice by public proclamation. In this manner the Governor is allowed pro tanto to set aside the legislative will. The wisdom of ac-

ording this right to the chief executive has been much debated in the making of Constitutions and the right is one which has not always been granted. And it is universally held that it is a right which, when granted, must be exercised within the time, and in the manner, provided by the instrument granting it. It is not a right to be lightly exercised, but when exercised there should be no doubt of that fact. A record should be made, and that record is the one the Constitution provides to preserve the evidence of its exercise, which under our Constitution is a public proclamation. Here the Governor wrote across the item under consideration the words "Vetoed and disapproved," and a similar notation was made across the face of other items. If there was a proclamation this notation constitutes it, and it occurs to us that the statement of the proposition carries its own refutation. The Governor does not sign a bill or write anything on it for the purpose of disapproving it. The Constitution provides that if he approve a bill he shall sign it, but if he disapproves the bill, or any portion of it, he does not evidence that disapproval by marginal notations. He must make the record which the Constitution requires; i. e., a proclamation. *Arkansas State Fair Ass'n v. Hodges*, 178 S. W. 939.

Believing that this notation on the bill, for the making of which the Constitution contains no authority, is insufficient to meet the requirement that there be a public proclamation, and, believing that this notation would never be recognized as a proclamation, in the absence of that label placed on it by the majority, we dissent from that holding.

HART, J., concurs.

SECURITY INS. CO. v. JAGGERS et al. (No. 193.)

(Supreme Court of Arkansas. Oct. 25, 1915.)

1. PRINCIPAL AND AGENT — 143 — UNDISCLOSED AGENCY — SURETY BOND — WHO MAY ENFORCE — PRINCIPAL OF OBLIGEE.

Where a bond securing the performance of his duties by a local insurance agent was executed by him to the general agent of the company for the latter's benefit, though it was not disclosed therein as the principal obligor, such company, nevertheless, could bring suit on such bond for the local agent's default.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 502-512; Dec. Dig. — 143.]

2. PLEADING — 216 — DEMURRER — CONSIDERATION OF EXHIBIT — STATUTE.

Under Kirby's Dig. § 6128, providing in part that, if the action is founded on a bond, the original or a copy thereof must be filed as part of the pleading if the party can produce the instrument, in an insurance company's action against its local agent and the sureties on his bond, the bond, filed as an exhibit to the complaint, could be considered on demurrer to the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 535-539; Dec. Dig. — 216.]

3. INSURANCE — 83 — AGENTS — INDEMNITY BOND — DEFAULT COVERED.

Where the bond of a local agent of an insurance company was conditioned that he should keep a true and correct account of all moneys received by him for the company and pay same over, should report business transacted, and in every way faithfully perform his duties as agent in compliance with the instructions of the general agent, and should, at the end of the agency, deliver up to such general agent all moneys, policies, books, and property due from him or in his possession, and that, if such local agent should do so, and reimburse such general agent for all extra expense occasioned by any delinquency or failure to comply with such conditions, the obligation should be void, such bond did not bind the local agent and his sureties to reimburse the company for the payment of losses occurring on policies issued by the local agent on prohibited risks.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 107-110; Dec. Dig. — 83.]

Appeal from Circuit Court, Lawrence County; Dene H. Coleman, Judge.

Suit by the Security Insurance Company against J. N. Jagers and others. Judgment for defendants on demurrer, and plaintiff appeals. Affirmed.

The appellant, an insurance company, brought suit against J. N. Jagers, as principal, and the sureties on his bond given to secure the faithful performance of his duties as local fire insurance agent to T. A. Manning, as general agent for the Security Fire Insurance Company.

The complaint alleges that the insurance company, through its general agent, T. A. Manning, appointed J. N. Jagers its local fire insurance agent, at the town of Walnut Ridge, with authority to sign, issue, and deliver policies of insurance, on the property in said town, in accordance with the rules and regulations of said company, and that said defendant agreed, in accepting said agency, to faithfully perform his duty as said agent, in compliance with the instructions of the general agent, through his proper representatives. It then states that Jagers and his sureties executed the bond, conditioned for the faithful performance of his duties, by Jagers the agent, and that:

"They would pay to said general agent all moneys due from said J. N. Jagers, and would reimburse said general agent for all expenses occasioned by any delinquency or failure on the part of said J. N. Jagers to comply with the conditions of said bond, and attached a copy of same to the complaint, and made it a part thereof as Exhibit A."

It states further that J. N. Jagers delivered two policies of insurance to certain persons, the owners of property that were prohibited risks, insuring one in the sum of \$1,500, and the other for \$400; that the agent was without authority to issue such policies, was notified to cancel and have them returned as he was authorized to do under the provisions of the policies, and failed to do so; that a loss occurred under both policies for which the insurance company became liable, and which it adjusted, agreeing to pay to

Fletcher Bros. \$1,326.87 under one policy, and to W. A. Bynum \$400, under the other policy; that it incurred the expense of sending the adjuster to Walnut Ridge for the adjustment of the loss of \$50, and—

"plaintiff states that the defendants, J. N. Jagers, E. H. Sharp, and J. C. Hall, are liable to it to the extent of \$300 on the said bond heretofore mentioned, because said loss was sustained by reason of the failure of said Jagers to faithfully perform his duties as agent in compliance with the instructions of the general agent, in that said Jagers did not faithfully perform his duties as such agent, and did not comply with the instructions of the general agent in writing said policies, which were on the prohibited list, and also in failing to cancel said policies after instructions to do so from said general agent."

The bond is conditioned as follows:

"The condition of this obligation is such that, whereas the above-named J. N. Jagers, having been appointed by said general agent as his agent for the town of Walnut Ridge, county of Lawrence, state of Arkansas, and as such agent will receive divers sums of money, policies, chattels, and other effects, the property of said T. A. Manning, general agent, and J. N. Jagers, being bound to keep true and correct account of the same, pay over such money correctly, and make regular reports of the business transacted by him to the said T. A. Manning, general agent, and in every way faithfully perform the duties as agent in compliance with the instructions of the general agent through his proper representatives, and at the end of the agency by any cause whatever shall deliver up to the said general agent or his authorized representatives all moneys, policies, books, and property due from or in his possession:

"Now, therefore, if the said J. N. Jagers shall promptly pay to the said general agent the moneys received from time to time, and shall well and truly perform all and singular the duties as agent of said general agent, in accordance with the instructions of said general agent, as given or made known by him or his proper representatives, for and during which time he officiates as agent, and shall deliver all property which he may receive and hold as agent to his successors in office, or to such person as the general agent or his authorized representative may direct, and reimburse said general agent for all extra expense occasioned by any delinquency or failure to comply with the foregoing conditions, then this obligation shall be null and void; otherwise to remain in full force and virtue."

The appellees interposed a demurrer to the complaint, which was sustained, and the complaint amended, and the demurrer again renewed. It was again sustained, and appellant standing upon his complaint, it was dismissed, from which judgment it prosecutes this appeal.

Cockrill & Armistead, of Little Rock, and H. L. Ponder, of Walnut Ridge, for appellant. J. N. Beakley, W. E. Beloate, and O. C. Blackford, all of Walnut Ridge, for appellees.

KIRBY, J. (after stating the facts as above). [1] The allegations of the complaint show that the bond was executed by the local agent, Jagers, to the general agent of appellant insurance company, for its benefit, and, although it was not disclosed therein as the principal or person for whose benefit the

bond was executed, it nevertheless had the right to bring suit thereon. *Mass. Bonding Co. v. Higgins*, 174 S. W. 1150; *Miss. Valley Const. Co. v. Abeles*, 87 Ark. 374, 112 S. W. 894; *Bryant Lumber Co. v. Crist*, 87 Ark. 434, 112 S. W. 965; *Frazier v. Polindexter*, 78 Ark. 241, 95 S. W. 464, 115 Am. St. Rep. 33, 8 Ann. Cas. 552; *Mechem on Agency*, §§ 768-770; *Shields v. Coyne*, 148 Iowa, 313, 127 N. W. 63, 29 L. R. A. (N. S.) 472, Ann. Cas. 1912C, 905; note, 31 Cyc. 1598.

[2] The action is founded on the bond of appellees, which was filed as an exhibit to the complaint, and may be considered upon demurrer to the pleadings. Section 6128, *Kirby's Digest*; *Sorrells v. McHenry*, 38 Ark. 127; *Euper v. State*, 85 Ark. 223, 107 S. W. 179.

[3] Under the terms and conditions of the bond, Jagers, as principal, was bound to keep a true and correct account of all moneys received by him for the insurance company and to pay same over, to make a report of the business transacted, and in every way faithfully perform the duties as agent in compliance with the instructions of the general agent, through his proper representatives, and at the end of the agency to deliver up to the said general agent, or his representative, all moneys, policies, books, and property due from him or in his possession, and it was further provided that, if he should do so, and reimburse said general agent for all extra expense occasioned by any delinquency or failure to comply with the foregoing conditions, the obligation should be void. It does not appear to contemplate that the agent should be bound to the payment of losses occurring on policies issued on prohibited risks by him, and does not, in the opinion of the court, bind him to any such payment.

The complaint therefore did not state a cause of action, and the court committed no error in sustaining the demurrer.

The judgment is affirmed.

CONWAY v. MILLER COUNTY HIGHWAY AND BRIDGE DIST. (No. 207.)

(Supreme Court of Arkansas. Nov. 1, 1915.)

1. STATUTES \Leftrightarrow 205—CONSTRUCTION.

A statute should be considered as a whole in construing it.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 282; Dec. Dig. \Leftrightarrow 205.]

2. HIGHWAYS \Leftrightarrow 90—UNITY OF IMPROVEMENT—STATUTE.

Acts 1915, p. 617, is entitled "An act to lay off and establish a part of Miller county into a public highway and bridge district for the construction of public highways from the city of Texarkana to various localities in the territory hereinafter described, and for the construction of a public bridge in connection with such highways over and across the Red river, * * * and to organize and incorporate a highway and bridge district and provide for levying assessments and collecting the same,

and for other purposes." Section 1 of the act defines the boundaries of the highway and bridge district and creates and names it. Section 2 provides that the district shall have power to construct and maintain 60 miles of free public highways leading from Texarkana to the point on the Red river at which it may deem it advisable and suitable to construct a bridge over and across such river, etc. Section 3 appoints the commission of the district, and provides for the appointment of their successors. Section 5 provides that the board of commissioners shall have the power to build a highway from Texarkana to such point on the Red river as they may select to build a bridge over the river in connection with the highway, and that the board "shall also have power to build a bridge over said Red river at such point suitable in all respects for footmen, vehicles, railroads, and other public utilities, if, in the opinion of the said commissioners, it may be deemed necessary under this act." Suit was brought to restrain the district from proceeding with the construction of highways under the act without the construction of a bridge over the Red river, and the district contended that section 5 of the act vested in it discretion to construct the highways without also constructing the bridge. *Held*, that such was not a proper construction of the act, the discretion vested in the commission and district by section 5 relating only to the kind of bridge which might be constructed, and whether it should be made available to railroads and other public utilities, and not to whether such bridge might be constructed at all, so that, if the construction of both highways and bridge was impossible within the cost limit of the act, the improvement must fail.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 301, 302; Dec. Dig. ¶90.]

Appeal from Miller Chancery Court; Jas. D. Shaver, Chancellor.

Suit by George T. Conway against the Miller County Highway and Bridge District. From a decree sustaining the demurrer to the complaint, except as to one paragraph, as to which the demurrer was overruled, plaintiff appeals. Reversed and cause remanded, with directions.

William H. Arnold, of Texarkana, for appellant. M. E. Sanderson, of Texarkana, and E. B. Kinsworthy and T. D. Crawford, both of Little Rock, for appellees.

SMITH, J. Appellant brought suit to restrain the Miller county highway and bridge district from proceeding with the construction of certain highways pursuant to plans adopted by said highway and bridge district under the purported authority of Act No. 153 of the Acts of the General Assembly of 1915. It was alleged in the complaint: That the said district was formed for the purpose of building a bridge across Red river at a point to be selected by the commissioners between the towns of Fulton and Index, and to build a highway leading to said bridge, and other highways in connection therewith. That by the terms of said act it is provided that:

"The improvements herein undertaken shall not exceed 15 per cent. of the value of the real property of said district, subject to improvement district assessments as ascertained by the state and county assessments."

That the real property of said district amounts to only \$4,000,000, so that the district is authorized to undertake no improvement that will cost exceeding \$600,000, and the bridge across Red river would cost almost that sum, and after building it the district would have no funds with which to build the highways which by the terms of said act it is required to build. That said improvement was intended to be a unit, and, there being no funds with which it can be constructed as such, the said district has no right to proceed with the construction of any part of said improvement. That nevertheless the commissioners have formed plans for the building of a system of highways and have abandoned the idea of constructing such a bridge. There were allegations in the complaint questioning the authority of the commissioners to construct the highways because the diversity of the public interests of said district was such that the roads could not be a single improvement. The fifth paragraph of the complaint alleged that by the terms of said act the interest upon the bonds authorized to be issued is made a part of the cost of the improvement, but the commissioners have resolved to disregard that limitation and to issue bonds for the full amount of 15 per cent. of the assessed value of the real property in the district, and will so issue bonds unless restrained by the order of the court. The court below sustained the demurrer to all of the complaint except the fifth paragraph, as to which the demurrer was overruled, and this appeal has been prosecuted from that decree.

[1, 2] As we view this act, it is now necessary to decide the question only of the unity of the improvement authorized by the act of the General Assembly above mentioned. The title of this act is as follows:

"An act to lay off and establish a part of Miller county into a public highway and bridge district for the construction of public highways from the city of Texarkana to the various localities in the territory hereinafter described, and for the construction of a public bridge in connection with such highways over and across the Red river between Fulton and Index, and to organize and incorporate a highway and bridge district, and to provide for levying assessments and collecting the same, and for other purposes."

The provisions of the act, which are material upon the consideration of this question, are as follows:

Section 1 of the act defines the boundaries of the district and provides that the territory therein included "be and the same is hereby created and constituted a highway and bridge district and said district shall be known as the 'Miller County Highway and Bridge District.'"

Section 2 of the act provides that the said district shall have the power to construct and maintain 60 miles of free public highways leading from the city of Texarkana to

such point on the Red river between Fulton and Index, at which it may deem desirable and suitable to construct a bridge over and across said Red river in connection with the plan and system of such highways, and at such point so selected on Red river, said district shall have power to construct and maintain a free public bridge in connection with said highways over and across said Red river, and shall have the power to construct and maintain other highways in connection with the highway leading to said bridge from the city of Texarkana to such points as the commissioners deem desirable, but not to exceed in the aggregate in connection with the highway to said bridge 60 miles in length. And this section provides that the commission shall have power to grant a right of way over said bridge to any public utility upon any terms which shall not interfere with the public use of said bridge.

Section 3 provides that three men there named "are hereby appointed the commission of said Miller county highway and bridge district," and provides for the appointment of their successors.

Section 5 provides that:

"The said board of commissioners shall have the power, and it is hereby made their duty, to build and construct a public highway from the city of Texarkana over and across the territory in said district to such point on Red river as they may select for the purpose of building the bridge over and across Red river in connection with said highway and system of highways, between Fulton and Index, as aforesaid. * * * And said board shall also have power, and it is hereby made their duty, to build and construct a bridge over and across said Red river at such point, suitable in all respects for footmen, vehicles, railroads and other public utilities, *if in the opinion of said commission it may be deemed necessary under this act.* Said highways and bridge to be built where, in the discretion of said board of commissioners, it is most practicable and best to commence, locate and end; and they shall have power to protect and maintain such highways and bridge in such effective condition as honest, able and energetic efforts on their part may obtain, by building, rebuilding and repairing, or such other work as the board may deem necessary."

This section further provides that the commissioners shall have power to determine the crown, height, slope, and grade of said highways, as well as the dimensions and character, in every respect, of said bridge, and make all needful regulations, and do all things in their opinion necessary to secure and promote the public convenience and safety over said highways and bridge; and further provides that:

Said "commissioners shall have the right of eminent domain, * * * for the purpose of condemning any land, levees and buildings, or other property, public or private, for the purpose of the right of way of said highway and bridge, wherever located as aforesaid."

Section 6 directs the commission to form plans for the construction of such highway and bridge, and to procure estimates of the cost thereof.

Other sections provide the manner in which the commissioners may obtain by condemna-

tion or otherwise the right of way for said highways and the approaches and abutments to said bridge, and define the words "right of way" as used in the act to mean and include all grounds necessary for the construction of highways and bridge, its approaches and abutments, and its piers, and all other necessary lands for the purpose of carrying out the construction of said highways and bridge.

Section 36 of the act confers authority upon the county court of Miller county to take over and acquire the highway and bridge upon such terms as may be agreed upon as to its future maintenance, but that, in the event the highway and bridge is not taken over by said county court as a public highway of said county, the commissioners shall levy annually such assessments upon the benefits as may be necessary for the maintenance of said highway and bridge for the purpose of maintaining same and its approaches, abutments, and piers in good repair and conditioned so as to keep it forever open to the public.

The parties differ as to the powers of the commissioners, and the decision of that question largely turns upon the construction of section 5. It is contended on behalf of the district that this section vests the discretion to construct the highways without also constructing the bridge. But we do not think that the section should be so construed. The act should be considered as a whole, and when so considered we think the legislative intent was to provide for an improvement district for the construction of the highways and bridge. The purpose of the act is so declared in its title, and in every instance a conjunctive conjunction is used in referring to the purpose of the act and the duties of the commission. A disjunctive is not used in a single instance. While this fact is not conclusive, it is a strong circumstance to be considered in interpreting the act, and, in arriving at the essence of the theory intended to be accomplished, if it be found that the improvement was intended to be a unit, then the provisions of the act are mandatory, and the commissioners have no discretion to choose the parts of the improvement they will construct. *Gallup v. Smith*, 59 Conn. 354, 22 Atl. 334, 12 L. R. A. 353. We think it could not be successfully contended that the commission has the authority to build the bridge without also building the roads connecting with it. Yet we think there is as much authority for so doing as there is for constructing the highways and eliminating the bridge from the plans of the improvement.

It is true that section 5 of the act provides as follows:

"And said board shall also have power, and it is hereby made their duty, to build and construct a bridge over and across said Red river at such point, suitable in all respects for footmen, vehicles, railroads and other public util-

ities, if in the opinion of said commission it may be deemed necessary under this act."

In the construction of the language quoted it is proper to bear in mind that the commissioners have only such power as is conferred by the whole act, and in the discharge of the duties there imposed upon them they have only such discretion as is expressly conferred upon them, or as is necessarily implied from a consideration of the duties so imposed, and we think the phrase, "if in the opinion of said commission it may be deemed necessary under this act," was not intended to enlarge the discretionary powers of the commission, nor to authorize them to make any change in the purpose of the act; but that the proper construction of this language is to hold that the discretion there vested relates only to the kind of bridge which they shall construct, and whether or not it shall be made available to railroads, and other public utilities. We think this language left to the commission the duty of determining the necessity or propriety of constructing a bridge suitable for railroads and other public utilities, and conferred the authority to construct the bridge so that it would be available for railroads and other public utilities, if they deemed it advisable so to do, and the discretion conferred upon the board is limited, not to a determination of whether a bridge shall be built at all or not, but solely as to the character of the bridge to be built.

Therefore, if the board was given no discretion to adopt plans which excluded the construction of the bridge, and if, as alleged in the complaint, the construction of both the highways and bridge is impossible within the limits set by the act, it follows that the board exceeded its authority, and the prayer of the complaint should have been granted.

The decree of the court below is therefore reversed, and the cause will be remanded, with directions to overrule the demurrer to the paragraph of the complaint which alleges the act of the General Assembly contemplated that the highways and bridge constituted a single improvement, and that the commission had no discretion to construct only a portion of the same.

DESHAZO v STATE. (No. 208.)

(Supreme Court of Arkansas. Nov. 1, 1915.)

1. CRIMINAL LAW § 829—PRESUMPTION OF INNOCENCE—INSTRUCTIONS—INSTRUCTIONS COVERED BY CHARGE GIVEN.

In a prosecution for assault with intent to kill, it was not error to refuse to instruct that the indictment, being a mere accusation, raised no presumption of guilt, where an instruction was given that the law presumes defendant innocent, and not guilty as charged, which presumption continues until the jury are satisfied of guilt beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.]

2. CRIMINAL LAW § 782—INSTRUCTIONS—INTERPRETATION OF FACTS.

In a prosecution for assault with intent to kill, it was not error to refuse to instruct that the facts must not only be consistent with defendant's guilt, but they must be inconsistent with his innocence; and, if the facts are susceptible of two interpretations, the interpretation of innocence must be adopted, where, according to the proof of the state, defendant was guilty, while, according to the testimony in his behalf, he acted in self-defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1849, 1851, 1852, 1877, 1878, 1880—1882, 1906, 1907, 1909—1911, 1960, 1966, 1967; Dec. Dig. § 782.]

3. CRIMINAL LAW § 829—INSTRUCTIONS—INSTRUCTIONS COVERED.

The court is not required to charge the law upon any question in every possible manner in which a correct statement thereof can be prepared, but it is sufficient if the law be so declared that the jury may not be in doubt as to the law when applied to the facts of the case. Hence it was not error, in a prosecution for assault with intent to kill, to refuse an instruction on the subject of reasonable doubt, where the law on such subject was covered by other instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.]

4. CRIMINAL LAW § 829—INSTRUCTIONS—JUSTIFICATION.

In a prosecution for assault with intent to kill, it was not error to refuse to instruct that mere words will not justify an assault, yet words accompanied by acts of a violent or threatening character will be provocation that may reduce the crime from assault with intent to kill to an aggravated assault, or to a justification of aggravated assault, where an instruction was given that if the assault was committed while defendant was under the influence of passion or excitement, caused by a provocation apparently sufficient to make the passion irresistible, the jury might acquit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.]

5. HOMICIDE § 95—ASSAULT WITH INTENT TO KILL—PROVOCATION—AGGRAVATED ASSAULT.

In a prosecution for assault with intent to kill, an instruction that threatening acts, accompanied by opprobrious words, would be a provocation that might reduce the degree of assault incorrectly stated the law in not permitting the jury to pass upon the sufficiency of the provocation, and in stating that provocation might justify an assault with intent to kill, or be a justification of aggravated assault, an "aggravated assault," under Kirby's Dig. § 1587, being committed when one person assaults another with a deadly weapon, instrument, or other thing with intent to inflict a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned or malignant disposition.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 123; Dec. Dig. § 95.]

Appeal from Circuit Court, Sevier County; Jeff. T. Cowling, Judge.

Dobson Deshazo was convicted of assault with intent to kill, and he appeals. Affirmed.

Steel, Lake & Head, of Texarkana, for appellant. Wallace Davis, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

SMITH, J. Appellant was convicted upon a charge of assault with intent to kill, and

on this appeal questions only the action of the court in refusing to give certain instructions asked by him.

[1] The first of the instructions so refused declared the law to be that the indictment in the case was a mere accusation, or charge, against the defendant, and raised no presumption of his guilt, and was no evidence of guilt, and that the jury should not permit themselves to be influenced to any extent because, or on account of, the indictment. This instruction, of course, correctly declares the law, and the court below might very well have given it, but it does not appear that this failure is error calling for the reversal of the case, inasmuch as the court gave the following instruction, numbered 4:

"(4) The court instructs the jury that the law presumes the defendant innocent in this case, and not guilty as charged in the indictment, and this presumption of innocence should continue and prevail in the minds of the jury until they are satisfied by the evidence beyond a reasonable doubt of his guilt." *Ross v. State*, 92 Ark. 481, 123 S. W. 756.

[2] The court refused to give the following instruction, numbered 2:

"(2) The court instructs the jury that the facts relied upon to show the defendant's guilt must not only be consistent with and point to his guilt, but they must be inconsistent with his innocence; and, if such facts are susceptible of two interpretations, one of innocence and one of guilt, the interpretation of innocence must be accepted in the defendant's behalf, and you will acquit."

This instruction, and others of a similar character, are usually given in cases where it is sought to prove the guilt of the defendant as an inference to be drawn from facts and circumstances established by the proof; and, while such an instruction is no doubt proper in cases of that kind, it cannot be said that it was error to refuse to give it here. This is true because this case is a swearing match, and according to the proof on the part of the state, appellant was guilty as charged, while according to the testimony in his behalf, he acted in his necessary self-defense.

[3] An instruction, numbered 3, asked by appellant, was also refused. This instruction dealt with the subject of reasonable doubt, but the law of that subject was covered in other instructions given by the court. And the same thing may be said of appellant's instruction numbered 4, which dealt with the question of the presumption of innocence. The court is not required to charge the law upon any question in every possible manner in which a correct statement of it can be prepared by counsel, but it is sufficient if the law be so declared that the jury may not be in doubt as to the law of that question, as applied to the facts of that case.

[4] It is earnestly insisted that error was committed in the refusal to give instruction numbered 13, which reads as follows:

"(13) The court tells you that, while mere words, however opprobrious, will not justify an assault, yet words accompanied by acts of

a violent or threatening character will be provocation that may reduce the crime from assault with intent to kill to an aggravated assault, or to a justification of aggravated assault."

It is said that this instruction was approved as a correct declaration of the law in the case of *Coulter v. State*, 110 Ark. 209, 161 S. W. 186. This instruction, numbered 13, is set out in full in the *Coulter Case*, where it is also numbered 13; but it was there complained that the court had erred in failing to give an instruction numbered 8, which was also set out in the opinion. But the court said:

"Thus it will be seen that the matters embraced in instruction No. 8 were fully covered by instructions Nos. 7 and 13."

This was not an approval of instruction numbered 13, but only a decision that it was not error to refuse the instruction numbered 8.

The court here gave an instruction numbered 8, which reads as follows:

"(8) If you believe from the evidence, or if the evidence raises in your minds a reasonable doubt, that the alleged assault was committed by the defendant while he was acting under the influence of passion and excitement, caused by a provocation apparently sufficient to make the passion irresistible, you will acquit the defendant of assault with intent to kill."

This instruction numbered 8 is an exact copy of the instruction numbered 8 referred to in the *Coulter Case*. In the *Coulter Case* it was held not to have been error to refuse instruction numbered 8 because instruction numbered 13 was given; while here instruction numbered 8 was given and instruction numbered 13 was refused.

[5] We think the instruction numbered 8 is a more accurate declaration of the law than instruction numbered 13; and, inasmuch as No. 8 was given, it was not error to refuse No. 13. In fact, we think the thirteenth instruction is not an exact statement of the law. It tells the jury that threatening acts, accompanied by opprobrious words, would be a provocation that might reduce the degree of the assault. It charges that opprobrious words and threatening acts would be a provocation legally sufficient to reduce the degree of the offense, while the jury should have been permitted to pass upon the sufficiency of the provocation to provoke a passion apparently irresistible, as stated in instruction numbered 8. This instruction numbered 13 concludes with the statement that the provocation might justify an assault with intent to kill, or be a justification of an aggravated assault. The court had defined an aggravated assault, and it is apparently a contradiction in terms to speak of a provocation which justifies an aggravated assault. An aggravated assault is committed when one person assaults another with a deadly weapon, instrument, or other thing, with the intent to inflict a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandon-

ed and malignant disposition. Section 1587, Kirby's Digest. The very definition of the statute negatives the presence of sufficient provocation, yet the instruction says, if there was sufficient provocation, it would justify the offense which is committed when no considerable provocation appears.

Finding no prejudicial error, the judgment is affirmed.

OWENS v. STATE. (No. 181.)

(Supreme Court of Arkansas. Oct. 25, 1915.)

1. HOMICIDE — PROSECUTION — EVIDENCE — SUFFICIENCY.

In a prosecution for homicide, evidence held sufficient to warrant a conviction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523-532; Dec. Dig. —253.]

2. CRIMINAL LAW — CONTINUANCE — DENIAL.

Where the showing on a motion for postponement did not clearly disclose the whereabouts of the absent witness, or establish that his attendance could be procured later, the denial was not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1350, 1364-1368; Dec. Dig. —608.]

3. CRIMINAL LAW — CONTINUANCE — DENIAL—ABSENT WITNESS.

The denial of a continuance on the ground of an absent witness, whose testimony would be merely cumulative, is not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1328-1330; Dec. Dig. —596.]

4. HOMICIDE — PROSECUTION — EVIDENCE.

In a prosecution for homicide, evidence that shoes of the same last as those sold to accused, but only a little shorter, fitted tracks at the place of the crime, except as to length, is admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 805; Dec. Dig. —170.]

5. CRIMINAL LAW — TRIAL—INSTRUCTIONS.

Where accused's requested charge that his alleged confession should be carefully weighed, and a conviction could not be had on such confession without other evidence, was modified and the jury were charged that the confession should be considered along with other evidence, but conviction could not be had on the unsupported confession, accused could not complain; the charge requested being on the weight of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770, 2013, 2014; Dec. Dig. —763, 764, 834.]

6. CRIMINAL LAW — TRIAL—ARGUMENT OF COUNSEL—IMPROPRIETIES.

That the prosecuting attorney made statements as to proof he would adduce, but on trial was unable to furnish it, is no ground for reversal, where the statements were in good faith, and accused requested no instructions that the jury should not consider such statements.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689-1691; Dec. Dig. —728.]

7. CRIMINAL LAW — TRIAL—ARGUMENT OF COUNSEL.

Where accused and another, who were traced by bloodhounds from the place of the

killing to the drug store where they were found the next morning, asserted that they spent the night together, argument by the prosecutor that such other person participated in the crime is warranted, though the evidence did not disclose it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. —720.]

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Charles Owens was convicted of murder in the first degree, and he appeals. Affirmed.

W. D. Davenport and Harry Neely, both of Searcy, for appellant. Wallace Davis, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

McCULLOCH, C. J. Appellant was convicted of the crime of murder in the first degree, and his punishment was fixed by the jury at life imprisonment. The charge against him is that he and one John Perdue committed the offense by killing Luther Cotham at the village or town of Georgetown, White county, Ark., on the night of April 27, 1915.

[1] The principal ground urged for a reversal of the judgment is that the evidence is not sufficient to sustain the verdict, and in disposing of that contention it is necessary to discuss in detail the circumstances of the killing and the facts and circumstances which tended to establish appellant's guilt.

Appellant lived at Georgetown in the house with deceased and the latter's wife. He had been living at Georgetown about a year, and living in the house with deceased and his wife since the month of December preceding the killing. Deceased and his wife lived in a room downstairs, and appellant occupied a room upstairs which was approached by a stairway leading up to the front porch. Appellant paid no board, but was living there at the request of the deceased. The killing occurred on Saturday night, and a few days before that deceased and his wife had decided to leave there, and had spoken to appellant about the fact that they were going to leave. Shortly before that time appellant had made a proposal to the wife of deceased that she leave her husband and go away with him, but she declined to accept the invitation. About supper time on the night of the killing deceased and his wife were absent from the house, and on their return they found appellant in their room with the door locked. A few days before that time Mrs. Cotham tried to get appellant to quit staying at the house, but, according to her testimony, he declined to do so. Mrs. Cotham's father also testified that he talked to appellant and tried to get him to leave, and suggested that he was causing trouble between Cotham and his wife, but that appellant declined to go, saying that he had talked to Cotham and that the latter had consented for him to stay. Mrs. Cotham also testified that about a week before the death of her husband appellant said to her that he

had eavesdropped her and her husband and watched them through the window, and that he said "he had a damn good notion of taking his gun out of his pocket and killing both of them."

There was a negro dance in Georgetown on the night of the killing at the house of a negro named McRae, and early in the evening appellant left the house of the Cothams and went to the dance. He invited Cotham to go with him, and the latter declined to go at that time, but about an hour later followed, and both of the men attended the dance. Appellant and Cotham were both white men. Witnesses testified that Cotham left the dance about 11 or 12 o'clock, and appellant himself testified the last time he saw Cotham the latter was standing out to one side, talking with several negro girls. The killing occurred some time during the night, but there is no direct testimony as to the hour it occurred. The proof adduced by the state shows that the watch of deceased stopped at 1 o'clock, and the inference is that the killing occurred at that hour. Several of the witnesses testified about the condition of Cotham's body, when found the next day, but there is no witness that states where the body was found, though it is fairly inferable from the testimony that the body was found in White river. Georgetown is situated on or near the bank of that stream. The witnesses who testified concerning the condition of the body stated that the left side of the face was crushed and mutilated, and that there were three knife wounds in the abdomen. The place of the killing was identified by several witnesses, who testified that they found tracks and blood and followed them to the bank of the river where the body was evidently thrown in. There was also found at the place thought to have been the scene of the killing three human teeth and a pistol cartridge, and also a fresh cork, which came out of a bottle of whisky. The indications were that some person had carried the dead body of Cotham from the place that the witnesses identified as the place of the killing to the river, and that the body was laid down on the ground at different places, the places being indicated by blood spots.

About 5 o'clock the next morning appellant and Perdue went to a drug store in Georgetown and awakened Dr. Alexander, the proprietor, and appellant asked for some medicine to be administered to Perdue, who was sick and suffering from stomach trouble. Perdue testified that he became grossly intoxicated the night before and slept most of the night and awoke early in the morning very sick. Appellant admitted that he and Perdue had been together all night; that he had remained with Perdue during the part of the night that the latter lay in a drunken sleep. Dr. Alexander administered the medicine, and appellant laid down on a bed in the back room of the drug store and slept until about 8 o'clock. He had a small suit case with

him and he placed that under the bed. An officer sent to Brinkley for bloodhounds, which were brought to the scene of the killing by the owner, who testified as to the qualifications of the dogs to follow a human trail. There was one track in particular that was plainer than the others, and when discovered early Sunday morning a pigpen was moved over it so as to fence it away from intruders. Appellant had bought a pair of shoes from a merchant at Georgetown about a week before the date of the killing, and the merchant testified that the shoes were No. 9 in size, and they took a No. 8½ shoe of the same make, and the same width last, and put it in the track and the shoe fit the track, except in length. The bloodhounds were taken to this track, and they began following a trail towards the river, and thence to a sawmill, and thence around the railroad station, and thence to the drug store and through the store back into the sleeping room, where one of the dogs mounted the bed where appellant had slept that morning, and the other dog went under the bed and could hardly be forced away from appellant's suit case, which was lying under the bed. The suit case, when opened, was found to contain some of appellant's clothing and three bottles of whisky.

Appellant was arrested by the officers at 6:20 o'clock in the evening while at the railroad station just as the train came in. The dogs were following the trail at that time, and, according to the witnesses, every man about the town except the railroad agent and appellant were following and watching the movements of the dogs. Several witnesses testified that during the forenoon of that day they noticed appellant with the left sleeve of his undershirt rolled up, and that there was blood on the sleeve. They testified that on the upper side there appeared to be a clot of blood, and on the lower side of the sleeve there was a smear of blood as if the sleeve had been rubbed against some bloody place. A physician, who qualified himself as a chemist, testified that he had made an examination and chemical analysis of splotches on a pair of pantaloons which appellant wore on the day after the killing, and that he found the splotches were caused by blood, but he could not say whether it was human blood or that of some other animal.

After the examining trial, appellant was incarcerated in the county jail of White county, where he remained until the time of this trial, which began on July 27, 1915. One Britt Barnard, who was also a prisoner in the jail under a charge of bribery, testified that he had been acquainted with appellant at Georgetown, and that after the latter was placed in jail he confessed to witness that he had killed Luther Cotham and threw his body in the river, and that he committed the deed on account of Cotham's wife. There are, perhaps, some other circumstances of

less importance than those just enumerated, pointing with some force towards the guilt of the accused.

We are of the opinion that the evidence is sufficient to sustain the verdict. The corpus delicti was established by abundant testimony, and the confession made to Barnard constituted evidence legally sufficient to support the verdict. In addition to that, there are many circumstances already referred to which tend to show that appellant was the guilty party. There is a sharp conflict, however, in the testimony bearing upon each of the circumstances just related. Appellant denies that he made any improper proposals to Cotham's wife, and denies any participation in the commission of the crime, or any knowledge of it. He stated that he went to the negro dance that night and remained there all night. He introduced other witnesses whose testimony tended to corroborate his own, to the effect that he remained at the dance after Cotham left there about midnight, and that he remained there all night until he went to Dr. Alexander's drug store the next morning. He denies that there was any blood upon his clothes, except a small spot of blood on his trousers, which he got there when he assisted Cotham in marking a hog about a week before the killing occurred. The state of the testimony made a case for the jury, and there was sufficient to warrant the jury in reaching the conclusion, beyond a reasonable doubt, of appellant's guilt of the crime.

[2, 3] It is insisted that the court erred in overruling appellant's motion for a postponement of the trial until a later day of the term. The postponement was sought to enable appellant to procure the testimony of one Lefty Sharp, who, according to the recitals of the motion, would testify that he was at the dance all night and played the piano for the dancers, and that he was in company with appellant and knew that he did not leave the dance that night. Appellant caused a subpoena to be issued for Sharp, but the sheriff in his return showed that the witness could not be found in that county. Witnesses were heard by the court upon that issue, and it appears therefrom that Sharp's people lived at Kensett, White county, but he was a strolling musician, and the last heard of him he was traveling with a minstrel show. One witness testified that about a week before the trial began he heard of Sharp being at Brinkley, Ark., and the deputy sheriff who tried to serve the subpoena testified that he received information that the witness Sharp was in Madison, Ark. It does not appear with any degree of certainty that the attendance of the witness could have been procured, and we cannot say that the court abused its discretion in refusing to postpone the trial. In addition to that, it appears the testimony of the witness, if his attendance could have been procured,

was to the effect that he was at the dance all night with appellant. Other witnesses testified to the same facts, and there were numerous other persons at the dance whose attendance at the trial could have been procured. The testimony of Sharp was, in other words, purely cumulative, and it was not an abuse of the discretion of the trial court to refuse to postpone the trial to enable appellant to get the testimony of that particular witness when the same testimony of other witnesses could easily be obtained.

[4] The next ground urged for a reversal is that the court erred in permitting witnesses to testify concerning the comparison of the shoe procured from the merchant with the track found at the scene of the killing. It will be remembered that the shoe compared with the track was not of the same size as that purchased from the merchant by appellant and worn by him, but the merchant testified that it was the same kind of a shoe, and made on the same last; the only difference being that the shoe with which the comparison was made was a half number smaller than the shoe sold to appellant. We are of the opinion that the conditions were so near the same in substance that the testimony was admissible, it being a question for the jury to determine, from the description given by the witnesses as to the comparison, whether or not appellant's foot made the track. *St. L. I. M. & S. Ry. Co. v. McMichael*, 171 S. W. 115. It is true the shoes were of different sizes, but the witnesses said when they placed the shoe in the track they were the same size except in length, and they undertook to state the difference in length. Appellant had, according to the testimony of the merchant, purchased the pair of shoes just a few days before the killing occurred, and that it was too short a time for the shoes to become considerably worn.

[5] Another assignment of error concerns the court's modification of instruction No. 7, requested by appellant. In that instruction the court was asked to tell the jury:

"That the alleged confession of the defendant should be received with great caution and carefully weighed, and if the evidence against the defendant consists of his confession, unsupported by other evidence, the jury will find the defendant not guilty."

The court struck out that language, but instructed the jury:

"That the alleged confession of the defendant should be considered by you along with the other evidence in the case; and, if the evidence against the defendant consists of his confession, unsupported by other evidence, the jury will find the defendant not guilty."

The instruction requested by appellant was upon the weight of the evidence, and the language used was properly stricken out. The court told the jury that the unsupported testimony of the confession was not sufficient, and that was as much as appellant was entitled to on that subject. The corpus delicti was established by undisput-

ed evidence, and the testimony as to the confession, if believed, was sufficient to sustain the conviction. It was not error for the court to refuse to instruct upon the weight of the testimony concerning the confession.

[6] The only remaining assignment relates to alleged misconduct of the prosecuting attorney in his opening statement to the jury and in his closing argument. It is claimed that the statements of the prosecuting attorney in his opening argument should have been excluded for the reason that there was no testimony to support it, and that some of the statements were incompetent even if there was testimony upon which to base them. We have carefully considered these assignments, and conclude that there was nothing in the statements that was calculated to operate to appellant's prejudice. There was no request made for an instruction, telling the jury that they should not consider the statements of the prosecuting attorney which were not subsequently borne out by the testimony adduced in the case, and the presumption should be indulged that the jury tried the case upon the testimony of the witnesses, and not upon the unsupported statements of the prosecuting attorney made in his opening argument. The prosecuting attorney may not always be able to make the proof that he anticipates, and the judgments of conviction should not be set aside merely because that officer makes a mistake. If reckless statements are made by a prosecuting attorney not in good faith, it is the duty of the court, by proper admonition and by punishment if need be, to stop such practice; but merely because the prosecuting attorney has said in his opening statement to the jury that he will prove things, which subsequently he is unable to do, does not afford any grounds for reversal.

[7] There is one statement in the closing argument of the prosecuting attorney which is called to our attention as prejudicial error, and to which the appellant saved his exceptions. That statement amounted to a comment on the failure of appellant to produce other witnesses except Perdue, and (quoting from the remarks) "the one that stood by and saw him strike the fatal blow." Also to the further comment of the prosecuting attorney on the character of Perdue, who was spoken of as "one of the murderers." It is urged that there is no evidence tending to show that Perdue participated in the crime, and that for that reason the statement was unsupported by the evidence. It was, we think, legitimate for the prosecuting attorney to draw the inference that Perdue was a participant in the crime. It may be that the testimony is insufficient to make out a case against Perdue, but the fact that he was, as shown

by some of the evidence, in the company of appellant during the night and went with him to Alexander's drug store early the next morning, justified the argument that the crime was committed by those two men.

Upon the whole we find no prejudicial error in this record, and, the testimony being legally sufficient to sustain the verdict, the judgment is affirmed.

WEST et al. v. WEST et al. (No. 202.)
(Supreme Court of Arkansas. Nov. 1, 1915.)

1. EVIDENCE \Leftrightarrow 580—TESTIMONY IN ANOTHER SUIT.

In an action to quiet title to land, as against the claim of defendant under a decree of divorce, testimony in the divorce suit between the defendant and her husband, plaintiffs' grantor, was inadmissible, since plaintiffs, not being parties to the divorce suit, were not concluded by anything done therein.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2413; Dec. Dig. \Leftrightarrow 580.]

2. HUSBAND AND WIFE \Leftrightarrow 6 — CONVEYANCE IN FRAUD OF INTENDED WIFE—TRUST.

If a woman or a man convey away her or his property for the purpose of depriving the intended husband or wife of the legal rights and benefits arising from the marriage, equity will avoid such conveyance, or compel the person taking it to hold the property in trust for, or subject to the rights of, the defrauded husband or wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 13-18; Dec. Dig. \Leftrightarrow 6.]

3. QUIETING TITLE \Leftrightarrow 44—BURDEN OF PROOF — CONVEYANCE IN FRAUD OF INTENDED WIFE.

In an action to quiet title, the defendant, claiming under a decree of divorce, from plaintiff's grantor and asserting that plaintiff's deed had been made in fraud of her marital rights, had the burden of proving it, since fraud is never presumed.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89-92; Dec. Dig. \Leftrightarrow 44.]

4. QUIETING TITLE \Leftrightarrow 44 — SUFFICIENCY OF EVIDENCE—CONVEYANCE IN FRAUD OF INTENDED WIFE.

In an action to quiet title, as against defendant, claiming under a divorce decree from plaintiff's grantor and asserting that plaintiff's deed was in fraud of her marital rights, evidence held insufficient to sustain a decree for the defendant, canceling plaintiff's deed in so far as it affected her interest.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89-92; Dec. Dig. \Leftrightarrow 44.]

Appeal from White Chancery Court; Jno. E. Martineau, Chancellor.

Action by J. A. West and others against J. L. West, Mary C. West, and others, with cross-complaint by Mary C. West. Decree for cross-complainant, and plaintiffs appeal. Reversed, and cause remanded, with directions.

J. A. West instituted this action in the chancery court against Mary C. West. The complaint alleges, in substance, that a decree of divorce was granted to Mary C. West from J. L. West; that in the decree certain commissioners were appointed to allot to

Mary C. West one-third of certain lands which were decreed to belong to J. L. West; that plaintiffs were not parties to that suit; that they are children of J. L. West by a former wife, that prior to his marriage to Mary C. West he conveyed to them by warranty deed 400 acres of land, and that said land belonged to them and that they had entered into possession of the land. The prayer of the complaint is that their title to the land be quieted, and that the claim of the defendant Mary C. West thereto be set aside as a cloud upon their title. The defendant Mary C. West answered and set up that the land had been conveyed to the plaintiffs by J. L. West in fraud of her marital rights and by way of cross-complaint asked that said deed be canceled and held for naught.

The facts are as follows: John L. West, a man more than 70 years of age, owned 480 acres of land adjoining the town of Letona, in White county, Ark. He was a widower with six children and, being desirous of providing for them, executed a deed to them to 400 acres of said land, and delivered the deed to his son J. A. West for the grantees. This son then entered into possession of the land for himself and the other children. He continued in possession from that time, making improvements on the land and collecting the rents therefrom. John L. West retained 80 acres of the land next to the town of Letona, and this was the most valuable part of his land. Some of it was being laid off into town lots and sold. He also owned some lots in the town of Letona. After he deeded the land to his children they permitted him to remain on the land and, when it was necessary for his support, gave him a part of the rent derived from the land. These facts were testified to by both John L. West and by J. A. West, and other witnesses who resided near them corroborated their testimony. Both John L. West and his son J. A. West testified that the conveyances were made in order that the father might make provision for his children. J. L. West stated that he executed the deed on May 8, 1908, conveying the 400 acres of land in controversy to his children because he was getting old and wanted them to have the land, and that he reserved the 80-acre tract adjoining Letona for himself. His son J. A. West testified that the deed was delivered to him on May 8, 1908, on the day that it was executed, and in this statement he is corroborated by the justice of the peace, who took the acknowledgment. The witness stated that his father at that time lived with his children, and that there had never been any talk of his marrying Mary C. West. The defendant Mary C. West testified that she married John L. West on the 12th day of August, 1908, and that she was engaged to him six weeks prior thereto; that they lived together on the land after their marriage about four years, until their

separation, and that her husband during all of this time collected the rents and exercised acts of ownership over the land. Other testimony will be referred to in the opinion.

The court found that the deed from J. L. West to his children, executed on the 8th day of May, 1908, was a fraud upon the marital rights of the said Mary C. West, and said deed, in so far as it affected her interests in the land, was canceled, set aside, and held for naught. A decree was entered accordingly, and to reverse that decree the plaintiffs have prosecuted this appeal.

John D. De Bois, of Searcy, for appellants.
Brundidge & Neely, of Searcy, for appellees.

HART, J. (after stating the facts as above).

[1] The testimony in the divorce suit between Mary C. West and John L. West was introduced in evidence in this case over the objection of the plaintiffs. It is evident that such action on the part of the court was erroneous. The plaintiffs were not parties to the divorce suit and the evidence in that action could not be introduced in the present action as testimony against the plaintiffs. The plaintiffs, not being parties to the divorce suit, were not concluded by anything done in that suit and the evidence in that action could not be used against them in the present one. If, however, after eliminating the incompetent testimony there remained sufficient competent evidence to support the finding of the chancellor, the decree should be upheld. Otherwise, it must be reversed. That is to say, when the competent evidence is considered, is the finding of the chancellor against the clear preponderance of the evidence?

[2] This brings us to a consideration of the law governing cases of this character. The general rule is that if a man or woman convey away his or her property for the purpose of depriving the intended husband or wife of the legal rights and benefits arising from such marriage, equity will avoid such conveyance, or compel the person taking it to hold the property in trust for or subject to the rights of the defrauded husband or wife. Perry on Trusts and Trustees (6th Ed.) vol. 1, § 213; Bishop on the Law of Married Women, vol. 2, § 350; Smith v. Smith, 6 N. J. Eq. 515; Leach v. Duvall, 8 Bush (Ky.) 201; Dearmond v. Dearmond, 10 Ind. 191; Collins v. Collins, 98 Md. 473, 57 Atl. 597, 103 Am. St. Rep. 408, and case note, 1 Ann. Cas. 856.

[3] In the application of the principles of law just announced to the facts of the present case, we think the chancellor erred in holding that the conveyance to the plaintiffs was in fraud of the marital rights of the defendant Mary C. West. Fraud is never presumed, but must be proved, and the burden was on the defendant to show that the deed had been made in fraud of her marital rights. This she did not do.

[4] The plaintiffs were the children of John L. West by a former marriage, and were the proper objects of his bounty. At the time he made the conveyance West owned 400 acres of land and some town lots in the town of Letona. He retained 80 acres adjoining the town and the town lots. The property not conveyed by him was the most valuable part of his estate. Neither is there anything in the record from which it might be inferred that he contemplated marriage, except the mere fact that he did marry on the 12th of August after he had conveyed his property to his children on the 8th of May. Mary C. West testified that they were engaged about six weeks before their marriage, but she does not say when they first contemplated marriage. On the other hand, J. A. West testified that his father lived with his children at the time he made the conveyance on the 8th day of May, and that at that time there was nothing whatever to indicate that he intended to marry the defendant, or any one else. John L. West himself testified that he conveyed the land to his children because he was getting old and wanted them to have the land. So it seems that his marriage was, so far as the record discloses, the result of a sudden impulse, on the part of the old man, after he had made the deed to his children. In any event there is nothing in the record tending to show that he contemplated marriage to the defendant, or any one else, at the time he executed the deed to his children. He had a right to deed his property to his children, and the chancellor erred in holding that the conveyance was made in fraud of the marital rights of the defendant.

The decree will be reversed, and the cause remanded, with directions to the chancellor to enter a decree in accordance with the prayer of the complaint.

FIDELITY & DEPOSIT CO. v. MERCHANTS' & FARMERS' BANK et al. (No. 210.)

(Supreme Court of Arkansas. Nov. 1, 1915.)

1. PRINCIPAL AND SURETY — BUILDING CONTRACTS — RECOVERY OF UNAUTHORIZED PAYMENTS.

Plaintiff, as surety, executed the statutory bond against liens to secure a building contract to erect a building for defendant bank. The contract provided that 15 per cent. of the contract price was to be retained until acceptance of the work, and that the contractors were to have no right to demand payment until they had shown that the previous payment on the architect's certificate had been disbursed for labor and materials on the work. The contractors getting into financial difficulties before completion, the surety elected to take charge, and notified the architect as the defendant's agent to issue no further certificates to the contractors. The architect, however, issued a certificate for the amount then due, which the bank applied to a note of the contractors held by it for an advance

payment under the contract. Claims for labor and materials were also outstanding. Held, that the payment for which the note was given being in violation of the provision of the contract price, the bank had no right to apply the certificate thereto, and that the sum represented thereby might be recovered by the surety as a fund to which it became entitled upon taking over the contract and paying liens.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 127; Dec. Dig. ¶82.]

2. PRINCIPAL AND SURETY — BUILDING CONTRACTS — UNAUTHORIZED PAYMENTS — WAIVER.

Where a bank for whom a building was being constructed under contract secured by bond violated the contract provision as to retention of 15 per cent. of the contract price until acceptance, the action of the surety company in completing the building upon the contractors' failure, after knowledge of the bank's payment, did not waive the breach, where it expressly reserved its rights against the bank for the wrongful payment.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. ¶86.]

Appeal from Desha Chancery Court; Z. T. Wood, Chancellor.

Action by the Fidelity & Deposit Company against the Merchants' & Farmers' Bank and others. Judgment for defendants, and plaintiff appeals. Reversed and rendered.

Cockrill & Armistead, of Little Rock, for appellant. Jack Bernhardt, of Arkansas City, and Samuel Frauenthal, of Little Rock, for appellees.

SMITH, J. The parties to this litigation prepared an agreement in the nature of an agreed statement of facts, it being in effect a statement of the respective contentions of the parties, and it was stipulated that this agreement might be read in evidence in lieu of depositions, but that either party might take proof to controvert the facts as there recited, but no such proof was taken. From this agreement we copy the following facts:

On July 31, 1913, R. J. McBride and J. M. McCammon, partners under the firm name of McBride & McCammon, and the Merchants' & Farmers' Bank, of Dumas, the appellee herein, entered into a building contract, a copy of which was attached as an exhibit to the agreement between counsel. Pursuant to a stipulation of this building contract the contractors made a written application to the appellant bonding company for a bond, which the bonding company thereafter executed. This bonding company made, executed, and delivered a contractor's bond to the state of Arkansas for the use of the Merchants' & Farmers' Bank and all persons in whose favor liens might accrue in compliance with Act No. 446 of the Acts of the General Assembly of 1911 in the penal sum of \$17,700, which bond was approved and filed as required by said act.

The building contract was an ordinary standard form building contract, by which the contractors agreed to construct a building for the bank for \$8,500. Certificates of

the architect were to be issued during the progress of the work, based on his estimate of the value of labor performed and materials incorporated in the building to the amount of 85 per cent., 15 per cent. of the whole to be retained until final completion and acceptance of the work.

The contractors agreed to use all moneys paid them on the work and not to divert it to any other other purpose until all labor and materials were paid for, and the contractors were given no right to demand any payment at all until they had shown, to the satisfaction of the architect and owner, that the preceding payment had been disbursed as theretofore provided. The owner or architect was given the right to demand statements and receipts showing payment for materials or labor and to withhold payments until such statements and receipts had been furnished. Upon the failure of the contractors to carry out their contract the owner, upon three days' notice, was authorized to take possession, carry out, and complete the work, and charge the expense thereof to the contractors deducting the same from the contract price and to collect any loss from the contractors or bondsmen.

Charles L. Thompson was named as the architect, and was made superintendent for the owner with power to reject work, etc. The contractors agreed to complete the building on or before December 25, 1913. This contract was dated July 3, 1913.

The application to the bonding company for a bond was made on August 1, 1913, and the work on the building commenced soon thereafter.

On March 14, 1914, Charles L. Thompson, the architect, wrote the agent of the bonding company that the contractors were in financial difficulties, and were unable to complete their contract, and that claims amounting to about \$1,000 had been filed against the building. On the 20th of March the bonding company as surety advised the architect that it would undertake the completion of the work, and would protect the bank against all claims of labor men and materialmen, and would in other respects comply with and carry out the terms of said bond, and notified the architect, as the agent for the bank, to make no further payments or give no further certificates to said contractors. The architect was requested to furnish an estimate of the probable cost of completing the building in accordance with the contract, and in response to this letter the architect advised the appellant that the uncompleted work on the building was of the value of \$600. After the agent of appellant had notified the architect to issue no more certificates in payment of the work done by the contractors, the bank, through its attorney, applied to and received from the architect a certificate showing a balance then due the contractors, less the retained percentage, of \$1,853. This certificate was dated the 23d of March, 1914, and was issued by

the architect upon the assurance of the bank's attorney that the contractors had directed this to be done. Appellee took this architect's certificate and applied it to a note payable to its order, dated August 13, 1913, due and payable December 1, 1913, which had been executed in favor of the bank by said contractors.

The attorneys for the bank and the bonding company conducted a correspondence with the view of adjusting the liability of the surety company, and during the time this correspondence was being carried on appellant discovered that there were outstanding claims for material and labor aggregating about \$3,500. The attorney for the bank agreed to accept the \$600 offered by the bonding company, provided the bonding company would discharge all claims for liens against the building, and would not seek to hold the bank liable for the \$1,853 estimate given it by the architect. The bonding company declined to accede to this request, whereupon it notified the bank that, reserving all of its rights in the premises, it would complete the building and would attempt to recover from the bank the said sum of \$1,853.

It was recited in the agreed statement of facts that R. J. McBride, of the firm of McBride & McCammon, alone represented his firm in the making and execution of the contract with the bank, and personally attended to all details in providing finances and paying bills and labor therefor; that all moneys received by him, either from the loan from the bank or from estimates during the progress of the contract, were paid to the account of said firm at the bank at Dumas, and checked out of said bank by said McBride for the purpose of paying labor, supply bills, material, and other expense growing out of the contract for said bank building, and that none of said funds was used or expended by him in any other contract that the firm was interested in at that time; that the note given by McBride & McCammon to the bank above referred to was secured by a writing from McBride & McCammon to said bank consisting of a letter signed by the contractors and directed to the architect to deliver to the bank any and all estimates that might become due to them on account of said contract as it progressed; that this letter was attached to the note as collateral, was of even date with the note, and held by the bank until it was finally paid by the application of said \$1,853 as shown by said last estimate, at which time it was delivered to McBride & McCammon.

[1] The controversy, therefore, is over the \$1,853, which the bank insists it had the right to apply to the note of its contractors under the estimate made by the architect on March 23, 1914; while the appellant bonding company claims it as a fund due from the bank as owner under the contract on the contract price to which the bonding company became entitled upon taking over and com-

pleting the building contract. The bonding company claims to be entitled to that fund under the doctrine of equitable subrogation, as well as under the terms of its contract contained in the application. The contractors abandoned the work about January 1, 1914, at which time there were unpaid bills of \$3,567.57, which were later paid by the bonding company. Appellee in its answer alleged that all sums advanced by it to the contractors "were legitimate in the conduct of its banking business" and it says the proof shows that the sums so advanced by it were expended by the contractors in and about the erection of the building contracted for. But appellant says that the \$3,500 transaction between the bank and the contractors, evidenced by the note of August 18, 1913, was either an ordinary bank loan, or was an advance payment on the work to be thereafter done by the contractors, and that in either event the bank had no right to apply the amount of the architect's estimate of March 28, 1914, to the payment of that indebtedness. And we agree with appellant in its contention. This would certainly be the case if this were an ordinary loan; but the appellee says it should not be so regarded, for the reason that this money was used in the discharge of demands for which the bonding company would have been liable if the demands had not been so paid. But the difficulty with that position is that, if the \$3,500 loan be treated as an advance payment under the contract, then it was prematurely made and was excessive and violated the provision of the contract for the retention of the 15 per cent. of earned estimate. In the case of *Prairie State National Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, it was said:

"That a stipulation in a building contract for the retention, until the completion of the work, of a certain portion of the consideration, is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed, that it raises an equity in the surety in the fund to be created, and that a disregard of such stipulation by the voluntary act of the creditor operates to release the sureties, is amply sustained by authority."

See, also, *Powell v. Fowler*, 85 Ark. 451, 108 S. W. 827, 122 Am. St. Rep. 41; *Marree v. Ingle*, 69 Ark. 126, 61 S. W. 369; *Lawhon v. Toors*, 73 Ark. 473, 84 S. W. 636; *National Surety Co. v. Long*, 79 Ark. 523, 96 S. W. 745.

It was provided in the building contract that the contractors should have no right to

demand any payment until they had shown, to the satisfaction of the architect and owner, that preceding payments had been disbursed as provided by the contract. Yet at the time this \$1,853 was applied by the bank to the credit of the contractors' note there were unpaid bills amounting to \$3,567.57, which the bonding company was required to, and did, pay. The bank was not required to pay any sum of money to free its property from the assertion of liens against it, as the statutory bond gave it exemption from that liability, and if the \$3,500 loan be treated as an advance to be used in the construction of the building, and it be conceded that it was so used, the fact remains that the advance or payment was made in violation of the terms of the contract which fixed the liability of the bonding company as surety.

[2] But it is urged by appellee that the bonding company has waived any forfeiture of the bond by its action in completing the building after knowledge of the breach of the contract by the bank. But we think this is not true, for the reason that when the bonding company was unable to compromise its liability by the payment of a fixed sum of money, it assumed the completion of the building upon the express condition that the right was reserved to hold the bank for the \$1,853 alleged to have been wrongfully applied by the bank to the satisfaction of the contractors' note to its order. The bank would have had the right to complete the building and charge the cost of the unfinished work to the bonding company, but it did not elect to do so, and had it done so, it would have then been confronted with the bonding company's claim for the misapplication of the architect's estimate. The bank knew when the bonding company entered upon the completion of the unfinished work that the bonding company was expressly reserving the right to litigate the appropriation made of the \$1,853, and under these circumstances we think it cannot be said that appellant waived the breach of the bond and has estopped itself from asserting its claim to the \$1,853.

The court below rendered judgment in favor of the bonding company for the sum of \$2,802.50, which sum the bank had tendered into court at the time of filing its answer; but we think this amount should be increased by the allowance of the disputed item of \$1,853, and the judgment of the court below will therefore be reversed, and judgment entered here for the appellant for the sum of \$4,155.50.

SOVEREIGN CAMP, WOODMEN OF THE WORLD, v. ETHRIDGE.

(Court of Appeals of Kentucky. Nov. 18, 1915.)

1. INSURANCE — 825 — MUTUAL BENEFIT INSURANCE — SUICIDE — INSANITY — EVIDENCE.

In an action by the beneficiary under a life insurance policy, where the defense was based upon a clause in the policy providing for forfeiture in case of suicide, evidence held sufficient to take the case to the jury on the question whether assured was so insane as to render him irresponsible for his act.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. 825.]

2. INSURANCE — 788 — SUICIDE — INSANITY — EFFECT.

A suicide forfeiture clause in an insurance policy will not render the policy void, where assured was so insane at the time of taking his own life as not to know that he was doing so, or that his act would cause death, or assured acted on an insanely ungovernable impulse.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1956; Dec. Dig. 738.]

Appeal from Circuit Court, Fulton County.

Action by B. J. Ethridge against the Sovereign Camp, Woodmen of the World. From a judgment for plaintiff, defendant appeals. Affirmed.

Coleman & Wells, of Murray, for appellant. R. O. Hester and Hester & Hester, all of Mayfield, for appellee.

CARROLL, J. E. D. Ethridge was a member of the appellant society, Woodmen of the World, and there was issued to him a policy of insurance for \$750, payable at his death to his mother, the appellee. Ethridge came to his death by drinking carbolic acid, and the appellant refused to pay the policy on the ground that it was stipulated in the policy that, "if the member holding this certificate should die by his own hand or act, whether sane or insane, this certificate shall be null and void and of no effect," and therefore the right to recover the insurance was forfeited by the admitted manner of Ethridge's death.

In avoidance of this plea the beneficiary averred in the reply that:

When Ethridge "came to his death he was of unsound mind, and that when he took his life he was crazy, and his mind was so far gone he was unconscious of the fact that he was taking his life, and was actuated by an irresistible impulse that he could not control or resist, and at the time he took his life his mind was so deranged that he was not responsible for his act."

On a trial before a jury there was a verdict in favor of the beneficiary, and from the judgment on this verdict, the insurer appeals.

[1] It is first urged as a ground for reversal that the evidence did not show that Ethridge at the time he took his life was laboring under such mental disturbance as not to know or appreciate the quality of his act, and therefore the court should have directed a verdict in favor of the appellant.

Briefly, the evidence tends to show that

Ethridge, who was employed in a mercantile establishment, was charged with stealing some tobacco from a railroad company. He was arrested on this charge, and taken before a magistrate, who took bond for his appearance, and continued the case for trial a few days later. Between the time of his arrest and the day when the case was set for trial in the examining court, Ethridge bought an ounce of carbolic acid from a druggist in the town where he lived, and on the following morning he was found in his room dead. There was evidence to the effect that he was a young man of ordinary intelligence, and that on the night before the day he took his life, and for several days previous thereto, his manner, habits, and conversation were about as they had usually been. Witnesses said that they did not observe any change, and that it had never occurred to them that his mind was not balanced. Other witnesses who were well acquainted with the deceased said that for some weeks before his death, and especially after his arrest, they observed evidence of failing mental power which they described. Shortly before he took the poison he wrote and left in his room a short note addressed to his mother, telling her, in substance, that he was not guilty of the charge preferred against him.

[2] Aside from the manner of his death, it may well be doubted if there was sufficient evidence to show that the young man was insane. But, considered in connection with the evidence of his curious unnatural conduct observable for some weeks before his death, the fact that he took his life, under the circumstances stated, furnished sufficient evidence that at the time his mind was so unbalanced as that he did not know or appreciate the quality of his act or on account of mental unsoundness did not have sufficient will power to control his actions to authorize the submission of this issue to a jury. The charge against him was not a serious one, although calculated to deeply humiliate and distress him, and it is hardly conceivable that he should have taken his life unless his mind was so unbalanced as to render him incapable of knowing or appreciating what he was doing.

We have written in a number of cases that a suicide clause like the one here in question will not avoid the policy if at the time the insured came to his death he was so insane that he did not know that he was taking his life, or that the act he was committing would probably result in his death, or he did not have sufficient will power to govern his actions by reason of some insane impulse the result of mental unsoundness. Bankers' Fraternal Union v. Donahue, 109 S. W. 878, 33 Ky. Law Rep. 196; Inter-Southern Life Ins. Co. v. Boyd, 124 S. W. 333; Modern Woodmen of America v. Neeley, 111 S. W. 282. And we think there was sufficient evidence to take the case to the jury on the issue made

and that the finding of the jury was not so flagrantly against the evidence as would authorize us to set it aside.

The instructions are complained of, but they are, in substance, the instructions approved in the cases cited and in many other like cases.

The judgment is affirmed.

TROSPER COAL CO. v. RADER.

(Court of Appeals of Kentucky. Nov. 18, 1915.)

1. APPEAL AND ERROR \S 922—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—MOTION TO DISCHARGE PANEL.

Where a motion to discharge a panel on the ground that it was irregularly summoned was not supported by affidavit and the facts were not verified by order of court or certified to in the bill of exceptions, the facts averred in the motion cannot be assumed as true on appeal, so the denial cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3723; Dec. Dig. \S 922.]

2. MASTER AND SERVANT \S 40—CONTRACT—BREACH—ACTIONS.

In an action for damages for breach of a contract, to pay plaintiff to pump water from a mine, evidence held sufficient to support the verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 47-49; Dec. Dig. \S 40.]

3. WITNESSES \S 198—COMPETENCY—ATTORNEY.

While an attorney cannot testify concerning communications between himself and his client, an attorney who is a mining expert is competent, in an action involving breach of a mining contract, to testify as to the number of tons of coal in an acre.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 747, 748, 753; Dec. Dig. \S 198.]

Appeal from Circuit Court, Knox County.

Action by C. T. Rader against the Trospers Coal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

P. D. Black and Black, Black & Owens, all of Barbourville, for appellant. J. M. Robison, of Barbourville, for appellee.

CLAY, C. This is the second appeal of this case. The opinion on the former appeal may be found in 154 Ky. 671, 159 S. W. 536. The first judgment was reversed because of indefiniteness in the proof of damages. On the second trial plaintiff recovered a judgment for \$900. Defendant appeals.

[1] The defendant made a motion to discharge the jury panel, on the ground that the sheriff, in violation of section 2274, Ky. Stats., summoned 15 bystanders to try the case. The motion was overruled, and defendant insists that this was error. The facts on which the motion is predicated appear only in the motion itself. No affidavit accompanies the motion. There is no order of court showing that 15 bystanders were summoned by the sheriff; nor are the facts certified to in the bill of exceptions. This court cannot assume that facts appearing only in a mo-

tion are true. For aught that the record shows, the trial court may have overruled the motion because the facts stated were not true. Unless the facts relied on to obtain the discharge of a jury panel are supported by an affidavit which is made a part of the record, or are verified by an order of court, or are certified to in the bill of exceptions, the action of the trial court in refusing to discharge the jury panel is not subject to review.

[2] The point is again made that plaintiff failed to show with reasonable certainty the amount of damages he sustained. Under his version of the contract, he was to get the water out and keep it out of a certain entry in defendant's mine. For this service defendant was to pay him 9 cents a ton on the coal mined from this entry, if taken out by the company, but, if taken out by him, 45 cents a ton. According to plaintiff's version, the contract included the coal left in the pillars and stumps of the entry, while defendant claims that the stumps and pillars were not included. Rader says that the cost of getting and keeping the water out of the entry was about 3 cents a ton, and that he could have made a clear profit of 6 cents a ton. Plaintiff's witnesses estimate the amount of coal left in the entry at from 25,000 to 37,000 tons. While it may be true that the estimates of his witnesses are excessive, we conclude, from an examination of all the evidence in the case, that it is sufficient to sustain the verdict of the jury, which is based on a finding of 15,000 tons.

[3] Complaint is made of the fact that H. H. Owens, one of defendant's attorneys, who is also a graduate of Harvard and a mining engineer of considerable experience, was called by plaintiff and testified, over defendant's objection, to the number of tons of coal in an acre. It is the rule that an attorney cannot testify concerning any communication made to him by his client in that relation, or his advice thereon, without his client's consent, but that in all other cases he is a competent witness for or against his client. Hall & Co. v. Renfro, 3 Metc. 51; Southard v. Cushing's Adm'r, 11 B. Mon. 344; section 606, Civil Code Prac.; Milan v. State, 24 Ark. 346; Loomis v. Norman Printers' Supply Co., 81 Conn. 343, 71 Atl. 358; Wilkinson v. People, 226 Ill. 135, 80 N. E. 699; 40 Cyc. 2233. Here Mr. Owens did not testify concerning any communication made to him by his client, or with reference to any advice that he gave his client. His evidence related only to certain scientific facts, and he was therefore a competent witness.

The real issues between the parties being covered by the instructions given by the trial court, we find no prejudicial error in the refusal of the trial court to give any one of the instructions offered by the defendant.

Judgment affirmed.

CLAY, Insurance Com'r, et al. v. HARTFORD LIFE INS. CO.

(Court of Appeals of Kentucky. Nov. 23, 1915.)

TAXATION \Leftrightarrow 387 — INSURANCE PREMIUMS — STATUTE.

Ky. St. § 4226, provides that every foreign life insurance company, other than a fraternal assessment life insurance company, doing business in the state, shall annually return a sworn statement of all premiums received for on the face of policies for original insurance, and all renewal premiums received, in cash or otherwise, in or out of the state on business done in the state during the year, and shall pay into the state treasury at the same time a tax of \$2 on each \$100 of premiums. Plaintiff insurance company, suing to determine its liability to taxation under the statute, was a Connecticut corporation authorized to do business in Kentucky. It had ceased to solicit business in the state, and was merely engaged in carrying out its contracts of insurance on the assessment plan previously entered into. Payment of the benefits provided by its contracts was wholly dependent upon the collection of assessments levied upon members holding contracts, and not upon the collection of any premiums. The company retained no part of its assessments, and derived no profit therefrom; the cost of administration being covered by an admission fee, paid by each member upon issuance of his certificate of membership, and annual dues. All of the company's contracts outstanding in the state contained the provision that, in case the laws of any state required a tax to be paid by the company on account of moneys collected, the member agreed to pay the amount to the company in addition to the payments needed to hold the certificate in force, either in connection with the payments of the assessment and annual dues, or otherwise, as the company might elect. Plaintiff was authorized to do business in the state as an assessment life insurance company under Ky. St. art. 4, subd. 3, defining such companies, prescribing the terms on which they may do business in the state, and providing that they shall be subject only to the provisions of the subdivision. Held, that plaintiff was liable to the tax, since section 4226 was broad enough to cover an assessment company, as by its terms it embraced "every [foreign] life insurance company other than fraternal assessment life insurance companies," while it levied the tax not only upon "premiums" but on "premium receipts," and "premium payments."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 648-651; Dec. Dig. \Leftrightarrow 387.]

Appeal from Circuit Court, Franklin County.

Suit by the Hartford Life Insurance Company against M. C. Clay, Insurance Commissioner, and others. Judgment for plaintiff, and defendants appeal. Reversed, and cause remanded.

Jas. Garnett, Atty. Gen., and M. M. Logan, Asst. Atty. Gen., for appellants. Brown & Nuckols, of Frankfort, for appellee.

CLAY, C. The question presented by this appeal is whether or not the Hartford Life Insurance Company, an assessment life insurance company, is taxable on its assessments under and by virtue of section 4226, Kentucky Statutes. To determine the question, the company brought suit against the Insurance Commissioner and Auditor of Pub-

lic Accounts. A demurrer to the petition was overruled, and, the defendants declining to plead further, judgment was rendered enjoining them from collecting the tax. The defendants appeal.

It appears from the petition that plaintiff is a corporation organized under the laws of the state of Connecticut, and authorized to do business in Kentucky. On January 1, 1913, it sold out its business in this state and elsewhere to another insurance company. The sale was approved by proper authorities of the states in which it had done business and became effective February 17, 1913. After that date it ceased to solicit any new business in the state and is now merely engaged in carrying out its contracts of life insurance upon the assessment plan only, which were entered into prior to said date. The nature of the business conducted in this state is the payment of certain benefits accruing under said contracts to the beneficiaries named therein. Payment of the benefits provided by said contracts is wholly dependent upon the collection of assessments levied upon members holding similar contracts, "and not upon the collection of any premium, and no premiums have been since said date collected by it." The company retains no part of said assessments and derives no profit whatever therefrom, but the cost of administration is covered by an admission fee of \$10 per thousand of insurance, paid by each member when his certificate of membership is issued, all of which was paid prior to February 17, 1913, and dues in the sum of \$3 per thousand of insurance are paid each year by each member, either in annual, semiannual, or quarterly installments. It also appears from the petition that all the contracts outstanding in this state contain the following provision:

"And that in case the laws of my country, state, or municipality in which the member or his beneficiary may reside, shall require a tax to be paid by said company on account of any moneys collected hereon, said member agrees to pay the amount of such tax to said company in addition to the payments hereinbefore named, as part of the payments needed to hold this certificate in force, either in connection with the payments of assessments and annual dues or otherwise, as said company may from time to time elect."

It is further alleged in the petition that if the commissioner is permitted to collect the tax it would cause an increase in the assessment of the members residing in this state, to the extent of such tax, and that this would result in direct hardship and injustice to each and every member in this state.

Section 4226, Kentucky Statutes, is as follows:

"Subdivision II. Foreign Life and Industrial Companies. 4226. (1) Reports and Taxes. Every life insurance company, other than fraternal assessment life insurance companies, not organized under the laws of this state, but doing business therein, shall, on the first day of January

in each year, or within thirty days thereafter, return to the Auditor of Public Accounts for deposit in the insurance department a statement under oath of all premiums received for on the face of the policy for original insurance and all renewal premiums received in cash or otherwise in this state, or out of this state, on business done in this state during the year ending the 31st day of December, and no deductions shall be made for dividends, or since the last returns were made, on all premium receipts, which shall include single premiums, annuity premiums, and premiums received for renewal, revival, or reinstatement of policies, annual and periodical premiums, dividends applied for premiums and additions and all other premium payments received during the preceding year on all policies which have been written in, or on, the lives of residents of this state, or out of this state on business done in this state, and shall at the same time pay into the state treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained. Every life insurance company not organized under the laws of this state, but doing business therein on what is known as the industrial insurance plan, whereby weekly premiums are collected, shall at the same time make a return to the Auditor of Public Accounts for deposit in the insurance department, a statement under oath of all premiums received on insurance written exclusively on the industrial plan, and shall at the same time pay into the state treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained. Any insurance company mentioned in this section doing insurance business other than on the industrial plan, shall make reports and pay into the state treasury the taxes due thereon under each report."

Plaintiff is authorized to do business in this state as an assessment life insurance company under and by virtue of subdivision 3, art. 4, Kentucky Statutes, c. 32, entitled "Assessment or Co-operative Life Insurance Companies."

To sustain the contention of plaintiff that it is not taxable under section 4226, Kentucky Statutes, it is argued that that section provides for the payment of a tax on premiums alone, and nowhere provides for a tax on assessments. It is further argued that the various sections of subdivision 3, art. 4, Kentucky Statutes, define assessment of co-operative life insurance companies, provide for their organization, prescribe the terms on which they can do business in the state, and further provide that such companies "shall be subject only to the provisions of this subdivision." It must be remembered, however, that the provisions of subdivision 3, art. 4, Kentucky Statutes, do not relate in any way to the question of taxation. They cover merely the subjects above referred to, and do not in any wise restrict the right of the Legislature to impose a tax on assessment companies, nor do they evince a legislative intent not to do so. The only question in the case, therefore, is whether or not section 4226 of the Kentucky Statutes is broad enough to cover assessment companies. By its very terms, it embraces "every life

insurance company, other than fraternal assessment life insurance companies, not organized under the laws of this state, but doing business therein." Clearly plaintiff is a life insurance company. It is not organized under the laws of this state. It is doing business in this state and, though an assessment life insurance company, it is not a fraternal assessment life insurance company. The statute plainly provides for a statement of all premiums received for on the face of the policy for original insurance and all renewal premiums received in cash or otherwise in this state, or out of this state on business done in this state during the year ending the 31st day of December. It goes further and provides that no deduction shall be made for dividends, or since the last returns were made, on all premium receipts, which shall include single premiums, annuity premiums, and premiums received for renewal, revival, or reinstatement of policies, annual and periodical premiums, dividends applied for premiums and additions, and "all other premium payments received during the preceding year on all policies which have been written in, or on, the lives of residents of this state." The statute provides for a tax of \$2 on each \$100 of said premiums as ascertained. In view of the fact that the statute plainly shows a legislative purpose to tax assessment life insurance companies, other than fraternal assessment life insurance companies, and in view of the use, not only of the word "premium," but of the words "premium receipts" and "premium payments," we think it clear that the Legislature intended to tax the premium income, or the charge for the insurance, regardless of the manner or form of payment or of the name by which it might be called. Here the plaintiff receives from its members in this state dues amounting to \$3 per annum on each \$1,000 of insurance. These dues are fixed in advance and are payable just as premiums are paid. That they are called "dues" instead of "premiums" is immaterial. They serve exactly the same purpose. Though it does not clearly appear from the petition, we take it that, if the dues be not sufficient to discharge the company's obligation, then additional assessments may be made. When or how often this occurs does not appear. Since the assessments are a portion of the charge for insurance, we conclude that both the assessments and so-called dues should be covered by the report which the company is required to make, and are properly taxable under the statute. It follows that the trial court should have sustained the demurrer to the petition.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

EAGAN v. CITY OF COVINGTON.

(Court of Appeals of Kentucky. Nov. 19, 1915.)

1. TRIAL — 139 — EVIDENCE — QUESTION FOR JURY.

Where any evidence is introduced tending to sustain the cause of action set out in the complaint, the case must be submitted to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. — 139.]

2. MUNICIPAL CORPORATIONS — 762 — PUBLIC WAYS — SAFETY — DUTY.

The duty of a municipality to keep its streets and sidewalks reasonably safe for travel extends to cases where the unsafe condition is caused by the act of persons other than the agents of the municipality.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1605-1611; Dec. Dig. — 762.]

3. MUNICIPAL CORPORATIONS — 788 — DEFECTIVE STREETS — LIABILITY — KNOWLEDGE.

A municipality is not liable for injuries due to the unsafe condition of a street or a sidewalk, created by the act of a third person, unless it had, or by ordinary care might have had, knowledge thereof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1641-1643, 1646, 1652; Dec. Dig. — 788.]

4. MUNICIPAL CORPORATIONS — 788 — DEFECTIVE WAYS — KNOWLEDGE — LIABILITY.

Where plaintiff, while walking along a street partly submerged by an overflow, was injured by falling into a week old water hole created by a previous overflow, which defect had not rendered the sidewalk unsafe until the day of the accident, and the municipal authorities had no notice or reasonable opportunity to learn of its dangerous condition, the city was not liable, since a municipality is not liable for injuries from defects in its ways unless it has actual or constructive notice thereof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1641-1643, 1646, 1652; Dec. Dig. — 788.]

5. MUNICIPAL CORPORATIONS — 821 — EVIDENCE — QUESTION FOR COURT.

Where but one inference can be drawn from the evidence, the question whether a city is charged with notice of a defective way so as to render it liable to a person injured thereby is for the court.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. — 821.]

Appeal from Circuit Court, Kenton County, Common-Law and Equity Division.

Action by Josephine Eagan against the City of Covington. From judgment for defendant, plaintiff appeals. Affirmed.

B. F. Graziani, of Covington, for appellant. Fred W. Schmitz and John A. Richmond, both of Covington, for appellee.

SETTLE, J. This is an appeal from a judgment of the Kenton circuit court, law and equity division, entered upon a verdict in favor of the appellee, city of Covington, returned by the jury in obedience to a peremptory instruction from the court. The action was brought by the appellant, Josephine Eagan, to recover of the appellee city

damages for injuries sustained to her person resulting from a fall into a hole of water in a sidewalk, which, it was alleged, appellee had knowingly and negligently maintained or permitted to exist. The accident, according to the evidence, occurred under the following circumstances: On March 26, 1913, about 5 o'clock p. m., appellant left a street car, upon which she had been a passenger, near the intersection of Third street and Crescent avenue, for the purpose of going to her home, about half a square on and beyond Crescent avenue. Third street runs into and ends upon Crescent avenue. On its west side Crescent avenue is bounded by a hill or hills. Third street is the first one reached in entering the city at that point from the Ohio river, and runs parallel with the river. The street cars run along Third street, and upon reaching Crescent avenue turn northwardly. The regular stopping place of the cars is on Crescent avenue at its intersection with Third street, but, as at the time of the accident the Ohio river, owing to frequent heavy rains, was out of its banks, and the presence of a large body of back water from a sewer overflowed Crescent avenue at the point of its intersection with Third street, the car upon which appellant was a passenger had to turn northwardly and run several yards on Crescent avenue before stopping. When appellant left the car she could not, owing to the presence of the standing water on Crescent avenue, immediately cross to the west side thereof without wading through the water, nor could she cross Crescent avenue from Third street in a southerly direction, for the same reason. She was therefore compelled to walk along the north side of Third street eastwardly to a point where there was no water between the curbs, in order to cross from the north side of Third street to the sidewalk on the south side thereof, from which she could proceed in a westerly direction to Crescent avenue, where it was sufficiently elevated above the water to enable her to reach its west side and proceed to her home. Third street is paved with brick between the curbing; but the sidewalk on the north side thereof, upon which appellant had to travel, is not paved. After leaving the street car and walking eastwardly on the north sidewalk of Third street a distance of about 40 feet, appellant claimed to have stepped upon two boards which lay upon the sidewalk with one end of each resting upon the curbing. Upon stepping upon the boards they either broke or separated, and she fell between or from them into a hole of water of such depth that her person was completely submerged. She, however, rose with her head to the surface, and succeeded in catching hold of the curbing, to which she clung, until rescued by two young men who came out of a nearby saloon in time to witness the

accident. After being taken out of the water appellant was carried to her home. It does not appear that any of her bones were broken, or that her body was materially bruised by the fall, but the wetting and shock she received greatly chilled her and caused her to contract a cold, which resulted in rheumatism, and confined her to her room or bed for about three weeks, by all of which she was caused very considerable physical and mental suffering.

The answer of the city is in two paragraphs, the first containing a traverse, and the second a plea of contributory negligence. A reply was filed controverting the plea of contributory negligence, and with the issues thus joined the case went to trial. The peremptory instruction directing the verdict for the appellee city was granted by the court at the conclusion of the appellant's evidence, and we are now called upon to say whether this action of the trial court was or was not error.

[1-3] If there was any evidence introduced in behalf of appellant conducing to sustain the cause of action set out in her petition, the case should have gone to the jury; otherwise the nonsuit was properly directed. It is admittedly the duty of a municipality to keep its streets and sidewalks in a reasonably safe condition for persons traveling thereon, and this duty extends to cases where the obstruction or unsafe condition of the street or sidewalk is brought about by persons other than the agents of the city; but in such case the party seeking to recover against the city for a failure to perform such duty must show that it had knowledge of the defect, or might have had knowledge thereof by the use of ordinary care. In other words, the city is not liable for injuries caused by such defects in its streets, in the absence of actual notice thereof, or unless they have existed so long that notice should be imputed to it. *Bell v. City of Henderson*, 74 S. W. 206, 24 Ky. Law Rep. 2434; *Mayfield v. Hughley*, 135 Ky. 532, 122 S. W. 838; *Canfield v. City of Newport*, 73 S. W. 788, 24 Ky. Law Rep. 2213.

Appellant introduced six witnesses besides herself. Her testimony only shows how the accident occurred, and that she had no information of the existence of the water hole until she fell therein. Mrs. Canfield testified as to the manner in which the accident occurred and to the effect that she knew nothing about the water hole, other than the fact that she had observed the boards lying across it about an hour before the accident. Mrs. Vandruff saw the accident, but knew nothing of the existence of the hole until the morning of the day the accident occurred, at which time it was not entirely filled with water and was covered by the boards. Clifford Johnson first saw the water hole about two days before the accident. According to his testimony, the hole had been made by a previous washout, but then

contained little or no water. When first seen by him, there was space enough north of the hole to enable those traveling the sidewalk to pass it in safety. At that time there were boards lying on the sidewalk and curbing near the hole, but none across or upon it. He further testified, however, that on the day of the accident the sudden rise of the river or overflow of the sewer filled the hole with water, and he then observed for the first time that two boards had been placed across the hole. Leo Harrington, one of the two young men who rescued appellant from the water hole at the time of the accident, never saw or knew of the existence of the hole until the rescue was effected. Henry Wanderla saw the washout or hole about a week before the accident. It was not then filled with water, nor was it so large as on the day of the accident. When first seen by him, there were boards scattered along and upon the sidewalk from Crescent avenue to a point beyond the hole, but there were no boards across the hole, and there was space on the north of it of sufficient width to be used by persons traveling the sidewalk. According to his further testimony, he again saw the hole on the day of the accident, and the two boards lying across it. It was then filled with water, and the water covered the sidewalk where the hole was situated to within about an inch of the top of the curbing. Anna Williams first saw the hole three or four days before it was filled with water, and knew that it did not become filled with water until the day of the accident. Nearly all of the witnesses mentioned testified that at the time of the accident the water in the hole must have been of the depth of ten or more feet.

[4] It is patent from the foregoing evidence that the hole into which appellant fell was caused by a previous rise in the river or overflow of the sewer; that it had not existed for more than a week; that it contained no water of consequence until the day of the accident, when it was filled by a sudden rise in the river or overflow from the sewer; that down to the day of the accident it was plainly discernible, and that those traveling the sidewalk had sufficient space in the sidewalk to pass it without danger; in other words, that its presence did not make the sidewalk dangerous until the day on which the accident occurred, and we have been unable to find in the record any evidence conducing to show that the authorities of the appellee city had any knowledge or information of its existence prior to the accident resulting in appellant's injuries. This is not strange, as the place of the accident is in a suburb of the city of Covington. It is true one or two witnesses testified that members of the police force of the city occasionally visited that neighborhood, but no witness testified that any of them were seen at or near the place of the accident on the day it occurred. Besides, a knowledge of a member

of the police force of a defect in a city street is only notice to the city when he is charged with some duty with reference thereto. *City of Louisville v. Lenahan*, 149 Ky. 537, 149 S. W. 932, Ann. Cas. 1914B, 164.

It is not apparent from the evidence how or by whom the planks from which appellant fell were placed over the water hole. They were probably floated over the hole by the water that overflowed the sidewalk. At any rate, there was no attempt to show that the planks were placed over the hole by any agent or employé of the appellee city, and neither the facts shown nor any reasonable inference deducible therefrom make it fairly apparent that the exercise of ordinary care on the part of the city authorities would have enabled them to discover the dangerous condition of the sidewalk before the occurrence of the accident resulting in appellant's injuries.

In *Canfield v. City of Newport*, *supra*, it is in the opinion said:

"The appellant, Patrick J. Canfield, brought this suit against the appellee, the city of Newport, to recover damages for injuries which resulted from falling into a manhole in the gutter at the southeast corner of Saratoga and Fifth streets, in the city of Newport, which he alleges the defendant negligently and knowingly permitted to remain open and unguarded. The testimony shows that on a Sunday morning in October, 1899, between 11 and 12 o'clock, some boys took the iron covering from this manhole to release a cat which had fallen into the sewer, and that when they attempted to replace the lid it fell into the hole, which was some nine feet deep; that a citizen who lived in the vicinity immediately place a barrel over the hole and weighted it down with rocks, thus furnishing an effectual barricade against accidents; that it remained in this position during the day, but was removed by some unauthorized person during the following night; that the appellant, Patrick J. Canfield, fell into this hole on Monday morning before daylight, while on his way from his home to the butcher shop. The testimony fails to show at what hour or by whom the barrel was taken from over the hole, or that the city authorities had notice that the covering had been removed. A city is not responsible for accidents which happen in its streets as the result of defects caused by the acts of persons not connected with its government, unless such defect has existed for such a length of time and under such circumstances that the city or its officers, in the exercise of proper care and diligence, ought to have obtained knowledge of it. *Elliott on Roads and Streets*, § 628; *City of Covington v. Asman* [68 S. W. 646] 24 Ky. Law Rep. 415. There was no defect in the covering of this manhole before it was interfered with by unauthorized persons, and the placing of a barrel over it appears to have been a reasonable precaution against accidents, although not taken by the city, and no injury would have resulted except for the unauthorized removal of it from the hole some time during Sunday night. The facts in the case do not, therefore, warrant a presumption of negligence on the part of the city of Newport, and we think the trial court properly directed the jury to find a verdict for appellee."

In *Hazellrigg v. City of Frankfort*, 92 S. W. 554, 29 Ky. Law Rep. 207, damages were claimed by the plaintiff (appellant) because of being thrown out of a buggy he was driving along a street of South Frankfort at 8 o'clock p. m.,

by running over a pile of crushed stone three feet high and eight feet wide. The evidence introduced in his behalf showed that the obstruction was first seen by the witnesses at 5 o'clock that afternoon, three hours before the accident. The trial court, at the conclusion of the plaintiff's evidence, granted a peremptory instruction directing a verdict in favor of the defendant, city of Frankfort. In affirming that judgment we in part said:

"In order to render the city liable, it must be shown that it, by exercising ordinary care, could have known of the existence of the obstruction in the street and removed the danger. We cannot say that it is actionable neglect for the city to fail to discover in three hours an obstruction in one of its streets caused by a lot of rock screenings being dumped there. There is no evidence that the city knew of the obstruction, and the bare fact that it had been there for three hours is not sufficient to charge it with liability."

In *Reed v. City of Detroit*, 99 Mich. 204, 58 N. W. 44, it was held that:

"Where the evidence for plaintiff showed that she stepped through a hole in a culvert in an outlying residence street, which hole was first seen on the morning before the accident, a verdict should have been directed for the city."

In *Bell v. City of Henderson*, *supra*, the appellant sued the city of Henderson to recover damages for a personal injury sustained by stepping into a hole in a platform which had, with the permission of the city, been erected by Norris & Lockett, hardware merchants, in front of their business house on First street, in the city of Henderson, the platform extending from the curbing of the pavement across the gutter to the street beyond, it being alleged that the platform was rotten and unsafe, which fact was known to the city, or could be by the exercise of ordinary care have been known by it, in time to have prevented the accident. It appeared from the evidence that on Friday evening before the plaintiff was hurt on Saturday night a plank in the platform was broken. A verdict in behalf of the defendant was directed by a peremptory instruction from the trial court. In the opinion it is said:

"It was the duty of the defendant [city] to use ordinary care to keep its streets and alleys free from obstructions and in safe condition for persons traveling in the usual modes by day and night. When they permitted Norris & Lockett to erect and maintain a platform in the street, which was liable to be used by pedestrians passing from the pavement to the street, it was as much bound to see that it was kept in good condition as if they had erected it themselves. And their liability for defects in the platform is exactly the same as their liability for defects in any other part of the street. But a municipality is not an insurer against accidents to persons using its thoroughfares. It is not liable for injuries caused by defective streets in the absence of actual notice of such defect, or unless they have existed so long that notice or knowledge thereof should be imputed to them. And notice should not be imputed where the defects are of recent origin, and particularly where they are concealed in anywise. Whilst generally the jury should determine as a question of fact whether a city has such notice, yet, where the facts are undisputed, and but one reasonable inference can be drawn from them, it

becomes, a question for the court to decide. * * * City of Corbin v. Benton, 151 Ky. 483, 152 S. W. 241, 43 L. R. A. (N. S.) 591.

[5] Applying the principle announced by the authorities supra to the facts of this case, they were not, in our opinion, sufficient to authorize its submission to the jury; and while, ordinarily, whether a city has had such notice of a defect in a street or sidewalk as to charge it with liability is a question for the jury, yet, where but one inference can be drawn from the facts, the question is for the court.

In our opinion, there was no error in the giving of the peremptory instruction directing a verdict for appellee; therefore the judgment is affirmed.

GRAHAM et al. v. TREADWAY.

THOMPSON et al. v. MORROW et al.

(Court of Appeals of Kentucky. Nov. 18, 1915.)

1. INJUNCTION — 80 — OFFICERS — DUTIES — MANDATE.

Precinct election officers can be compelled to perform their omitted duty to accompany the return of ballots to the county clerk with a statement showing whether and how contested ballots have been counted, since the rule that contested ballots cannot be considered in an election contest, has been abrogated by the statute requiring all ballots to be preserved.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 151; Dec. Dig. — 80.]

2. ELECTIONS — 299 — QUESTIONED BALLOTS — WHEN COUNTED.

Questioned ballots properly preserved and untampered with will be counted by the court in an election contest, whether or not accompanied by the statement required of the precinct officers by Ky. St. § 1482, showing whether and how they were counted; it being the policy of the law not to permit the disfranchisement of voters through the mistakes of election officials.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 306, 307; Dec. Dig. — 299.]

3. ELECTIONS — 260 — COMMISSIONERS — QUESTIONED BALLOTS — AUTHORITY.

Election commissioners are not authorized to canvass questioned ballots unaccompanied by the statement as to whether they were counted and how, required of precinct officers by Ky. St. § 1482.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 286; Dec. Dig. — 260.]

4. INJUNCTION — 80 — OFFICERS — MINISTERIAL DUTIES — MANDATE.

Mandatory injunction is a proper remedy to require the performance of purely ministerial duties by precinct election officers.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 151; Dec. Dig. — 80.]

5. INJUNCTION — 80 — OFFICERS — DISCRETIONARY DUTIES — MANDATE.

Duties of election commissioners involving the exercise of discretion will not be enforced by mandatory injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 151; Dec. Dig. — 80.]

Appeal from Circuit Court, McCracken County.

Action by R. R. Treadway against Z. C. Graham and others, consolidated with sim-

ilar action by Edwin P. Morrow and others against John Thompson and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. P. Hobson & Son, of Frankfort, and W. A. Berry, W. V. Eaton, S. E. Clay, S. H. Crossland, and J. D. Mocquot, all of Paducah, for appellants. J. C. Speight, of Mayfield, T. N. Hazelp and David Browning, both of Paducah, and O'Rear & Williams, of Frankfort, for appellees.

HURT, J. At the election held in the state of Kentucky and in the various counties of it on the 2d day of November, 1915, the Republican party had candidates for the various state offices, and in the county of McCracken a candidate for member of the House of Representatives from that county. The Democratic party likewise had candidates for all of the state offices and for a member of the House of Representatives from McCracken county. In the judicial district in which McCracken county is situated there was a Democratic candidate for judge of the circuit court, but no Republican candidate for that office, but there was an independent candidate for the office of circuit judge. The names of all the Democratic candidates were placed upon the ballot under the Democratic device, and all of the Republican candidates were placed under the Republican device, but the name of David Browning, the independent candidate for circuit judge in the county of McCracken, was placed on the ballot under a device of his own. His device was his own picture, and immediately under it was a circle, such as is under the Republican and Democratic devices, respectively, and at the end of his name was a small square, such as follows the name of each candidate whose name was upon the ballot. In Diegels precinct of McCracken county, when the officers of the election came to count the vote and certify the returns of the election from that precinct, there was found 40 ballots which had been cast by voters who had exercised their suffrage, by stamping with the stencil in the circle under the Republican device or the Democratic device, and also in the circle under the device of the independent, David Browning, and 11 ballots which had no stencil mark upon them, and one spoiled ballot, making in all 52 ballots, such as are described above. The precinct officers of the election, being in doubt as to how they should count the 40 ballots which were stamped under either the Democratic or the Republican device, and also in the circle under the device of the independent candidate, did not count them at all as having been cast for any candidate, but, with the 11 unmarked ballots and the spoiled ballot, placed them in the envelope, which is marked "Questioned Ballots," but on account of their volume they could not

close or seal the envelope, but placed it in the ballot box along with the other returns, and delivered it to the clerk of the county court on the evening of the day of the election. They did not accompany the questioned ballots with any certificate signed by them stating whether or not the ballots or any of them had been counted, or were not counted, or as to whom, or which of them were counted in the canvass which they had made of the votes cast at the precinct.

On the same day, at the Plow Factory precinct, in McCracken county, after the polls had been closed, when the precinct officers proceeded to canvass and certify the result of the election at the precinct, they found, among other ballots in the ballot box, 35 ballots which the voters casting them had exercised their right of suffrage by stamping with the stencil in the circle under the Democratic device or the Republican device, and also in the circle under the device of the independent candidate. The precinct officers did not count these ballots as being cast for any one, but placed them in the envelope upon which was printed the words "Questioned Ballots." They then sealed the envelope, and at the point of the seal on the envelope each of the officers of the election wrote his name. This envelope was then placed in the ballot box along with the other election returns from that precinct and locked, and delivered to the clerk of the county court immediately after the close of the polls on that evening. The precinct officers of the election did not accompany the envelope nor attach to it a statement or certificate signed by them showing whether they had included in the count of the votes cast in the precinct the questioned ballots, or had not included them in that count, or whether they had counted them for any one, or for whom.

The county court clerk and his deputy, when the ballot boxes were delivered to them, caused them to be unlocked, and took from the boxes the stub books and the envelopes containing the questioned ballots, and tied them in a bundle with a heavy cord and deposited them in the vault of the clerk's office.

When the board of election commissioners convened on Friday, following the election on Tuesday, it convened in a room which adjoins the vault of the clerk's office in which the election returns were deposited and kept by the clerk. The board of election commissioners proceeded to canvass the returns of the election at that time by calling upon the clerk for the returns of one precinct at a time, and when the returns from that precinct had been canvassed, they were returned to the vault of the clerk's office, or were placed in a pile upon the table at which the election commissioners were sitting while engaged in their work. The board of election commissioners refused to consider or to make any count of the questioned ballots returned

from the Diegels precinct or the Plow Factory precinct, presumably for the reason of the absence of a statement signed by the officers as to whether they had or had not counted the questioned ballots, and, if they were counted, what part of them had been counted, and for whom they were counted.

The board of election commissioners was about to complete its canvass of the returns of the election in the county, and to adjourn and issue certificates of election, when R. R. Treadway, who was the Republican candidate for member of the House of Representatives from McCracken county, instituted this suit against Z. C. Graham, his Democratic opponent, and the precinct election officers who had served at Diegels precinct and the Plow Factory precinct, the members of the board of election commissioners, and the clerk of the county court, in which he set up the failure of the precinct election officers to perform their duties with regard to the questioned ballots, by sealing them in envelopes and returning a statement signed by them as to whether they were counted or not counted by them in their canvass of the ballots at their respective precincts, and that the board of election commissioners were refusing to consider or to count these ballots, and that, if they should fail to do so, he would be defeated for the office of member of the Legislature, to which he alleged he had been elected, and sought a mandatory injunction against the precinct officers requiring them to convene and to secure the questioned ballots for their precincts, respectively, and to place them in an envelope, and to seal the envelope as required by law, and to make out a statement by which they would certify as to what had been done in regard to counting the ballots which were returned as questioned by them, and would deliver the ballots and the certificate to the clerk of the county court or the board of election commissioners, and that the board of election commissioners should then be required to convene and to complete the canvass of the returns of the election, and to enjoin them from delivering a certificate of election to Z. C. Graham, his opponent, until the returns of the election could be completed and canvassed, as above requested.

The Republican candidates for the state offices also filed their petition against their Democratic opponents and the precinct officers at Diegels and Plow Factory precincts, the members of the board of election commissioners, and the clerk of the county court, in which they made substantially the same allegations and sought the same relief as was sought by Treadway in his action, except they asked that the election commissioners be enjoined from certifying the returns from the election as to any one until further ordered. The defendants filed answer in each case traversing the allegations of the petition. The suits were consolidated and heard

before a special judge of the McCracken circuit court on the 11th day of November, 1915. A temporary restraining order was obtained in each case restraining the members of the board of election commissioners from completing the canvass of the returns and certifying the result of the election of the county until further ordered by the court, and, in the case of *Treadway v. Graham*, from issuing a certificate of election to Graham until the further order of the court. The two cases were consolidated and heard together.

The court, upon the trial of the motion below for a mandatory injunction, heard all the evidence offered by either side, including the testimony of the county court clerk and his deputy, the members of the board of election commissioners, and the precinct officers who held the election at the precincts from which the questioned ballots in controversy were returned. At the conclusion of the trial it rendered a judgment granting the prayer of the petition for a mandatory injunction requiring the precinct election officers at Diegels and Plow Factory precincts to convene at the office of the county court clerk on the 18th day of November, 1915, and to obtain from the clerk, who was ordered to deliver them to them, the uncounted ballots which were returned by them, respectively, and to place the ballots in envelopes, to seal same, and to write their names across the seal, and at the point of the seal indicated for that purpose, the judges of the election, in the presence of the clerk and sheriff, to place the county election seal in hot wax so that it can be plainly read, and to return the same to the county clerk with a true statement as to whether the questioned ballots have or have not been counted, and, if counted, what part and for whom, and then the election commissioners were ordered to convene on November 16, 1915, at 1 o'clock p. m. and complete the canvass of the election returns for the county, and to certify same according to law. The appellants excepted to this judgment, and prayed an appeal to this court, and by agreement of parties the cases were set upon the docket and agreed to be heard and decided at once.

The evidence in the case shows without question that the questioned ballots were not counted by the precinct election officers in the canvass and tabulation made by them of the votes cast at their respective precincts, and the board of election commissioners has refused to canvass them. We will not undertake to detail all the evidence heard bearing upon the question of the preservation of the questioned ballots, but suffice to say that they have at all times since their delivery to the clerk on the evening of the election been in the custody and under the control of the clerk and election commissioners, so far as the evidence discloses.

[1] It is insisted that the judgment should be reversed, because in an election contest

questioned or disputed ballots will not be counted when the precinct election officers have not accompanied them with a statement which shows whether or not they have been counted in the tabulation made by them in their canvass of the votes at the precincts, and, if counted, for whom they were counted, and for such reason the precinct election officers, after they have returned them to the clerk of the county court without such statement, ought not thereafter to be compelled to do what by law it was their duty to do in the first instance. The evil effects of a rule which would permit election officers, either from ignorance or fraud, to fail to do the duties required of them by law in the return of ballots about which they may have or pretend to have doubts as to how they should be counted, is easily discernible. It is true that it has been held by this court, in the cases of *Struss v. Johnson*, 100 Ky. 319, 38 S. W. 680, 18 Ky. Law Rep. 771, *Edwards v. Logan*, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257, 24 Ky. Law Rep. 1099, 25 Ky. Law Rep. 435, *Childress v. Pinson*, 100 S. W. 278, 30 Ky. Law Rep. 767, *Anderson v. Likens*, 104 Ky. 609, 47 S. W. 867, 20 Ky. Law Rep. 1001, *Cole v. Nunnally*, 140 Ky. 138, 130 S. W. 972, *Banks v. Sergeant*, 104 Ky. 849, 48 S. W. 149, 20 Ky. Law Rep. 1024, *Neeley v. Rice*, 123 Ky. 806, 97 S. W. 737, 20 Ky. Law Rep. 1142, *Duff v. Crawford*, 124 Ky. 73, 97 S. W. 1124, 30 Ky. Law Rep. 323, and others, that questioned ballots, unaccompanied by a statement from the precinct officers of the election as to whether or not they had counted them, and, if so, for whom, would not be considered in a suit contesting an election. This rule had its origin at a time when the law required the ballots which were counted to be at once destroyed by the precinct officers, and thus, if unaccompanied by a statement as to whether or not questioned ballots had been counted, it was impossible to know whether they should be added to or taken from the number of votes which were certified, as having been received by a candidate at an election. The law now, however, provides that all of the ballots shall be preserved and kept, and, it now being possible in a contested election to count all of the ballots, the rule adhered to in the cases supra has become unnecessary. In the recent case of *Snowden v. Flanery*, 159 Ky. 574, 167 S. W. 896, the court, considering this question, said:

"Upon a reconsideration of the matter, however, we have reached the determination that when upon a contest the ballot boxes are opened, and a recount is had by the court, then the questioned ballots, although they may not be certified in such a manner as to authorize the canvassing board to consider them, if they are otherwise properly preserved, they may be counted by the court; for in that event there is no necessity for a certificate showing whether, and, if so, how, the questioned ballots were counted by the precinct election officers."

[2, 3] It would now seem that the proper rule in case of a contest is that, if the ques-

tioned ballots have been so preserved that they have not been tampered with, they should be counted, whether accompanied by a statement of the officers or not, as required by section 1482, Ky. Statutes. The policy of the law of this state has always been not to permit mistakes of the election officers to disfranchise the voters or to defeat the will of the people expressed at the ballot box, where the truth of the matter is apparent. There is an absence of all proof or insistence that the ballots have been tampered with or changed since they were delivered to the clerk. From the proof in the case, as it now appears, the ballots have been so preserved that they should be canvassed. If they should be counted, then they ought to be put in such condition that the board of election commissioners may lawfully consider and canvass them. This court has frequently held that election commissioners are not authorized to consider or canvass questioned ballots, unless the statement required by section 1482, Ky. St., accompanies them. *Potter v. Campbell*, 155 Ky. 784, 160 S. W. 763; *Booe, County Judge, v. Kenner*, 105 Ky. 517, 49 S. W. 330, 20 Ky. Law Rep. 1343; *Houston v. Steele*, 98 Ky. 596, 34 S. W. 6, 17 Ky. Law Rep. 1149.

[4, 5] A proceeding by a mandatory injunction is a proper remedy to require election officers to perform their duties. The duty of the precinct officers to inclose the questioned ballots in an envelope, to seal it up, write their names across the seal, place the county election seal in hot wax at the point of the seal, and return a statement as to whether they have or have not counted them, and, if counted, what part and for whom, are ministerial duties, about which they exercise no discretion. They exercised their discretion when they determined not to count the ballots. The election commissioners can be lawfully required to canvass the returns of an election, and to canvass the questioned ballots, when they are accompanied by the proper statement. As to how they shall count them, or whether they shall be counted at all, if the purpose of the voter is not expressed upon the ballot, or if it is not intelligible, are matters within the discretion of the election commissioners, and the court will not control their discretion. *Potter v. Campbell*, 155 Ky. 784, 160 S. W. 763; *Riddell v. Childers*, 156 Ky. 315, 160 S. W. 1067; *Richardson v. Grinstead*, 156 Ky. 319, 160 S. W. 1069; *Denny v. Bosworth*, 113 Ky. 785, 68 S. W. 1078, 24 Ky. Law Rep. 554; *Bennett v. Richards*, 83 S. W. 154; *Mason v. Byrley*, 84 S. W. 767, 26 Ky. Law Rep. 487; *Anderson v. Likens*, 104 Ky. 699, 47 S. W. 867, 20 Ky. Law Rep. 1001; *State v. Gibbs*, 13 Fla. 55, 7 Am. Rep. 233; *State v. Pigott*, 97 Miss. 599, 54 South. 257, Ann. Cas. 1912C, 1254; cases cited in note to *State et al. v. Jackson & Prather*, 36 L. R. A. (N. S.) 1091. The court below does not seem by its judgment to have required

anything of the election officers, except such duties as are ministerial, and such duties as by law are required of them, and which they have failed to perform.

The judgment is therefore affirmed.

IMPERIAL JELLICO COAL CO. v. FOX.

(Court of Appeals of Kentucky. Nov. 23, 1915.)

1. JURY \S 75—IMPANELING—STATUTE.

Ky. St. \S 2261, providing that the court may discharge the regular first panel of a jury after they shall have served one week and impanel another jury as provided in the chapter, authorizes trial courts to discharge only the regular first panel of the jury after they shall have served one week and to impanel another. Under it courts are without authority to discharge the latter jury thus impaneled after a week's service and impanel a jury for the succeeding week, and to continue the practice for each week of the term.

[Ed. Note.—For other cases, see *Jury, Cent. Dig. §§ 384-390; Dec. Dig. \S 75.*]

2. MASTER AND SERVANT \S 217—INJURIES TO SERVANT—ASSUMPTION OF OBVIOUS RISK.

Where a coal miner engaged in "robbing" pillars noted that the roof was dangerous, and his "buddy" tested the same with his pick, but the miner, coming to the conclusion that it would stay up while they undercut the coal, stated that they could try it, the roof falling on him, necessitating the amputation of his foot, he could not recover for the injury, since, where the danger is so obvious to a servant that no man of ordinary prudence would continue work under the circumstances, the servant assumes the risk in undertaking to work.

[Ed. Note.—For other cases, see *Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. \S 217.*]

Appeal from Circuit Court, Whitley County.

Suit by John Fox against the Imperial Jellico Coal Company. Judgment for plaintiff, and defendant appeals. Reversed.

Tye, Siler & Gatliff, of Williamsburg, for appellant. Golden & Lay, of Barbourville, for appellee.

MILLER, C. J. The appellee Fox brought this suit to recover damages for personal injuries received by him while at work for the defendant in pulling stumps and pillars in its coal mine. Fox was 38 years old, and of more than 12 years' experience as a miner. The work of pulling stumps and pillars, sometimes called "robbing" work, consists in removing the pillars of coal that have been left standing as a support to the roof of the mine while the ordinary work of mining was going on. That it is very dangerous work is well known to any experienced miner. In this case a piece of slate had been hanging from the roof for some time, and had been noticed by Fox, as well as by Harp, his "buddy." Fox and Harp, accompanied by Mays, whom they had employed to operate their cutting machine, began work on the pillar in question about 8 o'clock in the eve-

ning. Fox and Harp examined the projecting slate in the roof, and Harp struck it several times with his pick, to ascertain its condition; Fox standing by and looking on. Harp says he found the roof "about half and half," meaning that the center of the projecting slate was "drummy," while around the edges it was hard or solid. Harp undertook to pull the slate down, and did remove a small part of it. Harp finally said he believed the slate in the roof would stand until they could finish their work at that place. Whereupon Fox said; "I don't know; we can try it." They at once began to operate the machine, undercutting the coal, thereby causing the slate "to take on more weight"; and, in about 40 minutes later, four or five carloads of slate fell from the roof, mashing Fox's left foot to such an extent that it became necessary to amputate the foot at the arch. He recovered a judgment for \$1,000, and the company appeals.

The plaintiff based his cause of action on the failure of the company to furnish props after having been requested so to do. The testimony for plaintiff shows there was one prop at his working place, but he claims it was about 18 inches too long, and could not be used without being cut off.

[1] 1. The judgment will have to be reversed on account of the error of the circuit court in requiring the appellant, over its objection, to try this case before a jury taken from the third panel selected by the court during its May term, 1914. Under section 2261 of the Kentucky Statutes, trial courts are authorized to discharge only the regular first panel of the jury after they shall have served one week, and impanel another jury; they are without authority to discharge the second jury thus impaneled after a week's service, and impanel a third jury for the succeeding week, and thus continue this practice for each week of the term, as seems to have been the practice in the Whitley circuit. This precise question was before the court in *Louisville & Nashville R. Co. v. Owens*, 164 Ky. 557, 175 S. W. 1039, and again in *Louisville & Nashville R. Co. v. Messer*, 165 Ky. 506, 176 S. W. 1200; and, in each case, the action of the court in discharging the second panel and impaneling another jury, as was done in this case, was held to be a reversible error. But, as the case will have to be retried, it is proper to consider at least one of the other alleged errors, in order that it may hereafter be avoided.

[2] 2. Appellant insists that its motion for a directed verdict in its favor, at the end of all the evidence, should have been sustained.

The proof shows that the slate had been in the condition in which Fox and Harp found it for at least a month, and Harp says he

had been asking for props for about two weeks. Appellant concedes it to be a sound proposition of law that if the slate, without being molested, had fallen upon and injured the plaintiff, then, in the light of the proof, he should recover; but that when Fox, by his own act, and without notice to the company, made the place more dangerous, and was injured by reason thereof, no recovery should be allowed him. In other words, defendant insists that since plaintiff bases his right of recovery on the failure of the company to furnish props so that he might make safe a dangerous roof which he thereafter examined, and, after having reached the conclusion that it would not fall within a certain length of time, he went to work during that time, with a machine undercutting the coal, and thereby caused the slate to take weight, become more dangerous, and fall upon plaintiff, he, himself, was the sole cause of the accident and cannot recover.

It should be borne in mind there was no assurance upon the part of the mine boss, or anybody representing the company, that the place was safe; on the contrary, Fox and Harp both say they examined the roof and came to the conclusion that it would hold until after they had finished their work, and that they would take that chance. On the other hand, they say they had called for props, and that the mine boss had promised to furnish them, but had failed to do so; and Harp and Fox both say it was their duty to do the propping of the roof in the place in question. So the case finally comes to the proposition that, although the plaintiff had called for props and had not received them, yet, is he entitled to recover where he proceeded to work, after satisfying himself, from an examination of the roof, that he could afford to take the chance of its falling? We think not.

The rule is well settled that, where the danger is so obvious to the servant that no man of ordinary prudence would continue to work under the circumstances, the servant assumes the risk if he undertakes the work, and the master is not liable if injury results. And we are of opinion this case comes within that rule. The failure of the company to furnish props, even though that fact be conceded, did not prevent the operation of the rule above announced, since it was the plaintiff's duty, in protecting himself, to decline to work when the danger was as obvious as he describes it.

Appellant's motion for a peremptory instruction should have been sustained; and, under this view of the case, it becomes unnecessary to consider the alleged errors in the instructions.

Judgment reversed.

**LOUISVILLE TRUST CO. v. BAYER
STEAM SOOT BLOWER CO.**

(Court of Appeals of Kentucky. Nov. 17, 1915.)

**1. SALES §168½—SATISFACTION OF BUYER—
TEST—DUTY.**

Where, in an action to recover the price of soot blowers, it appeared that under the purchase contract defendant was allowed six months in which to try them, agreeing to pay at the end of that time if the blowers proved satisfactory, an answer seeking to excuse a failure to try the blowers on the ground that they had proven unsatisfactory to other corporations having similar boiler pressure, and that defendant, to save the useless expense of installation, treated them in good faith as unsatisfactory, was bad, since it was defendant's duty under the contract to determine the sufficiency of the blowers by actual test.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 409-421; Dec. Dig. §168½.]

2. EVIDENCE §441—PAROL EVIDENCE.

A demurrer was properly sustained to defendant's answer alleging that at the time the contract was made plaintiff agreed to send a man to help installation, and charging a failure so to do, since a collateral parol agreement cannot vary the terms of a previous written contract, unless omitted therefrom through fraud or mistake.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. §441; Sales, Cent. Dig. § 721.]

**3. SALES §347—ACTIONS—PLEADING—WANT
OF CONSIDERATION.**

A demurrer was properly sustained to defendant's third paragraph of the answer, alleging that after the suit was in issue defendant offered to perform the contract if plaintiff would send a helper, which plaintiff agreed to do, and charging plaintiff's failure to perform, with a loss of \$48 expended by defendant on the faith of such agreement, since plaintiff's right under the original contract had already accrued, and the agreement set up was without consideration.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 962-972; Dec. Dig. §347; Contracts, Cent. Dig. § 1196.]

**4. COMMERCE §40—INTERSTATE COMMERCE—
FOREIGN CORPORATION—ACTS OF SALES'
AGENT—EFFECT.**

A foreign corporation maintaining a place of business in the state and selling machines through traveling agents, who send their orders to the home office, whence the goods are shipped, is engaged in and the transaction is one of interstate commerce unaffected by the fact that the salesman measures the building and the proposed location therein of the machine.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. §40.]

**5. COMMERCE §80—FOREIGN CORPORATIONS'
ACT—OPERATION—SERVICE OF PROCESS.**

Since Ky. St. § 571, requiring foreign corporations to maintain an agent in the state to receive service of process as a condition precedent to doing business therein, prevents a noncomplying corporation from recovering on a contract made in the prosecution of its business in the state, it is inoperative as to interstate commerce transactions, in that it imposes an unreasonable burden on interstate commerce, in conflict with the commerce clause of the federal Constitution.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. §80.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by the Bayer Steam Soot Blower Company against the Louisville Trust Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wehle & Wehle, of Louisville, for appellant. Grubbs & Grubbs, of Louisville, for appellee.

CLAY, C. Plaintiff, Bayer Steam Soot Blower Company, a Missouri corporation, brought this action against the Louisville Trust Company to recover \$330, the price of two soot blowers which it furnished defendant for use in its office building. Judgment was rendered on the pleadings in favor of plaintiff, and the defendant asks that an appeal be granted.

The contract between the parties was entered into on August 1, 1913. The contract provided, in substance, that the Louisville Trust Company was to have the privilege of trying the blowers for a period of six months, dating from the date of receipt of the blowers, and, if at the end of that time it was not satisfied and did not desire to retain the blowers, they would be removed by plaintiff at its expense. The contract also provided that, if the blowers did not prove satisfactory, the trust company was to notify plaintiff to that effect in writing within ten days after the expiration of the trial period; otherwise the purchase price was to become due and payable six months from the date of the receipt of the blowers.

The petition was filed on August 17, 1914. After setting out the contract between the parties, it states that the two blower systems were delivered to defendant in the month of August, 1913, and although defendant had had ample opportunity after receiving the machinery to give the system a fair trial, it had never given the system any trial whatever, but had retained the machinery in its possession ever since its delivery. Defendant answered in three paragraphs.

By the first paragraph it pleaded, in substance, that it failed to make a trial of the blower system, because it had ascertained that the system had been tried by other corporations in the city of Louisville having a similar boiler pressure to that of defendant's plant, and that the soot blowers were found unsatisfactory, and had to be removed and returned to St. Louis; that to install the system would have entailed an expense of from \$150 to \$160, which, in view of the experience of other concerns having a similar boiler pressure to that of plaintiff, would have been a useless waste; that, for this reason, defendant failed to make the connections and give the machinery a trial, and considered and treated the blowers in good faith as unsatisfactory to itself, and offered to return same to plaintiff.

By paragraph 2 defendant pleaded that at the time the contract was made plaintiff, by its authorized agent, entered into a collateral agreement, by which plaintiff contracted to send a competent person to make the necessary connections for the machinery, and the plaintiff failed to send a man for that purpose, although defendant notified plaintiff that it was ready to make the connections and that a man be sent.

By paragraph 3 defendant pleaded that plaintiff was a corporation organized under the laws of the state of Missouri, and was not a foreign insurance company, and was engaged in doing business in this state, and at the time of the execution of the contract sued on it had not complied with section 571 of the Kentucky Statutes, requiring every corporation but foreign insurance companies carrying on business in this state to file in the office of the secretary of state a statement signed by its president or secretary, giving the location of its offices in the state of Kentucky and the name or names of its agents thereat upon whom process might be served, and making it unlawful for such corporation to do business in this state until such statement has been filed, and that the contract sued on was null and void.

Plaintiff's demurrer to the first and second paragraphs of the answer was sustained, but overruled as to the third paragraph. Subsequently defendant filed an amended and supplemental answer, pleading, in substance, that since the filing of its original answer defendant had offered to have the connections made, provided plaintiff would send a competent man to help defendant make such connections, and, if such agent should succeed in making the connection, defendant would keep the system and pay the purchase price therefor and waive the defenses made in its answer. The plaintiff agreed to have a competent man come to Louisville to make the connection, and, relying upon this promise, defendant expended \$48, but plaintiff failed to comply with its agreement. The pleading concludes with a prayer to the effect that the petition be dismissed, and that defendant recover on its counterclaim the sum of \$48. To the amended and supplemental answer plaintiff interposed a demurrer, which was sustained. To the third paragraph of defendant's original answer plaintiff filed a reply, denying the plaintiff carried on business in the state of Kentucky, and pleading affirmatively that plaintiff was a Missouri corporation engaged in interstate commerce; that its method of doing business was through traveling agents sent into the state of Kentucky and other states to solicit orders for the blowers system on a commission basis; that these orders were submitted to plaintiff for its approval in St. Louis, and, when accepted by plaintiff, the orders were filled by shipping the blowers to the purchaser; that it had never had any office,

factory, or place of business in the state of Kentucky; and that the orders for the two blowers purchased by defendant were obtained by its traveling salesman, and were approved by plaintiff at its office in Missouri. It further pleads that section 571 of the Kentucky Statutes has no application to the business done by plaintiff, but that, if it does, it is in violation of the commerce clause of the federal Constitution. Defendant's demurrer to the reply was overruled, and, having declined to plead further, judgment was rendered in favor of plaintiff.

[1] The first question presented is the propriety of the trial court's action in sustaining the demurrer to the first paragraph of defendant's answer. This is not a case where the article sold was, without qualification, to be satisfactory to the purchaser. It is unnecessary, therefore, to determine whether the case is one where the purchaser must act reasonably. To determine the question of satisfaction, the contract plainly provides for a trial by the purchaser. The case is one where the purchaser must act in good faith. He should make the test required by the contract, and, after fairly and candidly investigating and considering the matter, reach a genuine conclusion. To permit the purchaser to rely on tests made by others similarly situated would not only do violence to the terms of the contract, but would inject into the case elements of confusion and uncertainty which the parties did not contemplate. Dissatisfaction with the blower system by others might be due to caprice, or to improper installation or operation, and all these questions would have to be taken into consideration in determining whether or not another purchaser was justified in refusing to pay for the articles because he had found them unsatisfactory. As before stated, the satisfaction or dissatisfaction referred to in the contract is that based on an actual trial made by the purchaser. As he must comply with his contract, and therefore act honestly in the matter of making the test himself, he cannot rely on the dissatisfaction of others similarly situated to escape the obligation which he voluntarily incurred. *Water Heater Co. v. Mansfield*, 48 Vt. 378; *Hollingsworth v. Colthurst*, 78 Kan. 455, 96 Pac. 851, 130 Am. St. Rep. 382, 18 L. R. A. (N. S.) 741; *Thaler v. Greisser Const. Co.*, 229 Pa. 512, 79 Atl. 149, 33 L. R. A. (N. S.) 345; 6 R. C. L. § 333, p. 952. Nor does the fact that the test would have involved expense affect the case, since that is an element which should have been considered before the contract was entered into. Having received the machinery, and having failed to make the trial required by the contract within the time specified therein, defendant is liable for the purchase price, unless the other defenses interposed are sufficient to defeat a recovery. *Kenney Co. v. Anderson*, 81 S. W. 663, 26 Ky. Law Rep. 367; *Forsythe*

v. Russell Co., 148 Ky. 490, 146 S. W. 1103.

[2] The court did not err in sustaining a demurrer to the second paragraph of defendant's answer, for the reason that there was no allegation that the collateral parol agreement relied on, which varied the terms of the written contract, was omitted therefrom by fraud or mistake. *Castleman-Blakemore Co. v. Pickrell & Craig Co.*, 163 Ky. 750, 174 S. W. 749.

[3] The next question presented is the propriety of the court's action in sustaining a demurrer to the amended and supplemental answer. This pleading sets up a defense which it is alleged occurred after the filing of the original answer. The basis of the defense is the offer of the defendant to install the machinery if plaintiff would send a competent man to assist in the work, the agreement of the defendant to withdraw its defenses, and the agreement on the part of plaintiff to send a competent man, which it failed to do. We find however, that though the two promises are set out in the pleading, the pleader is very careful to avoid alleging that the plaintiff's promise was made in consideration of the defendant's agreement to withdraw its defenses; in other words, the pleading fails to allege any consideration whatever for the promise. As plaintiff's rights under its contract had accrued at the time of the filing of the amended and supplemental answer, and plaintiff was therefore entitled to recover, the promise made by plaintiff to send a man to install the machinery was without consideration, and could not be enforced. It follows that the demurrer to the amended and supplemental answer was properly sustained.

[4, 5] The last question presented is whether or not the failure of plaintiff to comply with section 571 of the Kentucky Statutes prevents a recovery. That the plaintiff is engaged in, and that the transaction out of which this action grows is one of, interstate commerce, there can be no doubt. The reply shows that the plaintiff is a Missouri corporation. It sells its blowers in the various states by means of traveling agents, who receive a commission on the sales made. The agent takes the order, the order is transmitted to the company for its approval and, when approved, the machinery is shipped to the purchaser. The mere fact that the agent inspects and measures the building and the place where the machinery is to be installed in no wise affects the character of the transaction. We have held that section 571 is void as to foreign corporations engaged strictly in interstate commerce, and that such corpora-

tions are not criminally liable under that section for engaging in interstate transactions without complying with its provision. *Commonwealth v. Hogan*, 74 S. W. 737, 25 Ky. Law Rep. 41; *Ryman Steamboat Line v. Commonwealth*, 125 Ky. 253, 101 S. W. 403, 10 L. R. A. (N. S.) 1187, 30 Ky. Law Rep. 1276; *Commonwealth v. Eclipse Hay Press Co.*, 104 S. W. 224, 31 Ky. Law Rep. 824; *Commonwealth v. Baldwin*, 96 S. W. 914, 29 Ky. Law Rep. 1074; *Three States Buggy Co. v. Commonwealth*, 105 S. W. 971, 32 Ky. Law Rep. 385. The ruling of the United States Supreme Court is to the same effect. In the recent case of *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 35 Sup. Ct. 57, 59 L. Ed. 193, the United States Supreme Court held the requirement that a foreign corporation appoint a resident agent on whom process may be served in the action against it, as a condition precedent to suing in the courts of the state to collect a claim arising out of interstate commerce transactions, is an unconstitutional burden on interstate commerce. In discussing the question, the court said:

"The second one, respecting the appointment of a resident agent upon whom process may be served, is particularly burdensome, because, as the Supreme Court of the state has said, it requires the corporation to subject itself to the jurisdiction of the courts of the state in general as a prerequisite to suing in any of them; that is to say, it withholds the right to sue even in a single instance until the corporation renders itself amenable to suit in all the courts of the state by whosoever chooses to sue it there. If one state can impose such a condition, others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce. As applied to such rights, we think the conditions are unreasonable and burdensome, and therefore in conflict with the commerce clause."

Inasmuch as we have held that noncompliance with section 571 prevents a corporation from recovering on a contract made in carrying on its business in this state (*Oliver v. Louisville Realty Co.*, 156 Ky. 628, 161 S. W. 570, 51 L. R. A. [N. S.] 293, Ann. Cas. 1915C, 565), the effect of our construction of the statute is equally as burdensome on interstate commerce as the construction given by the Supreme Court of Dakota to the statute of that state referred to in the above opinion. It follows that section 571 of the Kentucky Statutes is inoperative as to interstate commerce transactions, and therefore does not prevent a recovery by plaintiff.

In view of the questions presented, the appeal is granted, and an opinion written. Judgment affirmed.

VOGT v. CITY OF OAKDALE.

(Court of Appeals of Kentucky. Nov. 18, 1915.)

1. MUNICIPAL CORPORATIONS — 407 — PUBLIC IMPROVEMENTS — ASSESSMENTS — "TAX."

A local assessment on property specially benefited by a local improvement for the cost thereof is but a charge for the improvement, and is not a tax within Const. §§ 157, 171, limiting the tax rate and requiring uniformity of taxes on all property within the same territorial limit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1003, 1004; Dec. Dig. § 407.]

For other definitions, see Words and Phrases, First and Second Series, Tax.]

2. CONSTITUTIONAL LAW — 290 — MUNICIPAL CORPORATIONS — 407 — DUE PROCESS OF LAW — LOCAL ASSESSMENTS.

Ky. St. § 3643, provides that the cost of any street improvement shall be assessed equally on the front feet of the abutting property not to exceed 50 per cent. of the value of the ground after making of the improvement, excluding the value of buildings and other improvements. Plaintiff owned a corner lot fronting 200 feet on the street improved and 50 feet on another street. The other lots on the street improved had a frontage of 50 feet and a depth of 200 feet. *Held*, that though plaintiff's lot had a depth of only 50 feet on the street improved, a frontage assessment was not a taking of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290; Municipal Corporations, Cent. Dig. §§ 1003, 1004; Dec. Dig. § 407.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by Ella Vogt against the City of Oakdale. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

W. S. Sanford, of Louisville, for appellant. Chapeze & Crawford, of Louisville, for appellee.

NUNN, J. Oakdale is a city of the fifth class. By an ordinance duly adopted it provided for the construction of a carriageway 30 feet wide on Kenton street, and, after advertising for bids, let the contract therefor according to the plans and specifications. The ordinance was passed and the street improvement attempted under the act of 1912, which is now section 3643 of the Kentucky Statutes. Under authority of the statute the ordinance provided that:

"Said work shall be done at the cost of the owners of the ground fronting and abutting upon said street according to the number of front feet owned by each of them respectively. * * * That the portion of said work charged to and assessed against the property owners shall be paid for on the ten year bond plan as provided for in the act of the General Assembly 1912."

Under the statute the charge against an abutting property owner—

"shall not exceed fifty per centum of the value of the ground after such improvement is made, excluding the value of the buildings and other improvements upon the property so improved."

[1] Except at the corners, the lots on Kenton street fronted 50 feet and extended back

200 feet, but appellant's lot, which was a corner, fronted 50 feet on Grand boulevard, and extended back 200 feet on Kenton street. It will thus be seen that upon the front-foot basis she will have to pay four times as much for the street improvement on Kenton street as the other lot owners on that street, excluding the corners, although the square foot area of her lot is no greater. She complains: (1) That the statute which provides for street construction on the front-foot basis is in violation of the fourteenth amendment to the United States Constitution, because it amounts to taking of property without due process of law, and because it is a tax assessment upon her property made without considering equality of burden as between the owners of similar property; (2) that it is in violation of section 171 of the Kentucky Constitution, requiring uniformity of taxes upon all property within the same territorial limit; (3) that it is in violation of section 157 of the Kentucky Constitution, because city taxation is increased beyond the limit therein authorized. Upon these grounds she instituted an action in equity to enjoin the city and its officers from constructing Kenton street at the expense of the abutting property owners, and from issuing or selling bonds to pay therefor. The lower court sustained demurrer to her petition, and she appeals. In our opinion the facts alleged do not entitle her to the relief prayed for, nor do they raise any of the questions above set forth. No averment is made as to the value of her, or other, property on Kenton street. There is no claim of spoliation; no claim of an expense in excess of the benefits to be received; no claim for an expense in excess of 50 per cent. of the value of her property. She merely alleges, in the form of conclusions, that her property—

"is no more valuable per square foot than many other pieces of property abutting thereon, and that this plaintiff's apportionment for said improvement will be many times greater, in proportion to the value of her property, than many other owners of property abutting upon said improvement."

"It is a fundamental doctrine of American jurisprudence that those receiving special benefits from the public should make compensation for them * * * and the levy upon property specially benefited of a cost of a local improvement is but a further application of this same doctrine. * * * An assessment for a public improvement is not a tax in the ordinary sense of the term, but a charge for improvements for the making of which for his benefit the property owner should pay compensation." 28 Cyc. 1102.

In *Gosnell v. City of Louisville*, 104 Ky. 201, 46 S. W. 722, 20 Ky. Law Rep. 519, the court said:

"The distinction between a tax and a local assessment has been uniformly recognized by the courts of this state; and, while the latter is, in one sense, a tax, being the imposition of a burden upon the citizen and an involuntary charge upon his property, it is not a tax in the sense contemplated by the framers of the Constitution." *Holzhauser v. City of Newport*, 94

Ky. 407, 22 S. W. 752, 15 Ky. Law Rep. 188; Maddux v. City of Newport, 14 S. W. 957, 12 Ky. Law Rep. 657; Levi v. City of Louisville, 97 Ky. 409, 30 S. W. 973, 16 Ky. Law Rep. 872, 28 L. R. A. 480; McNaughten v. Industrial School, 44 S. W. 380, 19 Ky. Law Rep. 1695; Zable v. Orphans' Home, 92 Ky. 89, 17 S. W. 212, 13 Ky. Law Rep. 385, 13 L. R. A. 668.

[2] It thus appears that there is no merit in appellant's contention that the statute and ordinance are in violation of sections 157 and 171 of the Kentucky Constitution. Neither are they violative of the fourteenth amendment of the United States Constitution. It does not appear that any property has been, or is about to be, taken without due process of law, nor that a tax assessment is about to be made which imposes upon her an unequal burden. The fact that the property bears the expense of improvement according to frontage rather than superficial area does not render it unconstitutional, nor of itself make the burden of taxation unequal. Either plan may inflict some hardships, but it is within the power of the Legislature to create a taxing district for improvements upon either plan. Louisville, etc., v. Barber Asphalt Paving Co., 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819; Shumate v. Heman, 181 U. S. 402, 25 Sup. Ct. 645, 45 L. Ed. 916, 922; French v. Barber Asphalt Paving Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879.

The French Case, supra, distinguishes the case of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, upon which appellant relies. The Norwood Case has no application here. It was a proceeding to condemn a right of way for a street through Baker's property at the expense of the property which he owned on each side of the proposed street. This was equivalent to taking, under the guise of taxation, private property for public use without compensation. Of course, on the front-foot plan the cost apportioned to appellant's property will be more than that apportioned to the other owners on Kenton, because her lot has a greater frontage on that street. If later on Grand boulevard is improved, she will have to bear a proportionate share of that expense also. But this extra expense is due to the fact that she owns a corner lot. It does not follow, however, that the burden of taxation is unequal. As a rule, corner lots are more valuable, and there is nothing in the petition to indicate that her case is an exception to the rule.

The judgment of the lower court is affirmed.

CARTER COAL CO. v. PRICHARD'S ADM'R.

(Court of Appeals of Kentucky. Nov. 18, 1915.)

1. REMOVAL OF CAUSES §86 — PETITION — SUFFICIENCY — FRAUD IN JOINDER OF PARTIES.

Where the defendant moves to remove a cause to the federal court, on the ground of diversity of citizenship, alleging fraud in the join-

der of parties, he must set out the facts relied on to show the fraud.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. §86.]

2. REMOVAL OF CAUSES §36—DIVERSITY OF CITIZENSHIP—FRAUDULENT JOINDER OF PARTIES.

Where the petition on its face states a good cause of action against both defendants named, the nonresident defendant cannot have the cause removed to the federal court on the ground of diversity of citizenship, in the absence of a positive showing of fraud in joining them in order to avoid the removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. §36.]

3. REMOVAL OF CAUSES §47—DIVERSITY OF CITIZENSHIP—FRAUDULENT JOINDER OF PARTIES.

A petition, alleging that a defendant's servant, as representative of the defendant employer, was the mine boss, superior in authority to the deceased, and directly charged with the duty of looking after the safety of the mine; that he directed the deceased to do the work he was doing at the time he was killed; that the accident in which deceased was killed was caused by the unsafe and dangerous condition of the mine roof; and that this condition was known to the defendant servant and the defendant employer, or could have been known to them by the exercise of ordinary care—states a good cause of action against both defendants, so that neither is entitled to a transfer to the federal court on the ground of diversity of citizenship, to avoid which the plaintiff made the alleged fraudulent joinder of parties.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 92; Dec. Dig. §47.]

4. DEATH §43—NEGLIGENCE—PERSONS LIABLE.

Under Const. § 241, providing that, whenever the death of a person results from injury inflicted by negligence or wrongful act, damages may be recovered from the corporation, or person so causing the same, and Ky. St. § 6, providing that damages may be recovered from the wrongdoer and its agents or servants causing the same, an action may be brought against both the employer and his servants whose negligence caused the death of deceased.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 59; Dec. Dig. §43.]

5. REMOVAL OF CAUSES §39—GROUNDS—DIVERSITY OF CITIZENSHIP—ERRONEOUSLY DIRECTED VERDICT FOR RESIDENT DEFENDANT.

In an action in which the deceased's employer and the employer's mine boss are joined as defendants, where the court erroneously directed a verdict for the defendant boss, the case will be treated as though the ruling were not made, and the defendant company cannot secure a removal to the federal court because the resident mine boss is no longer in the case, and there is therefore diversity of citizenship between the plaintiff and the remaining defendant.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 73; Dec. Dig. §39.]

6. REMOVAL OF CAUSES §39—DIVERSITY OF CITIZENSHIP—DIRECTED VERDICT FOR RESIDENT DEFENDANT.

In an action in which the deceased's employer and the employer's mine boss are joined as defendants, although a ruling of the court directing a verdict for the resident defendant was correct, the case must be treated as though he were still a party, since the plaintiff on appeal having preserved his exception may appeal from the directed verdict, and thus the party in whose

favor the verdict is directed is never out of the case until the appeal is decided.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 73; Dec. Dig. § 39.]

7. MASTER AND SERVANT § 289—INJURIES TO SERVANT—CARE REQUIRED—QUESTIONS FOR JURY.

The question whether the deceased employé in a mine, killed by fall of stone from the roof, exercised ordinary care for his own safety, held on the evidence for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092–1132; Dec. Dig. § 289.]

8. MASTER AND SERVANT § 118, 124 — INJURIES TO SERVANT—CARE REQUIRED OF MASTER—INSPECTION OF MINE ROOF.

It is the duty of the master operating a coal mine not only to inspect the roof of the mine in the exercise of ordinary care to provide a safe place for his servants to work, but also to support the roof in a proper manner.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209, 235–242; Dec. Dig. § 118, 124.]

9. MASTER AND SERVANT § 124—INJURIES TO SERVANT—CARE REQUIRED.

Where the duty of inspecting the mine is upon the master, he cannot escape liability for injuries to the servant unless the duty of inspection was imposed upon the injured person, or the danger was so obvious that a person of ordinary intelligence in the exercise of ordinary care could have discovered the peril; nor can he escape liability by a showing of inspection of the mine, since this is not a conclusive showing of exercise of the required degree of care, but the question is still for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235–242; Dec. Dig. § 124.]

Appeal from Circuit Court, Knox County.

Action by James E. Prichard's administrator against the Carter Coal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

P. D. Black and Black, Black & Owens, all of Barbourville, for appellant. J. D. Tugle, of Barbourville, for appellee.

CARROLL, J. This suit was brought by the administrator of James E. Prichard against the Carter Coal Company, a Delaware corporation, and Mike Donahue, its mine boss who was a citizen of Kentucky, to recover damages for the death of James E. Prichard while in the employment of the company and working under the direction and control of the defendant Donahue. At the time of his death, Prichard was a track man, engaged in placing a derailed car on the track, and while so engaged Prichard and two other men were killed by a large and heavy piece of slate that fell from the roof of the mine. On the trial of the case, there was a directed verdict as to Donahue and a judgment against the coal company.

On this appeal of the coal company, one assignment of error relates to the refusal of the trial court to remove the action to the federal court when the removal petition was first filed and also upon a renewal of the motion, at the conclusion of the evidence, when

the court determined that the plaintiff had failed to make out a case against Donahue and directed a verdict in his behalf.

The plaintiff's petition charged that the Carter Coal Company was the owner and operator of the mine in which Prichard came to his death, and:

That the defendant Donahue "was a servant and employé of the defendant company, working for it in the operation of its mine, acting in the capacity of a foreman or boss, and directing other servants of said company, including the said James E. Prichard, in the performance of their duties at work in said mine while at work for said company. * * * That he was put to work by the defendant company and by the mine foreman, Mike Donahue, to replace a car on the track, which was wrecked and off the rails of the track in its mine, and while so engaged a large quantity of slate, stone, and earth fell upon him and so bruised and mangled him that he immediately died. * * * That the decedent was ignorant and inexperienced in mining and did not know of the dangers and hazards attending the work at which he was employed at the time of his injury, and the defendant Donahue knew that the said Prichard was ignorant and inexperienced and did not know of the dangers and hazards attendant upon the duties required of him as aforesaid. Nor did the defendant company or Donahue inform him of the dangerous character of the work at which he was placed, or warn or caution him of the dangers attendant thereto. He said that the place where the said James E. Prichard was placed to work and where he received the injuries aforesaid was in a highly dangerous and unsafe place for the duties required of him, and was known by the defendant company and the mine foreman and boss, Donahue, to be highly dangerous and unsafe; but its unsafe condition was not known to him. He says that it was the duty of the defendant company and the defendant Donahue to inspect and make reasonably safe the working place of the said Prichard, which they failed to do, and that it was not the duty of the said Prichard to make safe his said working place. The plaintiff says that the injuries to the said Prichard were brought about and caused alone by reason of the joint and concurrent gross negligence of the defendant company, and the defendant Donahue, in failing to inform or instruct said Prichard in the duties required of him and of the dangerous character of the work at which he was placed, and warn or caution him of the danger and hazard attendant upon the work required of him."

In seasonable time after the defendants had been brought before the court by service of process, and before the Carter Coal Company had otherwise entered its appearance to the action, it moved the trial court to transfer the action to the federal court, upon the ground that it was a citizen of the state of Delaware, and averred that:

"The plaintiff, C. P. Prichard, has made the defendant Mike Donahue a party defendant herein with this petitioner for the sole purpose of undertaking to deprive this petitioner of the right to remove the said action to the United States District Court for the Eastern District of Kentucky for trial, and to fix the only jurisdiction for said trial in the Knox circuit court, and all of same is done willfully and wrongfully, and with fraudulent intent, while said plaintiff and his attorney know that said Mike Donahue is not liable in any way to plaintiff, and in no way concurred in any negligence, if any there was, which brought about the death of the decedent, Jas. E. Prichard, and that said Mike Donahue is

bound herein as a party with the fraudulent intent and for no other purpose, and without reasonable grounds for plaintiff and his attorney to believe that the said Mike Donahue is liable to plaintiff for the death of the decedent or that he was at all negligent in any way resulting in said death, and all of which is wrongful, unlawful, and fraudulent. The said action and controversy is wholly and entirely between plaintiff and your petitioner, and your petitioner's rights and the rights of the plaintiff herein can be determined wholly and entirely separate and independent of any cause of action, if any there be, against the defendant Mike Donahue."

Afterwards the motion to remove was overruled, and thereupon the defendants filed a joint answer traversing all the averments of the petition and pleading that the decedent assumed the risk of the injuries that caused his death; that his death was the result of an unavoidable accident; and that it was brought about by reason of his contributory negligence. The parties then went to trial, and when at the conclusion of the evidence for the plaintiff the trial judge erroneously, as we think, ordered a directed verdict as to Donahue, the motion to remove the action was renewed on the petition filed at the beginning of the case. This motion was overruled, and we think the ruling of the court was correct in overruling the motion first made as well as the motion made at the conclusion of the plaintiff's evidence.

In *Chesapeake & Ohio Ry. Co. v. Cockrell*, Adm'r, 232 U. S. 146, 34 Sup. Ct. 278, 58 L. Ed. 544, the Supreme Court of the United States said, in considering the sufficiency of a petition for removal:

"The right of removal from a state to a federal court, as is well understood, exists only in certain enumerated classes of cases. To the exercise of the right, therefore, it is essential that the case be shown to be within one of those classes, and this must be done by a verified petition setting forth, agreeably to the ordinary rules of pleading, the particular facts, not already appearing, out of which the right arises. It is not enough to allege in terms that the case is removable or belongs to one of the enumerated classes, or otherwise to rest the right upon mere legal conclusions. As in other pleadings, there must be a statement of the facts relied upon, and not otherwise appearing, in order that the court may draw the proper conclusion from all the facts, and that, in the event of a removal, the opposing party may take issue, by a motion to remand, with what is alleged in the petition. * * * So, when in such a case a resident defendant is joined with the nonresident, the joinder, even although fair upon its face, may be shown by a petition for removal to be only a fraudulent device to prevent a removal; but the showing must consist of a statement of facts rightly engendering that conclusion. Merely to traverse the allegations upon which the liability of the resident defendant is rested, or to apply the epithet 'fraudulent' to the joinder, will not suffice; the showing must be such as compels the conclusion that the joinder is without right and made in bad faith."

[1-3] As the removal petition was merely a traverse of the plaintiff's petition coupled with the charge that the joinder was fraudulent, we think that, when tested by the rule of pleading laid down in this case, it was not sufficient when the motion was first made at a time when Donahue was a party defendant.

The substance of it was that Donahue was fraudulently joined as a party defendant for the sole purpose of depriving the petitioner of the right of removal, although the plaintiff and his attorney knew that Donahue was not in any way liable to the plaintiff or guilty of any negligence contributing to the death of the deceased. As distinctly held in the *Cockrell* case, the facts relied on to show a fraudulent joinder must be set forth, and this the petition for removal did not do. It is true the petition avers that Donahue was not in any manner responsible for the accident or resulting injury; but this unfounded averment did not entitle the foreign corporation to a removal, because the petition, if its averments were true, stated a good joint cause of action against Donahue and the coal company. And as the petition, assuming its averments to be true, stated a good joint cause of action against the defendants, the right of removal on the ground of diverse citizenship did not exist, in the absence of grounds showing a fraudulent joinder. But in this case a fraudulent joinder could not be shown because the plaintiff had the right, as we will presently point out, to join Donahue, a resident of this state, as a defendant in this action, and, if the allegations of the petition were supported by evidence, to prosecute the action against him to a final judgment.

The petition averred, and the evidence introduced on the trial showed, that Donahue was, as the representative of the coal company, acting in the capacity of mine boss, superior in authority to the deceased and directly charged with the duty of looking after the safety of the mine. It also charged, and the evidence also showed, that Donahue directed the deceased to do the work he was doing at the time he was killed. It was further charged, and there was evidence to support it, that the accident was caused by the unsafe and dangerous condition of the mine roof, and that this condition was known to Donahue and the coal company, or could have been known to them by the exercise of ordinary care. So that, measured by the averments of the plaintiff's petition, which were supported by evidence, Donahue was jointly liable with the coal company, and the plaintiff had in good faith the legal right to join him as a defendant and prosecute the action against him to a judgment.

In *Haynes' Adm'r v. C., N. O. & T. P. Ry. Co.*, 145 Ky. 209, 140 S. W. 176, Ann. Cas. 1913B, 719, this court said, in speaking of the joint liability of the employer and its superior servant to an employé who is injured or killed by the acts of omission or commission on the part of the superior servant involving a breach of duty to the injured party:

"In some jurisdictions the servant is not held accountable to third persons for nonfeasance, but is for misfeasance; but a contrary rule, and one that is in accord with the weight of modern authority, prevails in this state. We do not recognize any distinction, so far as the accountabil-

ity of the servant is concerned, between acts of misfeasance and nonfeasance. If a servant performs in an unlawful manner an act that results in injury to a third person, or if a servant fails to observe a duty that he owes to third persons, and injury results from his fault of commission or omission, he is liable in damages. There is no reason for making a distinction between acts of commission and omission when each involves a breach of duty. The servant is not personally liable in either case because the breach of duty was committed by him while acting in the capacity of servant, but responsibility attaches to him as an individual wrongdoer without respect to the position in which he acts or the relation he bears to some other person. It is the fact that the servant is guilty of a wrongful or negligent act amounting to a breach of duty that he owes to the injured person that makes him liable. It is not at all material whether his wrongful or negligent act is committed in an affirmative or willful manner, or results from mere nonattention to a duty that he owes to third persons, and that it is entirely within his power to perform or omit to perform. There are innumerable situations and conditions presented in the everyday affairs of life that make it the duty of persons to so act as not to harm others, and when any person, whatever his position or relation in life may be, fails, from negligence, inattention, or willfulness, to perform the duty imposed, he will be liable."

Evans Chemical Works v. Ball, 159 Ky. 399, 167 S. W. 390, and *Murray v. Cowherd*, 148 Ky. 591, 147 S. W. 6, 40 L. R. A. (N. S.) 617, are to the same effect.

[4] The right to join the servant and the master in actions of tort is also distinctly authorized by section 241 of the Constitution providing, in part, that:

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same."

And by section 6 of the Kentucky Statutes, providing, in part, that:

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same."

And under authority of these constitutional and statutory provisions we have frequently announced the rule that an action to recover damages for wrongful death may be prosecuted jointly against the master and the servants guilty of the negligence complained of. *C. & O. Ry. Co. v. Dixon*, 104 Ky. 608, 47 S. W. 615, 20 Ky. Law Rep. 792; *C., N. O. & T. P. Ry. Co. v. Finnell*, 108 Ky. 135, 55 S. W. 902, 22 Ky. Law Rep. 86, 57 L. R. A. 266; *Winston v. I. C. R. R. Co.*, 111 Ky. 954, 65 S. W. 13, 23 Ky. Law Rep. 1283, 55 L. R. A. 603.

It may be further noticed that the Supreme Court of the United States has in many cases recognized the right of a plaintiff in an action for tort in a state court to join as defendants the master and servant whose negligence caused the injuries of which he complains, although the master may be a non-resident of the state in which the action was brought and the servant a resident defendant. *Alabama Great Southern R. Co. v. Thompson*,

200 U. S. 203, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147; *C., N. O. & T. P. Ry. Co. v. Bohon*, 200 U. S. § 221, 26 Sup. Ct. 166, 50 L. Ed. 448, 4 Ann. Cas. 1152; *C. & O. Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; *Southern Ry. v. Miller*, 217 U. S. 209, 30 Sup. Ct. 450, 54 L. Ed. 732; *C. B. & Q. Ry. Co. v. Willard*, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521.

[5] So that, under the pleading and evidence, the trial court committed error in directing a verdict as to Donahue. But as the ruling in ordering a directed verdict as to Donahue was erroneous, the status of the coal company should be regarded the same as if the motion to direct a verdict in regard to Donahue had been overruled. The coal company will not be allowed to avail itself of this ruling of the trial court to secure an advantage that it could not have obtained except for this erroneous ruling.

[6] There is, too, another reason for sustaining the correctness of the trial court's ruling in refusing to remove the case after the directed verdict had gone as to Donahue. The ground for this reason is the practice that appears to have been announced by the Supreme Court of the United States in *American Car & Foundry Co. v. Kettelhake*, decided in January, 1915, and reported in 236 U. S. 311, 35 Sup. Ct. 355, 59 L. Ed. 594. The opinion in that case shows that a suit was brought in a Missouri court by Kettelhake's widow against the car company, a New Jersey corporation, and Ellers and Martin, citizens of Missouri, to recover damages for the negligent killing of her husband by the movement of a train of cars operated by the car company. It was conceded that the action was properly brought jointly against the car company and Ellers and Martin, and we infer that Ellers and Martin were made parties defendant because they failed as employes of the car company, superior in authority to Kettelhake, to perform some duty they owed him. On the trial of the case, at the conclusion of the evidence for the plaintiff, the trial court peremptorily instructed the jury to find for the defendants Ellers and Martin, and thereupon the car company filed its petition for removal to the federal court, and moved the court to transfer the case upon the ground that as the action then stood it was simply a case between the plaintiff a citizen of Missouri and the car company a citizen of New Jersey. The trial court, however, declined to remove the action, and on the appeal of the car company from the judgment against it this ruling was approved by the St. Louis Court of Appeals. From the judgment of the St. Louis court holding that the case was not removable, an appeal was prosecuted to the Supreme Court of the United States. It also appears that from the ruling of the trial court directing a peremptory instruction, the plaintiff appealed to the Supreme Court of Missouri, and

this appeal was pending undisposed of in that court when this case was decided in the Supreme Court of the United States. In holding that the trial court correctly ruled in refusing to remove the case after the peremptory instruction had been sustained as to Eilers and Martin, the court, after commenting on other cases, said this:

"Taking these cases together, we think it fairly appears from them that, where there is a joint cause of action against defendants resident of the same state with the plaintiff and a non-resident defendant, it must appear to make the case a removable one as to a nonresident defendant because of dismissal as to resident defendants, that the discontinuance as to such defendants was voluntary on the part of the plaintiff, and that such action has taken the resident defendants out of the case, so as to leave a controversy wholly between the plaintiff and the nonresident defendant. * * * The ruling of the court sustaining the demurrer to the evidence interposed by the resident defendants practically determined the question of their liability, and under the Missouri practice, as we understand it, there was a right to take an involuntary nonsuit with leave to move to set it aside, and when that motion was overruled there was a remedy by appeal to the Supreme Court of Missouri, as was done in the present case, and the order is not final until the appellate court passes upon it. We cannot agree to the contention that upon this record, when the court had sustained the demurrers to the evidence as to Martin and Eilers and plaintiff took the nonsuit, the case was so far terminated as between the plaintiff and the resident defendants as to leave a removable controversy wholly between the plaintiff and a nonresident corporation. The element upon which the decision in the Powers Case, supra, depended—the voluntary dismissal and consequent conclusion of the suit in the state court as to the resident defendants—is not present in this case."

It also appears from the opinion that the Missouri practice when a peremptory instruction is given by the trial court is not materially different from ours. Under our practice an appeal lies from the ruling of the trial court in directing a verdict as to one or more of the defendants when there is an exception taken to this ruling as there was in this case, and on this appeal the correctness of the ruling of the trial court is drawn in question by counsel for the plaintiff below as under our practice he has the right to do.

Adopting the view expressed by the Supreme Court in this case, we think that, when the plaintiff properly states a joint cause of action against a nonresident and a resident defendant, the fact that the trial court gives a peremptory instruction as to the resident defendant, whether this ruling be erroneous or not, does not then entitle a nonresident defendant to removal of the action on the ground of diverse citizenship, if the plaintiff excepts, as he may do, to the ruling of the court releasing the resident defendant and prosecutes, as he may do, from such ruling an original appeal to this court or a cross-appeal on the appeal of the defendant. At any rate, if the plaintiff excepts to the ruling releasing the resident defendant, and the correctness of this ruling

is brought to the attention of this court either on the appeal of the plaintiff or on the appeal of the nonresident defendant from a judgment against it, it could not be said that the resident defendant, who was properly joined in the first instance, did not remain a party defendant until this court had finally determined the correctness of the ruling of the trial court. So that in no state of case that we can think of is the coal company in a position to complain of the ruling of the trial court in refusing to remove the action when the verdict had gone against Donahue. If this directed verdict had been properly ordered by the trial court, Donahue, who was properly joined as a defendant, would continue to remain a defendant until this court, on appeal, had approved the ruling of the trial court in directing a verdict.

[7] It is urged, however, that the trial court should have directed a verdict in favor of the coal company on the ground that the evidence showed it was the duty of the deceased to inspect the roof of the mine, and therefore, if the roof was in an unsafe condition, his failure to observe it and save himself from danger was such contributory negligence as would defeat a recovery.

The evidence was somewhat conflicting as to the duty of inspection imposed upon the deceased; but the weight of it, we think, tends to show that it was not his duty to inspect the mine at the place where he was working. The coal company had inspectors, the chief of whom was Donahue, the mine boss. It also had timbermen, and Prichard was not engaged in mining coal at the time of his death, but was engaged as a track man, and the custom as to the duty of the miners engaged in removing coal to inspect the roof did not extend to laborers such as Prichard who were engaged in a distinct character of work from that of mining coal.

It is true it was the duty of the deceased to exercise ordinary care for his own safety, although not charged with the duty of inspection, and if the unsafe condition of the roof at the place where he was working was so obvious as that a person of ordinary intelligence, in the exercise of ordinary care for his own safety, could not have failed to discover it, this would have amounted to such contributory negligence as would have defeated a recovery. This, however, was a question of fact that should have been and was submitted to the jury. The evidence that the duty of inspecting the roof of the mine at the place where he was working rested upon the deceased was not at all so convincing as to justify the court, as a matter of law, to direct a verdict for the coal company. Nor was the evidence as to the dangerous and unsafe condition of the roof of the mine so conclusive as to justify the legal presumption that the deceased, in the exercise of ordinary care, should have discovered it. There was evidence of the dangerous condition of the roof and evidence

that this condition had been brought to the attention of one of the men whose duty it was to inspect and protect the roof. There was also evidence tending to show that the roof at this place was not sufficiently protected by timber, and that Donahue, who was the chief inspector, had not examined the roof on the day the slate fell.

[8] A further contention of the coal company is that if the duty of inspecting the roof of the mine in a proper and sufficient manner devolved upon it, having discharged its duty in this respect, it should not be held accountable for an accident that happened notwithstanding its careful inspection. In support of this view, there was evidence tending to show that on the day preceding the accident the roof at this place was inspected and found to be in a safe condition. There was further evidence tending to show that the piece of slate that fell was so large and thick that the usual and customary inspection would not have disclosed its defective condition. Resting on this evidence, the argument is made: First, that the coal company had fulfilled its duty of inspection and exercised the required care in respect thereto; and, second, that when the most careful inspection would not have disclosed the defect in the roof, the injuries resulting from the fall of the slate must be attributable to accidental causes that no amount of care could have guarded against.

The answer to this argument is that it was the duty of the coal company to exercise ordinary care to furnish to the deceased a reasonably safe place in which to work, and this duty carried with it the duty of inspection and the duty of supporting the roof with timbers in the event an inspection disclosed the necessity for timbering. And there was evidence conducing to show that the roof was unsafe and that this condition, by the exercise of ordinary care, could have been discovered in time to have protected the roof, if ordinary care had been exercised to adopt this method of safety after the attention of the coal company was called to the necessity for supporting the roof.

[9] In cases like this, where the law imposes upon the mineowner the duty of inspection, and the further duty of supporting the roof by timber if inspection shows this to be necessary, it cannot escape liability for accident unless it appears that the duty of inspection was imposed upon the injured person, or it is shown that the danger was so obvious as that a person of ordinary intelligence could, in the exercise of ordinary care, have discovered the peril. It may be that the roof was inspected, but this was not conclusive evidence of the exercise of the required degree of care on the part of the coal company. It does not follow, from the mere fact that the inspector decides that the roof is safe and therefore supports

are not necessary, that this will exonerate the mineowner, in the event an injury happens by the falling in of the roof. As was said in *Williams Coal Co. v. Cooper*, 138 Ky. 287, 127 S. W. 1000:

"If in cases like this the master could be relieved of liability upon the statement of the person charged with the duty of inspection that in his judgment the place was safe, there would be but few cases in which an employé who relied upon the inspection, and was injured, could recover, as it is fair to assume that in every instance the person charged with the duty of inspection would say that he had performed it. But his statement is not conclusive. It was a question for the jury to say from the evidence whether or not the place was reasonably safe. And in considering this question they had the right to give such weight as they deemed proper to the statement of the inspector. They may or may not believe from it that the master discharged his duty in furnishing a reasonably safe place."

The same principle was announced in *Hudleston's Adm'r v. Straight Creek Coal & Coke Co.*, 138 Ky. 506, 128 S. W. 589, where it was said:

"The jury have the right to hear and consider, not only the evidence from the mouths of witnesses as to what they did and what was done, but they have also the right to hear and consider other evidence from witnesses who are qualified to testify as to the physical condition of the place or appliance before, at the time, and immediately after the accident, and the jury may from the facts and circumstances thus proven be warranted in concluding that they are entitled to more weight than the personal evidence of the witnesses whose testimony was in contradiction of these facts and circumstances."

The instructions are complained of, but we think they submitted to the jury all the substantial issues in the case.

The judgment is affirmed.

MOSES v. PROCTOR COAL CO.

(Court of Appeals of Kentucky. Nov. 18, 1915.)

1. DAMAGES — 32 — PERSONAL INJURIES — PLEADING AND PROOF—FUTURE SUFFERING.

In an action for personal injuries, plaintiff is entitled to recover for suffering which he will continue to endure after the trial, regardless whether a permanent impairment of earning power is pleaded or proven.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 40, 41, 71; Dec. Dig. § 32.]

2. MASTER AND SERVANT — 89 — EXISTENCE OF RELATION—WAITING TO WORK.

Where plaintiff, a coal miner, reported for work in a mine at the proper place and time, as ordered by the mine foreman, and upon arrival found the room not yet ready, because another employé had not finished his task of track placing, and while waiting for and voluntarily assisting in the completion of the placing, plaintiff was injured by a blast from an adjoining room, which blew through the partition, he was entitled to recover, regardless of the fact that he was assisting at the track placing as a mere volunteer, since while waiting for the room to be prepared, plaintiff's employer owed him the duty of providing a safe place.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 153-156; Dec. Dig. § 89.]

3. MASTER AND SERVANT ~~80~~—SAFE PLACE—TO AND FROM WORK.

The duty of the employer to provide a safe place for employes to work includes such places as the servant properly passes in going to and from his actual working place.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 153-156; Dec. Dig. ~~80~~.]

4. TRIAL ~~112~~—ARGUMENT OF COUNSEL—LIMITATION.

Where the trial of a personal injury case consumed a whole day, involving the examination of 18 witnesses, and the giving of 8 instructions, it was error to limit the argument of counsel to 20 minutes on each side.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 273, 274; Dec. Dig. ~~112~~.]

Appeal from Circuit Court, Whitley County.

Action by Mart Moses against the Proctor Coal Company. Judgment for plaintiff for an insufficient amount, and he appeals. Reversed.

R. S. Rose and R. L. Pope, both of Williamsburg, for appellant. Tye, Siler & Gatliff, of Williamsburg, for appellee.

HANNAH, J. Mart Moses sued the Proctor Coal Company in the Whitley circuit court to recover damages for injuries sustained by him while working in the defendant's coal mine at Red Ash on July 13, 1914. He obtained a verdict and judgment in the sum of \$250; but, deeming the sum awarded insufficient to compensate him for his injuries, he appeals, insisting that the trial court erred in instructing the jury and in limiting the argument to 20 minutes on a side.

The plaintiff and his brother were engaged in what is termed "robbing," that is, the extraction of pillars and stumps. On Thursday before the Monday on which plaintiff was injured, they had completed the work to which they had theretofore been assigned, and were informed that there would be no place available for them to work in until the following Monday, the mine foreman promising to have a certain room prepared in the interim so that they could go to work therein on that day. On Monday, the plaintiff and his brother went to the place or room in question, and upon their arrival there, they found that the room was not quite ready for them, in that the track was not in proper position. George Woods, another servant of the company, was engaged in preparing the room for their work. It was necessary to pull the track over next to the side of the room. Woods was unable to do this by himself, and he requested plaintiff and his brother to assist him, which they did. After the track was moved over, plaintiff was assisting Woods in setting some timbers, when a miner in an adjoining room exploded a charge of powder in shooting down coal, broke through the connecting wall between his room and that in which plaintiff was working, and injured him.

[1] 1. The court gave the following instruction on the measure of damages:

"If your verdict is for the plaintiff, Moses, you will find for him such a sum in damages as you may believe from the evidence will fairly and reasonably compensate the plaintiff, Moses, for the pain and suffering, if any he has suffered, and for the permanent destruction of his power to earn money, if any he has suffered, as the direct and proximate result of the carelessness or negligence of the defendant company as predicated in instruction No. 1 above, not to exceed, however, the sum of \$30,000, the amount claimed in plaintiff's petition."

The plaintiff asked an instruction, which, in addition to the elements of damages mentioned in the instruction given, also authorized the jury to find for such mental and physical pain as he had already suffered and such as it was reasonably certain he would endure in the future as the direct result of his injuries so sustained, and the court declined to give such an instruction. This was error, as there was some evidence tending to show that plaintiff's suffering from the injuries in question had not ceased at the time of the trial. See *Hobson, Blain & Caldwell on Instructions*, §§ 216, 217, and the authorities thereunder cited; *C. & O. Ry. v. Johnson*, 145 Ky. 481, 140 S. W. 687; *Howard v. Henderson Traction Co.*, 121 S. W. 954; *L. & N. v. Logsdon*, 114 Ky. 746, 71 S. W. 905, 24 Ky. Law Rep. 1566; *L. & N. v. Lynch*, 137 Ky. 696, 126 S. W. 362.

Where it appears from the evidence that the plaintiff will continue after the trial to endure suffering from his injuries, he may recover therefor, regardless of whether there is permanent impairment of earning power pleaded or proven. *L. & N. v. Stewart*, 163 Ky. 164, 173 S. W. 757; *Main Jellico Mountain Coal Co. v. Young*, 160 Ky. 397, 169 S. W. 841.

[2] 2. The action was defended upon the theory that the plaintiff, at the time he was injured, was not in the course of his employment; that he was employed to extract coal; that the working place was not ready for him; and that he was a mere volunteer, or was assisting George Woods to discharge duties which Woods alone was under obligation to perform. And it is now contemplated by appellee that it was entitled to a directed verdict, hence there should be no reversal of the judgment, even if the trial court did err in the instructions given.

We are not impressed with the contention that defendant owed to plaintiff no duty at the time he was injured. It may be conceded that he was not at that time engaged in the performance of any work for which he was employed, and that he was doing work for which the coal company was under no obligation to pay him. But he was at the place where he had been ordered to report for work; and whether he sat down to watch another servant make the place ready, or whether he voluntarily assisted that servant

in doing so, the company's duty to provide him with a reasonably safe place obtained.

[3] This case is somewhat analogous to those wherein the servant is injured while going to or from his place of work in a mine. The rule in such cases is that the duty to provide a reasonably safe place includes the places where the servant properly passes in going to and from his actual working place. See *Fluehart Collieries Company v. Elam*, 151 Ky. 47, 151 S. W. 34; *Broadway Coal Mining Co. v. Robinson*, 150 Ky. 707, 150 S. W. 1000; *Jellico Coal Mining Co. v. Woods*, 154 Ky. 683, 159 S. W. 530.

If the plaintiff in the instant case had been passing this spot where the explosion occurred, on his way to or from the face of the coal at the back end of the room, which was his place of work, and which was about 50 feet from the place where he was injured, he certainly would come within the safe place doctrine; and we think the mere fact that he was temporarily assisting Woods to prepare the place so that he could commence his work, would not operate to exclude him from the benefits of the obligation of that doctrine, for he was there in obedience to the orders and instructions which he had theretofore received from the company's mine foreman.

3. The court admitted evidence and gave an instruction covering defendant's plea that Woods was an independent contractor, and appellant complains of this. It was error to admit this evidence and to give such an instruction. Woods was not an independent contractor. *Bon Jellico Coal Co. v. Murphy*, 161 Ky. 450, 171 S. W. 160. In fact, Woods denied that he even asked plaintiff and his brother to assist in moving the track or setting the timbers, and there was no evidence to support defendant's claim that plaintiff was working for Woods.

4. There was a plea of contributory negligence, and some evidence that the plaintiff knew that the miner in the adjoining room was boring a hole in the wall and placing a shot, notwithstanding which knowledge he (the plaintiff) continued to work in the room where he was injured. The defendant was entitled to an instruction on contributory negligence, but the ones given (Nos. 4 and 6) were prolix and confusing. There was no material conflict in the evidence. There were but three real issues to submit to the jury: (1) Did defendant exercise ordinary care to furnish plaintiff with a reasonably safe place in which to work; (2) was defendant guilty of contributory negligence; (3) the measure of damages.

Upon another trial, the court will give the following instructions:

"No. 1. It was the duty of the defendant to exercise ordinary care to provide the plaintiff at the time when and the place where he was injured, with a reasonably safe place in which to work considering the character and nature of his employment; and if the jury believe from the evidence that the defendant negligently fail-

ed to perform this duty, and that as a direct result of such failure (if any such failure there was) the plaintiff was injured, the jury will find for plaintiff; and unless they so believe, or if they should believe as in instruction No. 2, they will find for the defendant."

"No. 2. It was the duty of plaintiff, Moses, to exercise ordinary care for his own safety at the time and place of his injury; and if the jury believe from the evidence that he failed to perform this duty, and that such failure (if any there was) upon his part, contributed to his injury to such an extent that but for it he would not have received such injury, then the jury will find for the defendant, although they should believe from the evidence that defendant was negligent as defined in instruction No. 1."

"No. 3. If the jury find for plaintiff, they will award him damages in such sum as they may believe from the evidence will reasonably compensate him for such mental and physical pain as he has suffered and is reasonably certain to suffer, if any, as the direct result of his injuries; and, if the jury believe from the evidence that his injury is permanent, they will award him such further sum as they may believe from the evidence will reasonably compensate him for the permanent impairment of his power to earn money, if any, the whole of said finding, however, not to exceed the amount claimed in the petition, \$30,000."

These 3 instructions, together with one defining negligence and ordinary care, and one permitting 9 or more of the jury to agree, are all the instructions that should be given, if the evidence on another trial be substantially the same.

[4] 5. The trial of the case consumed one whole day. There were 16 witnesses examined. There were 8 instructions given. The court limited the argument to 20 minutes on a side, and we think this time insufficient to present reasonably the several matters necessary to be brought to the attention of the jury under the evidence and the instructions given.

For the reasons indicated, the judgment is reversed.

VASA CO. v. OHIO VALLEY BANKING & TRUST CO.

(Court of Appeals of Kentucky. Nov. 23, 1915.)

1. APPEAL AND ERROR ⚡671—QUESTIONS REVIEWABLE—SUFFICIENCY OF EVIDENCE—RECORD.

Where there is no bill of evidence in the record, the court can only determine whether the pleadings support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. ⚡671.]

2. BANKS AND BANKING ⚡226 — LIABILITY OF BANK TO CUSTOMER—PLEADINGS.

A petition, in an action against a bank by its customer, which alleges that the customer purchased property from a third person for \$6,500, executing notes for deferred payment, that the deed stipulated that if any of the notes were not paid within 30 days after maturity the whole price should become collectable; that a note was placed with the bank for collection; that at the time of the maturity of the note the customer was entitled to a credit on the books of the bank in excess of the amount of the note, which fact was known to the bank, but was unknown to the customer; that, by reason of the refusal of the bank to correctly state the customer's account,

the customer was unable to pay the note; and that to prevent loss the customer sold the property for \$5,000, though reasonably worth \$8,500—states no cause of action for failing to aver that the customer could not have raised the money to pay the note, or could not have made other arrangements satisfactory to the vendor, and for failing to aver that the property could have been sold for more than \$5,000.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 867-870; Dec. Dig. 6-228.]

Appeal from Circuit Court, Henderson County.

Action by the Vasa Company against the Ohio Valley Banking & Trust Company. From a judgment for defendant, plaintiff appeals. Affirmed.

John C. Worsham, of Henderson, for appellant. Montgomery Merritt and Yeaman & Yeaman, all of Henderson, for appellee.

CARROLL, J. The substance of the petition in this case is: That the Vasa Company, a corporation, in November, 1912, purchased a storehouse in the city of Henderson from Mrs. Bucholz for the sum of \$6,500, executing its notes for deferred payments amounting to \$4,000. That the deed to the property provided that, if any of notes for the unpaid purchase money were not paid within 30 days after maturity, the whole of the purchase money should become collectable. That one note for \$300 fell due in May, 1913, and was before maturity placed with the Planters' Bank, now the Ohio Valley Banking & Trust Company, for collection, and the bank demanded of it payment of the note. That it did not, as it then believed, have the money with which to pay the note, and Mrs. Bucholz notified it that unless the note was at once paid she would bring suit to enforce her lien. That, in order to prevent loss of what it had paid on the purchase price, it sold the house for \$5,000, although it was reasonably worth \$6,500, losing thereby \$1,500. It further averred: That, prior to the maturity of the note, it kept an account with the bank, and during said time it had left various notes with the bank to be discounted and placed to its credit, and at the time the purchase-money note matured it was entitled to a credit on the books of the bank of \$2,420, which fact was known to the bank but was unknown to it, because the bank informed it that it had no sum to its credit and refused to give it a statement of its account, although the same was demanded. That at the time the note matured it did not have sufficient funds, exclusive of this \$2,420, to pay the purchase-money note, and, by reason of the refusal of the plaintiff to inform it of the correct state of its account, it was unable to pay the note. It was further averred that in September, 1913, it was notified by the bank that it had a balance of \$2,420. That if it had known this it could have paid said note and saved

its property. The answer was a traverse of the averments of the petition, and a statement of fact. On a trial of the case there was a directed verdict for the bank, and the Vasa Company appeals.

[1] There is no bill of evidence with the record, and so we are concerned only with the sufficiency of the pleadings, or rather the sufficiency of the answer, to support the judgment, and there is, of course, no question about this. *Myers v. Saltry*, 163 Ky. 481, 173 S. W. 1138; *Meyers v. Same*, 164 Ky. 350, 175 S. W. 626.

[2] But, aside from this, the petition does not state any cause of action, and consequently, if the evidence were here, it would not help the case for the appellant. There is no averment that it could not have raised the money to pay this \$300, or that it could not have made other arrangements that would have satisfied Mrs. Bucholz, or have effected a postponement of the sale. There is no averment that the property could have been sold at the time it was sold for more than \$5,000. It may, as averred, have been reasonably worth \$6,500, but whether it could have been put on the market and sold for more than \$5,000 is not made to appear.

There are other objections to the sufficiency of the petition, but we are well satisfied that it did not state any cause of action, and the judgment is affirmed.

CINCINNATI, N. O. & T. P. RY. CO. v. NOLAN.

(Court of Appeals of Kentucky. Nov. 23, 1915.)

1. NEGLIGENCE 6-101—COMPARATIVE NEGLIGENCE—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT.

The contributory negligence of the injured servant will, under federal Employers' Liability Act April 22, 1908, c. 149, § 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665), only reduce the recovery.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. 6-101.]

2. DAMAGES 6-132—PERSONAL INJURIES—MEASURE.

An award of \$9,500 in favor of a brakeman 22 years of age, who was earning \$105 per month, for an injury resulting in the forcing of the femur into the hip joint so that the leg became shortened and permanently stiffened, is not excessive in view of the fact that a prior jury had awarded \$10,000.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372, 385, 396; Dec. Dig. 6-132.]

Appeal from Circuit Court, Lincoln County.

Action by Edward Nolan against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

K. S. Alcorn, of Stanford, and John Galvin, of Cincinnati, Ohio, for appellant. Emmet Puryear, Robt. Harding, and John W. Rawlings, all of Danville, and P. M. McRoberts, of Stanford, for appellee.

HANNAH, J. Edward Nolan sued the Cincinnati, New Orleans & Texas Pacific Railway Company, in the Lincoln circuit court, to recover damages for injuries received by him when a handhold on top of a freight car gave way and precipitated him to the ground, in the course of his employment as head brakeman on one of the defendant's trains at Stearns. There was a verdict and judgment in plaintiff's favor in the sum of \$10,000, which upon appeal was reversed. *C. & N. O. & T. P. Ry. Co. v. Nolan*, 161 Ky. 205, 170 S. W. 650. Upon a second trial, there was a verdict and judgment in favor of the plaintiff in the sum of \$9,500; and the defendant company again appeals.

Appellant complains of the instruction on the measure of damages, but the instruction given conforms to the direction of this court contained in the opinion on the former appeal.

Appellant also complains of the instruction on contributory negligence, but the one given is that approved in *C. & N. O. & T. P. Ry. Co. v. Goode*, 163 Ky. 60, 173 S. W. 329.

[1, 2] Appellant also complains that the verdict is excessive. Appellee at the time of the injury was 22 years of age, earning \$105 per month. The injury was one affecting the femur, or rather the head of the femur (or hip bone) at the point where it works in its socket in the pelvic bone. The evidence for the plaintiff was to the effect that his fall from the car caused a fracture somewhere about the neck of the femur at the socket, resulting in the forcing of the bone up into this socket—an impacted fracture. The injured leg is shorter than the other by an inch or an inch and a half; and, according to the evidence for the plaintiff, the whole leg is perfectly stiff, and this condition is doubtless permanent, not only at the hip, but also at the knee and ankle. In other words, if the evidence for the plaintiff is to be given credence, he is permanently deprived of the use of the entire injured leg. The accident occurred in the night as plaintiff was climbing down off of the top of a freight car, he at the time being alone. And, although under the federal Employers' Liability Act (under which this action was brought) contributory negligence on the part of the plaintiff would have reduced the recovery, there was no evidence to support any claim for a reduction of the damages on that account. From the nature of the injuries, plaintiff's suffering must necessarily have been intense, and this suffering the proof shows continued to the day of trial, and doubtless will continue for some time. In view of these circumstances, and the fact that a former jury fixed the damages at \$10,000, we are unable to say that the verdict of \$9,500 was so excessive as to indicate passion and prejudice in the assessment of damages and to justify a reversal of the

judgment. *N. & W. Ry. v. Thompson*, 161 Ky. 814, 171 S. W. 451; *E. T. T. Co. v. Jeffries*, 160 Ky. 482, 169 S. W. 825; *Citizens' Telephone Company v. Wakefield*, 126 S. W. 127.

Appellant argues that the verdict is evidently based upon the assumption that plaintiff has permanently lost the use of his leg, and contends that:

"Even if the testimony tended to support the plaintiff in his claims as to his injuries, such a verdict could not stand, if previous rulings of this court serve as a guide."

But the contrary is true.

In the Jeffries Case, supra, the plaintiff lost a leg and was awarded \$10,500, which this court held not excessive, and said:

"We have affirmed verdicts in the following cases as not being excessive: *L. & N. v. Moore*, 83 Ky. 675, where a brakeman recovered a verdict for \$9,000 for the loss of a leg; *South Covington Street Ry. v. Weber*, 82 S. W. 988, 26 Ky. Law Rep. 922, a verdict for \$10,000 for the loss of a child's hand; *L. & N. v. Smith* [135 Ky. 462], 122 S. W. 806, a verdict for \$12,500 where a man forty-four years old lost one hand and was otherwise crushed; *Price & Lucas C. & V. Co. v. Haley* [137 Ky. 305], 125 S. W. 720, a verdict for \$9,000 in favor of a man 57 years old for the loss of an arm; and *C. & O. Ry. v. Davis*, 58 S. W. 698, 22 Ky. Law Rep. 748, where a boy 9 years old recovered \$10,000 for the loss of a foot."

Judgment affirmed.

GOVER v. WILLIAMS.

(Court of Appeals of Kentucky. Nov. 26, 1915.)

APPEAL AND ERROR — 1009 — QUESTIONS OF FACT — CONFLICTING EVIDENCE.

Where the evidence is conflicting, and on consideration of the whole case the mind is left in doubt, so that the court on appeal cannot determine with reasonable certainty that the chancellor erred, his finding will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. — 1009.]

Appeal from Circuit Court, Lincoln County.

Action by B. G. Gover against Bettie Williams. Judgment for defendant, and plaintiff appeals. Affirmed.

Emmet Puryear, of Danville, J. S. Owsley, of Stanford, and Robert Harding, of Danville, for appellant. P. M. McRoberts, of Stanford, for appellee.

CLAY, C. Plaintiff, B. G. Gover, rented from the defendant, Mrs. Bettie Williams, her farm, consisting of about 235 acres, located in Lincoln county, for the years 1910, 1911, and 1912. By an agreed judgment entered in the Lincoln circuit court the rental contract was terminated and defendant given possession of her farm on December 31, 1911. Plaintiff brought this action against the defendant to recover the sum of \$977.67, subject to a credit of \$165.93. His petition is in eight paragraphs, and each paragraph contains a number of items. Defendant filed an

answer and counterclaim containing 21 paragraphs, denying the allegations of the petition, and asking judgment on divers claims, aggregating \$2,197.53, subject to a credit of \$601.35, leaving due her an alleged balance of \$1,596.18. The case was referred to the master commissioner to hear proof and settle the accounts between the parties. The commissioner made a report, to which plaintiff filed numerous exceptions. On the hearing by the chancellor the exceptions were overruled and the report confirmed. Judgment was then entered in conformity with the report in favor of the defendant. Plaintiff appeals.

We have carefully considered the evidence. In every instance it is conflicting. With but few exceptions, plaintiff and defendant are the only witnesses, and he testifies one way, while the defendant testifies the other. The case is one, therefore, where the commissioner and chancellor believed one witness, rather than another. In cases where the evidence is conflicting, and upon consideration of the whole case the mind is left in doubt, and this court cannot determine with reasonable certainty, that the chancellor has erred, it is our rule not to disturb his finding. *Rawlings v. Fish*, 151 Ky. 764, 152 S. W. 941; *Wilson v. Ward*, 151 Ky. 233, 151 S. W. 353; *City of West Covington v. Dods*, 152 Ky. 617, 153 S. W. 964. Clearly the case is one calling for the application of the above rule.

Judgment affirmed.

COMMONWEALTH v. PARR'S EX'R.

(Court of Appeals of Kentucky. Nov. 24, 1915.)

1. TAXATION — 241 — EXEMPT FROM TAXATION — STATUTES OF PUBLIC CHARITY.

A home for feeble old women, who have no estate of their own, and who are unable to provide for themselves the necessities of life, is an institution of purely public charity within Const. § 170, providing that institutions of purely public charity shall be exempt from taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 389-393; Dec. Dig. 241.]

For other definitions, see *Words and Phrases*, First and Second Series, *Institutions of Public Charity*.]

2. TAXATION — 241 — EXEMPTION — PUBLIC CHARITIES.

The fact that a fund bequeathed to a trustee for the purpose of founding a home for old and destitute women is withheld by the trustee and executor from the board of managers of the home, pending a contest of the will, does not remove it from the protection of Const. § 170, providing that institutions of purely public charity shall be exempt from taxation, since the equitable title to the fund was nevertheless vested in the board of managers.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 389-393; Dec. Dig. 241.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by the Commonwealth of Kentucky

against Daniel G. Parr's executor to subject property to taxation. From a judgment dismissing the proceedings, the Commonwealth appeals. Affirmed.

M. J. Holt and A. Scott Bullitt, Co. Atty., both of Louisville, for the Commonwealth. O'Neal & O'Neal, N. T. White, and H. P. Reager, Jr., all of Louisville, for appellee.

MILLER, C. J. Daniel G. Parr, of Louisville, died testate, on December 30, 1903. The Fidelity Trust Company qualified as executor of his will. By the eleventh clause of that instrument the testator devised the residuum of his estate to trustees, who were directed to use it in providing and establishing, in the city of Louisville, or county of Jefferson, Ky., a permanent home for old and destitute women residents and citizens of the state of Kentucky, to be known as "Parr's Rest," "where feeble old women, who have no estate of their own, and who are unable to provide for themselves the necessities of life, might find shelter and rest in their declining years." The trustees were directed to form a corporation, to be known as "Parr's Rest," for the administration of the trust; and that has been done. Owing to a contest over the probate of the will, the executor and trustee refrained from turning over the residuary estate to the board of managers of Parr's Rest, pending the contest. However, on August 23, 1904, the Fidelity Trust Company, as executor and trustee under the will, entered into a written contract with the board of managers of Parr's Rest, which recited that, in consideration of the executor's delivering to the trustees of Parr's Rest certain specified stocks and bonds of the aggregate value of \$194,303.68, the board of managers of Parr's Rest appointed the Fidelity Trust Company its agent to hold said personal property for said board of managers until the 1st day of February, 1906, at which time the agency therein created should expire and said board of managers should have the right to receive from its said agent the property above described. The contract further provided, however, that, should a contest be filed against the probate of the will of Daniel G. Parr, the agency should continue until the contest should be finally settled, or in case no appeal should be taken the agency should continue until the expiration of the time in which an appeal could be taken; and, should no contest be instituted prior to February 1, 1906, the agency should then cease and the personalty above described should be turned over to the board of managers of Parr's Rest. The home known as Parr's Rest was established and opened for inmates in December, 1909.

After Mr. Parr's death, the State Revenue Agent instituted proceedings to recover taxes upon personalty which it was claimed Dan-

iel G. Parr had failed to return for taxation, for the years 1900 to 1904, both included; and that suit was settled by the payment of \$2,701.20 by the executor. Of these five suits before us, which have been consolidated and heard as one case, one was brought by the commonwealth against the Fidelity Trust Company, as executor and trustee of Daniel G. Parr's estate, and the others are against Parr's Rest and the Fidelity Trust Company, trustee and agent of Parr's Rest; all being for the purpose of assessing for taxation for the years 1904 to 1909, inclusive, the residuum of the estate which was held during those years by the Fidelity Trust Company under the contract of agency, above recited. The cases were dismissed by the county court; and, upon an appeal to the circuit court and a trial de novo in that court, the chancellor held the property was exempt from taxation, and dismissed the proceedings in that court. From that judgment, the commonwealth appeals.

The exemption was granted under section 170 of the Constitution, which, among other things, provides that, "institutions of purely public charity" shall be exempt from taxation. See, also, Kentucky Statutes, § 4026.

[1] That Parr's Rest is an institution of purely public charity, within the meaning of section 170 of the Constitution, there can be no question. 6 Cyc. 900; Ford v. Ford, 91 Ky. 575, 16 S. W. 451, 13 Ky. Law Rep. 183; Zable v. Louisville Baptist Orphans' Home, 92 Ky. 89, 17 S. W. 212, 13 Ky. Law Rep. 385, 13 L. R. A. 668; Trustees of Kentucky Female Orphan School v. City of Louisville, 100 Ky. 487, 36 S. W. 921, 19 Ky. Law Rep. 1916, 40 L. R. A. 119; Commonwealth v. Thomas, Trustee, 119 Ky. 208, 83 S. W. 572, 26 Ky. Law Rep. 1128, 6 L. R. A. (N. S.) 320; Widows' and Orphans' Home v. Commonwealth, 126 Ky. 386, 103 S. W. 354, 31 Ky. Law Rep. 775, 16 L. R. A. (N. S.) 829; City of Dayton v. Trustees of Speer's Hospital, 165 Ky. 60, 176 S. W. 861; Neptune Fire Engine & Hose Co. v. Board of Education, 166 Ky. 1, 178 S. W. 1138.

In the case last above cited, we said:

"Mr. Justice Gray, when on the Supreme Bench of Massachusetts, defined a charity in its legal sense as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. Jackson v. Phillips, 14 Allen [Mass.] 555. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature. Jackson v. Phillips, supra. While this last definition is perhaps not as concise as could be desired, it is nevertheless both clear and comprehensive, and is adopted by Perry in his work on Trusts as the most satisfactory definition of a charitable use; and it has lately been approved by the Supreme Court of Pennsylvania in Fire Insurance Patrol v.

Boyd [120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745], where the distinction between the motive and the purpose of the gift is pointed out, and the purpose declared to be the true test. Without confining themselves to any one definition, but looking at the subject in its broadest significance, text-writers have generally classified charitable gifts as follows: (1) Gifts for eleemosynary purposes; (2) gifts for educational purposes; (3) gifts for religious purposes; and (4) gifts for public purposes. Bispham's Principles of Equity, § 120."

[2] Appellant contends, however, that the legal title to this personality, aggregating \$200,000 in value, during the years involved—from 1904 to 1909, inclusive—was vested in the executors of Daniel G. Parr, and that it was not devoted to any charitable purpose until it was actually turned over to the managers of Parr's Rest in December, 1909; that the contract of August 23, 1904, was a mere pretext for the purpose of avoiding taxation for the years mentioned, and was of no real efficacy, because both the legal title and the possession of the property were still retained by the Fidelity Trust Company; and that although it pretended to hold the property, after August 23, 1904, as agent for the managers of Parr's Rest, it really held it as executor or trustee under the will.

We do not, however, so understand the case. The equitable title to this fund was in the board of managers of Parr's Rest during those years, and the fact that the statute provided that the appeal to the circuit court to contest the probate of the will by the county court might be brought at any time within five years thereafter justified the executor, in this case, in retaining possession of the fund until the will was finally established. In no other way could the executor effectually protect itself, or the estate in its hands.

In our opinion, the case is not affected by the contract of August 23, 1904. It was immaterial whether the Fidelity Trust Company held this fund as trustee under the will of Daniel G. Parr, or as the agent of the board of managers of Parr's Rest, since, in either case, it held the property for the use and benefit of the board of managers of Parr's Rest; and under section 170 of the Constitution its property was exempt from taxation.

This question was set at rest by the opinion of this court in Norton v. City of Louisville, 118 Ky. 836, 82 S. W. 621, 26 Ky. Law Rep. 846. In that case, the testator devised the residuum of his estate for the establishment of a trust to be known as "Norton Trust Fund," the trustees thereof to be the same as the executors named in the will. The duration of said trust fund was fixed at five years from the date of the testator's death, he expressing the hope that during that period the trustees would be able to dispose of all of the testator's real estate; and, when that end should be accomplished and his estate reduced to cash, the trust fund should be ter-

minated by the trustees and the proceeds of the fund paid to the Louisville Baptist Orphans' Home. The city of Louisville attempted to tax the "Norton Trust Fund" while it was in the hands of the trustees, and before it was paid over to the Baptist Orphans' Home. In asserting the exemption of the fund from taxation, this court said:

"While the beneficiary of the trust fund is not given the immediate care and control of it, it is the equitable owner of it, and it could not rightfully be diverted to any uses or purposes other than those designated by the testator. If the condition required it, the beneficiary could by appropriate proceedings rescue the fund from any misappropriation of it. It is the owner of the fund, though temporarily controlled by others. While Norton and Barr are designated as trustees under the will, still they are the trustees for the beneficial owner. They are accountable to it for the management of the property and the execution of the trust. The practical effect of the provision of the will under consideration is that the fund is given to the orphans' home, but it is to be managed for it for the specified time by the trustees named by the testator. If the income from the property or from its proceeds were to go to another during the five years, then it would be very clear that the property or fund should be taxed during that period. When one is the equitable owner of property and is entitled to the income from it, he has the enjoyment of every benefit that could come to any one who might own the property. To hold that the property should be taxed because it is controlled by other than the trustees of the orphans' home for a specified period is giving effect to the shadow, and not the substance, of things. * * * In the case at bar it is admitted that the entire proceeds of the property sought to be taxed, and the income arising therefrom, will go to the orphans' home under the will. In our opinion, the property is exempt from taxation."

We consider the Norton Case, *supra*, as concluding the case before us.

Judgment affirmed.

AVEY v. BURNLEY.

(Court of Appeals of Kentucky. Nov. 24, 1915.)

RECEIVERS \S 168—CONTRACTS—INDIVIDUAL LIABILITY.

A receiver cannot be sued individually upon a contract made by him as a receiver.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 321, 322; Dec. Dig. \S 168.]

Appeal from Circuit Court, Carlisle County.

Action by E. W. Avey against J. R. Burnley. From a judgment for defendant sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

E. T. Bullock, of Clinton, for appellant.
John E. Kane, of Bardwell, for appellee.

MILLER, C. J. The appellant Avey prosecutes this appeal from a judgment of the circuit court which sustained a demurrer to his petition seeking a judgment against Burnley for \$312.40.

The petition alleges that in a suit pending in the Carlisle circuit court between E. W.

Avey and S. W. Ables, involving a settlement of accounts between them, the defendant, J. R. Burnley, was appointed receiver, with instructions to take charge of certain property, including some growing corn, in which Avey and Ables had an interest, and to gather the corn and crib and sell it and report his acts as receiver to the court; that Burnley qualified as receiver, and at his sale of the property the plaintiff, E. W. Avey, bought the corn, which was in two cribs on the place, for 55 cents per bushel, at the crib; that Burnley represented to Avey there were 1,791 bushels of corn in the two cribs, and that Avey was to pay him \$985.05 therefor, which was at the agreed price of 55 cents per bushel; and that Avey paid said sum to Burnley.

The petition further states that there were only 1,223 bushels of corn in the two cribs, and that Avey demanded of Burnley that he repay him \$312.40 for the shortage, which amounted to 568 bushels, and that Burnley refused to repay any part of it.

The petition alleges that Avey bought the corn from Burnley as receiver, while Burnley is sued individually. There is no allegation of bad faith upon the part of Burnley; and it does not appear whether he has turned the purchase money he received for the corn into court, or still has it.

Passing the question whether a petition against a receiver should affirmatively show that permission to sue the receiver had been granted by the court appointing him, there can be no doubt that the petition in this case is insufficient, because Avey sues Burnley individually on a contract made with him as receiver.

Judgment affirmed.

MASON COUNTY et al. v. HAYSWOOD HOSPITAL OF MAYSVILLE.

(Court of Appeals of Kentucky. Nov. 23, 1915.)

TAXATION \S 241—EXEMPTIONS—HOSPITAL—CONSTITUTIONAL PROVISIONS—"INSTITUTION OF PURELY PUBLIC CHARITY."

Under Const. § 170, exempting institutions of purely public charity from taxation, a hospital incorporated by trustees as a charitable corporation, having no capital stock and holding property for the maintenance of a hospital for the treatment of sick and disabled persons and for medical and surgical treatment and the maintenance of poor persons not able to provide it for themselves, maintained without pecuniary profit, and having funds invested the income of which was used solely in meeting its necessary expenses, was an "institution of purely public charity," whose invested fund was exempt from taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 389-393; Dec. Dig. \S 241.]

For other definitions, see *Words and Phrases*, First and Second Series, *Institution of Public Charity*.]

Appeal from Circuit Court, Mason County.

Action for injunction by the Hayswood Hospital of Maysville against Mason County

and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. H. Rees, of Maysville, for appellants. Worthington, Cochran & Browning, of Maysville, for appellee.

NUNN, J. Upon the plea that it is an institution of purely public charity appellee brought this action to restrain the sheriff and assessor of Mason county from listing for taxation, or levying upon, or selling any of its property for taxes. Appellants demurred to the petition. The demurrer being overruled they bring this appeal, having declined to plead further. Only two questions are raised for decision: (1) Is the appellee an institution of purely public charity within the meaning of section 170 of the Kentucky Constitution? (2) If an institution of purely public charity does the exemption from taxation apply to its property which is not directly connected with the hospital and not used for hospital purposes, although the income therefrom is used solely in meeting the necessary expense of the hospital?

The idea of this hospital originated in 1907, with Mrs. Mary V. Wilson, an elderly widow residing in Maysville. She conceived the idea of founding the hospital and conveyed the property now used as a hospital to Dr. Thos. E. Pickett, J. Foster Barbour, Clarence L. Sallee, and A. M. J. Cochran, as trustees, and gave them powers of succession. The trust imposed was: "The establishment and maintenance and operation on said premises of a hospital for the treatment of sick and disabled persons." The trustees were directed to adopt and put in force such rules and regulations as would best carry out the trust. If need be they might incorporate, and if the incorporation issued stock then, "if any returns arise from said stock they will apply them in providing treatment in said hospital for the worthy poor of Maysville." The conveyance further stipulated that the trustees "are to render their services without compensation."

The trust was accepted, and, in 1908, the trustees formed a corporation under the provisions of sections 879 to 883, inclusive, of the Kentucky Statutes. The trustees were the incorporators "as a charitable corporation having no capital stock, under the corporate name of 'Hayswood Hospital.'"

In 1911 the corporation accepted from Mrs. Fannie A. Hays a conveyance of a tract of land situated five miles from Maysville, containing about 150 acres. The trust expressed in the deed was to provide at the hospital "medical and surgical treatment, and for necessary maintenance while undergoing treatment, to poor persons in need of same, and not able in whole or part to provide the same for themselves." This conveyance also stipulated that the trustees shall serve without compensation. In 1912, McIlvaney de-

vised \$1,000 and his residuary estate to the hospital in trust for the purpose of establishing a "free ward for the treatment of children whose parents or friends are not able to pay for their treatment, the trustees to be the sole judges of who may receive free treatment." Since then the trustees have received upon substantially the same terms two other bequests aggregating \$4,800. The above is all the property owned by the hospital. It is alleged in the petition that the trustees have maintained and operated the hospital pursuant to the trust provisions of the deeds referred to and from which "no private pecuniary profit has ever been, or can ever be derived"; they have made valuable and permanent improvements on the hospital property, and equipped it with medical and surgical appliances, and employed trained nurses and attendants.

The funds with which the hospital has been equipped and operated "have been derived in part from private donations * * * and in part from the moneys received from sick and disabled persons who have been treated therein * * * the receipt from patients at plaintiff's hospital have never been sufficient to defray the expense thereof and keep up and maintain the hospital, nor is it the purpose of plaintiff ever to make it a paying institution. It has kept the balance of the money so given it, after paying for needed improvements and repairs, invested so as to yield an income to be applied to the making up of the deficiency in the necessary running expenses; in other words, as an endowment fund. This fund amounts to about \$11,500. * * * The purpose of plaintiff is as soon as it can be done to make other improvements on said hospital building."

We are of opinion that the petition sufficiently shows that the hospital is an institution of purely public charity. It is not operated for profit. It is unnecessary to enter into an extended discussion of the questions raised, for both have many times been passed on by this court. The recent cases of *City of Dayton v. Speer's Hospital*, 185 Ky. 56, 176 S. W. 361; *Commonwealth v. Board of Education of Methodist Episcopal Church*, 166 Ky. 610, 179 S. W. 596, and many other cases therein cited, conclusively settle the question. Since the opinion of the lower court is in harmony with the law as set forth in these opinions, the judgment is affirmed.

GAY et al. v. BRENT.

(Court of Appeals of Kentucky. Nov. 23, 1915.)

1. CONSTITUTIONAL LAW §240 — MONOPOLIES §10—EQUAL PROTECTION OF LAW — POOLS AND COMBINES.

Ky. St. §§ 3915-3921, providing that it shall be unlawful for any association or person to become a member of, or in any way interested in, any pool, trust, combine, agreement, or confederation for the purpose of regulating, con-

trolling, or fixing the price of any merchandise, manufactured article, or property, fixing a penalty for violation thereof, and making void agreements contrary thereto, is not unconstitutional as being discriminatory.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 388, 692, 693, 697-699; Dec. Dig. ¶240; Monopolies, Cent. Dig. § 9; Dec. Dig. ¶10.]

2. CONSTITUTIONAL LAW ¶30—CONSTRUCTION—SELF-EXECUTING PROVISIONS.

Const. § 198, providing that it shall be the duty of the General Assembly from time to time to enact such laws as may be necessary to prevent all trusts, pools, combinations, or other organizations "from combining to depreciate below its real value any article or to enhance the value of any article above its real value," does not contravene any provision of the federal Constitution, since it is not self-executing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 32; Dec. Dig. ¶30.]

3. CONSTITUTIONAL LAW ¶296 — MONOPOLIES ¶10—DUE PROCESS—VALIDITY.

Ky. St. § 3941a, providing in substance that it shall be lawful for any number of persons to combine, unite, or pool crops of wheat, tobacco, and other farm products raised by them for the purpose of classifying, holding, and disposing of the same in order to obtain a higher price than they could by selling separately, is void, since it is in conflict with the fourteenth amendment of the federal Constitution; it not being possible when such section is construed in connection with Const. § 198, forbidding combinations to enhance or depreciate values of merchandise, and Ky. St. §§ 3915-3921 forbidding combinations in regulation of trade, to determine with reasonable certainty when the price of an article has been enhanced above or depreciated below its real value.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 325-338, 840-846; Dec. Dig. ¶296; Monopolies, Cent. Dig. § 9; Dec. Dig. ¶10.]

4. STATUTES ¶143—AMENDMENT—UNCONSTITUTIONAL AMENDMENTS.

Since the validity of a constitutional enactment cannot be impaired by an unconstitutional amendment, the amendment of Ky. St. §§ 3915-3921, prohibiting the regulation or fixing of prices of commodities of any kind, by the unconstitutional act of 1906 (Acts 1906, c. 117; Ky. St. § 3941a), legalizing pools of farm products does not affect the validity of the act amended.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 211; Dec. Dig. ¶143.]

5. CONTRACTS ¶116—VALIDITY—CONTRACTS IN RESTRAINT OF TRADE.

Since the common-law doctrine of restraint of trade is in force in this state, unaffected by Const. § 198, providing that it shall be unlawful to form combinations to depreciate below or enhance above real value, the value of any article, or Ky. St. § 3941a, legalizing pools of farm products, an executory contract for the purchase of blue grass seed, pursuant to a private agreement to form a pool to restrain trade in such commodity, was unenforceable when it appeared that the parties seeking the enforcement of the contract did so to secure a monopoly in the commodity by controlling the market and suppressing competition.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. ¶116.]

Appeal from Circuit Court, Clark County.

Action by David S. Gay and others against N. Ford Brent. From a judgment dismissing the petition, plaintiffs appeal. Affirmed.

Shelby, Northcutt & Shelby, of Lexington, Talbott & Whitley, of Paris, E. S. Jouett, of Louisville, and B. R. Jouett and J. M. Stevenson, both of Winchester, for appellants. Pendleton, Bush & Bush, of Winchester, and Harmon Stitt and Reuben Hutchcraft, both of Paris, for appellee.

CARROLL, J. Briefly, the facts of this case are these: Previous to 1906 David S. Gay, J. S. Wilson, E. F. Spears & Son, and N. Ford Brent were dealers in Kentucky blue grass seed, each of them doing business in competition with and independent of the others. About 90 per cent. of the blue grass seed of the world is produced in Kentucky, and in the years previous to 1906 clean blue grass seed had been selling at from 80 cents to \$1.35 a bushel, the usual price being \$1.25 a bushel. In June, 1906, Gay, Wilson, and Spears & Son conceived the purpose of securing control of the blue grass seed market, and in execution of this plan they entered into a private, written contract, which is set out in full in the opinion written in this case when it was here before and that may be found in 149 Ky. 615, 149 S. W. 915, 41 L. R. A. (N. S.) 1034.

After this agreement was entered into, and pursuant to its terms, and to accomplish the intended object, the parties to the agreement at once commenced to buy all of the blue grass seed available, their purchases including the seed owned by farmers as well as dealers. Among the purchases of seed so made was a large quantity bought from Brent at \$1.30 per bushel. When the time arrived for the delivery of this seed by Brent he refused to perform the contract, and thereupon Gay, Wilson, and Spears & Son, who are doing business under the name of the Kentucky Blue Grass Seed Company, brought suit against Brent to recover damages for a breach of the contract, alleging in the petition that between the time the contract was entered into and the time specified for the delivery of the seed, it had advanced 38 cents per bushel, and had he performed his contract they would have realized a profit of this sum.

In the answer to this petition, which is set out at length in the former opinion, Brent charged that the purpose of the agreement between Gay, Wilson, and Spears & Son, of which agreement he was ignorant when he contracted to deliver the seed, was to control the blue grass seed market and create a monopoly in unreasonable and unlawful restraint of trade, and to thereby increase the cost of blue grass seed to the public. He further averred that in entering into this agreement Gay, Wilson, and Spears & Son intended to and did form and create a trust, combine and pool in violation of the statute law of the state for the purpose of enhancing the price of blue grass seed above its real value, and that immediately after one object of the

pool had been accomplished in practically securing control of the blue grass market, they did arbitrarily raise the price of blue grass seed above its real value. To this answer a general demurrer was sustained, and from the judgment of the lower court holding that his answer did not present a defense, Brent prosecuted an appeal to this court.

In the course of the opinion of this court holding that the answer presented a good defense on which Brent was entitled to go to trial, it was said:

"Nor do we find it necessary in disposing of the case to consider at all the anti-trust statutes of the state. Leaving out of view entirely the applicability of the anti-trust statutes, we think the controlling and decisive question in the case is: Did the averments of the answer, which must be treated as true, state the defense of an unlawful and unreasonable restraint of trade upon which Brent was entitled to introduce evidence and have a decision on the merits? * * * It will also be noticed that the answer in substance charged that the partnership or agreement entered into between Gay and his associates had for its purpose the creation of a trust and monopoly to control the blue grass seed market of the country, and to fix and regulate the price at which the seed should be sold; and that in pursuance of this purpose and to carry it into effect the purchase of the carload of seed from Brent was one of many purchases undertaken in execution of the plan to control and monopolize the market and fix and regulate the price of the seed."

In answer to the argument that the purchase of the seed from Brent involved only a small part of the blue grass seed then on the market, and therefore it should not be treated as an illegal arrangement, or as an unreasonable or unlawful agreement in restraint of trade, the court said, quoting with approval from the opinion in *Merchants' Ice & Cold Storage Co. v. Rohrman*, 138 Ky. 530, 128 S. W. 599, 30 L. R. A. (N. S.) 973, 137 Am. St. Rep. 890; and applying it to the facts of the Brent Case:

"But the validity of this particular contract cannot be determined by looking at it alone. It must be considered in connection with the others of which it was and is a part, and when so considered in connection with the circumstances under which it was entered into and the conditions that gave rise to its execution, we find that it was only one of a number of like contracts secured about the same time by the Merchants' Refrigerating Company in furtherance of the purpose to obtain control of the ice market and effectually destroy substantial competition. In short, we think it is plain that the purpose in the minds of the parties to this transaction was to purchase the National Ice & Cold Storage Company and Rohrman's interest therein, as a link in the chain that would finally bind all the consumers of ice in Louisville to the wheels of a single concern, thereby creating a condition that would enable the purchaser to control the market and stifle, if not suppress, competition. * * * If a contract is made that suppresses competition, and controls the market, and that contract is entered into between those who have theretofore engaged in competition in the market sought to be controlled, it is a contract in restraint of trade. It may be more. It may amount to a trust or conspiracy or a monopoly, but it is nevertheless a contract in restraint of trade. To restrain trade is the essential feature of the contract—the reason why it was made. If trade that is in competition could not be

restrained, the promoters would not go into the scheme; and when such a contract is made, whatever form it may assume, or by whatever name it may be called, and although it may be reached under the law of monopolies, trusts, and conspiracies, it will be declared void as being in unreasonable restraint of trade."

It was further said in the opinion:

"Nor do we think that in ruling that the scheme of Gay and Company was an agreement in restraint of trade, we have unduly extended the scope of the principle upon which the doctrine rests. It is true that by the common-law contracts treated as being in restraint of trade were limited to contracts having for their purpose the purchase of some trade or business, as a part of which the seller agreed not to engage in the trade or business he had disposed of. But, in dealing with conditions brought about by modern business methods, it has been found necessary for the public good to extend the common-law prohibition against contracts in restraint of trade to states of case involving more than the mere purchasing and selling of a trade or business, so as to give the courts for the good of the public authority to prevent as much as possible combinations and arrangements having for their purpose the creation of a monopoly, the control of prices, and the suppression of competition. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 [20 Sup. Ct. 96], 44 L. Ed. 136.

"The restraint of trade may be accomplished in more ways than one. Every business scheme that has for its purpose the control of the market and the fixing of prices, necessarily tends to restrain trade and suppress competition in the article sought to be controlled. But when the doctrine was first recognized conditions were such that the public good only required that it be applied to contracts of sale and between the parties to the contract. It is, however, manifest that if this wholesome principle of the common law should be confined to the narrow limits that were sufficient in its origin, it would be wholly inadequate to correct the evils that modern trade conditions have produced. And so, taking for a foundation the principle that illegal and unreasonable restraint of trade is obnoxious to the spirit of the law, the range of this principle will be extended to meet the requirements of to-day and to embrace every condition in which an unlawful attempt is made to restrain trade and control the market and suppress competition by whatever means these ends are sought to be accomplished."

On the trial of the case, after it was remanded, the law and facts, by agreement, were submitted to the trial court, and in a judgment and an opinion holding that Gay, Wilson, and Spears & Son could not maintain the action, the trial court said, in his findings of law, that:

"The Kentucky statutes against pools, trusts, and conspiracies do not apply to contracts in restraint of trade. Contracts in restraint of trade are controlled by the common law, and when they are unreasonable, they are declared to be void. A contract entered into between those who have theretofore engaged in competition with reference to any particular product or commodity, which suppresses competition and controls the market with reference to that product or commodity, is in unreasonable restraint of trade; and this suppression is not required to be total in order to bring it within the condemnation of the law. When the enforcement of an executory contract would be a step in the perfection of a scheme to restrain trade in a product or commodity, the law will not aid the perfection of such a scheme by enforcing such an executory contract."

In his findings of fact the court said:

"It was not the purpose of the plaintiffs in entering into the written agreement of June 1, 1906, to fix the price of blue grass seed above its real value. The purpose of the parties in entering into that agreement was to establish a stable market for blue grass seed, and thereby enable the producers to realize a fair and reasonable price for it. The effect of that agreement and what was done under it by the plaintiffs was to substantially suppress competition in the purchase of blue grass seed. The purchase of the carload of seed from defendant was a part of a scheme of plaintiffs to control the blue grass seed market and make effective the agreement of June 1, 1906. It follows from these views and these findings of law and fact that the defense of unreasonable restraint of trade has been sustained by the defendant, and it is therefore adjudged that the petition be dismissed."

From that judgment this appeal is prosecuted.

In the argument on this appeal counsel for appellants do not contend that the purpose of the agreement between Gay, Wilson, and Spears & Son was not to secure control of the blue grass seed market and thereby suppress competition. They rest their claim for reversal on the ground that the common law doctrine invalidating executory contracts in restraint of trade, has been abrogated by the Constitution and statutes of this state, and therefore, assuming the correctness of the finding of the trial court, that "it was not the purpose of the plaintiffs in entering into the written agreement of June 1, 1906, to fix the price of blue grass seed above its real value," but only to "establish a stable market for blue grass seed, and thereby enable the producers to realize a fair and reasonable price for it," they insist that the judgment should be reversed with directions to enter a judgment in favor of Gay, Wilson, and Spears & Son for the amount of damages they sustained by reason of the breach of the contract.

We do not find ourselves quite able to agree with the finding of the lower court that the purpose of the agreement was not to enhance the price of blue grass seed above its real value; but not regarding this question as a material one in the disposition of the case, we will not extend the opinion in stating the reasons why we have reached, on this issue of fact, a different conclusion from that arrived at by the lower court. For entertaining the view that the contract between Brent and Gay, Wilson, and Spears & Son was in restraint of trade we will at once go to a consideration of the main question, which is whether the common-law doctrine of restraint of trade, as set forth in the opinion from which we have quoted, is yet in force in this state and available as a defense in the attempted enforcement of an executory contract, when the facts show that the parties seeking the enforcement of the contract are doing so with the purpose of securing a monopoly in a commodity by controlling the market and suppressing com-

petition in the article that is the subject-matter of the executory contract.

An understanding and disposition of this question makes it necessary that we should set forth at some length the state of the Constitution and statutory law in this state on the subject of pools, trusts, and monopolies, and the construction that has been put on these laws by this court as well as by the Supreme Court of the United States.

The first statute enacted by the Legislature of this state prohibiting the formation of trusts, pools, and monopolies for the purpose of regulating, controlling, or fixing the price of an article became a law in 1890, and may be found in sections 3915-3921, inclusive, of the Kentucky Statutes. The substance of this act was that it should be unlawful for any corporation, partnership, association, or person to become a member of or in any way interested in any pool, trust, combine, agreement, or confederation with any other corporation, partnership, association, or person for the purpose of regulating, controlling, or fixing the price of any merchandise, manufactured article, or property. Another provision fixed a penalty for a violation of this statute. Another made any contract or agreement violating its provisions void; and there was a further provision that the purchasers of any property or article from a corporation, partnership, or persons transacting business contrary to the provisions of the act should not be liable for the price of or payment for such article or property.

It will be observed that the illegality of the transactions prohibited by the statute did not depend on the fact that the purpose of the combination was to enhance the price of an article above its real value, or depreciate its value below its real value. It was made unlawful to enter into or become a party to any agreement or arrangement "for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured article, or property of any kind" without regard to whether the price of the article, merchandise, or property was enhanced or diminished. This statute stood until 1906 as the only declaration of the Legislature of the state dealing or attempting to deal with the subject set forth in the statute.

However, in the new Constitution of the state, adopted in 1891, it was provided, in section 193, that:

"It shall be the duty of the General Assembly from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations, or other organizations, from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value."

Subsequent to the adoption of this constitutional provision, and in 1900, there came to this court the case of *Commonwealth v. Grinstead*, 108 Ky. 59, 55 S. W. 720, 57 S. W. 471. 21 Ky. Law Rep. 1444, 22 Ky. Law Rep. 377.

In that case Grinstead and Tinsley were indicted for a violation of the act of 1890, and in this court the chief contention of the defendants was that the act of 1890 was repealed by the new Constitution of 1891, because inconsistent with it, and was furthermore no longer the law because in conflict with section 198 of the Constitution. But the court in a very full opinion rejected these arguments, and held that the act of 1890 remained in full force, unaffected by the new Constitution or section 198 thereof. And in *Com. v. Bavarian Brewing Co.*, 112 Ky. 925, 66 S. W. 1016, 23 Ky. Law Rep. 2334, the question was again before the court, and the ruling in the Grinstead & Tinsley Case was adhered to. So that it has been definitely and correctly determined by this court that the present Constitution does not affect in any manner the validity of the act of 1890.

Coming now to the effect on the act of 1890 of the legislation subsequent to the adoption of the present Constitution, we find that in 1906 the first act under the new Constitution on the subject of pools and combinations was enacted. This section is now section 3941a of the Kentucky Statutes, and it provides, in substance, that it should be lawful for any number of persons to combine, unite, or pool crops of wheat, tobacco and other farm products raised by them for the purpose of classifying, growing, holding, or disposing of the same in order to obtain a higher price than they could obtain by selling these crops separately; and that contracts entered into for the purpose of carrying out the objects of the act should be lawful, and that suits might be maintained for any breach of these contracts. In 1908 and 1910 other acts were passed, the purpose of which was to strengthen and make more effective the act of 1906, and these acts made it an offense, by fine and imprisonment, for any person to sell or solicit or buy any pooled property which had been listed of record as provided in the acts.

After the act of 1906 was passed, and in 1909, there came to this court the case of *Commonwealth v. International Harvester Co.*, 131 Ky. 551, 115 S. W. 703, 133 Am. St. Rep. 256, and the question presented was the sufficiency of an indictment against the Harvester Company charging it with a violation of the act of 1890. The contention of the Harvester Company was that as the act of 1906 allowed farmers to do as legal the things that were charged as illegal against it, the act of 1890 must fall because in conflict with the fourteenth amendment to the Constitution of the United States forbidding legislation that denied the equal protection of the law to all persons, and therefore it could not be indicted for a violation of the act of 1890. The lower court sustained this contention and dismissed the indictment, but in reviewing the judgment this court said that the act of 1890 and the act of 1906 should be construed together as one act and made to conform to section 198 of the Constitution. It

was also held that the act of 1906, although by its terms limited to farmers and growers of crops, operated, when read in connection with the act of 1890, to confer upon all persons the same benefits and privileges extended to farmers. So, reading the act of 1890 and the act of 1906 as one act, in connection with section 198 of the Constitution, it was further held to be essential to a prosecution against any corporation, partnership, association, or person for entering into a pool, trust, or combination for the purpose of regulating, controlling, or fixing the price of any article, to charge in the indictment and show by evidence that the purpose or effect of the trust, pool, or combination was to depreciate the cost of the article below its real value or to enhance the cost of the article above its real value, as this was the test of illegality fixed by the Constitution and by the act of 1906 when properly read and construed. In short, the ruling of the court in this case was that no pool, trust, or combination created or entered into for the purpose of fixing the price of any article was unlawful, unless the purpose or effect of the pool, trust, or combination was to increase the price of the article above, or decrease it below, its real value.

In the later case of *International Harvester Co. v. Commonwealth*, 137 Ky. 668, 126 S. W. 352, the indictment was for a violation of the act of 1890, and following the ruling in the previous *International Harvester Case*, it was held to be necessary to a conviction to show that the purpose of the pool or combination was to increase or depreciate the price of an article above or below its real value, although the indictment might have been found under the act of 1890. In *International Harvester Co. v. Commonwealth*, 144 Ky. 403, 138 S. W. 248; *International Harvester Co. v. Commonwealth*, 147 Ky. 564, 144 S. W. 1064; *International Harvester Co. v. Commonwealth*, 147 Ky. 795, 146 S. W. 12; *International Harvester Co. v. Commonwealth*, 149 Ky. 41, 147 S. W. 760, and perhaps other cases the law as laid down in the first case in 131 Ky. and 115 S. W. was followed.

Collins v. Commonwealth, 141 Ky. 564, 133 S. W. 233, was an indictment against Collins for selling a crop of pooled tobacco in violation of the acts of 1908 and 1910, now section 3941c of the Kentucky Statutes. In that case on the authority of the rule announced in the *International Harvester Cases*, the validity of the statute imposing a penalty for selling pooled tobacco was recognized, and the judgment against Collins imposing the penalty provided by the statute was affirmed.

On an appeal by the *International Harvester Company* to the Supreme Court of the United States from the judgments of this court affirming judgments against it in the cases mentioned, the Supreme Court, in 234 U. S. 216, 34 Sup. Ct. 853, 58 L. Ed. 1284, in an opinion reversing the opinion of this court, after saying that:

"When the Court of Appeals came to deal with the act of 1890, the Constitution of 1891, and the act of 1906, it reached the conclusion, which now may be regarded as the established construction of the three taken together, that by interaction and to avoid questions of constitutionality, they were to be taken to make any combination for the purpose of controlling prices lawful unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article."

—came to the conclusion that these acts and the section of the Constitution so construed were opposed to the fourteenth amendment of the Constitution of the United States, because it was not possible under these statutory and constitutional provisions so construed for any person to determine with reasonable certainty when the price of an article had been enhanced above, or depreciated below, its real value.

In the case of *Collins v. Commonwealth*, also appealed from this court, the Supreme Court of the United States, in an opinion that may be found in 234 U. S. 634, 34 Sup. Ct. 924, 58 L. Ed. 1510, reversed the judgment of this court, and held that the prosecution against Collins for selling pooled tobacco could not be sustained because the acts of 1908 and 1910, as construed by this court in the 131 Ky. (115 S. W.) case, were by reason of their uncertainty in making the guilt of Collins depend on whether the purpose of the pool, of which he was a party, was to enhance or decrease the price of the pooled property above its real value fundamentally defective.

As the law announced by the Supreme Court of the United States in these opinions is of course conclusive and binding upon this court, as much so as the law announced by this court is conclusive and binding upon the circuit courts and inferior courts of this state, the question arises: What is the effect to be given to the Supreme Court decisions in their operation upon the act of 1890, section 198 of the Constitution, the acts of 1906, 1908 and 1910, and the opinions of this court in the *International Harvester Cases* construing these statutory and constitutional provisions?

[1] Taking up first the act of 1890, we think it may be confidently asserted that this act is not open to any constitutional objection on the ground that it is violative of either the state or federal Constitution. This act does not discriminate against any person or set of persons. Its provisions are broad enough to embrace all who are guilty of the offense described in the statute. It was intended to and does apply equally and alike to all corporations, partnerships, companies, individuals, or associations who "shall create, establish, organize, or enter into or become a member of or a party to or in any way interested in any pool, trust, combine, agreement, confederation, or understanding with any other corporation, partnership, individual, or person, or association of persons

for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles, or property of any kind." Nor is there any intimation in the opinions of the Supreme Court that this act is obnoxious to any provision of the federal Constitution.

[2] We may also with equal confidence, assert that section 198 of the Constitution standing alone does not contravene any provision of the federal Constitution for the simple reason that this section of the Constitution is not self-executing. It does not undertake to punish, prohibit, or make unlawful any pools, combinations, or other organizations formed for the purpose of depreciating below its real value or enhancing above its real value the cost of any article or created for any other purpose. Standing alone, it is merely a direction to the legislative department of the state to enact such laws as may be necessary to prevent the condition described in the section. *Commonwealth v. Grinstead*, 108 Ky. 59, 55 S. W. 720, 57 S. W. 471, 21 Ky. Law Rep. 1444, 22 Ky. Law Rep. 377.

So that putting aside for the moment the common-law doctrine of restraint of trade and the act of 1890, no person or set of persons could be prosecuted or punished for entering into a trust, pool, combination, or other arrangement to depreciate below its real value or enhance above its real value the price of any article, if this section of the Constitution were the only authority for such prosecution. Nor under this section alone would the validity of any contract entered into for the purpose of enhancing the cost of any article above its real value or depreciating it below its real value be effected.

It is therefore obvious that the vice in the laws of this state pointed out in the Supreme Court decisions is not to be found in the act of 1890, or in section 198 of the Constitution, but in the acts of 1906, 1908, and 1910 as construed by this court in the *International Harvester Cases* and the other cases mentioned. If the acts of 1906, 1908, and 1910 had never been enacted, or if the construction placed on these acts by this court had never been adopted, there could be no objection to the common law or statutory anti-trust law in force in this state. Coming now to the acts of 1906, 1908, and 1910 we find that these acts do not on their face amend or purport to amend the act of 1890. They were, as shown by their title and subject-matter, independent enactments. Nor, indeed, do they on their face purport to have been enacted for the purpose of giving effect to section 198 of the Constitution. The title to the act of 1906, c. 117, declares that it is "An act permitting persons to combine or pool their crops of wheat, tobacco and other products and sell the same as a whole, and making contracts in pursuance thereof val-

id"; and the body of the act provides that it shall be lawful for any number of persons to pool, combine, or unite these crops for the purpose of classifying, holding, and disposing of the same "in order or for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately or individually." The act of 1908 (Acts 1908, c. 8) merely amended the act of 1906.

The act of 1910 (Acts 1910, c. 7) in its title declares that it is "an act to authorize and regulate the recordation of agreements for pooling farm products," and in its body provides that:

"Any person buying or soliciting pooled or pledged property, the lists of which have been recorded as herein provided shall upon conviction be fined not less than ten nor more than one thousand dollars or imprisoned not less than fifteen nor more than ninety days or both so fined and imprisoned."

In 1910 acts other than the one mentioned, intended to strengthen and make more effective the act of 1906, were enacted by the Legislature, but it is not important that we should set out either the title or the purpose of these acts.

In the *International Harvester Case*, 131 Ky. 551, 115 S. W. 703, 133 Am. St. Rep. 256, this court, on the binding authority of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, was confronted by the situation that the act of 1906, standing alone, and limited in its application to farmers, would be obnoxious to the state as well as the federal Constitution, and if not so limited would license and authorize all corporations or persons, in whatever business engaged, to combine and unite with other persons or corporations for the purpose of obtaining greater prices for their property or products than could be obtained if they were sold in competition. In writing this opinion it fully understood that if this act were construed to confer on farmers the exclusive privilege of combining and pooling their crops, to the end that a greater price might be obtained therefor, and to deny to other classes the right to combine or pool their products for the same purpose, it would be in direct violation not only of section 3 of the Bill of Rights, but of the fourteenth amendment to the Constitution of the United States.

It further understood that if this act were so construed as to confer upon all corporations and persons the right to combine for the purpose of getting greater prices for their products than could be obtained if they acted independently and in competition with each other, the inevitable result would be that combinations and monopolies would be formed by corporations engaged in the manufacture and sale of necessary articles to farmers and others for the sole purpose of increasing the price of these articles.

To escape these conditions it was thought

by a majority of the court that the constitutional objections could be overcome and the alternative objection to removing all restraint on trusts and combinations could be avoided by reading together the act of 1890, section 198 of the Constitution and the act of 1906, and this solution of what was then recognized as a very troublesome question, was decided upon. It should also be said that, in reaching the conclusion expressed in the 131 Ky. 551, case (115 S. W. 703, 133 Am. St. Rep. 256), the court was endeavoring to carry out, in a way that would stand the test of judicial scrutiny when measured by constitutional limitations, the legislative will. If there was any way of escape it was not to be assumed that the Legislature intended that we should have no anti-trust laws in this state, or that it intended to declare that all corporations and persons might combine to get, as expressed in the act of 1906, a better or higher price for their property than they could or might obtain by selling it separately or as individuals, although the price so obtained might be much more than the real value of the article. It is perfectly manifest from a reading of these acts that the Legislature did not intend to do either of these things, and yet it is certain that one or the other of these alternatives would have resulted if the court had sustained this legislation and adopted any other conclusion than the one reached.

The Supreme Court of the United States, however, found that this construction did not avail to remove the constitutional objection to the legislation when so construed. The effect of the opinions of the Supreme Court in the *International Harvester Case* and in the *Collins Case* is that legislation that makes criminal liability depend upon the question whether the purpose of the pool or combination is to increase or decrease the price of property above or below its real value, cannot be sustained. It is true that the Supreme Court did not rule that this legislation of itself was violative of the federal Constitution. That question was not before the court. But it did rule that the acts of 1906, 1908, and 1910 as construed by this court were opposed to the federal Constitution. A further necessary effect of these opinions is that no valid legislation can be enacted to carry out the provisions of section 198 of the Constitution if the legislation follows the wording of the Constitution and makes either civil rights or criminal liability depend on whether the price of an article is enhanced or decreased above or below its real value. It is true that the question of the validity of legislation of this character in its effect upon contract rights and liabilities was not before the Supreme Court in the cases mentioned. But from the reasoning of the court, especially in the *Collins Case*, there seems no escape from the conclusion that if the question came before the

Supreme Court it would hold that contract rights or liabilities depending on the question whether the price of an article had been increased or decreased above or below its real value, could not be enforced, because of the uncertainty of determining whether the value of the article in question had been increased above or decreased below its real value. For example, if under the act of 1906, or 1910, as construed by this court in the *Harvester Case*, a party was sued for selling a pooled crop in violation of his agreement, or for refusing to deliver a crop he had agreed to pool, it would be indispensable to a recovery that the plaintiff should show that the purpose of the pool was not to increase the price of the article above its real value or decrease it below its real value, because if the purpose of the pool was to do either of these things, the contract would be invalid. *Owen County Burley Society v. Brumback*, 128 Ky. 137, 107 S. W. 710, 32 Ky. Law. Rep. 916. It is therefore at once apparent that in the attempted enforcement of civil rights and liabilities under and by virtue of these statutes the same element of uncertainty would arise to prevent the enforcement of the right or liability that would arise in a criminal prosecution for a violation of the provisions of these pooling acts. And if this uncertainty would defeat a criminal prosecution, it would likewise defeat a civil action.

It should, however, be here pointed out that the conclusion we have reached in respect to the effect of these acts on contract rights and liabilities does not go to the extent of holding that mere uncertainty or indefiniteness in a legislative act would prevent the enforcement of civil rights or liabilities arising thereunder if the enforcement of these rights and liabilities may be rested on common-law rules. This distinction was made in *L. & N. R. R. Co. v. Commonwealth*, 99 Ky. 132, 35 S. W. 129, 18 Ky. Law Rep. 42, 33 L. R. A. 209, 59 Am. St. Rep. 457, where the court said that although sections 816 and 819 of the Kentucky Statutes could not, on account of their uncertainty, be made the basis of a criminal prosecution, this did not prevent the shipper from recovering back from the carrier under common-law principles the excess of charges over reasonable rates.

[3] In view, therefore, of these Supreme Court decisions, the validity of the acts of 1906, 1908, and 1910 can only be sustained upon the ground that all corporations and persons doing business of any kind in this state shall be permitted to enjoy the same privileges as farmers; namely, to combine, unite, and pool their property or products for the purpose of selling them at a higher price than they could obtain if acting separately or in competition with each other, without regard to whether the price at which the property or products was sold was more

than their real value or not, and this of course would be to say that we had no anti-trust laws in this state.

To put the validity of this legislation upon this ground, which is the only ground on which it can stand, would not only be obnoxious to the whole spirit and purpose of our laws, common and statutory, and the public policy of the state from its very beginning, but would license and authorize all corporations engaged in any kind of business in this state, or selling any kind of articles or products to the people of the state, to combine or unite for the purpose of selling these articles or property to the people of the state at any price they could obtain. A ruling like this would not only be an intolerable departure from the legislative intent in the enactment of the acts of 1906, 1908, and 1910, as expressed in their title and body, but would place the people of the state who must buy articles of necessity from corporations engaged in their manufacture, absolutely under the control of these corporations, who could and certainly would combine and fix the price of these articles at any sum they desired. And to say that the Legislature of the state intended to do this would be setting down a wanton reproach if not an insult to the intelligence and public spirit of the members, and this we were not willing to do when the 131 Ky. 551, case (115 S. W. 703, 133 Am. St. Rep. 256) was written, and are not willing to do now.

We are therefore constrained to hold that the acts of 1906, 1908, and 1910, now sections 3941a, 3941d of the Kentucky Statutes, are void. We are also constrained to overrule the case of *Commonwealth v. International Harvester Co.*, 131 Ky. 551, 115 S. W. 703, 133 Am. St. Rep. 256, and the subsequent cases resting on this opinion. Thus putting out of the way these acts and the decisions of this court holding that these acts and the act of 1890 and section 198 of the Constitution should be read together as one harmonious whole, we are now back to the safe place from which we ventured in 1906, and again stand on solid constitutional ground.

[4] This conclusion leaves to be decided the question of the effect of the act of 1890 of the opinions of this court holding that it was amended by the act of 1906. This question is, we think, easy of solution. The validity of a constitutional enactment such as the act of 1890 cannot be impaired or affected by an unconstitutional amendment. The amendment may be held invalid, but the act it amends, if free from constitutional objections, will stand as it did before the unconstitutional amendment. It cannot for a moment be entertained that an unconstitutional amendment to a valid act can destroy the validity of the act. The amendatory act is void from its inception, and may

be entirely discarded as unaffected the original act. *People v. Butler Foundry & Iron Co.*, 201 Ill. 236, 66 N. E. 349; *Ex parte Davis* (C. C.) 21 Fed. 396; *City of Lexington v. County Bank*, 165 Mo. 671, 65 S. W. 943; *Whitlock v. Hawkins*, 105 Va. 242, 53 S. E. 401, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880; *Waters-Pierce Oil Co. v. State of Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657.

[5] Holding that the act of 1890 is now in full force and effect, another question arising is whether the common-law doctrine of restraint of trade is also in force in this state, or has it been abrogated or modified by the act of 1890?

In support of the argument that the common-law doctrine of restraint of trade is not in force in this state, some reliance is placed by counsel for appellants on the case of *Gathright v. Bylesby*, 154 Ky. 106, 157 S. W. 45. In that case it was held on the authority of the *International Harvester Company Cases* that no pool, trust, combination, or monopoly was obnoxious to the laws of the state or the public policy of the state, unless its purpose was to increase the price of an article above its real value or decrease its price below its real value. And it may be conceded that, under the law as declared in the *International Harvester Cases*, the common-law doctrine of restraint of trade, as set forth in the cases of *Gay v. Brent and Merchants' Ice & Cold Storage Co. v. Rohrman*, was modified, at least in so far as the doctrine was extended in these cases to include all contracts or agreements entered into for the essential purpose of suppressing competition and trade in an article, although it was not the object of the combination to increase or depreciate the price of the article above or below its real value. But as the rule announced in the *International Harvester Company Cases* is no longer controlling, the state of the law in respect to trusts, combinations, and monopolies is the same as it was when the case of *Gay v. Brent* originated, and when the opinions in that case and in the case of *Merchants' Ice & Cold Storage Co. v. Rohrman* were written. *State v. Rollins*, 8 N. H. 550; *Moseley v. Brown*, 76 Va. 419; *Mathewson v. Phoenix Iron Co.* (C. C.) 20 Fed. 281.

There is now no public policy or statute law of the state opposed to the recognition of the common-law doctrine of restraint of trade. This doctrine as set forth in *Gay v. Brent and Merchants' Ice & Cold Storage Co. v. Rohrman*, and the statute of 1890 on the subject of pools, trusts, and monopolies are not in conflict. They are living, companion pieces of the law, and either may be invoked, whichever is the most available, for the purpose of staying the unlawful activities of any agreement, pool, trust, combination, or monopoly created or entered into by any

corporation, partnership, or association of persons for the purpose of suppressing competition, controlling the market, or regulating or fixing the price of any species of property.

It follows from the views expressed that the judgment appealed from should be affirmed; and it is so ordered.

GERMANIA FIRE INS. CO. v. TURLEY.

(Court of Appeals of Kentucky. Nov. 24, 1915.)
INSURANCE — §328 — TRANSFER OF POLICY — FORFEITURE.

Since a clause in a fire insurance policy, forfeiting the policy if any change takes place in the title, possession, or interest of the insured in the property, or if the policy be assigned, must be construed to contemplate only transfers which permanently divest the insured of all interest in the property, where, upon a sale of the land by insured, the policy was transferred with the consent of the company, subsequently again transferred without the consent of the company, and finally transferred to the original owner without the consent of the company, the policy was not thereby rendered void, in the absence of a declaration of forfeiture; the property having been restored to the party with whom the company originally contracted, before the loss occurred and the liability of the company having merely been suspended during the interim.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 794-822, 825; Dec. Dig. §328.]

Appeal from Circuit Court, Daviess County.

Action by T. J. Turley against the Germania Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

C. M. Finn, of Owensboro, for appellant. Miller & Sandidge, of Owensboro, for appellee.

SETTLE, J. The appellee, T. J. Turley, by this action sought to recover of the appellant, Germania Fire Insurance Company, \$200, alleged to be the fair cash value of a barn owned by him, upon which, by its policy issued January 28, 1910, appellant granted him that amount of insurance against its loss by fire; it being alleged in the petition that in May, 1914, the barn was destroyed by fire. It appears from further allegations of the petition that the policy in question also granted to the appellee insurance of \$3,500 on his dwelling house, located on the lot upon which the barn was situated, and that for the insurance upon the two buildings he paid appellant the premium demanded, amounting to \$73.20; that the policy insured the two buildings for a period of five years from its date, and contains a provision making the insurance, in case of loss on either building, payable to the Fidelity & Columbia Trust Company, of Louisville, Ky., as its interest may appear; this provision being made because the trust company then had a mortgage upon the two buildings and the lot upon which they are situated.

The answer of appellant admitted the contract of insurance, as contained in the policy referred to, but denied any liability upon the policy, or that appellee was the owner or holder of the policy at the time of the destruction of the barn by fire, and pleads that, subsequent to the issuance of the policy, and before the burning of the barn, the appellee sold and conveyed the property to Ben J. Head, and then assigned to him the policy sued on, by which he parted with the title to both the property and policy; that Head sold and conveyed the property to another, the sale and conveyance being accompanied by an assignment of the policy in question, without the consent of appellant indorsed on the policy; that by the terms of the policy it is provided that in case any change should take place in the title, possession, or interest of the assured, the policy in that event should become null and void, unless otherwise provided by agreement indorsed thereon; and, further, that appellant did not, by any agreement indorsed on the policy, waive its right to declare it null and void because of a change in the title to the property. Finally, it was alleged in the answer that, by reason of such change in the title to the property, the policy became and is null and void.

Appellee filed an amended petition in which it was averred that on May 17, 1912, appellee sold and by deed conveyed the property in question to Ben J. Head, and at the same time assigned and transferred to him the policy of insurance upon the dwelling house and barn, and that on July 3, 1912, appellant, by an indorsement on the policy, consented to the assignment to Head; that on August 19, 1912, Head sold and conveyed the property to J. M. Hamilton, and at the same time transferred to him the policy, to which appellant, through its local agent at Owensboro, consented, and agreed to later indorse such consent upon the policy, which was then in the hands of the Fidelity & Columbia Trust Company, but which indorsement it did not, in fact, make; that on January 1, 1914, the property was sold and conveyed by Hamilton to R. H. Ford, and Hamilton then agreed to and did assign Ford the policy, to which assignment appellant, through its local agent, again agreed, such agreement being accompanied by a promise to have such consent indorsed on the policy, with which promise it also failed to comply; that on April 22, 1914, Ford sold and conveyed the property to the appellee, the original owner and vendor, Ford assigning the policy to appellee; and that at that time appellee applied to appellant's local agent at Owensboro for its assent to the assignment of the policy from Ford to him, but that the agent informed him that he was not then acting as agent for appellant, and that the latter had determined to quit business in this state, or would soon do so.

It was further alleged in the amended petition that when Ford delivered to the appel-

lee the deed reconveying to him the property, he also assigned and delivered to him the policy in question, and that when thereafter the barn was destroyed by fire he (Turley) was in possession of the policy and then held the title to the property covered by the policy, which restored the situation occupied by appellee and appellant to what it was when the policy was issued and delivered to the former by the latter. The facts alleged in the amended petition were also, in substance, pleaded in a reply filed by appellee to the appellant's answer. The reply, in addition, contained a traverse of the averments of the answer with respect to the alleged right of appellant to rely upon the forfeiture claimed as arising under the clause of the policy providing therefor in case of a change in the title of the property, and pleaded a waiver on the part of appellant of such right of forfeiture.

By agreement of the parties a jury was waived, and the law and facts submitted to the court, the trial resulting in a judgment in favor of appellee against appellant for the \$200, claimed in the petition as the loss sustained on the barn. Appellant complains of that judgment, and has moved this court to grant it an appeal, as provided by rule 20 (169 S. W. vii) of this court, adopted in conformity to the act of March 17, 1914 (Laws 1914, c. 24) regulating appeals in civil cases when the amount in controversy, exclusive of interest and costs, is as large as \$200 and less than \$500, which appeal, in view of the novelty of the question involved, we deem it proper to grant.

The provision under which appellant seeks to enforce the forfeiture claimed in this action is in the following language:

"If the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, the property covered in whole or in part by this policy * * * or in case any change takes place in title, possession or interest of the assured in the above-mentioned property * * * or if this policy be assigned * * * then in each and every one of the above cases this entire policy shall be null and void, unless otherwise provided by agreement indorsed thereon."

The above clause does not mean that every conceivable change that might take place in the title of the property, or assignment of the policy, without the agreement of the insurance company indorsed thereon, would have the effect to forfeit the policy. In construing this clause the courts seem to have held that many transfers which apparently come literally within its terms cannot reasonably be held to be covered thereby. Thus it has been held that such a policy provision does not apply to transfers from one joint owner to another. *Cooley's Insurance Briefs*, 1726; *Lockwood v. Middlesex Ins. Co.*, 47 Conn. 553; *Hyatt v. Watt*, 37 Barb. (N. Y.) 29; *German Mutual Fire Ins. Co. v. Fox*, 4 Neb. (Unof.) 833, 96 N. W. 652, 63 L. R. A. 334; *Tillou v. Kingston Mut. L. Ins. Co.*, 7 Barb.

(N. Y.) 570; *Royal Ins. Co. v. Sockman*, 8 O. C. D. 404.

The provision in question now appears in all similar policies. Its principal object being to secure to the insurer a contracting party of its own choosing, we reasonably infer that it is intended to cover only such transfers of the property and policy as would permanently vest the interest of the person with whom the insurer contracted in another, or others, who were strangers to the transaction and with whom it had not consented to contract. It cannot be claimed that the provision in question will prevent a merchant from selling to retail customers goods covered by the policy, yet, if literally construed, it might be said to do so. Neither can it be claimed that a transfer by one partner of all his interest in the insured property covered by the policy to his copartner is such a transfer as would be covered by the clause in question. It has also been held that this clause does not cover a change in the title, whereby the interest of the insured in the property insured is increased after the taking out of the policy, nor will it apply where the property insured is conveyed by a deed of assignment made by the assured for the benefit of creditors, whereby the insured property and the policy are both transferred to the assignee. *Phoenix Ins. Co. v. Lawrence*, 4 Metc. 9, 81 Am. Dec. 521. So, after all, the point to be determined is not what transfers may be covered by the language used, but what transfers did the parties intend should be covered by it.

In adopting the clause in question the parties did not have in mind a second assignment to the same party. Having issued the policy to appellee in the beginning, because under the contract he was the party insured by it, it must be assumed that appellant agreed he might stand as the party insured for the whole period of five years covered by the policy. This being true, it is not reasonable to suppose that the above clause was allowed to remain in the contract in order to protect appellant against a sale of the property or assignment of the policy, which, in the course of events, might be made to appellee himself during the life of the policy. In other words, appellee, in accepting the policy containing the provision in question, will not be presumed to have been providing against a transfer to himself; nor, on the other hand, can it be presumed that appellant intended it to provide against a transfer of the policy to the very person with whom it was then contracting.

It is clearly shown that appellant, by a proper indorsement on the policy, consented to its assignment by appellee to Head shortly after the sale and conveyance of the lot by appellee to him. If Head had subsequently resold and conveyed the property to appellee, instead of to Hamilton, and at the time reassigned to him the policy, it could not be successfully contended that the failure of

appellant to consent, in writing indorsed on the policy, to such reassignment of it to appellee would have amounted to a violation of the above provision of the policy, or prevented appellee from recovering the indemnity provided by the policy, if the barn had been destroyed by fire following such resale of the property and reassignment of the policy to him. If this be true, how can it be said that the latter's right to recover for the loss of the barn is affected by the sale and conveyance of the property and transfer of the policy from Head to Hamilton, from Hamilton to Ford, and from Ford back to appellee. In the first instance, it would have been unnecessary for Head to obtain the consent of appellant, indorsed on the policy, to its reassignment to appellee. In the second instance, the title to the property and policy would equally be in appellee, the person primarily accepted by appellant as the assured, and the five years, to cover which the policy was issued, had not expired.

Whether any sale and conveyance of the lot containing the insured buildings, after the one from appellee to Head, following which appellant indorsed on the policy its consent to its assignment to Head, might have given appellant the right to enforce the forfeiture now demanded is not presented for decision. In point of fact, the forfeiture was not claimed or had because of any of such sales, although appellant had notice of each through its Owensboro agent when made; and, having delayed such right, if any it had, until the title to the property was restored to appellee, the person with whom it originally contracted and to whom it issued the policy, it cannot, it would seem, because of any of the changes in the title referred to, escape liability on the policy for the loss sustained by appellee after its reconveyance to him.

The principle here announced was recognized in *Born v. Home Ins. Co.*, 110 Iowa, 379, 81 N. W. 676, 80 Am. St. Rep. 300, where in it was held that, although a policy of insurance provided that it should become forfeited if the property insured were thereafter mortgaged without the consent of the company, the fact that the property was so mortgaged did not avoid the policy, as the mortgage was paid off and satisfied prior to the loss, and such payment operated to restore the property to the protection of the policy. In a footnote to the opinion the doctrine in question is more clearly recognized in the following statement of the law:

"The general rule to be deduced from the weight of authority is that the violation of a condition in a policy of insurance which works a forfeiture thereof merely suspends the insurance during the violation, and that if such violation is discontinued during the life of the policy, and is nonexistent at the time of loss, the policy revives, the insurance is restored, and the insurer is liable, although he has never consented to a violation of the conditions in the policy, and such violation has been such that the insurer could, had he known of it at the time, have declared a forfeiture therefor." State

Ins. Co. v. Schreck, 27 Neb. 527, 48 N. W. 340, 6 L. R. A. 524, 20 Am. St. Rep. 696; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740; *Johansen v. Home Fire Ins. Co.*, 54 Neb. 548, 74 N. W. 866; *Home Fire Ins. Co. v. Johansen*, 59 Neb. 349, 80 N. W. 1047; *Tompkins v. Hartford Fire Ins. Co.*, 22 App. Div. 380, 49 N. Y. Supp. 184.

In a number of jurisdictions it has been held that, although a policy of fire insurance contains a condition avoiding it if the premises are put to a changed use, or if certain prohibited articles are placed thereon, nevertheless a change in the use of the insured premises or the keeping of prohibited articles thereon, without the consent of the insurer, if abandoned or discontinued before the loss occurs, renders the insurer liable where he has not declared a forfeiture of the policy before loss, and the increased hazard caused by such prohibited use in no way continues to affect the risk at the time of loss. In such case the insurance is merely suspended during the prohibited use of the premises and revived immediately upon its discontinuance. *Joyce v. Maine, Ins. Co.*, 45 Me. 168, 71 Am. Dec. 536; *U. S., etc., Ins. Co. v. Kimberly*, 34 Md. 224, 6 Am. Rep. 325; *Garrison v. Farmers' Fire Ins. Co.*, 50 N. J. Law, 235, 28 Atl. 8; *Cumb. Valley, etc., Ins. Co. v. Schell*, 29 Pa. 31; *Mutual Fire Ins. Co. v. Coatesville Shoe Factory*, 80 Pa. 407; *Schmidt v. Peoria Ins. Co.*, 41 Ill. 295; *Ins. Co. v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497; *Ins. Co. v. Garland*, 108 Ill. 226; *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595; *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459, 21 Am. Dec. 686; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. 9, 81 Am. Dec. 521.

In yet another footnote to *Born v. Home Ins. Co.*, supra, we find this further statement of the law, more directly applicable to the facts of the instant case:

"If the policy contains a condition that it shall become void upon the alienation of the insured property, without the consent of the insured, it has been generally held that, if the insured sells or assigns the property during the existence of the policy, without the consent of the insured, the insurance does not, from that fact alone, become absolutely void, but is merely suspended, and if the insured reacquires the title before the loss, the policy is renewed and the insurer becomes again liable."

The cases cited in support of this doctrine, viz., *Power v. Ocean Ins. Co.*, 19 La. 28, 38 Am. Dec. 665, *Hitchcock v. N. W. Ins. Co.*, 26 N. Y. 68, *Lane v. Maine, etc., Ins. Co.*, 12 Me. 44, 23 Am. Dec. 150, *Worthington v. Bearse*, 12 Allen (Mass.) 382, 90 Am. Dec. 152, and *Shearman v. Niagara Fire Ins. Co.*, 46 N. Y. 526, 7 Am. Rep. 380, seem to fully sustain it.

We have not been able to discover that the question before us has ever been decided in this jurisdiction, but in view of the authorities, supra, and the well-known rule that forfeitures are not favored, we are of opinion that the nullity or forfeiture of the pol-

icy, made permissible by the clause under which the appellant here seeks to avoid liability for the loss sustained by appellee, must be understood as relating to cases where the insured has absolutely and permanently divested himself of all interest in the subject-matter of insurance; for if without any interest at the time of the loss, the insured cannot be said to have sustained any injury; and the person to whom a transfer is made without the consent of the insurer cannot recover, because he is not a party to the contract. But a different rule obtains where, as in the instant case, there was but a temporary change in the title to the property, the title being restored to the insured prior to the loss sustained; for in such case his relation to the contract of insurance is the same as when the contract was made, and he is the identical party to whom the policy was issued. There was therefore only a temporary suspension of the risk, continuing while the insured remained divested of the title to the property, and a revival of the risk upon the restoration to him of the title, which, being in him at the time of the loss, entitles him to recover of the appellant the amount thereof.

Louisville German Fire Ins. Co. v. Schnelder, 165 Ky. 235, 176 S. W. 1154, does not conflict with the conclusion herein reached. The opinion therein differentiates the case from this. In that case the insurance company was a purely local mutual association, its charter and policy providing that a recorded conveyance of the insured property should, of itself, operate to terminate the membership of the assured in the association and invalidate the policy. Hence, it was held that such was the effect of the conveyance in that case. It also appears from the opinion that, because of the conveyance, the company actually struck the name of the assured from the membership list before the loss. In other words, there was a forfeiture of the policy before the loss occurred. In the instant case there was never a forfeiture of the policy, although the insurer had notice of each sale of the property when made.

For the reasons indicated, we concur in the conclusion reached by the circuit court. Judgment affirmed.

CINCINNATI, N. O. & T. P. RY. CO. v. FROGG'S ADMR.

(Court of Appeals of Kentucky. Nov. 23, 1915.)

1. RAILROADS—§398—INJURY ON TRACK—SUFFICIENCY OF EVIDENCE.

In an administrator's action against a railroad for death of one claimed to have been struck by portions of an engine step, which broke when striking a concrete obstruction, evidence held insufficient to support verdict for plaintiff under the doctrine that, where the evidence leaves the court in the position of having to theorize as to the manner in which deceased met his death, and the theories advanced

are equally plausible, one involving defendant's negligence, the other its freedom from negligence, and both arising upon mere conjecture, recovery cannot be had.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1356, 1358-1363; Dec. Dig. ¶ 398.]

2. EVIDENCE ¶ 258—DECLARATION AGAINST INTEREST—IDENTIFICATION OF MAKER.

In an administrator's action against a railroad, its engineer and conductor, for a death alleged to have been caused by portions of a shattered engine step striking decedent, where a witness, over defendant's objection, testified that he was present at the inquest, that he saw two men whom people said were the engineer and conductor of the train that killed deceased, that one of such men testified on the inquest that the cab step of the engine was loose when he last examined it before the accident, such testimony would have been admissible against the conductor or engineer if the witness had been able to identify either as the person who had so testified upon the inquest, but it was incompetent as to the conductor and engineer, and also the railroad, where the witness was unable to identify the person who had so testified, and no other witness aided his testimony by connecting the statement testified to with either of the trainmen.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1006, 1007; Dec. Dig. ¶ 258.]

Appeal from Circuit Court, McCreary County.

Action by Arthur Frogg's administrator against the Cincinnati, New Orleans & Texas Pacific Railway Company and others. Judgment for plaintiff, and defendant Railway Company appeals. Reversed, with directions.

Tye, Siler & Gatcliffe, of Williamsburg, and John Galvin, of Cincinnati, Ohio, for appellant. Robert Harding and John W. Rawlings, both of Danville, J. P. Hobson & Son, of Frankfort, and John M. Perkins, of Whitley City, for appellee.

HANNAH, J. About 9 o'clock on the night of April 26, 1913, Arthur Frogg, a young man about 20 years of age, was killed near the railroad depot at Pine Knot. His administrator instituted this action in the McCreary circuit court against the Cincinnati, New Orleans & Texas Pacific Railway Company to recover damages for his death, and obtained a verdict and judgment in the sum of \$5,000. The railway company appeals.

Pine Knot is a village of some 500 or 600 inhabitants. The tracks of the railway company run north and south through the village. The larger portion of the town is east of the tracks, and rather northeast of the depot. A public highway crosses the tracks just south of the depot, which is on the east side of the tracks. This highway crosses the tracks from west to east, and, after passing the depot, it then turns to the north and runs parallel with the railroad tracks. Along in front of the depot, and extending from this public highway to a point probably 150 feet north of the depot, there is on the premises of the appellant a plat-

form, bordered by a concrete curb next to the railway tracks. And from the north end of this platform a pathway leads off in a northeasterly direction, crossing a couple of storage side tracks, to an intersection with the public highway above mentioned. By using the railroad platform and this pathway, persons desiring to pass from that part of the town west of the tracks near the depot to that portion of the town on the east side of the tracks and northeast of the depot were able to lessen the distance as compared with the route of the public highway; and it appears from the evidence in the record that the people of Pine Knot almost universally used this route via the depot platform in passing between the two mentioned portions of the town. This platform immediately in front of and near the depot was constructed of lumber, but to the north of the depot, it was made of gravel.

Frogg had been working on a job of railroad grading, but on the day in question, it being a Saturday, he did not work in the afternoon. He was at his father's distillery, and drank some whisky about 2 o'clock, and then left. His father says that he was drinking, but not drunk. He returned about half past 3, and again left, and went to Pine Knot. His father lived about three-quarters of a mile north of the Pine Knot depot.

The evidence for the plaintiff conduces to show that Frogg was at the home of Fred Smith, on the west side of the tracks and rather south of the Pine Knot depot, on the night in question; that he left there to return to that portion of the town on the other side of the tracks (in doing which he would ordinarily have walked north along the depot platform); and that in a period of time which was about sufficient for him to have reached the depot a freight train came into Pine Knot from the south. As this train passed the depot platform, going north, a noise or jar attracted the attention of the engineer. The train came to a stop, and Frogg's body was found lying on the gravel extension of the platform north of the depot. A fracture of the skull an inch above and 2 inches in front of the left ear had produced instant death. His left shoulder was bruised; and there were a number of bruises on his left side and down his back and on his left hip, and the skin had been knocked off the left shin bone in three or four places. The back of his left coat sleeve was torn, and there was a torn place in his trousers over the left hip.

An iron step attached to the cab of the locomotive (used in mounting to the cab) had been torn from its fastenings and broken into several pieces, and these pieces were lying near where Frogg was found. One of these weighed 10 or 12 pounds. A hole had been torn in the concrete curb which ran along in front of the platform next to the

tracks. This hole was about 50 feet south of where the body was found. The curb mentioned was about 20 to 24 inches in height and 20 to 22 inches from the track; and the step of the locomotive cab, when in proper position, cleared the curb about 6 inches.

No one saw Frogg killed; but it was the theory of the plaintiff that the cab step was loose, and dropping down struck the concrete curb, breaking it into pieces, and that these flying pieces of the step struck and killed him as he was walking north along the depot platform. On the other hand, it is the contention of the railway company that a peremptory instruction should have been granted in its favor at the close of plaintiff's evidence, upon the ground that there was no evidence showing liability on its part.

[1] It has been held that, to authorize a recovery in cases like this, it is not essential that there should be direct evidence from the mouths of eyewitnesses to the occurrence; that the manner in which the accident happened, as well as the negligence of the railway company, may be established by circumstances. *Southern Railway v. Caplinger's Adm'r*, 151 Ky. 749, 152 S. W. 947, 49 L. R. A. (N. S.) 660.

In *L. & N. R. R. v. Taylor's Adm'r*, 158 Ky. 633, 166 S. W. 199, Taylor was struck and killed by a freight train. No one saw the occurrence; but Taylor was seen starting up the track. A train followed him. The marks made on the cross-ties by the heels of his shoes, the condition of the cinders between the rails, and the wounds on his body all showed that he was struck from behind by the train and dragged quite a distance. It was sought to be contended in that case that Taylor was probably killed in an attempt to board the moving train; but this court held that, in view of the physical facts, the jury was justified in reaching the conclusion that he was killed in the manner above stated.

The evidence in the case at bar, however, does not so clearly point to the actual manner of Frogg's death. The apparently fatal weakness in the theory of the plaintiff rests in the number and distribution of the wounds on the body. The step was undoubtedly broken into several pieces, and this was doubtless caused by its striking the concrete curb as contended by plaintiff; but that all or practically all of those pieces should have continued to fly through the air for a distance of 50 feet, and all or practically all of them strike Frogg, as must have been done to have caused the number of wounds found on his body, does not seem conceivable. It seems to us that it is just as reasonable a theory (if, indeed, it be not more reasonable) to say, as defendant theorizes, that Frogg was struck while sitting on the curb, and that this knocked the step loose and caused

it to tear up the concrete curb. All the wounds were on his left side; and, had he been sitting on the curb, his left side would have been nearer to the approaching train. If he was killed in this way, the number and distribution of the wounds on his body and the tearing of his clothes is more satisfactorily accounted for than by the theory that a number of the pieces struck him practically all over the left side of his body; especially as some of the wounds were on the front of the body and some on the back, although all on the left side thereof.

It seems to us, therefore, that this case is one which demands the application of the doctrine that, where the evidence leaves us in the position of having to theorize as to the manner in which deceased met his death, and the theories advanced are equally plausible, one involving negligence on the part of the defendant, and the other freedom from such negligence, and both arising upon mere conjecture, a recovery cannot be had. *Caldwell's Adm'r v. C. & O. Ry.*, 155 Ky. 609, 160 S. W. 158; *Osborne's Adm'r v. C., N. O. & T. P. Ry.*, 158 Ky. 176, 164 S. W. 818; *Bell's Adm'r v. C. & O. Ry.*, 161 Ky. 466, 170 S. W. 1180; *Woodburn v. U. L., H. & P. Co.*, 164 Ky. 29, 174 S. W. 730; *L. & N. v. Chambers*, 165 Ky. 736, 178 S. W. 1101.

[2] Over the objection of the defendant railway company, a witness, Cross, was permitted to testify that he was present at the inquest held by the coroner over the body of Frogg; that he saw two men there whom people said were the engineer and conductor of the train in question; that one of the men so pointed out to him testified on that inquest that the cab step was loose when he examined it at Robbins or Glemmarrow, stations south of Pine Knot. This testimony was not corroborated in any way; in fact (though we are not now considering the evidence of defendant's witnesses), this witness was contradicted by all the other witnesses who were present at the inquest, including the magistrate who presided.

The conductor and engineer of the train were joined with the railway company as defendants in the action; and if this witness had been able to identify either as the person who had so testified upon the inquest, the evidence in question would have been admissible against the person who had so testified, but against him alone. But, as the witness was unable to identify the person who had so testified, and no other witness aided his testimony by connecting the statement so testified about with either of the defendant trainmen, the evidence in question was incompetent, even as against either of those defendants, and in no event was it competent against the railway, and, being incompetent, it was of no assistance to the plaintiff upon the consideration of the defendants' motion for a peremptory instruction.

The judgment is reversed, with directions to direct a verdict for the defendants if upon a second trial the evidence should be substantially the same as on the first trial.

KIRK v. KIRK'S EX'R.

(Court of Appeals of Kentucky. Nov. 24, 1915.)

1. LIMITATION OF ACTIONS §177—How RAISED—COMPLAINT—SUFFICIENCY.

In a complaint for the reformation of a deed, executed eight years before the suit, on the ground of fraud, it was not necessary that the complaint should negative the running of the statute of limitations by alleging that plaintiff could not have sooner discovered the fraud by the exercise of reasonable diligence, since the statute is a matter of defense to be raised by plea.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 663-666; Dec. Dig. §177.]

2. WILLS §545—LIFE ESTATE—REMAINDER—FEE SIMPLE.

Under a clause in a will devising lands to testator's three sons which declared that the estates taken were only life estates, and in case of the death of the sons or either of them, without heirs of their body immediately at their death, the lands so given should go to testator's other living children, the surviving son took a fee simple in the lands devised on the death of the other two without issue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1171-1176, 1310-1318; Dec. Dig. §545.]

Appeal from Circuit Court, Mason County.

Action by Elizabeth M. Kirk against Morris C. Kirk, as executor of Morris C. Kirk, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Allan D. Cole, of Maysville, for appellant. Worthington, Cochran & Browning and Slatery & Rees, all of Maysville, for appellee.

SETTLE, J. By this action, instituted in the court below, the appellant, Elizabeth M. Kirk, sought to recover of the appellee, Morris C. Kirk, as executor of the will of Morris C. Kirk, deceased, and devisee under the latter's will, 206 acres of land lying in Mason county, Ky., and the rental value thereof for the seven years next preceding the bringing of the action, aggregating in amount \$21,000. Appellee filed a general demurrer to the petition, as amended, which the circuit court sustained, and, appellant refusing to plead further, judgment was entered dismissing her petition. This appeal is prosecuted from that judgment.

The land in question was devised to appellant's husband, Erasmus G. Kirk, deceased, by the will of his father, Richard Kirk. Erasmus G. Kirk died in 1906, testate, and appellant claims title to the land mentioned under his will, of which she is the sole devisee. The same land is in possession of and claimed by the appellee, Morris C. Kirk, under the will of his uncle, Morris C. Kirk, deceased, who died in 1914, and whose will, after bequeathing certain specific legacies to

other relatives, devised the residue of his estate, including this land, to his nephew, the appellee Morris C. Kirk.

It was alleged in the petition, as amended, that the 206-acre tract of land, together with a smaller tract of 25 acres, which her husband, Erasmus G. Kirk, acquired by purchase and conveyance several years prior to his death, and also devised her by his will, was conveyed by appellant to Morris C. Kirk, deceased, by deed of date June 8, 1906, whereby she intended to convey to him the 25-acre tract of land at the agreed price of \$2,000, which sum was then paid her in cash by Morris C. Kirk, but that by mistake of the draughtsman of the deed, or the fraud of the decedent, Morris C. Kirk, one of which facts, it was alleged, was true, though she did not know which was true, the instrument was made to falsely recite that it conveyed all the real estate owned by Erasmus G. Kirk at his death, whereas she had in fact sold only the 25-acre tract of land to him. It was further alleged in the petition that appellant did not learn of the mistake or fraud mentioned until within the 90 days next before the institution of the action. In the prayer of the petition it was asked that the contract of sale be rescinded and the deed canceled in so far as it purported to convey the 206 acres of land, and that the instrument be so reformed as to make it convey simply the 25 acres of land sold the grantee and attempted to be conveyed him thereby.

[1] Appellee's demurrer to the petition, as amended, is based on the grounds: (1) That the action is barred by the statute of limitations; (2) that the facts alleged in the petition and amendment, and furnished by the exhibits filed therewith, fail to state or manifest a cause of action. With respect to the first ground of demurrer, it should be observed that the appellant's action was instituted 8 years after the execution and delivery of the deed attacked by the petition, and it is insisted for appellee that, while the statute allows the bringing of such an action within 10 years next succeeding the commission of the alleged fraud or mistake sought to be corrected, it requires that it be done within 5 years next after its discovery; and, further, that the averment of the petition that appellant did not discover the fraud or mistake until within 90 days of the filing of the petition is insufficient to meet the requirement of the statute, unless coupled with or followed by the additional averment that reasonable diligence on appellant's part would not have enabled her to discover it sooner, which averment was not made.

This contention cannot be sustained. In *Swinebroad v. Wood*, 123 Ky. 664, 97 S. W. 25, 29 Ky. Law Rep. 1202, it was held that, in an action for relief on the ground of fraud or mistake, the plaintiff need not anticipate a plea of the five or ten year statute, and that, if the defendant would rely upon limita-

tion, it must be pleaded instead of being raised by demurrer. This decision was followed in *Yager's Adm'r v. President, etc., of Bank of Kentucky*, 125 Ky. 177, 100 S. W. 848, 30 Ky. Law Rep. 1287, and has been approved in one or more later cases.

[2] The second ground of demurrer is, however, fatal to the recovery sought by appellant. The facts alleged in the petition as amended, and exhibits filed therewith, show that appellant is not entitled to the relief prayed, as they manifest her want of title to the 206 acres of land, or any part thereon, sued for, or to the rents alleged to have accrued therefrom. This is so because the land in question was received by her husband, Erasmus G. Kirk, under the will of his father, Richard Kirk, which devised him only a life estate therein, and, as the interest the husband took in the land under the will ceased or ended with his death, he was without power to pass the title thereto to appellant by his will, as attempted by the devise therein made of it to her.

It is admitted in the petition that the 206 acres of land was devised appellant's husband by the will of his father, Richard Kirk. The will of Richard Kirk appears to have been executed January 28, 1881, at which time the testator had three sons, Erasmus G., Morris C., and Bluford B. Kirk, all of whom were then unmarried. After providing in the first and second clauses of the will for the payment of his debts, and that his real and personal property be kept intact until that end was accomplished, the testator therein disposed of his real estate as follows:

"Third. After my debts are paid, I will and bequeath to my wife Angeline Kirk, during her natural life, my home farm containing about 229 acres and known as the Nathaniel Kirk and Garrett Applegate land, less about 80 acres of it—the part willed to me by my father, Richard Kirk, Senior, on my paying for it, which is hereinafter willed to my son Bluford B. Kirk.

"Fourth. After my debts are paid as aforesaid, I will and bequeath to my sons Erasmus G. and Morris C. Kirk, subject to the condition hereinafter specified, the two tracts of land known as the 'dowry tract,' in which they already own an interest, and the tract of land deeded to me by Robert Downing containing in both tracts about 268 acres, more or less.

"Fifth. After my debts are paid as aforesaid, I will and bequeath to my son Bluford B. Kirk, the 80 acres, more or less, excepted from the home farm of 229 acres, more or less; and also the remainder of the 229 acres called the home farm, after my wife's life estate ceases by her death.

"Sixth. The estate taken by my sons in the fourth and fifth clauses of this my will shall only be life estates; and in case they or either of them die, without heirs of their bodies, immediately at their death, the land hereby willed them for life shall go to my other living children and at the time should any of my other children be dead leaving heirs of their body, such heirs shall take the land, or an interest therein, the same as their father would have done if living."

March 14, 1883, Richard Kirk made the following codicil to his will:

"Codicil. My son Bluford B. Kirk having departed this life, I make this codicil, not chang-

ing my foregoing will in any way—merely making a division of the land willed to my said deceased son, to wit: When they are entitled to it under my will I bequeath to my son Morris C. Kirk all the land willed to my deceased son on the east side of the road and to my son Erasmus G. Kirk all the land willed to my deceased son on the west side of the county road, except the tenement occupied by Wash Lyon and half acre of land therewith, which I bequeath to my son Morris C. Kirk. In this division I require my son Morris C. to relinquish to my son Erasmus G. the $\frac{2}{13}$ that he owns individually in the 'dowry' on the west side of said road; and if he fails or refuses to do so then I will enough of the land on the east side of the road to make it up. There is some woods on the east side of the road and my son Erasmus is always to have his stove wood out of the dower or rough part of the timber therein."

Richard Kirk died in 1893, and shortly thereafter his will and codicil were duly probated. He was survived by two of his sons, Erasmus G. Kirk and Morris C. Kirk. Erasmus G. Kirk shortly thereafter married the appellant and died in 1906, without issue. His brother, Morris C. Kirk, survived him, but died in 1914, without issue.

If the latter, as the last survivor of the sons of Richard Kirk, upon the death of Erasmus G. Kirk took under the sixth clause of his father's will a fee-simple title to the land which Erasmus had received under the father's will, it is clear that on June 8, 1906, when appellant executed to him the deed here attempted to be reformed, he already held the fee-simple title to all of the land, exclusive of the 25 acres, the deed purported to convey him, in view of which appellant is estopped to complain that the 206 acres was included in the conveyance made by the deed. This being true, there can be no just complaint from the appellant that the \$2,000 then paid her by Morris C. Kirk was an inadequate price for the 25 acres of land, which was all the land he got by the conveyance; indeed, the petition does not so allege.

The only question remaining to be determined is whether, in the conclusion expressed, we have given the correct meaning to Richard Kirk's will. Fortunately, we have as a guide a previous construction given the will by this court in *Smoot v. Kirk*, 104 S. W. 716, 31 Ky. Law Rep. 1081. The case was decided after the death of Erasmus G. Kirk and while Morris C. Kirk was still living, and the action seems to have grown out of the refusal of a purchaser of a part of the land, which had been directly devised Morris by the will of his father, to accept a deed Morris tendered him therefor; his objection being that Morris, though the sole survivor of the sons of Richard Kirk, was unable to convey him a fee-simple title. In the opinion it is said:

"Richard Kirk by his will devised certain lands to his three sons. Two of the sons have since died without issue. The third is living but has no issue. The question for decision in this case is the nature of the estate taken by the three sons, and particularly by the last survivor, appellee. The question arises under the sixth clause of the will, which reads as follows: 'The

estates taken by my sons in the fourth and fifth clauses of this, my last will, shall only be life estates, and in case they, or either of them, die without heirs of their bodies, immediately at their death, the land hereby willed for life shall go to my other living children, and at the time should any of my other children be dead leaving heirs of their body said heirs shall take the land or any interest therein, the same as their father would have done if living.'

"It is claimed that appellee has only a life estate in the land, while the latter claims the fee. The testamentary clause would have created a fee-simple estate but for the sixth clause quoted above, and there would be less trouble in construing it but for the statement contained in it that life estates only are given to his three sons. Technical terms are to receive their technical meaning ordinarily in the construction of documents. But, if it appears from the context that the draftsman of the instrument misemployed technical terms, there is no sense in giving them technical meaning, when to do so destroys the intent otherwise clearly manifested in the instrument, as it is the latter that is invariably to control. If the words 'life estates' be omitted from the paragraph, as misdescription of the estate specifically and actually created, it will be seen that the testator intended that his sons were to have defeasible fees, for remaindermen are not provided. The devise of the fee to be defeated contingently is in no sense a life estate as that term is used in law. The testator had devised specifically to his sons certain lands. Without anything else being said, they would have taken their lands in fee. But it was the evident purpose of the testator to continue the land in his own blood so far as that was practicable. The thought occurring that some of them might die without issue, provision was made that the land devised to such one should go to the surviving brothers, or in the event that one of them had previously died, but leaving issue, that his issue should stand in his place, as to the portion devised to the issueless son. But if any one of the sons died leaving issue there is no devise over, but such son of the testator then would have taken the fee; the contingency upon which it was to be divested not having happened. He could have disposed of it by will, or by sale or gift. When two of the three sons had died without issue, the third took the whole by the terms of the will, but not as remainderman. As to such final survivor the condition could never arise by which if he died without issue the terms of the will could be complied with, to wit: That his two brothers or their issue or the survivor of them could take. We cannot presume that the testator meant for the title to lapse or revert. The only condition that he contemplated as the one upon which the fee previously defeated should be divested was that one or two of his sons might die without issue. In that event the whole of the estate must of necessity go to the survivor, as no one else was provided in the instrument to take from the survivor. We conclude that Morris C. Kirk, the survivor of the three sons, the other two having died without issue, is invested with the fee simple of the whole of the devised realty. Such was the judgment below, and it is affirmed."

As under the will of Richard Kirk the death of his two sons Bluford and Erasmus, without issue, vested in the testator's third son and their brother Morris C. Kirk, as sole survivor, an absolute or fee-simple title to the lands it devised them, and the title thus derived by Morris C. Kirk to the land in controversy was devised by his will to his nephew, the appellee Morris C. Kirk, appellant's claim thereto is wholly without mer-

it; and, if not entitled to the 206 acres of land, no benefit can result to her from a reformation of the deed of June 8, 1906, executed by her to Morris C. Kirk, deceased. Judgment affirmed.

SOUTHERN MINING CO. v. LEWIS' ADM'R.

(Court of Appeals of Kentucky. Nov. 23, 1915.)

1. MASTER AND SERVANT \Leftrightarrow 286—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY.

In an administrator's action for the death of a mine company's servant, struck by a wild empty mine car traveling downgrade outside the mine, question whether the death was due to the employing company's negligence held for the jury under the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1038-1042, 1044, 1046-1050; Dec. Dig. \Leftrightarrow 286.]

2. NEGLIGENCE \Leftrightarrow 122—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In an action for death by wrongful act, the burden is on the defendant to show contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-223, 229-234; Dec. Dig. \Leftrightarrow 122.]

3. MASTER AND SERVANT \Leftrightarrow 265—INJURIES TO SERVANT—NEGLIGENCE—BURDEN OF PROOF.

In an action for injuries to a servant, negligence will not be presumed from the fact that the servant has been injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. \Leftrightarrow 265.]

4. NEGLIGENCE \Leftrightarrow 134—CIRCUMSTANTIAL EVIDENCE.

It is not necessary to establish negligence by eyewitnesses in a case against an injured servant's employer; circumstantial evidence is sufficient.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. \Leftrightarrow 134.]

Appeal from Circuit Court, Bell County.

Action by W. S. Lewis' administrator against the Southern Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. N. Sharp, of Knoxville, Tenn., and Robt. G. Low and Wm. Low, both of Pineville, for appellant. John Howard, of Middlesboro, Chas. I. Dawson, of Pineville, and Hazelrigg & Hazelrigg, of Frankfort, for appellee.

NUNN, J. The Tejay mine was owned and operated by appellant company, and on Tuesday April 14, 1913, W. S. Lewis, an employé at the mine, was killed. Lewis at the time was working outside the mine, and had just finished loading eight mine cars with timbers. The motor was hauling them into the mine, and he was walking behind them along the track toward his place of regular work, when a wild empty mine car came down the grade from his rear and ran over

him. His administrator sued, and recovered \$7,500. On this appeal the appellant says the court erred in failing to instruct the jury peremptorily to find for it.

[1, 2] Lewis had been working at this mine only three days, and was employed to work on the track. On the morning he was killed the foreman started him to work inside the mine clearing the track of some fallen slate. The foreman heard of a need for timbers in some other parts of the mine, and told Lewis to go out and load eight cars. The timber yard was situated outside and on a track that led directly into the portal of an old mine entry. Some distance underground from the portal the old entry connected with the new, but it was there bratticed off so that the regular mine haulage was carried on only through the new entry. The track in the old entry, however, was maintained, and cars that were not needed or that were in a damaged condition were often shoved up there and left until needed or until they could be repaired. The track leading out of the old entry and past the timber yard and for a considerable distance beyond was down-grade at least $1\frac{1}{2}$ per cent. It was also around a sharp curve and through a considerable cut, and for that reason one standing on the track at the timber yard could not see closer than 30 to 40 feet of the old entry portal. The timbers were stocked on a bank at an elevation of 4 or 5 feet above the track. Lewis, while upon this bank and throwing timbers down to be loaded on the cars, had a range of vision probably up to the portal, but he could not see a car upon the track within 40 feet of the portal, because the cut and curve obstructed his view. Lewis told Gillispie, the motorman, to take eight empty cars and set them off in front of the timber yard. The motorman says that Lewis was there when he set the cars, and Lewis put a scotch under the front one in order to secure it and keep it from running downgrade. To set these cars, the motorman backed a train up on this track, the eight empties first, leaving them there, and then he cut off a number of cars loaded with slate and took them on to the proper place to be unloaded, and went again into the mine. He thinks he left the last empty car within 30 feet of the old portal. In the course of an hour or two, or by 11 o'clock, the cars were loaded, and Gillispie, the motorman, again coupled onto them and took them into the mine. In a very short while some men working near by heard calls for help in the direction of this track, and at a place 75 feet down from where Lewis had been at work they found him under an empty mine car fatally crushed. As soon as other men came they lifted the car off of him. He was asked how the car happened to get on him. According to the testimony of Lige Rice, he said "he was following a water tank [car] along, and the car came out of the mine there and

caught him." This water car was then standing 15 or 20 feet still further down the grade.

It is a matter of dispute as to how these two cars happened to be left or placed on the track in the vicinity of the old entry, but the main question is whether they were loaded and permitted to run wild down the grade by appellant's negligence. The water tank referred to was a car rigged up with a tight bed, and was used for hauling water. On cross-examination the witness Rice said that Lewis, in answer to a question how it happened, said that "he was following or pushing the water tank, and that the car came out of the mine [the old entry] and caught him." The witness did not remember whether Lewis said he was following or pushing the water box, but did say "he didn't know it was up there [in the old entry]."

Doc Davidson, another motorman, testifies that on Saturday before the accident he "pushed some cars back up there; I can't say whether it was back in the entry or not." This witness and others testify that, according to custom, "some cars that were unloaded and that we did not need we would back up in there." None of the cars were provided with brakes, nor were there any sprags in the yard or in the neighborhood of the old entry with which to secure the cars and keep them from rolling down the grade. They were merely scotched with a "chip, or stick, or rock, or anything lying handy."

There was testimony as to rust conditions on the track in the old entry after the accident which tended to show recent movement of cars thereon. In such case the marks could only have been made by the cars in question. These cars also had drip marks on them; that is, they appeared to have just come from a place in the mine where there was a constant dripping of water.

Lem Parsons, the mine foreman, says that on the day before the accident he noticed the water car standing on the track "a little above the motor house." This would be near about or above the tie yard. He was then asked these questions:

"Q. Tell the jury whether or not, if a trip of cars should bump into that car standing there on that siding and above it back some distance, whether that would release it from any mooring it had there or any scotching, and permit it to come back down the track. A. Certainly, if it moved away from the scotch. Q. Did you notice any cars above the water car? A. No, sir; I did not pay any particular attention, and I didn't notice it."

Gillispie, the motorman that placed these eight cars which Lewis loaded, says that he backed them up in front of the tie yard, and that the furthest car came within about a car length (10 feet) of the mouth of the old entry. In answer to another question he fixes the distance at about 25 feet of the mouth of the old entry. From where the motor car stood on the track we doubt if

the motorman could see much closer than 50 feet of the old entry, and it is evident that the last car of the eight which he set off for loading was around the curve and out of sight; that is, neither he nor Lewis, nor others down on the straight track, could see the last car of the eight or anything beyond it. Gillispie again says he pushed his "trip nearly to the drift mouth." He was not certain whether, at the time he placed the eight cars, the water car was also taken up, nor did he "notice to see whether there was any water car up there or not," and when he pulled the eight loaded cars out he "didn't know whether any other cars followed after them." He then testified as follows:

"Q. If any car had been back on this track at any point here where the trip of cars was at the mouth of the entry, in pushing your trip up there would you have come in contact with it? A. Yes, sir. Q. If it had been scotched, tell the jury whether or not that would have loosened its scotch and when the trip was pulled out permitted it to come on down with it? A. Yes, sir."

The issue in the case is whether by appellant's negligence these cars came loose from whatever fastening they had and rolled down the track. The theory of the administrator, appellee, is that these two cars were in or about the old entry, and were held in place by a chip or some other like obstruction placed on the track next to the wheel, and that while in this position the train of cars shoved in there by Gillispie, the motorman, for Lewis to load came in contact with the water car and mine car, and both of them were thereby shoved further up the grade. Later on, when the eight loaded cars were moved out, the water car and the empty mine car behind it were thus released, and came rolling down the track. On the other hand, appellant contends that the water car and the empty car were on the outside of the old entry and in plain view of Lewis while he was at work, and that he, for some purpose of his own, released and pushed the water car down the track without noticing or scotching the empty behind it, and that the empty car, therefore, ran over and killed him. But the difficulty with appellant's contention is that there is no evidence that Lewis saw either of the cars before or at the time they were loosed, or that he could have seen them from where he was at work or as he came to or went from his work of loading, even if it was his duty to look for them, which it was not. Neither is there any evidence that he released either of the cars, or that he could have had any purpose in so doing. In fact, there is no evidence of any negligence on the part of Lewis. It is established that the two cars were up there in or about the old entry. It is admitted that they were released and caused to roll down, and thereby Lewis was killed. As we have already noted, the evidence tends to show that they were released by the way in which Gillispie operated the

motor train, both in placing and removing the eight cars which Lewis loaded. There is no evidence tending to show a contrary or different state of affairs. It is not material whether he was run over by one or both cars, or whether he was following or pushing the first and was run over by the second. As heretofore explained, the first car stopped at a point 15 or 20 feet beyond the place where he was run over by the mine car. It is plain that Lewis stepped in behind the train of cars as they went out and proceeded to follow them down the track. This was the usual and customary route for his return to the new entry. He had gone about 75 feet. If he heard the empty water car and stepped off of the track to let it pass, and then came back on the track, and was overtaken by the next car, that would not be evidence of negligence on his part. The fact that the company negligently permitted one car to go wild would not impute contributory negligence to Lewis for failing to suspect that the company was guilty of still more negligence in letting another car go wild. The facts and circumstances in evidence warranted the court in submitting the question of appellant's negligence to the jury, and we think the evidence was sufficient to justify the conclusion that, when the motorman put the eight cars on the tie yard for loading, his train extended near to or into the old entry, and in that way the water car and mine car were shoved back up the grade and clear of the chip or obstruction which scotched and held them in place. As the loaded cars were moved out Lewis stepped in behind them on his way to his other place of work. The two cars referred to, no longer scotched, naturally followed, at first slowly, but increasing in speed with distance. The water car, being heavier, probably traveled faster. It may be a matter of conjecture whether one or both cars ran over him, or if only the last car how he escaped the first, but it does not follow from these conjectures that the proof failed to show that he was killed as the direct result of appellant's negligence. It is clearly shown that both cars were by appellant's negligence released and caused to run wild down the grade, and Lewis was killed thereby while he was at a place where duty called him—where he had a right to be. Therefore it makes no difference in this case whether one or both cars ran over him, or whether, when overtaken by the last, he was pushing or following the first. In either event appellant's negligence was the proximate cause of his death. Appellant insists that we can with equal propriety infer that Lewis released the cars. This is not true, because there is proof to show that appellant released the cars, and none to show that Lewis released them. In an action for death by wrongful act, the burden is upon the defendant to show the contributory negligence upon which it relies. *L. & C. Mining Co. v. Stephens' Adm'r*,

104 Ky. 507, 47 S. W. 321, 20 Ky. Law Rep. 696; C., N. O. & T. P. Ry. Co. v. Yocum's Adm'r, 137 Ky. 117, 123 S. W. 247, 1200.

[3, 4] This case does not come within that line of cases where the injury may have resulted from two or more causes, only one of which was the master's negligence. If it was mere conjecture or speculation as to whether the wild car were released by appellant or by Lewis, appellant, of course, would not be liable. If the evidence showed that by a mere possibility the injury was the result of the master's negligence, it would not be sufficient to fix liability. Negligence will not be presumed from the fact that the servant has been injured, and one who alleges negligence must prove it. In the case of death by wrongful act, this rule applies with equal force to one who alleges contributory negligence. As to appellant, there is sufficient evidence to show that it was negligent in the manner in which it stocked empty cars on the track in and about the old entry. It was negligent also in the manner in which it operated the train of cars whereby the cars already standing on the track were released and permitted to run wild down the grade. In this way the appellant failed to exercise ordinary care to provide Lewis a reasonably safe place to work. These conditions were known to appellant, or in the exercise of ordinary care it could have known of and provided against them. To make out a case it is not necessary to establish it by eyewitnesses. This may be done by circumstantial evidence. *L. & N. v. Taylor*, 158 Ky. 633, 166 S. W. 199; *Southern Ry. Co. v. Caplinger's Adm'r*, 151 Ky. 749, 152 S. W. 947, 49 L. R. A. (N. S.) 660.

It seems to us that the appellee made out a plain case of negligence against appellant; a case in which there is very little conflict in the evidence. Such questions as were in issue the court submitted to the jury under proper instructions, and the finding of the jury in behalf of appellee is, as we think, in accord with the evidence.

The judgment is therefore affirmed.

ROCKCASTLE MINING, LUMBER & OIL CO. v. BAKER et al.

(Court of Appeals of Kentucky. Nov. 24, 1915.)

1. MARRIAGE — COHABITATION — PRESUMPTION — REBUTTAL.

The presumption of marriage, which arose from cohabitation for over 50 years under a generally recognized claim of marriage by a couple who raised a large family of children, was not overcome by the testimony of the woman's child, who was an interested witness, that his mother and stepfather began cohabiting without marriage when he was 5 years old.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 58-69, 79; Dec. Dig. § 40.]

2. MARRIAGE — COHABITATION — PRESUMPTION.

The presumption of marriage arising from cohabitation in apparent matrimony is stronger

and less easily overthrown than other presumptions of fact, because marriage is of the highest public interest.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 58-69, 79; Dec. Dig. § 40.]

Appeal from Circuit Court, Jackson County.

Action between the Rockcastle Mining, Lumber & Oil Company and D. H. Baker and others. From a judgment for Baker and others, the company appeals. Affirmed.

J. R. Llewellyn, of McKee, and Williams & Johnson, of London, for appellant. A. W. Baker, of McKee, for appellees.

TURNER, J. On the 9th day of January, 1892, Emeline B. Gardner executed a deed by which she conveyed to John F. Hubbard a small tract of land in Jackson county. Robert Gardner, who had for many years lived with Emeline Gardner as her husband, did not join with her in this deed. Thereafter appellee Baker recovered a judgment against Emeline Gardner, and, treating the conveyance by her to Hubbard as void, had his execution issued, levied on the land, and sold, and at the sale became the purchaser, and now claims under this execution sale. The appellant is claiming title under the deed from Emeline Gardner to Hubbard, and the only question in the case is whether, at the time of the execution of the deed to Hubbard, Robert Gardner was the husband of Emeline Gardner, for, if he was, her deed to Hubbard was void, and, if he was not, her conveyance was valid, and Baker acquired nothing by the subsequent execution sale.

Hubbard was the son of Emeline Gardner, but it is not clear from the record whether he was an illegitimate son, or her child by a former marriage. In an effort to uphold the conveyance of his mother to him, he testifies that when he was about five years of age his mother and Robert Gardner began illicit relations in Kenton county, Ky.; that they continued such relations thereafter when they moved to Ohio and Indiana, and when they moved back to Kentucky; that they had never in fact been married. On the other hand, it is shown that these two old people had lived together as husband and wife since about the year 1860, or earlier; that they each had held themselves out as husband and wife in the communities where they lived; that they had raised a large family of children; that they had claimed they were married by a ceremony performed in 1860 at Cincinnati; that they were recognized in the communities where they resided as husband and wife; that they were devout Christian people, and were recognized by their church associates as husband and wife, and in all respects were considered and treated by their neighbors as such.

[1] There is a great deal said in the briefs

about common-law marriages in Kentucky, and about the recognition of common-law marriages in other states by the courts of this state; but in our view of this case the only real question is whether, after this long lapse of years, this weak, unsatisfactory testimony of an interested witness, testifying about transactions which occurred when he was an infant only five years of age, is sufficient to overcome the presumption of marriage which arises because of the long, uninterrupted cohabitation of the old people, the raising of a family by them, and the recognition of them by their friends and neighbors as husband and wife during this long period.

There is evidence in the record that the old people claimed to have been married in Cincinnati in September, 1860; but there is no competent record evidence of such marriage, although there appears in the record a certificate of a probate judge or justice from Cincinnati to the effect that in 1884 the courthouse in Cincinnati was burned and many of the marriage records destroyed. How far the presumption of marriage will be indulged by the courts when men and women cohabit together, in the absence of direct evidence of marriage, has been frequently considered in the courts of this state as applied to the presumption of legitimacy of children; but in this case there is no question of legitimacy raised. We think, however, that the same general rule of law must control, although the presumption might not be so freely indulged where no question of legitimacy arises. We have here an old couple who have lived together constantly for more than 50 years; who have in that time raised a large family of children; who claimed to have been married in another state, although there is no record evidence of such marriage; who had been constantly during that time recognized and treated by their neighbors as husband and wife; who throughout that period in all their social and commercial activities have been recognized as man and wife. To permit, under these circumstances, weak, flimsy, and unsatisfactory testimony of an interested witness to overcome the presumption which necessarily arises from these conditions, would be a dangerous precedent.

[2] Bishop on Marriage, Divorce, Separation, vol. 1, § 959, under the general title of "Evidence of Marriage," thus states the rule which must control this case, to wit:

"Persons dwelling together in apparent matrimony are presumed, in the absence of any counter presumption or evidence special to the case, to be in fact married. The reason is that such is the common order of society, and that if the parties were not what they thus hold themselves out as being, they would be living in the constant violation of decency and of law. And because marriage is the highest public interest, this presumption is stronger and less easily overthrown than the other and ordinary presumptions of fact."

Likewise Keezer on Marriage and Divorce, § 44, distinctly recognizes this doctrine in the following language:

"In the absence of any charge of criminal intent, as in the case of bigamy, marriage may be presumed to exist as a fact between a man and woman, who have openly cohabitated and consorted together, under circumstances which would justify the presumption. This presumption of fact is based upon the various presumptions of law in favor of innocence rather than guilt, of regularity in a ceremony rather than irregularity, and a general presumption of marriage."

See, also, Caldwell v. Williams, 118 S. W. 932; Klenke v. Noonan, 118 Ky. 436, 81 S. W. 241, 26 Ky. Law Rep. 305; and 26 Cyc. 540.

This presumption of law arising from long cohabitation and recognition has not been overcome by the evidence in this case.

The judgment is affirmed.

LACK SINGLETREE CO. v. CHERRY.

(Court of Appeals of Kentucky. Nov. 18, 1915.)

1. MASTER AND SERVANT ⇐220—INJURIES TO SERVANT—INCOMPETENT FELLOW SERVANT.

If a servant believes another servant to be incompetent, and complains of that fact to the master, and the master assures the servant there is no danger; and the servant, relying upon this assurance, continues in his work, and is injured by reason of the incompetency of the other servant, the master is liable, unless the danger was so obvious that an ordinarily prudent person would not have continued his work; so, a petition averring such state of facts is sufficient, though it does not deny plaintiff's knowledge of his fellow servant's incompetence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 625-637, 641, 644-647; Dec. Dig. ⇐220.]

2. MASTER AND SERVANT ⇐216—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A servant does not assume the risk arising from want of sufficient and skillful fellow servants, unless the incompetence was such that an ordinary man would not have continued work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 567-573; Dec. Dig. ⇐216.]

3. MASTER AND SERVANT ⇐216—INJURIES TO SERVANT—DUTY OF MASTER.

While a servant assumes the risk of ordinary negligence of fellow servants, the master is bound to engage reasonably competent fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 567-573; Dec. Dig. ⇐216.]

Appeal from Circuit Court, McCracken County.

Action by W. W. Cherry against the Lack Singletree Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Berry & Grassham, of Paducah, for appellant. Hendrick & Nichols and F. N. Burns, all of Paducah, for appellee.

MILLER, C. J. The appellant operates a factory in which it makes singletree clips.

George Koerner worked as a molder for the appellant, and the appellee, W. W. Cherry, was his "shifter" or assistant. Koerner's duties required him to carry the molten metal from the place where it was melted and pour it into molds; and it was Cherry's duty to ship the molds from one place to another after they were filled with the molten metal, as the necessities of the work required. The petition alleges that Koerner was so incompetent and negligent by reason of his clumsiness and defective eyesight, that he negligently struck a ladle he was carrying, filled with molten metal, against a plank, and spilled the metal upon Cherry's foot, burning it to the bone, and seriously and permanently injuring him. Cherry recovered a verdict and judgment for \$1,000, and the defendant appeals.

[1] After charging Koerner with the delinquencies and negligence above stated, the petition admits that the plaintiff knew these delinquencies before he was injured; and it further alleges that he went to appellant's foreman upon two occasions and complained to him of Koerner's lack of sight, of his awkwardness and clumsiness, of his incompetency to perform the services required of him, and that it was dangerous for appellee to work with or near Koerner. The petition further alleges that the foreman assured Cherry that Koerner was a competent and experienced man, and capable of performing his duties as a molder; that there was no danger in Cherry's working in conjunction with him for a short while, and until the foreman could place him elsewhere; that Cherry relied upon the superior knowledge and judgment of the foreman, and upon the assurance above stated; and that one of said assurances was made to appellee three or four days before the accident, while the second was made only a day or two before the accident.

Appellant insists that the petition does not state a cause of action, and that its demurrer thereto should have been sustained, because it admits that appellee knew of Koerner's infirmities and incompetency, and that, his knowledge in these respects being equal to the knowledge of the master, Cherry could not recover under the rule laid down in *Bogenschutz v. Smith*, 84 Ky. 330, 1 S. W. 578, 8 Ky. Law Rep. 376. Appellant relies upon the authority of that case for a reversal.

While it must be admitted that *Bogenschutz v. Smith*, supra, sustains appellant's contention, in a large measure, it should not be forgotten that the doctrine there announced upon this subject has been somewhat departed from by this court, if not entirely repudiated.

In the late case of the *East Tennessee Telephone Co. v. Jeffries*, 153 Ky. 136, 154 S. W. 1113, we said:

"It is evident from the language of the instructions referred to that the trial court was

of opinion that the facts of the instant case brought it within the rule announced in *Bogenschutz v. Smith*, 84 Ky. 330 [1 S. W. 578, 8 Ky. Law Rep. 376], which in effect holds that, if the information of the master and servant with respect to the place of work or tools with which to perform the work are equal, and if both are either without fault or in equal fault, the servant cannot recover damages of the master. This rule was first declared in England, and later followed in many of the American states, but it has in this state been so modified in cases decided since that of *Bogenschutz v. Smith*, as to have been practically disaffirmed. *Pfisterer v. J. H. Peter & Co.*, 117 Ky. 501 [78 S. W. 450, 25 Ky. Law Rep. 1605]; *L. & N. R. R. Co. v. Foley*, 94 Ky. 224 [21 S. W. 866, 15 Ky. Law Rep. 17]; *Olive Hill Fire Brick Co. v. Ash*, 146 Ky. 253 [142 S. W. 403]; *Frazier & Foster v. Danner*, 146 Ky. 76 [142 S. W. 216]; *Ky. Free Stone Co. v. McGee*, 118 Ky. 308 [80 S. W. 1113, 25 Ky. Law Rep. 2211]; *Angel v. Jellico Coal Mining Co.*, 115 Ky. 728 [74 S. W. 714, 25 Ky. Law Rep. 108]; *Ohio Valley Ry. Co. v. McKinley* [33 S. W. 186] 17 Ky. Law Rep. 1028; *Int. Coal Co. v. Fannon*, 145 Ky. 198 [140 S. W. 163]."

The law upon this subject was tersely stated in *Bell-Coggeshall Co. v. Lewis*, 89 S. W. 135, 28 Ky. Law Rep. 149, as follows:

"The instructions given by the trial court aptly presented the law governing the case. They, in substance, informed the jury that, if they believed from the evidence the assistant furnished appellee by appellant was competent to perform the duties assigned him, they should find for appellant; upon the other hand, if they believed from the evidence that the assistant was incompetent to perform the duties, and appellee was injured by reason of the incompetence of such assistant, and that before being injured he complained to appellant's superintendent of the incompetence of the assistant, and was assured by the superintendent of his competency, and, relying upon such assurance, appellee accepted the services of the assistant, it was the duty of the jury to find for appellee, unless they further believed from the evidence that the danger of his continuing work with the incompetent assistant was so obvious that an ordinarily prudent man would not have continued to work as appellee did, even though such assurance was given.

"The jury were also advised that, if they believed from the evidence that, though appellee's assistant was incompetent, and still he continued to work without complaint on his part and without assurance on the part of his employer or superintendent of the competency of such assistant, or if they believed from the evidence that, though such assurance was given, appellee did not rely upon it, they should find for appellant."

The modern doctrine may therefore be said to be that, if a servant believes another servant to be incompetent, and he complains of that fact to the master, and the master assures the servant that there is no danger, and the servant, relying upon this assurance, continues in his work, and is injured by reason of the incompetency of the other servant, the master is liable, unless the danger of continuing in the work with the incompetent assistant was so obvious that an ordinarily prudent person would not have continued to work, as appellee did, even though such assurance was given; and a petition showing such a state of facts is sufficient, although it fails to contain the allegation negating the plaintiff's knowledge of the defective place.

as was held in *Bogenschutz v. Smith*, supra.

It was the duty of the appellant to use ordinary care to employ a competent molder, and if it failed to do so, and assured appellee it would replace him by a competent workman, appellee had the right to rely upon this assurance.

The petition fully complies with the modern rule as above laid down, and the demurrer thereto was properly overruled.

[2] The proof shows that Koerner was blind in one eye, and could see very indifferently with his other eye; that he was quite awkward and clumsy in his movements; and appellant insists that, since Cherry had worked with Koerner for about six months before the accident, he necessarily knew his delinquencies and defects as a workman, and consequently assumed that risk. We think this point is sufficiently answered by the following language taken from the opinion of this court in *I. C. R. R. Co. v. Langan*, 116 Ky. 321, 76 S. W. 32, 25 Ky. Law Rep. 500:

"Appellant's next point is that appellee was aware of the danger in his employment resulting in his injury at the time he undertook it, and that his continuing in this employment, with knowledge of the inadequate force, was equivalent to his own assumption of the danger incident to the task. This would be true if the danger was such an obvious one as that the injury was reasonably certain to result, so that none but a reckless man would have undertaken it under the circumstances. We understand the rule on this subject to be that, if the danger or risk is such that a prudent man would have refused to do the work under the circumstances because of the danger, then the servant will act at his peril in undertaking it. But where the probability of injury is such that the minds and judgments of prudent men might well differ upon the certainty of its happening or with regard to whether the force or appliances are reasonably safe or adequate to the performance of the task, and where the master insists, after objection, that the servant proceed with the work, or assures him that the force is adequate or the machinery safe, then the servant has a right to rely upon the master's presumed superior knowledge. The risk is thereby assumed entirely by the master, and he impliedly assures the servant, who relies upon his statement, or who obeys his positive direction, that if he (the master) is in error as to the safety, he would indemnify the obedient servant against the consequences. *Shearman & Red. Neg. 126; Clark v. Holmes*, 7 Hurl. & N. 937; *Snow v. Housatonic R. R.*, 8 Allen (Mass.) 450, 85 Am. Dec. 720; *Conroy v. Vulcan Iron Works*, 62 Mo. 89."

The opinion in that case also quoted from the case of *N. P. R. R. Co. v. Herbert*, 116

179 S.W.—68

U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755, where the Supreme Court of the United States said:

"The servant does not undertake * * * the risks arising from the want of sufficient and skillful collaborators, or from defective machinery. * * * His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him."

See, also, *Lasch v. Stratton*, 101 Ky. 672, 42 S. W. 756, 19 Ky. Law Rep. 889; *Shanks v. Citizens' General Electric Co.*, 76 S. W. 379, 25 Ky. Law Rep. 811; *L. & N. R. R. Co. v. Mahan*, 113 S. W. 886.

[3] Finally, appellant insists that the trial court erred in refusing to give instruction M offered by appellant, upon the law of fellow servants. Considered as an abstract proposition of law, appellee does not question the soundness of the instruction, but denies its applicability to this case. The recovery was sought in this action because of the master's failure to select a competent servant to work with the appellee, and, further, because the master assured appellee that the incompetent servant was competent.

We think the contention of appellant is well answered by the following excerpt taken from the opinion of this court in the *Langan Case*, above referred to:

"There are certain risks which a laborer assumes as incident of his employment. Among these is that of the ordinary negligence of his fellow servants. Although each servant in the common employment is a representative of the master to the extent that he is acting within the scope of his duties, yet for many kinds of ordinary neglect towards his fellow servants the master may not be liable for resulting injuries. However, there are certain duties which the master owes to his servants that are primary and personal in their nature, and which he may not delegate to another so as to escape liability for their nonperformance. Among these he owes to his servants to furnish them a reasonably safe place in which to do their work, and must furnish them reasonably safe tools and appliances with which to do it. Alongside of these he must furnish them adequate assistance, or a sufficient number of workmen. So, where the master assigns or imposes upon one of his servants the duty of representing him in providing these means, the servant's acts are deemed to be those of the master, and for a simple neglect by such servant the master is responsible as though he acted in person."

The doctrine of fellow servant had no application under the facts of this case, and the court properly refused to give the instruction asked.

Judgment affirmed.

CITY OF PRINCETON et al. v. PRINCETON ELECTRIC LIGHT & POWER CO.

(Court of Appeals of Kentucky. Nov. 17, 1915.)

1. MUNICIPAL CORPORATIONS — ADVERTISEMENTS — CONSTITUTIONAL PROVISIONS.

The purpose of Const. § 164, prohibiting any municipality from granting any franchise for a term exceeding 20 years, and providing that, before granting a franchise for a term of years, the municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder, is to secure municipalities against the loss of valuable rights, and to give information to all having an interest in the privileges to be sold, and thereby enable municipalities to receive the value of privileges to be granted.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1471-1476, 1479; Dec. Dig. ¶683.]

2. MUNICIPAL CORPORATIONS — ADVERTISEMENTS — CONSTITUTIONAL PROVISIONS.

Under Const. § 164, providing that a municipality before granting a franchise, shall after due advertisement receive bids therefor, and award the same to the highest and best bidder, a city advertising the sale of a franchise, with a right to exercise it for 10 years, may not receive a bid and grant a valid franchise to exercise the privilege for 15 or any other number of years; and a stipulation in an ordinance granting a franchise for 10 years, pursuant to a bid after advertisement, that the grantee shall have the right to another franchise, which the city may conclude to create and sell at the expiration of the 10 years, is invalid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1471-1476, 1479; Dec. Dig. ¶683.]

3. MUNICIPAL CORPORATIONS — GRANT OF FRANCHISE — NATURE OF RIGHT — CONSTRUCTION — "FRANCHISE."

A "franchise" is a special privilege bestowed by the government on an individual, and which does not apply to the citizens generally as a matter of right; and where there is any ambiguity, in an ordinance granting a franchise, as to the time in which it is to be enjoyed, it will be construed more strictly against the grantee.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1481; Dec. Dig. ¶684.

For other definitions, see *Words and Phrases*, First and Second Series, *Franchise*.]

4. MUNICIPAL CORPORATIONS — ADVERTISEMENTS — VALIDITY.

An ordinance of a city granting a franchise for 10 years, enacted without advertising and receiving bids, as required by Const. § 164, is void, and the grantee of the franchise receives nothing thereby.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1471-1476, 1479; Dec. Dig. ¶683.]

5. MUNICIPAL CORPORATIONS — ADVERTISEMENTS — VALIDITY.

An ordinance of a city granting to an electric light and power company the exclusive right for a term of years to manufacture and sell electric light and power within the limits of the city, with the privilege of using the streets and alleys for poles and wires, attempts to create a franchise beyond the power of the city to grant, for the right to produce and sell elec-

tricity as a commercial product is a business which is open to all, and the franchise which a city can grant is the use of its streets for the delivery of light and power produced by electricity to the consumers thereof, but it cannot grant the privilege to one to use its streets and alleys to the exclusion of another to whom it may grant a franchise for the same purpose.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1467-1470; Dec. Dig. ¶682.]

6. MUNICIPAL CORPORATIONS — ADVERTISEMENTS — VALIDITY.

A franchise granted by a city for more than 20 years after the granting thereof is beyond the power of the city to grant.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1467-1470; Dec. Dig. ¶682.]

7. WORDS AND PHRASES — "PUBLIC POLICY."

"Public policy" is equivalent to the policy of the law, and is a principle of law which holds that no one can lawfully do a thing which tends to be injurious to the public, or is contrary to the public good; and public policy must be looked for in the Constitution and statutes and the decisions of the highest court of a state.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Public Policy*.]

8. MUNICIPAL CORPORATIONS — ADVERTISEMENTS — VALIDITY.

A grant by a city of a franchise to an electric light and power company for 10 years, to begin about 4½ years after the enactment of the ordinance granting the franchise, is invalid, as contrary to public policy.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1467-1470; Dec. Dig. ¶682.]

9. ELECTRICITY — INVALID FRANCHISE — COMPENSATION — ENFORCEMENT.

Where a franchise to an electric light and power company to supply a city and the inhabitants thereof with electric light and power for a term of years is void under Const. § 164, the company furnishing light and power for the city may not collect therefor.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. ¶11.]

10. MUNICIPAL CORPORATIONS — CONTRACTS — VALIDITY.

A municipal corporation can exercise only the powers granted it, and it is not bound by contracts of its officers which they have no power to make; and where a city receives benefits under such void contracts, the law does not raise any promise to pay for the benefits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 651-656, 682; Dec. Dig. ¶247.]

11. MUNICIPAL CORPORATIONS — CONTRACTS — VALIDITY.

One contracting with a municipality must at his peril know the rights and powers of the officers thereof to make contracts, and the manner in which they must make them.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 645-650; Dec. Dig. ¶226.]

12. ELECTRICITY — CURRENT FURNISHED CITY — COMPENSATION UNDER VOID FRANCHISE — PAYMENT — RECOVERY.

A city, paying for electricity furnished by a company operating under a void franchise, cannot recover the sums paid, where the sums charged and paid were not unreasonable, and not induced by fraud or mistake.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. ¶11.]

13. ELECTRICITY ⚡4 — VOID FRANCHISE — RIGHTS—USE OF STREETS—LICENSE.

Where an ordinance of a city granted to a company the right to supply electric light and power, and the company acted thereunder, the company, using the streets of the city, used them as a licensee, though the ordinance was void; and while the city could revoke the license, it must give the company a reasonable time within which to remove its property from the streets.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 1; Dec. Dig. ⚡4.]

14. INJUNCTION ⚡67 — FRANCHISES — ENFORCEMENT.

Citizens of a municipality may compel a grantee of a franchise, where there are provisions therein for their benefit, to exercise the franchise.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 135; Dec. Dig. ⚡67.]

15. ELECTRICITY ⚡4 — USE OF STREETS — FRANCHISES.

A city need not allow the use of its streets by a public service corporation without a franchise, merely because it has entered into obligations with citizens which it cannot perform without a franchise.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 1; Dec. Dig. ⚡4.]

16. MUNICIPAL CORPORATIONS ⚡1027—FRANCHISES—ENFORCEMENT.

Where a city brought suit against a public service corporation having a void franchise, to protect the rights of the city, and its petition contained all the causes of action and sought all the relief obtainable, the petition of a citizen to be made a party plaintiff was properly rejected.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2198; Dec. Dig. ⚡1027.]

Appeal from Circuit Court, Caldwell County.

Action by the City of Princeton and others against the Princeton Electric Light & Power Company, in which R. W. Lisanby petitioned to be made a party plaintiff. There was a judgment rejecting the petition of R. W. Lisanby and for defendant, and the city and R. W. Lisanby appeal. Reversed in part, affirmed in part, and remanded, with directions.

R. W. Lisanby and S. Hodge, both of Princeton, for appellants. Selden Y. Trimble, of Hopkinsville, John O. Gates, of Princeton, and Trimble & Bell, of Hopkinsville, for appellee.

HURT, J. Princeton is a city of the fourth class. On the 8th day of October, 1896, the council of the city adopted a resolution directing its clerk to cause advertisement to be made for sealed bids for the sale of a franchise to furnish the city with electric lights for a period of 10 years, the bids to be received on the 22d day of October thereafter. The bid of Eddins and Boyce was accepted, and it was thereafter granted to them by an ordinance, which we assume was duly adopted. On account of the conclusions we have reached, and which will be apparent from what is hereinafter said, it is not necessary to consider the various rea-

sons which are urged by appellants, contending that the ordinance which granted the franchise is void.

The appellants contend that this franchise, if valid, expired on the 1st day of January, 1907, and the appellee contends that it did not expire until the 1st day of January, 1917, and this is the only question which we deem necessary to be determined with reference to the alleged franchise. The resolution directing the clerk to advertise for sale the franchise described it as a "franchise for furnishing the city with electric lights for a period of 10 years." The preamble of the ordinance which granted the franchise recited that the clerk had been directed to advertise for a sale of the franchise for 10 years, and that he had acted in accordance with the direction. The first clause of the ordinance is as follows:

"The said J. T. Eddins and R. B. Boyce are hereby granted the exclusive right or franchise to manufacture and sell electric light within the corporate limits of the city of Princeton, Ky., for public, private, and commercial use, for and during the period of 10 years, from and after January 1, 1897."

The foregoing seems to definitely fix the time of the expiration of the franchise. However, section 11 of the ordinance granting the franchise provides that, if the grantees desire to sell or transfer it before the time of its expiration, the appellant city shall have the first right to purchase it, and that it shall be sold or transferred only after the city has received notice and refused to purchase it, within a reasonable time, at a sum equal to any bona fide offer that may be made for it by another. Section 12 of the ordinance provides that upon the expiration of the franchise the city shall have the option of purchasing the electric light plant, and all poles, wires, tools, machinery, or appurtenances belonging thereto, at a price to be agreed upon by the city and the grantees, or their successors, and in the event of a disagreement the price to be determined by appraisers. Section 13 provides that, upon the expiration of the franchise and the failure or refusal of the city to purchase the plant, if the city should determine to grant another franchise, the grantees shall have an option upon it, provided they will accept it upon such reasonable terms as may be named by the city. By other provisions of the ordinance it was provided that the grantees of the franchise should not sell, assign, or transfer it to a corporation, nor operate it as the agents of any corporation or a corporation, and that the failure or refusal of the grantees to comply with any of the conditions or requirements of the ordinance should have the effect to annul the ordinance and to forfeit the franchise.

In the year 1904, however, the grantees of the franchise and others organized a corporation and the plant and franchise were trans-

ferred to it. Thereafter, in the latter part of the year 1906 (the date does not definitely appear), the council of appellant city adopted an ordinance, in which it was recited that the franchise theretofore granted to Eddins and Boyce would expire on January 1, 1907, and that the city had failed to exercise its option to purchase the plant and fixtures on or before the expiration of it, and that Eddins and Boyce had transferred their plant and franchise to the appellee, and after said recitations, by its terms, undertook to grant appellee the exclusive right to manufacture electric light and electric power, or either, for public or commercial use, within the corporate limits of the city, for and during the 10 years from and after January 1, 1907, in consideration of the acceptance and compliance with all the conditions thereafter set out in the ordinance. The attempted sale of this franchise was never advertised at all, nor was it offered for sale publicly, nor bids received for it. No attempt was made to comply with the requirements of section 164 of the Constitution. Under the above-recited arrangements the appellee now contends that it has a valid franchise," and is now operating under same, and that all these transactions and stipulations amount to having received a valid franchise under the ordinance of 1906 to operate in the city from January 1, 1897, until January 1, 1917. We cannot agree to the soundness of this contention. Section 164 of the Constitution provides as follows:

"No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. * * *

[1] The purpose of "due advertisement" provided for is to give information to all who may desire to become purchasers of the franchise, and to enable them to make bids therefor, and to secure the municipalities against the loss of valuable rights for mere paltry considerations. It is to give information to all, who have an interest in the privileges to be sold, of what is proposed to be done, that citizens of a municipality may protect their rights in such matters in any proper way that necessity may create. The sale to the highest and best bidder is to enable the municipality to receive the value of the privilege to be granted away, and to prevent municipal councils from granting valuable rights and privileges to favorites without any sufficient consideration. It follows, as a natural sequence, that the only thing which can be lawfully sold is the thing which has been advertised for sale.

[2] A city council, after having advertised the sale of a franchise, with the right to exercise it for 10 years, could not receive a

bid and grant a valid franchise to exercise the privilege designated for 15 or any other number of years. To attempt to do so would be the attempt to grant the right to exercise the privilege without due advertisement, as required by the Constitution. Where the council advertised to sell a franchise for 10 years, a stipulation in the ordinance granting the franchise for ten years, providing that at the expiration of the 10 years the grantee should have the right to have granted to him another franchise, which the city might conclude to create and sell at that time, is invalid.

A reading of the ordinance granting the franchise from January 1, 1897, until January 1, 1907, and the ordinance granting a franchise to be exercised from January 1, 1907, until January 1, 1917, conclusively shows that neither the council of the city nor the appellee construed or understood the first-named ordinance as granting a franchise for any longer period than until January 1, 1907. At the time of the adoption of the last-named ordinance, a resolution of the council is as follows:

"By ordinance, the Princeton Electric Light & Power Company was granted an extension of 10 years from January 1, 1907, on their franchise, by unanimous vote of the council."

Section 1 of the ordinance recites:

"That whereas, the franchise heretofore granted by the city of Princeton to J. T. Eddins and R. B. Boyce * * * to manufacture and sell electric light within the corporate limits of the city of Princeton will expire January 1, 1907," etc.

In the same section of the ordinance are the words:

"Are hereby granted the exclusive right to manufacture and sell electric light and electric power, or either, for public or commercial use. * * * for and during the ten years from and after January 1, 1907," etc.

Pending the negotiations for the attempted granting of the franchise, the proceedings of the council show the report of a committee, which recommended—

"letting another franchise for 10 years from January 1, 1907, when old electric or present franchise expires," and, further, the appointment of a committee, "with authority to close contract for lights and extend franchise for 10 years from expiration of present one, with said electric light company."

All of this makes exceedingly plain the construction put upon the proceedings by the parties themselves, at the time, as to number of years the franchise granted in 1896 was to extend, and when it should expire.

[3, 4] Further, the alleged franchise from 1907 until 1917 is materially different, both as to the thing granted and the terms and conditions upon which it was granted, from the one which was granted in 1896. Ignoring the contention that the franchise granted in 1906 had been forfeited by the grantees transferring it contrary to the provisions of the ordinance of 1896, it seems that the ordinance which purports to grant the appellee a franchise to be exercised from January 1,

1907, until January 1, 1917, was adopted and the privilege attempted to be granted for a term of years without advertisement and without receiving bids for the franchise publicly, and without a letting to the highest and best bidder. A franchise being a special privilege bestowed by the government upon an individual, and which does not belong to the citizens generally as a matter of common right, if there is any ambiguity in the terms of an ordinance granting a franchise, as to the time in which it is to be enjoyed, it will be construed more strictly against the grantee. 15 Cyc. 467. The franchise granted in 1896 (if one was granted) expired on the 1st day of January, 1907, and the ordinance which purported to grant a franchise to be enjoyed from January 1, 1907, until January 1, 1917, was void, and the grantees received nothing thereby. *Frankfort Telephone Co. v. Board of Council of City of Frankfort*, 125 Ky. 59, 100 S. W. 310, 30 Ky. Law Rep. 885; *Nicholasville Water Co. v. Board of Council of Nicholasville*, 36 S. W. 549, 38 S. W. 430, 18 Ky. Law Rep. 592; *Monarch v. Owensboro City R. R. Co.*, 119 Ky. 939, 85 S. W. 193, 27 Ky. Law Rep. 380; *City of Providence v. Providence Electric Light Co.*, 122 Ky. 237, 91 S. W. 664, 28 Ky. Law Rep. 1015; *Oum, T. & T. Co. v. Hickman*, 129 Ky. 220, 111 S. W. 311, 33 Ky. Law Rep. 330; *Christian-Todd Tel. Co. v. Com.*, 156 Ky. 557, 161 S. W. 543.

[5] The ordinance directing the advertisement for sale of a franchise to furnish light and power from January 1, 1917, until January 1, 1927, was adopted in the year 1912. The conditions and requirements under which the franchise proposed to be sold was to be exercised was described as the same then enjoyed by the appellee under the franchise it then held. The appellee then did not hold any franchise, but the nature and character of the franchise was to be sought in the void ordinance of 1906. It did not have so much as a contract with the city, since the manner of its making was in direct conflict with the constitutional requirement. The appellee was the only bidder for the franchise proposed to be sold, in 1912, for the term beginning January 1, 1917, and extending 10 years thereafter. The ordinance adopted by the council, which attempted to create the proposed franchise and directed its advertisement and sale, did not create and offer for sale a franchise to use the streets and public ways and places of the municipality for the distribution of the electrical current and its delivery to the consumers, but by its exact terms attempted to create and offer for sale a franchise "for the exclusive right to manufacture and sell electric light and power for public, municipal, and private commercial purposes, within the corporate limits of the city of Princeton, Ky., for and during a period of 10 years, from and after January 1, 1917," etc. In the ordinance adopted thereafter the franchise granted was described "as the exclusive right, for and during the

period of 10 years, from and after January 1, 1917, to manufacture and sell electric light and power within the corporate limits of the city of Princeton, Kentucky." By a clause of the ordinance after the granting of the franchise it was given the privilege of the use of the streets and alleys for its poles and wires, as might be necessary for the lighting of the city.

The franchise attempted to be granted is one which cannot be created and is beyond the power of the municipal authorities to grant. The right to produce and sell electricity as a commercial product is not a prerogative of a government, but is a business which is open to all, and for that reason is not a franchise. The franchise which the municipality can grant is the use of its streets for the delivery of the light and power, produced by the electricity, to the consumers of it. *Purnell v. McLane*, 98 Md. 589, 56 Atl. 830; 15 Cyc. 467. Neither can a municipality grant the privilege to one to use its streets and alleys to the exclusion of another, to whom it may grant a franchise to use them for the same purposes. The franchise attempted to be granted in 1896 was subject to the above objections; but, it having expired on January 1, 1907, no consideration of it is now necessary. The same objection existed to the franchise attempted to be granted in 1906; but it was invalid for other reasons above stated. By the terms of the ordinance granting the franchise to be exercised from January 1, 1917, until January 1, 1927, the appellee was required to accept its terms and conditions by writing an acceptance upon the record of the city council, and execute bond for the performance of the conditions and obligations undertaken by it. No time was fixed for the acceptance or execution of the bond, which, however, should have been done within a reasonable time to make the franchise irrevocable by the council of the city. It, however, neglected to accept the grant as required, or to execute the bond, until in the year 1914, when the city council adopted an ordinance by which it undertook to revoke the grant of the franchise, and to declare that the appellee was using the streets and public ways and places of the city without authority of law. Since the filing of this suit, the appellee has made and tendered in court a bond, as required by the ordinance which granted the franchise.

[6] With the view entertained by us with regard to the validity of the ordinance purporting to grant the franchise and the power of the council to create and sell a franchise for the purpose of creating and furnishing electric light and power in a city of the fourth class, it is unnecessary to determine the effectiveness of the repealing ordinance adopted by the council in 1914. The bid was received for the sale of the franchise from January 1, 1917, until January 1, 1927, on the 3d day of June, 1912. This was a period of 4½ years before the franchise can be en-

joyed. If the grant is valid, it ties the hands of the city for over 15 years. If it is within the power of the city council to create and grant a franchise which is not to be exercised for $4\frac{1}{2}$ years, it is within its power to grant one for 5 or a less number of years, and postpone the time of its exercise to 15 or a greater number of years, so as not to carry the exercise of it beyond 20 years. This court has held that, if the termination of the period for which a franchise is granted is more than 20 years after the granting of the franchise, it is beyond the power of the council to grant it. If the franchise granted to Eddins and Boyce, in 1906, and the period of its exercise commencing as it did on January 1, 1907, had been for 20 years, as contended by appellee, instead of 10, the attempt to grant it would have been void, because the period of its termination would have been more than 20 years after its granting. *City of Somerset v. Smith*, 105 Ky. 678, 49 S. W. 456, 20 Ky. Law Rep. 1488; *Hilliard v. Fetter Lighting & Heating Co.*, 127 Ky. 95, 105 S. W. 115, 31 Ky. Law Rep. 1330.

[7] Putting aside any objection to the franchise attempted to be granted in 1912, on account of the want of power in the municipal council to create or grant such a franchise, and passing over the effect of the ordinance purporting to revoke the ordinance granting the franchise, the question is presented as to whether or not a municipal council of a city of the fourth class can grant a valid franchise to a public service corporation, for the use of its streets and public ways for its apparatus, for the period of 10 years, the time of its exercise to commence at the termination of $4\frac{1}{2}$ years after the granting of it? It is insisted that such a proceeding is void, as being contrary to sound public policy. Public policy has been defined as being the equivalent to the policy of the law, and is a principle of law which holds that no one can lawfully do a thing which tends to be injurious to the public or is contrary to the public good. 32 Cyc. 1251. The good of the community, in certain cases, is relied upon to restrict the freedom of contracting. The public policy must be looked for in the Constitution and statutes and the decisions of the courts of last resort of a state, and where there is no legislative prohibition of a certain character of agreement before a court is authorized to declare it void, it must appear that such an agreement or contract has a tendency to injure the public or is against the public good, or is contrary to sound policy and good morals. 9 Cyc. 482. There is no legislative prohibition, in this state, of the granting of a franchise for 10 years, and postponing the commencement of the exercise of it for $4\frac{1}{2}$ years, after the granting of it.

[8] Looking to the policy of the law to be deduced from the Constitution and statutes, it is apparent that the requirements of our

Constitution and the statutes, which govern the granting of franchises by municipal corporations, were intended to remedy serious wrongs under which the public was suffering. Theretofore the valuable franchises, which should be enjoyed primarily for the benefit of the public, as well as the grantees of them, were often granted to individuals for a great number of years, more than the lifetime of a generation, upon terms which the changing conditions of humanity rendered irksome and burdensome and stood in the way of public achievement. The grants oftentimes tied the hands of posterity to the chariot wheels of an individual who was lucky enough to have obliging friends in authority or designing enough to control the authorities. Light in the streets and public places has become an essential to the happiness and proper enjoyment of the property of the people of cities and towns. The dwellings of the citizens must be lighted by some producing power beyond the ownership of the ordinary citizen. The power and effectiveness of lighting and power-producing apparatus has been revolutionized within the lives of the present generation, and the inventive genius of the time adds to its efficiency and cheapness from day to day. To grant franchises for the production of light and power, not to be exercised until an unreasonable distance of time has expired, will oftentimes have the effect of denying to the people of municipalities the opportunity of enjoying the best, latest, and cheapest creations of genius until the period of the franchise and its postponement has expired. The policy of our legislation has been to attempt to so regulate the granting of franchises that the benefits of their exercise may be shared by the public, and to prevent them being granted primarily for the benefit of the grantees. The purchaser of a franchise should have a reasonable time, before the beginning of the term of his franchise, to prepare the necessary machinery and fixtures to enable him to exercise his franchise in a way beneficial to himself and the patrons of the operations of his franchise; but the time should not be so great as to make it apparent that the arrangement looks more to the benefits of the purchaser of the franchise than it does to those of the public. The grant of a franchise to furnish light and power, in a city of the fourth class, for the period of 10 years, to be exercised after a time which is $4\frac{1}{2}$ years after the granting of the franchise, is an unreasonable length of time between its granting and exercise, and such a proceeding tends to be injurious to the public interests, and is therefore void.

[9] The appellee has been operating, at least since January 1, 1907, without any franchise and without any valid contract with the city so to do. The appellant city, together with other relief, seeks to recover from appellee the sum of \$7,942.50, which is made up of sums of money paid to appellee

by the city, during 5 years last past, for lights and power furnished the city, and alleged to be over and above what such lights and power so furnished were reasonably worth and rent for the use of the streets by its poles and wires during the same time. The ordinance of 1906, which attempted to grant a franchise to appellee from January 1, 1907, until January 1, 1917, viewed as a contract to exercise the privilege of furnishing the lights for a term of years, without advertisement of its making, or allowing competitive bidding, or the receipt of bids publicly, or awarding to the highest and best bidder, falls within the inhibition of section 164 of the Constitution, supra, and is void. If the sums collected from the city for the use of the lights and power by the appellee had not already been paid, and appellee was attempting to coerce collection by law, there is no doubt that its demands would be denied. The law does not imply any obligation or promise upon the part of a municipal corporation to pay on account of having received benefits. The only powers such a corporation has arise from the laws creating it, and the municipality cannot be bound by the contracts of its officers which they have no power to make; and if the municipality receives benefits under such void contracts, the law does not raise any promise to pay for the benefits. If there is no obligation created by the void contract, the law does not create an obligation.

[10] The laws provide how municipalities may bind themselves, and the contracts to be obligatory must be made in the manner the laws prescribe. A different rule prevails in regard to municipalities to that which governs private persons and private corporations. The persons who contract with municipal corporations must, at their peril, know the rights and powers of the officers of such municipalities to make contracts and the manner in which they must make them. Any other rule would destroy all the restrictions which are thrown around the people of municipalities for their protection by the statute laws and the Constitution, and would render abortive all such provisions. The rule in certain instances may be harsh, but no other is practical. Trustees of Bellevue v. Hohn, 82 Ky. 1; Murphy v. City of Louisville, 9 Bush, 189; Covington v. Hallam & Myers, 16 Ky. Law Rep. 128; Owensboro v. Weir, 95 Ky. 158, 24 S. W. 115, 15 Ky. Law Rep. 506; District of Highlands v. Michie, 107 S. W. 216, 32 Ky. Law Rep. 761; Floyd v. Allen, 137 Ky. 575, 126 S. W. 124, 27 L. R. A. (N. S.) 1125; City of Newport v. Schoolfield, 142 Ky. 287, 134 S. W. 503; City of Louisville v. Parsons, 150 Ky. 420, 150 S. W. 498; Grinstead v. Monroe County, 156 Ky. 296, 160 S. W. 1041; Floyd County v. Oswego Bridge Co., 143 Ky. 693, 137 S. W. 237; Perry County v. Engle, 116 Ky. 594, 76 S. W. 382, 25 Ky. Law Rep. 813; Worrell Mfg. Co. v. City of Ashland, 159 Ky. 656, 167 S. W. 922,

52 L. R. A. (N. S.) 880. The decisions in Frankfort Bridge Co. v. City of Frankfort, 18 B. Mon. 41, Nicholasville Water Co. v. Board of Council, 36 S. W. 549, 38 S. W. 430, 18 Ky. Law Rep. 592, Board of City of Frankfort v. Capital Gas Co., 96 S. W. 870, 29 Ky. Law Rep. 1114, and City of Providence v. Providence Electric Light Co., 122 Ky. 237, 91 S. W. 664, 28 Ky. Law Rep. 1015, referred to and relied upon by counsel, to the extent that they held a doctrine contrary to the above, were overruled by this court in the recent case of Worrell Mfg. Co. v. City of Ashland, supra.

[11] There was no legal obligation upon the part of appellant city to pay the sums to the appellee, which it now seeks to recover from it, and it could not have been coerced to do it. The council had the power to create a binding obligation upon the city to pay for the lights and power, if it had gone about doing so in the manner provided by law. The proof fails to show that the sums charged and paid were unreasonable, or in excess of the value of the services rendered the city for which the sums were paid. The city received the benefits and voluntarily paid for them. The payments were not induced by fraud, nor made under any mistake, which is alleged or appears upon the record. The payments were made, as we presume, upon resolutions of the council, which acted upon a full knowledge of the facts. Because the city would not be compelled at law to pay for the lights and power furnished it by appellee, if sought to be coerced to do so, it does not follow as a natural sequence that it can recover of the appellee the sums paid, under the conditions detailed above, in a court of equity. The city, resisting a claim made against it under a void contract, or an obligation sought to be placed upon it through an unauthorized assumption of power by its officers, is in a different attitude from what it is when it comes into court asking relief. When it seeks equitable relief, it must comply with the ancient rule and "do equity." This principle was adhered to in the recent case of Miles Auto Co. v. Dorsey, 163 Ky. 692, 174 S. W. 502. In the case at bar there seems to be an absence of any ground for equitable relief against appellee for the recovery of the sums sued for.

[12] While the appellee has not a franchise to use the streets and public ways for the extending of its wires, erection of poles, and other apparatus placed in and along the streets, the proceedings under which it came into the city and its streets amounts to a license to do so, and it is not a mere trespasser. The city has the power to revoke the license, and it seems has done so. A licensee must always act with the knowledge that the license can and may be withdrawn. The circumstances are such as to protect it against being summarily ousted from the streets and public ways and places of the

city. It appears from the proof that upon the faith of the ordinance, which attempted to grant a franchise to appellee, extending from January 1, 1917, until January 1, 1927, the appellee has expended large sums of money in securing and preparing a new location for the main portion of its plant, and at the present time furnishes light to a majority of the citizens of the city in their dwellings and business houses, to the churches, schools, and public buildings, and power for the operation of the city waterworks plant, and to railroad shops, which are in the city, and has entered into various contracts with different parties to furnish light and power, and upon which the parties are relying for the conduct of their business and avocations, and there is no other plant for the generation of electric light and power in the city. These engagements, however, do not protect the appellee from an ouster from the streets and public ways, but should be considered in fixing the time when the ouster should be put into effect.

[13, 14] Citizens of a municipality may compel a grantee of a franchise, where there are provisions in it for their benefit, to exercise the franchise (*Cumberland T. & T. Co. v. Hickman*, 129 Ky. 220, 111 S. W. 311, 33 Ky. Law Rep. 730); but a city could not be required to allow the use of its streets by a public service corporation without a franchise, because it had entered into obligations with citizens, which it could not perform without a franchise. It was its duty to obtain a franchise before entering into such obligations. The appellee, however, having been permitted by the council of the city under different grants of permission to use the streets and public ways for such a length of time, and to make such large investments upon the faith of such permissions, and the public interests being affected, the appellee should have a reasonable time and opportunity to remove its property from the streets and public ways and places of the city, or to acquire a franchise, and in view of the large interests affected it should have one year from the rendition of the judgment, in accordance with this opinion, to remove its property or to acquire a franchise. *East Telephone Co. v. City of Frankfort*, 141 Ky. 591, 133 S. W. 564.

[15, 16] The petition of R. W. Lisanby to be made a party plaintiff in this action was properly rejected. The city as a corporate entity was to maintain this suit for an infraction of its rights, and its petition contained all the causes of action, and sought all the relief, which the petition of Lisanby alleged or sought. He could not as a citizen of the city maintain a suit, which was already being prosecuted by the city, upon the ground that the officers of the city might thereafter conclude to discontinue the suit. The petition offered to be filed contained

nothing which was not already alleged in the petition of the city, and no sufficient reason was given in it to authorize the petitioner to intervene.

It is therefore ordered that the judgment appealed from be reversed upon the appeal of the city of Princeton, and affirmed upon the appeal of R. W. Lisanby; and the cause is remanded, with directions to proceed in conformity with this opinion. All concur.

STEARNS COAL & LUMBER CO. et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 24, 1915.)

1. TRIAL \S 370—TRIAL BY COURT—SUBMISSION OF ISSUES TO JURY.

All persons are entitled to have controversies determined by the tribunals provided by law for the trial thereof, and in accordance with the law of the land, and in a special proceeding, created by statute failing to provide for trial by jury, the court, over the objection of a party, may not submit the issues to a jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 881, 885; Dec. Dig. \S 370.]

2. TAXATION \S 362½—ASSESSMENT OF TAXES—OMITTED PROPERTY—PROCEEDINGS.

A proceeding under Ky. St. c. 108, art. 17, for the assessment of property omitted, is a special proceeding, and the judge of the county court acts in a ministerial capacity, though his judgment is the judgment of a court, and, to the extent of determining whether the property has been omitted, and the value thereof, he acts judicially within the rule applicable to the circuit court on appeal from a judgment of the county court.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 1164, 1319-1323; Dec. Dig. \S 362½.]

3. TAXATION \S 362½—ASSESSMENT OF TAXES—OMITTED PROPERTY—PROCEEDINGS.

Under Ky. St. \S 4260, providing for the assessment of omitted property, and authorizing either party to appeal from the decision of the county court to the circuit court, and then to the Court of Appeals as in other civil cases, and, declaring that if the court shall decide that the property is liable to assessment and has been omitted, the clerk of the court shall enter judgment, a party to a proceeding may object to the submission of the issues to a jury, and where he so objects, the court must proceed without a jury, or its judgment will be erroneous.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 1164, 1319-1323; Dec. Dig. \S 362½.]

4. JURY \S 10—TRIAL BY JURY—CONSTITUTIONAL RIGHT.

The constitutional right of a jury trial exists only where by the common law a jury trial was customarily had, and the right to trial by jury means a trial according to the course of the common law.

[Ed. Note.—For other cases, see Jury, Cent. Dig. \S 15, 16, 27½; Dec. Dig. \S 10.]

Appeal from Circuit Court, Whitley County.

Consolidated actions by the Commonwealth of Kentucky, by a revenue agent, against the Stearns Coal & Lumber Company, the Stearns Coal Company, and the Stearns Lumber Company. From a judgment for

the Commonwealth, defendants appeal. Reversed and remanded.

See, also, 163 Ky. 837, 174 S. W. 771.

J. N. Sharp, of Knoxville, Tenn., and J. P. Hobson & Son, of Frankfort, for appellants. Henry O. Gillis, of Williamsburg, for appellee.

HURT, J. This proceeding consists of three special proceedings instituted in the county court of Whitley county, in the name of the commonwealth of Kentucky, by one of its revenue agents. One of the proceedings was against the Stearns Coal Company, Limited, another was against the Stearns Lumber Company, and the other against the Stearns Coal & Lumber Company. The purpose of the proceedings was to cause property alleged to be owned by these companies in Whitley county, and which had been omitted from assessment, to be assessed for the purpose of state and county taxation. The statement filed against the Stearns Coal Company, Limited, alleged that the appellant had in its possession and was the owner of a lease from Roberta S. Bryant to it, consisting of the right to mine coal on 26,885 acres of land, and that the lease was of the value of \$1,611,300, and, also, machinery, houses, and equipment and engines which were used in the business of mining coal of the value of \$100,000, and that the company had failed to list the property for taxation for the years 1906, 1907, 1908, 1909, and 1910, and prayed the court to fix the value of the property and cause it to be listed for taxation. The statement against the Stearns Lumber Company alleged that on the 1st day of September, 1906, it was the owner of standing timber on 10,000 acres of land, which had been conveyed to the company by a deed from Roberta S. Bryant, and was of the value of \$30,000, and also personal property of various kinds, office fixtures, etc., which were located on the town site of Stearns, Ky., and were of the value of \$100,000; that the appellant owned this property on the 1st day of September, 1906, and on the same day in 1907, 1908, and 1909, respectively, and had omitted to list the same for taxation for each of those years, and asked the court to value the property and to have it to be certified to the sheriff for the purpose of collecting the taxes thereon. The statement against the Stearns Coal & Lumber Company alleged that it owned, on the 1st day of September, 1910, various articles of personal property located on the town site of Stearns, Ky., and of the value of \$100,000, and also a lease on 26,855 acres of coal lands from Roberta S. Bryant, and of the value of \$500,000, and of houses, machinery, tools, and equipment for mining coal on the leased land to the value of \$100,000, and that it had omitted to list this property for taxation, and asked that the court fix the value and cause it to be certified to the sheriff of Whit-

ley county for collection of the taxes due thereon. Answers were filed in the name of the various companies which were made defendants in the statements, respectively, and by agreement of parties the proceedings were transferred to the Whitley circuit court for trial, and by further agreement were consolidated and agreed to be heard and tried together under the style of Commonwealth of Kentucky, by etc., against the Stearns Coal Company, Limited, Stearns Lumber Company, and Stearns Coal & Lumber Company, and by further agreement it was agreed that if the property owned by the companies was listed by either of them for taxation for any year, it should be considered as having been properly listed, and in the event the court should adjudge that either one of the companies had failed to list for taxation any property owned by either of them for either of the years, it should be listed as the property of the Stearns Coal & Lumber Company.

Upon the calling of the consolidated cases for trial, without any one having requested it to be done, the court directed that a jury be impaneled to hear and determine the issues in the case. Each of the defendants objected to the impanelling of the jury and to the submission of the questions and issues in the case to a jury, and moved the court to hear and try the case without the intervention of a jury. The court overruled the objections of the defendants, and ordered a jury to be impaneled, to which ruling the defendants objected. Thereupon the evidence was heard, and the court instructed the jury, and the jury returned a verdict, to the effect that the appellants had failed for certain years to list for taxation large bodies of land and coal mines and personal property, and fixing values thereon. The court thereupon entered a judgment, following the verdict of the jury, and ordering the property found by the jury to have been omitted from assessment, for taxation by the appellants to be assessed, and directing that it be certified to the sheriff for the collection of the taxes adjudged to be due thereon for the various years embraced by the statements.

At the close of all the evidence the appellants moved the court to discharge the jury and to pass upon the issues of the case itself, which the court overruled, and the appellants excepted. The appellants, having filed grounds, moved the court to set aside the verdict of the jury and judgment of the court and to grant them a new trial, but the court overruled their motion, to which appellants excepted, and prayed an appeal to this court, which was granted.

[1] It is insisted as a ground for a reversal of the judgment that the court erred to the prejudice of the appellants in causing a jury to be impaneled and submitting the issues to it for trial and entering a judgment in accordance with the verdict of the

jury. It may be said that as a matter of common right all persons and corporations are entitled to have such controversies as they may enter into to be determined by the tribunals provided by law for the trial of such matters and in accordance with the law of the land.

[2] The proceeding by revenue agents to cause property to be listed for taxation, which has been omitted by the owners, the assessors, or boards of supervisors, is a special proceeding provided for by article 17, c. 108, Ky. St. It may, further, be said that in a proceeding of this character the judge of the county court does not act in a judicial capacity, but in a ministerial capacity, and as such is only one of the agencies provided by law for assessing property for taxation. His judgment, however, is the judgment of a court, and, to the extent of determining whether property has been assessed or omitted and its value, he acts judicially, and the same rule would apply to the circuit court upon an appeal from a judgment of the county court. *Baldwin v. Shine*, 84 Ky. 502, 2 S. W. 164, 8 Ky. Law Rep. 496; *Baldwin v. Hewitt*, 88 Ky. 673, 11 S. W. 803, 11 Ky. Law Rep. 199; *Cassidy v. Young*, 92 Ky. 227, 17 S. W. 485, 13 Ky. Law Rep. 512; *Hoke v. Commonwealth*, 79 Ky. 587; *Commonwealth v. Ryan*, 126 Ky. 649, 104 S. W. 727, 31 Ky. Law Rep. 1069; *Commonwealth, etc., v. Weissinger*, 143 Ky. 368, 136 S. W. 875.

[3] In setting out the method by which property may be assessed for taxation upon the suggestion of the revenue agent, section 4260, Ky. St., provides for the filing in the clerk's office of the county a statement containing a description of the value of the property proposed to be assessed and the name and place of the residence of the owner or person in the possession of the property and the year or years for which the property is proposed to be assessed, and provides that the clerk shall issue a summons against the owner, and, after the service by the sheriff, the statute provides as follows:

"At the next regular term of the county court after the summons has been served five days, if it shall appear to the court that the property is liable for taxation and has not been assessed, the court shall enter an order fixing the value thereof at a fair cash value, estimated as required by law; if not liable for taxation, he shall make an order to that effect, etc. * * * The judgment of the court shall have the same force and effect as the judgment of the court in civil cases. Either party may appeal from the decision of the county court to the circuit court and then to the court of appeals, as in other civil cases. * * * If the court shall decide that the property is liable to assessment, and has not been assessed, the clerk of the court shall enter a judgment on a book kept for that purpose, etc. * * *"

There is no other authority for this character of proceeding except that contained in the statute, *supra*. Being a special proceed-

ing provided for by statute, and defining the method of procedure and who shall have authority to make the assessment, it would seem that the proceeding would have to conform in all respects to the requirements of the statute. The statute provides that the court shall determine whether the property ought to be assessed and the value of the property which has been omitted from assessment, and shall perform all other duties in connection with the proceeding.

The provisions of the statute nowhere give room for the intervention of a jury, or provide in any place that the questions in issue may be heard or tried by a jury. There are many reasons why the legislative authority imposed the duties required by this statute upon the judge of the court alone, but it is not necessary to enumerate them here. Suffice it to say that under the provisions of the statute no litigant is required, in this character of proceeding, to submit the issues of his case to the determination of a jury. This is not a case of equitable cognizance where the court has a right to call a jury to pass upon the questions of fact in an advisory character. To deny to a litigant in a case of this kind a trial by jury would not be an infringement of the ancient right of trial by jury.

[4] The constitutional right of a jury trial exists only in cases where, by the common law, a jury trial was customarily had and the constitutional right to a trial by jury means a trial according to the course of the common law. *Carder v. Weisenburgh*, 95 Ky. 135, 23 S. W. 964, 15 Ky. Law Rep. 497; *Comington v. Louisville Trust Co.*, 128 Ky. 697, 108 S. W. 950, 117 S. W. 681, 33 Ky. Law Rep. 53, 884, 129 Am. St. Rep. 322; *Rieger v. Schulte et al.*, 151 Ky. 129, 151 S. W. 395. The authority for this proceeding, being founded upon a recent statute, is, of course, a proceeding unknown to the common law. Besides, in the case at bar, the commonwealth did not request a jury, and the appellant opposed it. It was the duty of the court to have proceeded without the intervention of a jury, to perform the duties required of it by law in such cases, especially when one of the litigants objected to the jury trial. The construction which has been placed upon this statute here seems to be that adopted by all the courts of the commonwealth up to this time. Therefore the appellant did not have a trial as provided by law.

The judgment is reversed, and the case remanded, for proceedings consistent with this opinion.

The various other questions insisted upon by the appellant are not necessary now to be determined, as they chiefly grow out of the proceedings of the jury trial, and such as did not arise from the jury trial were not passed upon by the court below.

HUDSON ENGINEERING CO. et al.
v. SHAW.

SHAW v. HUDSON ENGINEERING
CO. et al.

(Court of Appeals of Kentucky. Nov. 24, 1915.)

1. NEW TRIAL \Leftrightarrow 97—GROUNDS—SURPRISE—
NECESSITY FOR OBJECTION AT TRIAL.

Reversal will not be granted on the ground of surprise, where no objection was made when the evidence constituting the alleged surprise was offered, and no motion was made for postponement or continuance of the case; for a party cannot take chances on a verdict in his favor and afterwards on adverse verdict claim new trial on the ground of surprise.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 195-198; Dec. Dig. \Leftrightarrow 97.]

2. NEW TRIAL \Leftrightarrow 102 — GROUNDS — NEWLY
DISCOVERED EVIDENCE—DILIGENCE.

Where, in an action on a contract, the defendant could have easily discovered the evidence before the trial, and the case was pending for 3½ years and he failed to produce the evidence, he is not entitled to a new trial on the ground of newly discovered evidence, since he did not use reasonable diligence to produce it at the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210-214; Dec. Dig. \Leftrightarrow 102.]

3. PATENTS \Leftrightarrow 211 — TITLE — CONTRACTS —
"USE OF PATENTS."

Where defendant agreed to pay the plaintiff patentee a certain sum for the use of his patents and thereafter failed to pay the sum while retaining the patents which had been assigned to it, the retention of the patent constitutes use, and use does not require actual physical employment of the patents in carrying on defendant's business, but means the right to use the property.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 304-311; Dec. Dig. \Leftrightarrow 211.]

4. ATTACHMENT \Leftrightarrow 191 — FORTHCOMING
BONDS—EFFECT.

Under Civ. Code Prac. § 214, providing that the sheriff may deliver attached property to the person in whose possession it is found upon such person's execution of a bond to the plaintiff with sufficient sureties, to the effect that the obligors are bound, in double the value of the property, that the defendant will perform the judgment, or that the property or its value will be forthcoming and subject to the order of the court, the bond executed is only an obligation to produce the property; the lien of the attachment and the power of the court over the property continuing as if the attachment were still in force.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 633-636; Dec. Dig. \Leftrightarrow 191.]

5. ATTACHMENT \Leftrightarrow 338—FORTHCOMING BONDS
— LIABILITY—SUBSEQUENT AMENDMENT OF
PETITION—EFFECT.

Where defendant gave a bond, under Civ. Code Prac. § 221, to release attached property in an action to recover \$880, and plaintiff thereafter amended seeking by the amendment to recover \$6,500, the surety was not liable for the full amount of the final judgment for \$6,500; such liability not being within the contemplation of the parties.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1290-1303; Dec. Dig. \Leftrightarrow 338.]

6. ATTACHMENT \Leftrightarrow 337—RELEASE BOND—LI-
ABILITY—SUBSEQUENT AMENDMENT OF PE-
TITION—EFFECT.

Although after the defendant surety company gives its bond, under Civ. Code Prac. § 221, to release attached property, the plaintiff amends his petition, thereby seeking to recover a greater sum, the surety company is not discharged from all liability, for its liability cannot be increased by the amendment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1213-1222; Dec. Dig. \Leftrightarrow 337.]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

Action by Clifford Shaw against the Hudson Engineering Company and the Fidelity & Deposit Company of Maryland. From judgment partially in favor of plaintiff, plaintiff and defendant Fidelity & Deposit Company of Maryland appeal. Affirmed in part.

Chas. A. J. Walker and W. M. Locke, both of Cincinnati, Ohio, for Shaw. Myers & Howard, of Covington, and Gordon, Morrill & Ginter and David Davis, all of Cincinnati, Ohio, for Fidelity & Deposit Co. and Hudson Engineering Co.

CLAY, C. These two appeals grew out of the same transaction and will be considered in one opinion. Clifford Shaw invented certain apparatus for raising water and other liquids and secured patents thereon. These patents were regularly assigned and transferred to the Bacon Air Lift Company, in consideration of an alleged agreement on the part of the company to employ Shaw at a salary of \$200 per month and expenses, so long as the company used said patents. In 1903, the Bacon Air Lift Company sold and transferred all of its property of every kind to the Hudson Engineering & Contracting Company, which in turn sold and transferred its property to the Hudson Engineering Company. In each case each vendee took over all of the assets and assumed all of the liabilities of its vendor. According to Shaw's evidence, he remained in the employ of the three companies for a number of years, receiving a salary of \$200 a month and expenses for the entire time, with the exception of certain periods when he, together with other officers and employees of the company, remitted a portion of their salary to help the company out. On June 1, 1910, the Hudson Engineering Company discharged him. At that time there was due him for services and expenses \$204.75. Shaw protested and asked to be continued under his contract, but the company refused to give him employment. After the termination of the contract, the company kept the patents and never offered to return or transfer them to Shaw. After his discharge, Shaw was able to earn only about \$75 a month. This suit was filed on October 2, 1911. Shaw did not ask for damages for breach of the contract, but sued for the installments of salary and expense then due, amounting to \$881.79, for which judg-

ment was prayed. At the same time Shaw obtained an order of attachment, which was levied by the sheriff of Kenton county on certain property belonging to the defendant Hudson Engineering Company. On December 5, 1911, and before plaintiff's petition was amended, the defendant, with the Fidelity & Deposit Company of Maryland as surety, executed to plaintiff a bond, by which it agreed to perform the judgment of the court rendered in the action. Subsequently, plaintiff filed various amended and supplemental petitions to recover on the installments of salary due at the time they were filed. On February 5, 1913, plaintiff recovered of the defendant Hudson Engineering Company a judgment for the sum of \$204.75, with interest. On October 30, 1914, he recovered a further judgment in the sum of \$6,500, with interest from that date. From this judgment the Hudson Engineering Company appeals. After judgment was rendered, plaintiff sought to hold the surety company liable for the full amount of the last judgment. The trial court held that the surety company was liable only for the amount claimed in the original petition, and was not liable for any sums claimed by amended and supplemental petitions filed subsequent to the execution of the bond and without notice to the surety. From this judgment plaintiff appeals, on the ground that the surety is liable for the whole amount of the final judgment rendered in the action. The surety company prosecutes a cross-appeal, on the ground that the action of plaintiff, in seeking to increase the amount for which the surety company was liable, released the surety company from all liability.

We shall first consider the appeal of the Hudson Engineering Company. A reversal is asked on the ground of surprise, newly discovered evidence, and error in the instructions.

[1] It is unnecessary to set out the facts on which the claim of surprise is based. When the evidence constituting the surprise was offered, the attention of the court was not called to the fact. No motion was made for a postponement or continuance of the case. Under the circumstances, a party cannot take chances on a verdict in his favor and afterwards claim a new trial on the ground of surprise. *Thompson v. Porter*, 4 Bibb, 70; *Remley v. I. C. R. R. Co.*, 151 Ky. 796, 152 S. W. 973; *Kentucky Distilleries & Warehouse Co. v. Wells*, 149 Ky. 275, 143 S. W. 375; *Liverpool & London & Globe Insurance Co. v. Wright*, 158 Ky. 290, 164 S. W. 952.

[2] The newly discovered evidence relied on is the affidavit of George R. Young, who, together with Shaw, owned an interest in the patents, to the effect that the Bacon Air Lift Company did not make a contract with Shaw which was to continue as long as the Bacon Air Lift Company used the patents, and that he would give his deposition to this effect. Accompanying the affidavit of Young is the

affidavit of John J. Boyd, president of the Hudson Engineering Company, to the effect that, if he had known in advance of the trial that Shaw would claim that Young was present at the time of making the contract of employment, he would have arranged either to have had Young present and testify in the case, or would have had his deposition taken. The argument is made that the petition was predicated on a contract partly in writing and partly oral. Filed with the petition was a written contract reciting that Shaw had agreed to assign the patents to the Bacon Air Lift Company, and that that company had agreed to employ Shaw and "pay him therefor a certain sum per month which had been mutually agreed upon." This contract was signed by the Bacon Air Lift Company, "by Edward A. Hosmer." Because of these facts, the defendant was led to believe that plaintiff would prove an oral contract made with Hosmer and not with the directors of the company. Not being apprised of the fact that plaintiff would claim that Young was present when the contract was made, the claim is that there is no failure of diligence on defendant's part in not having taken Young's deposition or having him present at the trial. As a matter of fact, however, plaintiff relied on a contract made with the company. It was but natural that he should prove that this contract was made with the board of directors. Defendant was not justified in assuming that the contract was made with Hosmer alone. It should have anticipated that plaintiff would attempt to prove that the contract was made with the board of directors and have been prepared to rebut this proof by the testimony of the directors. As the case was pending for 3½ years, ample opportunity was given the defendant to consult the members of the board who made the contract, and, if thought proper, to take their depositions or have them present at the trial. A party is not entitled to a new trial because of newly discovered evidence, unless he uses reasonable diligence to produce it at the trial. *Olds Motor Works v. Shaffer*, 145 Ky. 616, 140 S. W. 1047, 37 L. R. A. (N. S.) 560, Ann. Cas. 1913B, 689; *Houston, Stanwood & Gamble v. Schneider*, 148 Ky. 651, 147 S. W. 371. In the present case no diligence was shown. The trial court did not err in refusing a new trial on the ground of newly discovered evidence.

[3] The defendant offered evidence to the effect that, with the exception of two contracts in Kentucky, it did not use the patents and inventions acquired from plaintiff after June, 1910, and that since October, 1911, it had never made any use of the patents or inventions. The trial court instructed the jury, in substance, that the failure of the defendant to retransfer the patents and inventions to the plaintiff, or offer to do so, amounted to a continued use of the patents and inventions within the meaning of the

first and second instructions authorizing a recovery by plaintiff, if the jury believed from the evidence that defendant made a contract with plaintiff to pay him a salary of \$200 a month so long as it continued to use said patents and inventions. It is insisted that this instruction was erroneous, because defendant was not liable on the contract unless it made actual use of the patents and inventions. A patent may be disposed of, either by transferring the entire patent, or giving a license for use of the patent. In the case under consideration the entire patents were transferred of record to the defendant. No title whatever remained in plaintiff. The transfer put it out of the power of plaintiff to use the patents and put it in the power of the defendant to make such use of the patents as it saw fit. According to plaintiff's evidence, the consideration for the transfer was the agreement on the part of the transferee to employ him at a salary of \$200 a month, so long as it continued to use the patents. Under these circumstances, defendant could not escape liability on the contract of employment without restoring the consideration which it received. We therefore agree with the trial court that the word "use," as applied to the circumstances of this case, does not mean the actual physical employment of the patents and inventions in carrying on the defendant's business, but means the right to use such property. As the instruction referred to accords with this view, it follows that it is not subject to complaint.

The appeal of plaintiff Shaw and the cross-appeal of the Fidelity & Deposit Company of Maryland present two questions: (1) Is the surety company liable only for the amount claimed in the original petition and the affidavit for attachment, or is it liable for the full amount of the judgment, including the claim set up by amended and supplemental petitions filed after the execution of the bond and without notice to the surety? (2) Was the surety released from all liability by reason of the amendments covering the installments of salary due after the filing of the original petition and the execution of the bond?

The amount claimed in the original petition and affidavit for attachment, consisting of several items, is \$881.79. The order of attachment directed the sheriff to attach and safely keep so much of the property of the defendant, in the county, not exempt from execution, as would satisfy the claim of plaintiff, and \$30 for the costs of the action. Before any amendment was filed increasing the amount prayed for, the bond, by which the defendant and the surety company agreed to perform the judgment of the court in the action, was executed.

Section 214 of the Civil Code is as follows:

"The sheriff may deliver any attached property to the person in whose possession it is found, upon the execution, in the presence of the sher-

iff, of a bond to the plaintiff, by such person, with one or more sufficient sureties, to the effect that the obligors are bound, in double the value of the property, that the defendant shall perform the judgment of the court in the action, or that the property or its value shall be forthcoming and subject to the order of the court."

Section 221 of the Civil Code provides:

"If the defendant, before judgment, cause a bond to be executed to the plaintiff by one or more sufficient sureties, approved by the court, to the effect that the defendant shall perform the judgment of the court, the attachment shall be discharged, and restitution be made of any property taken under it or of the proceeds thereof."

[4] Our attention is called to the fact that defendant had the option to execute bond under either of the above sections; that, where the bond is executed under section 214, it is a mere obligation for the forthcoming of the property; the lien created by the attachment, and the power of the court over the attached property, subsist and continue as effectually as if no bond had been given, or the possession never taken out of the hands of the officer; and continues until final judgment is rendered disposing of the attachment. *Bell v. Western River Co.*, 3 Metc. 558; *Edwards Bernard Co. v. Pfanz*, 115 Ky. 393, 73 S. W. 1018, 24 Ky. Law Rep. 2296; *Hobson v. Hall*, 13 Ky. Law Rep. 109, 14 S. W. 958; *Lee v. Newton*, 27 Ky. Law Rep. 1004, 87 S. W. 789. And no action can be maintained on a bond unless the attachment is sustained. On the other hand, where the bond is executed pursuant to section 221, all power of the court and its officers over the attached property ceases, and plaintiff can look only to the bond. Furthermore, the attachment is discharged by operation of law, and the obligors in the bond are bound unconditionally to perform the judgment of the court in the action. In a proceeding to enforce the bond, neither the sufficiency of the grounds of the attachment, nor the liability of the property levied on, nor the claims of any person to the attached property, can be considered. *Hazelrigg v. Donaldson*, 2 Metc. 445; *Taylor v. Taylor*, 3 Bush, 118. It is therefore insisted that, if a surety company desired to limit its liability, it should have executed bond under section 214; but, if it elected to execute bond under section 221, it is liable for the full amount of the judgment, whether based on the amount claimed in the original petition or on the amounts set up by amended and supplemental petitions. While it may be true that a paid surety is no longer the favorite of the law, and that the courts will not construe his bond as strictly as the bond of a surety for mere accommodation, yet we know of no rule of law that will extend a surety's liability far beyond what was within the contemplation of the parties at the time of the execution of the bond. Here the plaintiff was seeking to recover only the sum of \$881.79, and he asked for an attachment only to that extent. The attachment itself was valid

only to the extent of that sum. To release the property, the bond in question was executed. Thereafter plaintiff, without notice to the surety company, sought, by amended and supplemental petitions, to recover the additional sum of about \$6,500, and was finally awarded a judgment for that amount. In our opinion, the surety company is not liable for this additional amount. The obligation to perform the judgment of the court means the judgment of the court based on the cause of action stated, and the amount claimed, in plaintiff's pleadings on which the writ of attachment is issued, when the bond is executed. In this opinion we are greatly fortified by the views of the Supreme Court of Pennsylvania in the case of Commonwealth, for Use of Charles A. Gettman, v. A. B. Baxter & Co. et al., 235 Pa. 179, 84 Atl. 136, 42 L. R. A. (N. S.) 484.

[5, 6] On the cross-appeal of the surety company it is insisted that the attempt, by an amended petition, to increase its liability, discharges it of all liability under the bond. Great stress is placed on the claim that the amended and supplemental petitions, setting up the installments of salary that became due since the filing of the original petition, stated entirely new causes of action which increased the amount of the final judgment obtained in the action. It may be conceded that there is authority for the position, based on the old doctrine applicable to bail

absolute, that any material alteration in the contract of suretyship releases the surety. Thus it is held that, where one becomes bail for another, he is responsible only for the demand contained in the suit. Another demand cannot be added without defeating the contract of bail. *Bean v. Parker*, 17 Mass. 602; *Langley v. Adams*, 40 Me. 125. In other words, the theory on which the surety is released is that its liability has been increased. In the present case, we have held that the liability of the surety was not increased by the amendments. That being true, the amendments in no way affected the rights of the surety. If the amendments do not increase the surety's liability, upon what ground can it be said that the obligee in a bond should not recover all that he is entitled to under the bond, merely because, through a misapprehension of the law, or otherwise, he seeks to recover more than is due him? In our opinion, the question answers itself. Under no circumstances should the obligor in a bond be released from his obligation to pay that which he justly owes, merely because the obligee asks for more. *Commonwealth, for Use of Charles A. Gettman, v. A. B. Baxter & Co. et al.*, *supra*.

The judgment in the case first mentioned in the caption is affirmed. The judgment in the second case mentioned in the caption is affirmed both on the original appeal and cross-appeal.

ANDREWS et al. v. MCGILL et al. (No. 5530.)
(Court of Civil Appeals of Texas. San Antonio.
Nov. 10, 1915.)

1. CARRIERS — 215—CARRIAGE OF LIVE STOCK
—LIABILITY.

A carrier receiving from another carrier cattle for shipment is liable for injuries to the cattle caused by placing them in pens without shelter and too small to accommodate them properly, and allowing them to remain therein for a day in the sun without food or water, though it may not be liable for not holding a train for the cattle.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 923; Dec. Dig. — 215.]

2. CARRIERS — 219—CARRIAGE OF LIVE STOCK
—LIABILITY.

A connecting carrier, guilty of negligently handling cattle received from the initial carrier, is liable for the injuries caused thereby, though the initial carrier was negligent in delaying the delivery of the cattle and prevented the connecting carrier in taking them out on its first train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 950, 951; Dec. Dig. — 219.]

Appeal from Jim Wells County Court; L. Broeter, Judge.

Action by H. F. & J. C. McGill against Frank Andrews, receiver of the St. Louis, Brownsville & Mexico Railway Company, and another. From a judgment for plaintiffs, the Texas Mexican Railway Company appeals. Affirmed.

Greer & Hamilton and Asher R. Smith, all of Laredo, for appellant. Perkins & Leslie, of Alice, for appellees.

FLY, O. J. This is a suit for damage to 79 steers shipped by appellees over the lines of the St. Louis, Brownsville & Mexico Railway Company, Frank Andrews being its receiver, and the Texas Mexican Railway Company, from Norias, a station on the first-named railroad, to Alice, a station on the last-named railway. The cause was submitted to a jury on special issues, and on the answers judgment was rendered in favor of appellees against the receiver for \$32.50, and against the Texas Mexican Railway Company for \$400. The latter alone has appealed.

[1] The requested charge of appellant refusal of which is complained of in the first assignment of error was properly rejected by the court. The evidence showed that the negligence of appellant consisted in holding the cattle in pens, without shelter, in Robstown, too small to accommodate them properly, and it would have been erroneous to have instructed a verdict for appellant in case the jury found that there was no damage to the cattle between Robstown and Alice. The evidence showed that the cattle were crowded, without food or water, into pens too small for their comfort, and allowed to remain therein for a day in the sun, causing great damage to them, and that the cattle had been

delivered to appellant by its connecting carrier before they were placed in the pens. Most of the damage to the cattle occurred at Robstown after they had been delivered to appellant. It may not have been liable for not holding its train for the cattle for a few minutes longer than it did, but it is liable for its treatment of the cattle in Robstown.

[2] The special charge the refusal of which is assailed in the second assignment of error was properly refused by the court. It was alleged and proved that a large part of the damages occurred through the negligence of appellant after the cattle were delivered to it in Robstown, and it would have been decidedly improper to have instructed the jury, in effect, that as the first carrier had delayed the cattle on its road, appellant would not be liable for its negligence while the cattle were in the pens at Robstown. The first carrier was doubtless negligent in not delivering the cattle with proper dispatch, so that they could have gone out on the morning train, but that negligence did not authorize or justify further negligence on the part of appellant. The law applicable to a delivery of the cattle by one carrier to another was correctly embodied in a special charge asked by the receiver and given by the court.

The judgment is affirmed.

INTERNATIONAL & G. N. RY. CO. v.
BERTHEA. (No. 1502.)*

(Court of Civil Appeals of Texas. Texarkana.
Nov. 8, 1915. Rehearing Denied
Nov. 18, 1915.)

1. CARRIERS — 322 — CARRIAGE OF PASSENGERS—INJURIES TO PASSENGER—FINDINGS.

In a passenger's action for injuries caused by derailment of the train, a finding by the jury that a defect, in that one of the two broken rails which first gave way, could not have been discovered by the highest care, did not require judgment for defendant, since it did not attribute the cause of derailment to that rail, and since the court was presumed to have found that such defective rail was not the proximate cause of the derailment.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. — 322; Trial, Cent. Dig. § 860.]

2. APPEAL AND ERROR — 931—REVIEW—PRESUMPTIONS.

When a special answer does not find all the facts necessary to form the basis of a judgment, but does answer all the questions submitted, the court is presumed to have found the omitted facts necessary to support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762—3771; Dec. Dig. — 931.]

3. CARRIERS — 320 — CARRIAGE OF PASSENGERS — INJURY TO PASSENGER — PROXIMATE CAUSE.

In a passenger's action for injuries in a derailment of the train, where it appeared that the rail first struck by the train was splintered for a distance of about five feet, but that its base remained in place, while the end of the next rail was entirely broken off for two feet, and was found hanging in a truck, it could not be said, as

a matter of law, that the breakage in the first rail was the proximate cause of the derailment, although such rail contained a hidden defect.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.]

4. CARRIERS § 322 — CARRIAGE OF PASSENGERS—INJURIES TO PASSENGER—FINDINGS—CONSISTENCY.

In a passenger's action for injuries in a derailment of the train, a finding by the jury that a hidden defect in the first rail that gave way was not discoverable by the highest care was not in conflict with another finding that defendant had not used a high degree of care to have the rails at the place of derailment in reasonably safe condition, when considered in connection with the court's finding that the proximate cause of the derailment was not the rail containing the hidden defect, but the rail next thereto.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 322; Trial, Cent. Dig. § 860.]

5. TRIAL § 365—SPECIAL FINDINGS.

A finding upon a special issue submitted to the jury becomes immaterial when other facts have the legal effect to eliminate the issue embodied in such finding.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 871-874; Dec. Dig. § 365.]

6. CARRIERS § 318 — CARRIAGE OF PASSENGERS—ACTION FOR INJURIES—ROADBED—EVIDENCE.

In a passenger's action for injuries sustained in a derailment of the train, evidence held sufficient to sustain a finding that defendant was negligent in failing to maintain a rail securely spiked to the ties.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.]

Appeal from District Court, Rusk County; W. O. Buford, Judge.

Action by J. F. Berthea against the International & Great Northern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Appellee, a passenger on appellant's regular south-bound passenger train, was injured by the derailment of the main line of the coach in which he was riding, in consequence of the breakage of certain track rails. This action was brought to recover damages for the injuries thus sustained, and a recovery by appellee was had.

According to the evidence, which is undisputed, two rails of the track, adjoining each other on the same side of the track, were broken as follows: Between 18 inches and 2 feet was entirely broken off of the end of one of the rails, and between 4½ and 5 feet of the ball of the south end of the next or north rail was shivered or broken off down to the web or base of the rail. The broken portion of the south rail was found hanging in the trucks of the derailed chair car. The web or base of the north rail remained and was still on the ties. An examination of the broken end of the south rail disclosed no inherent defect or flaw in it, but inside the ball that was shivered off the north rail at the point of breaking there was

found a hollow defect or flaw made in the molding of the rail. The flaw in the north rail was so wholly concealed inside the rail as not to be discoverable by inspection. The evidence supports the finding of the jury, on special issue, that the defect causing the break in the north rail was not discoverable by the exercise of a high degree of care before the injury. And there is evidence to support the further findings comprehended in the verdict of the jury, and the judgment of the trial court, that as to the breaking of the south rail appellant was guilty of negligence, and such negligence proximately caused the injury. The evidence warrants the amount of the verdict.

Morris & Sims, of Palestine, and Futch & Tipps, of Henderson, for appellant. Felix J. McCord, of Longview, and J. W. McDavid, of Henderson, for appellee.

LEVY, J. (after stating the facts as above).

[1] The jury answered "No" to the following question propounded:

"Could the servants and agents of the defendant company, by the exercise of that degree of care which a very prudent and cautious person would have exercised under the same or similar circumstances, have discovered the defect in the rail which first gave way on the occasion of the wreck complained of in this suit?"

And the appellant, by its fourth assignment of error, complains of the refusal of the court to enter judgment in its favor on the finding by the jury. The answer of the jury goes to the extent only of finding as a fact that the defect "in the rail which first gave way" was not discoverable before the time of the derailment by the highest degree of practicable forethought and skill. The answer does not attribute or refer the cause of the derailment to the track rail which first gave way or broke, and there does not appear in the record any other finding by the jury respecting the proximate cause of the derailment to be considered in connection with the instant answer. Therefore the assignment must, we think, be overruled, for it is believed that in the circumstances there was presented for decision in point of fact by the jury or court the vital question of the proximate cause of the derailment was a fact necessary to support a judgment for appellant; for, under doctrine of law, the finding by the jury of want of negligence on the part of appellant in respect to the breakage of one of the track rails would not have the legal effect to relieve of liability, unless it further appears as a fact that such defective rail, for which appellant was not responsible, was the proximate cause of the derailment.

[2] When a special answer does not find all the facts necessary to form the basis of a judgment, but does answer all the questions submitted, the court is presumed to have found from the evidence the omitted facts necessary to support the judgment ren-

dered by him, if the evidence authorizes the fact thus presumed. *Oil Co. v. Wallace*, 23 Tex. Civ. App. 12, 54 S. W. 639; article 1985, R. S. And, as the trial court entered judgment for the plaintiff, it must be assumed, in support of his judgment, that he concluded as a fact, and which has evidence to support it, that the particular defective rail, which the jury found the appellant was not legally responsible for, was in the evidence only a condition, and not the efficient cause of the derailment.

[3] The fact appears without dispute that the smoker and chair car of appellant's south-bound passenger train were derailed. It happened in a cut on the main line. The track there was level and straight, and on dry, sandy ground, and, according to the evidence, was surfaced, in good alignment, and had good, new ties. The rails were 75-pound rails, but the employees did not know how long a time they had been in use. Immediately after, and with the purpose of ascertaining the cause of the derailment, a passenger on the train and certain experienced employees of appellant made an examination of the physical evidences on the ground. They found two rails of the track, adjoining each other on the same side of the track, broken, as follows: Between 18 inches and 2 feet was entirely broken off of the north end of one of the rails, and between $4\frac{1}{2}$ and 5 feet of the ball of the south end of the next or north rail was shivered or broken off down to the web or base of the rail. The broken portion of the south rail was found hanging in the trucks of the derailed chair car. The web or base of the north rail remained and was still on the ties. An examination of the broken end of the south rail disclosed no defect or flaw in it, but inside the ball that was shivered off the north rail at the point of breaking there was found a hollow defect or flaw made in the molding of the rail. The witnesses say that the flaw in the north rail was such as to weaken the strength of the rail, and was so wholly concealed inside the rail as not to be discoverable by inspection, and could not be seen if the rail had not been broken. An inspection of the roadbed and track had been made before the derailment, and it appeared sufficient. The engineer testified that as the train approached the cut he felt something give way under the back drivewheel of the engine, and heard a drivewheel "knocking," and he at once applied the air in the emergency to stop the train immediately. Upon applying the air the engineer looked back towards the train and saw the rear cars careening. The train stopped quickly after the air was applied. The engine, baggage car, and front trucks of the next or combination car all remained on the track. These are all the facts and circumstances relied on to show the cause of the derailment. Taking the engineer's

affirmative evidence, it must be said, as a fact, that there was a breakage of two track rails under the weight of the engine as it passed over them. An examination of the track made immediately afterwards disclosed, it appears, that the breakage in the two rails was not of the same kind and character. About 2 feet was entirely broken off of the north end of the south rail, and such broken off part was off the ties, hanging in the trucks of the chair car. The ball of the south end of the next or north rail for the length of about 5 feet was shivered off, and the web or base of the shivered portion of the rail remained and was still on the ties; and it appears without dispute that after the giving way of the rails under the engine the baggage car and the front trucks of the combination car passed over the broken rails without derailment. Thus, in the circumstances, the derailment of the rear cars cannot be attributed and referred absolutely to the fact of breakage in the north rail. The further fact that 2 feet of the south rail was entirely broken off and an open space for that length left in the track might, it could reasonably be said, have been the cause of the derailment; for such open space would permit and allow the wheel of the car to sink down to the ties for the lack of that much rail to support it. It presents a physical situation at least which the jury or the court might infer was the proximate cause of the derailment; and the physical situation presented in the breakage of the north rail does not necessarily exclude any other inference than that such breakage solely or proximately caused the derailment. A jury or the trial court may have legitimately drawn the inference or conclusion that only the shivering off of a part of the rail, its under part or base remaining spiked to the ties, did not solely or proximately cause the derailment. It is true that a witness stated that the breakage of the north rail caused the derailment; but his answer was an opinion purely, and became but a circumstance for consideration by the court or the jury. It is not thought, in view of the circumstances proven, that this court can properly say, as a matter of law, that the breakage in the north rail was the sole or proximate cause of the derailment.

[4] It is further contended by the eighth assignment of error that the above-stated special finding of the jury is in conflict with their answer to the third question propounded, and that the findings would not support a judgment for appellee. The third question, in substance, asked the jury to say whether or not appellant had used a high degree of care to have the track and rails in a reasonably safe condition at the place of derailment, and the jury answered, "No." Giving, as the jury did, the general answer "No" to the question, the verdict may, it is true, be construed, and have the effect, as being a finding

that appellant was negligent in respect to both of the broken rails in evidence; and such finding may seem, as appellant insists it is, apparently inconsistent with the further finding in the special answer that appellant was not negligent in respect to the breakage in the north rail. But when the findings are read in the light of the further finding by the court, as comprehended in his judgment, of the proximate cause of the derailment and injury being the south rail, any legal inconsistency or contradiction disappears. If the appellant were negligent in respect to the north rail, but such negligence did not cause the derailment, the appellee could not, as a matter of law, recover on this particular ground of negligence had it been the only ground. And likewise, if the appellant were not negligent in respect to the north rail, it would not, as a matter of law, be entitled to a judgment, unless it appeared as a further fact that the defective north rail, for which condition appellant was not legally responsible, was the proximate cause of the derailment and injury. But if the broken south rail, respecting which the jury found negligence, was the proximate cause of the derailment and injury, as comprehended in the judgment of the court, the appellee was entitled to a judgment, irrespective of whether appellant was negligent or not negligent respecting the north rail, which appeared, as a fact, not to be the proximate cause of the injury.

[5] A finding upon a special issue submitted to the jury becomes immaterial when other facts have the legal effect to eliminate the issue embodied in such finding. *Hill v. Hoeldtke*, 104 Tex. 594, 142 S. W. 871, 40 L. R. A. (N. S.) 672. Therefore, in the light of the finding by the court, as comprehended in his judgment, there was no such legal conflict in the findings of the jury as to warrant a reversal.

It is contended by the second assignment of error that the court erred in submitting certain matters in question 3 about which there was no dispute in the evidence. It is not believed that this worked any injury to appellant such as to warrant a reversal.

[6] It is thought that there is evidence in the record to establish in favor of appellee the issue of negligence proximately causing the injury, in respect to the broken south rail in the track; and the fifth and seventh assignments of error are overruled. It appears that the end of the south rail broke entirely off, and to such an extent as to permit and allow a derailment. There was no hidden flaw or defect in this rail, as affirmatively appears; and its breaking is accounted for by the weight of the engine passing over it. The engine drawing the train was large and heavy; and from the fact that the broken part was found hanging in the trucks of the chair car the inference

was permissible that the rail was not sufficiently spiked to the ties, which were shown to be new ties laid on a well ballasted road-bed, to hold it as nearly as possible in place if a break in the rail should occur. It is not shown that it was a new rail, nor that its weakness could not have been as well ascertained before the break as after.

The judgment is affirmed.

MEMPHIS COTTON OIL CO. et al. v. GIST. (No. 842.)

(Court of Civil Appeals of Texas. Amarillo.
Nov. 6, 1915.)

1. PLEADING \S 245—AMENDMENTS—TIME TO AMEND.

Where, in foreclosure proceedings, a misdescription of the note sued on, as to date and amount is corrected by trial amendment, an assignment of error will not lie thereto where defendants were not misled or surprised; the record showing that they were only expected to defend against one note and mortgage.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 635, 653-675; Dec. Dig. \S 245.]

2. CONTINUANCE \S 30—GROUNDS—SURPRISE—AMENDMENT OF PETITION.

Where defendants in a foreclosure suit were not surprised or misled by a trial amendment to the petition, correcting a misdescription of the note as to date and amount, it was not error to refuse to permit them to withdraw their announcement of ready for trial and to grant a continuance.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 90-112; Dec. Dig. \S 30.]

3. BANKS AND BANKING \S 262 — POWER OF CASHIER—TRANSFER OF SECURITIES.

The cashier of a national bank has power to transfer notes and bills receivable, payable to the bank, without special authority from the directors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1001-1006; Dec. Dig. \S 262.]

4. REFORMATION OF INSTRUMENTS \S 19—MISTAKE—EVIDENCE.

In foreclosure proceedings, it was not error to refuse to correct a deed of trust running to defendants as to a misdescription, where it does not appear that a mutual mistake as to such description had been made.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 74-78; Dec. Dig. \S 19.]

5. MORTGAGES \S 274 — RIGHTS OF SUBSEQUENT PURCHASER—IMPROVEMENTS.

Purchasers of land under a deed of trust, who placed improvements in good faith upon the property with a belief in the sufficiency of the title, which they deraigned through the mortgagor, cannot recover, as against a prior mortgagee, the value of such improvements.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 718-724, 728; Dec. Dig. \S 274.]

Appeal from District Court, Hall County; J. A. Nabors, Judge.

Action by John M. Gist against the Memphis Cotton Oil Company and others, upon a note and mortgage. Judgment for plaintiff, and defendants appeal. Affirmed.

Arnold & Taylor, of Henrietta, and Presler & Thorne, of Memphis, for appellants. Jos. H. Aynesworth, of Childress, and Moss & Leak and H. D. Spencer, all of Memphis, for appellee.

HENDRICKS, J. In 1906 John M. Gist, the owner of property in the town of Ell, Hall county, Tex., conveyed five acres of land to Fred L. and A. M. Willingham, in consideration that the latter would build, equip, and operate a gin at that place. This property was a part of section 55, block No. 18, H. & G. N. Ry. Co. survey, and the location began at a point 106 varas south of the northwest corner of said section No. 55; thence east 106 varas for corner; thence south 228 varas for corner; thence west 106 varas for the southwest corner of the tract; thence north with section line 228 varas to the place of beginning. That same year Willingham Bros. executed a deed of trust to the Continental Gin Company of Dallas, Tex., to secure certain indebtedness for gin machinery. The land described in this deed of trust began at a point 196 varas south of the northwest corner of section No. 55, block 18, H. & G. N. Ry. Co.; thence east 106 varas for corner; thence south 228 varas for corner; thence west 106 varas for the southwest corner of the tract; thence north with section line 228 varas to the place of beginning. In 1908 John M. Gist, the appellee herein, for the purpose of assisting Willingham Bros. the proprietors of the gin, in continuing the operation of the ginning business, became their surety on a note made to the Hall County National Bank for about \$3,000, and thereafter, on account of the failure of Willingham Bros. to pay said note, Gist paid the amount due upon the note to the bank, and received a transfer of said note and the mortgage securing the same. This deed of trust to the bank embraced the correct field notes identifying the land, beginning at a point 106 varas south of the northwest corner of section 55, while the deed of trust to the Gin Company, prior in time to the bank's, called, as stated, for the beginning point at 196 varas of the northwest corner of said section, 90 varas south from the point of the other beginning call. On account of the failure of the Willingham Bros. to pay the Continental Gin Company, the Memphis Cotton Oil Company, likewise interested in the gin's operations, for the purpose of assisting the Willinghams, paid the Gin Company the amount of the debt, receiving the transfer of the debt and mortgage to it. Willingham Bros. failed to pay the Memphis Cotton Oil Company the amount of the last mortgage mentioned, and a substitute trustee, appointed by said Oil Company, purported to sell the property embraced therein, and the Oil Company became the purchaser at said sale; and thereafter W. A. Bennett and one Shepperd became the ostensible owners of the property embraced in said instrument. This suit was instituted

by Gist upon his mortgage and note executed in 1908, against the Oil Company, Willingham Bros., Shepperd, and Bennett. The defendants, Oil Company, Shepperd, and Bennett, pleaded a mutual mistake as to the beginning call of 196 varas south of the northwest corner of the instrument, and Shepperd and Bennett especially claimed valuable improvements upon the property in good faith; and the court found, at the request of said defendants, the value of the improvements on that part of the land found subject to plaintiff's lien, and placed there by said defendants, to be \$1,200. The trial court without the assistance of a jury, rendered judgment in favor of Gist for the amount of the debt and a foreclosure against all of the appellants for his mortgage lien, securing said debt, and rejected the plea of improvements in good faith.

[1] Appellants' first assignment of error is overruled. The misdescription of the note as to the date and as to amount, was met by trial amendment. The record shows that the appellants were only expected to defend against one note and mortgage, and could not have been misled or surprised.

"If the misdescription will tend to mislead and surprise the adverse party, it should be noticed by the court; if not, it may be disregarded." *National Bank v. Stephenson*, 82 Tex. 436, 18 S. W. 583, and cases cited.

[2] For the same reason, we think the trial court properly refused to permit the defendants to withdraw their announcement of ready for trial and continue the case, raised under their second assignment.

[3] The appellants' third assignment challenges the action of the court in permitting the plaintiff to establish by parol testimony the note transferred by the Hall County National Bank, "for the reason that the cashier of the National Bank had no power or authority to sell or transfer notes and bills receivable, payable to said bank, and by such actions transcended his power," and for the further reason that within the scope of his authority the cashier could not transfer the paper of the bank without a resolution of the board of directors, which is not shown to have been made. The Supreme Court of the United States said, in the case of *Merchants' National Bank v. State National Bank*, 10 Wall. 650, 19 L. Ed. 1008:

"The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities."

See, also, *Rosenberg v. First National Bank*, 27 S. W. 897; *Arnold v. Swenson*, 44 S. W. 570; *Morse on Banks and Banking*, § 158, under *Indorsement*.

[4] The fourth assignment of error complains that the court should have corrected the Continental Gin Company's deed of trust, to make the beginning call read 106 varas in

lieu of 196. The statement made under this assignment, for the purpose of sustaining its tenability, is bare of any fact, or equity pointing to a mutual mistake; nor does it afford, by inference or otherwise, any explanation of the error, the circumstances of the execution of the instrument, or whether the mistake was mutual or unilateral. It may be surmised, on account of the circumstances of the ownership of the five acres, the furnishing of the gin machinery by the Continental Gin Company, and its location upon the property, that a mistake was made, but whether intentional or mutual, or unilateral, is not shown. *San Antonio National Bank v. McLane*, 96 Tex. 48-55, 70 S. W. 201, and cases cited. We understood appellants' counsel in the oral argument to admit the insufficiency of this record for the purpose of correcting the alleged mistake. The trial court, in foreclosing plaintiff's mortgage, only foreclosed the same to the extent of 90 varas, instead of 106 varas, from the northwest corner of section 55, for the reason, we presume, that, the Continental Gin Company's mortgage being prior in time and calling for the land 196 varas from said corner, the later covered 16 varas of the land embraced in appellee's mortgage.

[5] The fifth assignment of error is seriously insisted upon, complaining of the court's action in refusing the value of the improvements found by the court, made in good faith, on that part of the land adjudged to appellee, *Gist*. The statute, providing for compensation for improvements made in good faith under claim of title, of course cannot be invoked upon the question. The right to recover the value of improvements placed upon another's land in good faith may exist, however, under principles of equity independent of any statute. *Scott v. Mather*, 14 Tex. 235; *Eberling v. Deutscher Verein*, 72 Tex. 339, 12 S. W. 205; *Van Zandt v. Brantley*, 16 Tex. Civ. App. 420, 42 S. W. 617; *Patrick v. Roach*, 21 Tex. 251; *Wood v. Cahill*, 21 Tex. Civ. App. 40, 50 S. W. 1071.

This cause stands upon the record with the appellee as a prior mortgagee; the insufficiency of the record in regard to mistake and the lack of equity for reformation against *Gist* resolves the status in that manner. We can find no authority whatever, and we are cited to none, that purchasers placing improvements in good faith upon property, with a belief in the sufficiency of the title, and derailing the same through the mortgagor, can prevail against a mortgagee in equity for the value of such improvements. *Jones on Mortgages*, vol. 1, § 147 (8th Ed.) says:

"A lien of a mortgage extends to all improvements and repairs subsequently made upon the mortgaged premises, whether made by the mortgagor or by a purchaser from him, without equal notice of the existence of the mortgage."

The Supreme Court of North Carolina said, in the case of *Wharton v. Moore*, 84 N. C. 479, 37 Am. Rep. 627:

"The land in the unimproved state when Carter received his mortgage was worth only \$250; and improvements were put on it by Moore and Adams after the conveyance to them, which enhanced its value at least \$1,000. * * * And the latter insists 'that by reason of their improvements they have a right to so much of the proceeds as the lot has been enhanced thereby. This right to betterments is a doctrine that has gradually grown up in the practice of the courts of equity. * * * But it may now be considered as an established principle of equity that whenever a plaintiff seeks the aid of a court of equity to enforce his title against an innocent person, who has made improvements on land, without notice of a superior title, believing himself to be the absolute owner, aid will be given to him, only upon the terms that he shall make due compensation to such innocent person to the extent of the enhanced value of the premises, by reason of the meliorations or improvements, upon the principle that he who seeks equity must do equity. * * * But we have been unable to find any case in which the doctrine has been held to apply to mortgages.'"

The North Carolina Supreme Court said that the statute of that state, providing a remedy for the recovery of betterments for innocent defendants, in expressly declaring that its provisions shall not apply to a suit brought by a mortgagee against a mortgagor, that the Legislature was simply re-enacting the generally admitted principle that the right to betterments is not conceded to mortgagors or parties claiming under them, and that court further quotes *Washburn on Real Property*, vol. 2:

"If the mortgagor, or any one standing in his place, enhances the value of the premises by improvements, they become additional security for the debt, and he can only claim the surplus, if any, upon such sale being made after satisfying the debt."

To the same effect are *Childs v. Dolan*, 5 Allen (Mass.) 319, and *Martin v. Beatty*, 54 Ill. 100; *Rice v. Dewey*, 54 Barb. (N. Y.) 455, which later case holds—

"Improvements that constitute a part of the realty, irrespective of the question by whom made, are * * * subject to the lien of the mortgage."

We are unable to work out the proffered equity in this case upon any satisfactory basis, and there is no assignment, or position assumed in this court, asking that the excess, if any, resultant from the proceeds of the sale, be granted to appellants. We feel impelled to affirm the judgment of the lower court; and it is so ordered.

J. B. FARTHING LUMBER CO. v. ILLIG
et ux. (No. 433.)

(Court of Civil Appeals of Texas. El Paso.
Nov. 4, 1915.)

1. APPEAL AND ERROR ~~6569~~—STATEMENT OF FACTS—PREPARATION.

Under the statute, appellant without consent of appellee may, without the reporter's

transcript, prepare a statement of facts on appeal, and have it approved by the judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2530-2545; Dec. Dig. ☞ 569.]

2. APPEAL AND ERROR ☞ 758—ASSIGNMENTS OF ERROR—GROUNDS OF MOTION FOR NEW TRIAL—BRIEFS.

Under the rules for briefing, Rev. St. 1911, art. 1612, as amended by Acts 83d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612), making grounds assigned in a motion for new trial assignments of error, the assignments in the brief must be true copies of such grounds, and not reconstructions thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. ☞ 758.]

8. APPEAL AND ERROR ☞ 758—ASSIGNMENTS OF ERROR—GROUNDS OF MOTION FOR NEW TRIAL—REFERENCE.

Where assignments of error are grounds assigned in a motion for new trial, they, as given in the brief, must, as required by Rule 25 (142 S. W. xii), refer to the portion of the motion in which they are complained of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. ☞ 758.]

4. APPEAL AND ERROR ☞ 499—BILL OF EXCEPTIONS—REFUSAL OF CHARGES—SUBMISSION TO COUNSEL.

Bills of exceptions to refusal of requested special charges must disclose that such charges were submitted to opposing counsel for examination and objection, as required by Rev. St. art. 1973, as amended by Acts 33d Leg. c. 59 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1973).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. ☞ 499.]

Appeal from Harris County Court, at Law; Clark C. Wren, Judge.

Action by R. C. Illig and wife against the J. B. Farthing Lumber Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Jno. C. Williams, of Houston, for appellant. Fisher, Campbell & Amerman, of Houston, for appellees.

WALTHALL, J. Appellees, R. C. Illig and wife, plaintiffs below, sued the appellant, J. B. Farthing Lumber Company, in the county court at law of Harris county, Tex., for a balance which they alleged was due them on a contract with W. W. Brunson for the construction of their residence in Houston, at the contract price of \$3,750. Appellees allege that to build the house they borrowed \$4,200 from G. W. Burkitt; that, with the consent of appellees and Brunson, Burkitt paid over to appellant the sum of \$4,069, for which appellant agreed on behalf of appellees and Burkitt to have the house built by Brunson and to pay off and become responsible for all bills for labor and material furnished in the construction of the house and to return any balance not used by it to appellees; that appellee R. C. Illig is a paper hanger and painter, and undertook to do that part of the work for which he was to be paid out of the contract price by appellant; that he was paid for his work except a balance of \$79.50; that \$275 should have been

paid out of the contract price for tin work, which was not done; and that the owner of the claim for tin work was threatening to file a mechanic's lien; that there remains an unused balance in the hands of appellant of the \$4,069, the sum of \$279, which appellant had converted to its own use.

Appellant specially denied that the contract price for the house was \$3,750, and alleged that the contract price was \$4,860 and evidenced by 73 notes, 71 of which notes for the sum of \$40 each, one note for \$20, one for \$2,000, all payable to the order of Brunson, all bearing interest and secured by a mortgage, mechanic's and materialman's lien; that Brunson sold the notes to Burkitt for \$4,200, upon agreement to pay Brunson \$2,100 upon an order from appellee R. C. Illig and \$2,100 on completion of building and acceptance by appellee; that Brunson with said acceptance and contract, and with the knowledge and acquiescence of appellees, represented to appellant that he was to receive cash for said notes to enable him to build said house for the sum of \$4,200 less \$131 brokerage; that Brunson was the owner of said notes and entitled to \$4,069 with which to build said house; that appellees knew that Brunson had the notes in his possession and the agreement of Burkitt to buy the notes at said price and the said representations then being made by Brunson with reference to them. Appellant alleged that appellees, by reason of said facts, were estopped from denying that Brunson was the owner of said notes and entitled to the proceeds of their sale; that Brunson agreed with appellant that appellant, for the net proceeds of the sale of said notes, should furnish to Brunson certain lumber and material for the construction of said house and assigned to appellant the proceeds of the said notes, upon acceptance by Burkitt; that thereupon appellant furnished to Brunson material to build said house at an agreed price, and advanced to Brunson, for labor performed, out of said funds, stating the items. Appellant denied the statements of appellees contained in the several paragraphs of their petition.

Appellees, by supplemental petition, admitted the execution of the notes described in the answer, and alleged that the aggregate amount stated embraced and included the accumulated interest on the deferred payments; denied any knowledge of the alleged dealings between Brunson and appellant; denied that they ever consented to any money, the proceeds of said notes being paid by Burkitt to appellant, except upon the express understanding that appellant would see that the said house was completed and all labor and material claims paid and all money accounted for as stated, and that the acceptance by Burkitt agreeing to pay all labor claims, as stated. Appellees denied the several matters alleged in the answer, except such as were admitted.

At the request of appellees, the case was submitted to the jury on special issues, and the jury found as follows: (1) The contract price agreed upon between R. C. Illig and Brunson for the construction of the house was \$3,750. (2) The item of painting and paper hanging was included in the contract price. (3) The item of electric fixtures was included in the contract price. (4) The sum of \$425 was the allowance in the contract price for painting and paper hanging. (5) The amount agreed upon between Brunson and Illig for doing the painting and paper hanging was \$425. (6) The amount Illig had received for doing the painting and paper hanging was \$370. (7) That there were no extras placed in the house during its construction not covered by the contract price.

The appellant presented special issues to the court to be submitted to the jury, all of which were refused by the court.

The court entered its judgment in favor of appellees in the aggregate sum of \$373.50, and that appellant take nothing upon any claim or set-off. The appellant presented its motion to set aside the judgment rendered and grant it a new trial, one of the grounds being that the uncontradicted evidence showed that \$40 extras had been placed upon said house and that said amount was included in the judgment entered. The appellees filed a remittitur of said item of \$40, and the motion for new trial was overruled. Appellant gave notice of and perfected its appeal.

[1] Appellees have filed in this court a motion to strike out the statement of facts and bills of exceptions filed in this court on the ground: That the statement of facts filed was not agreed to by them, and is filed by them as a statement of facts prepared by the judge of the trial court after the parties had failed to agree. That no question and answer transcript was filed in the trial court in time and in the manner required by law, in that no question and answer transcript was in fact filed by the stenographer as required by law, but that a question and answer transcript was prepared in duplicate by the stenographer and turned over to counsel for appellant. That, exactly 90 days after the adjournment of the term at which the cause was tried, the attorney for appellant filed with the clerk of the court one copy of a question and answer transcript, and upon the next day filed a duplicate thereof, the record showing that the first copy filed by appellant's attorney at the same time the trial judge filed his statement of facts, and that the duplicate question and answer transcript was not filed by appellant's attorney until the day after the trial court had filed his statement of facts, the parties not agreeing. The proposition of appellees is that the circumstances and times under which the said question and answer transcript was filed, and with reference to the time the trial judge filed his statement of facts, does not meet the requirements of ar-

ticles 1924 and 2070, Revised Statutes of 1911.

There is some conflict in the cases reported on the construction to be placed on the above articles of the statute. Counsel presenting the motion refers us to the cases of *Buffalo Bayou Co. v. Lorentz*, 170 S. W. 1052. On somewhat similar conditions to the instant case, the Galveston court, on motion in the first case above, struck out the statement of facts and overruled a motion to reinstate. The case was thereafter transferred to the San Antonio court. That court overruled a motion to reinstate the statements of facts (175 S. W. 736), but later, on its own motion and for reasons given, set aside its former order and reinstated the statement (177 S. W. 1183). In passing on the motion, we need not do more than refer to the case of *Camden Fire Ins. Ass'n v. M., K. & T. Ry. Co.*, 175 S. W. 816, and *Ft. Worth Pub. Co. v. Armstrong*, 175 S. W. 1113. The reasoning of the courts in the last two cases construing the articles of the statutes referred to meets our approval. The motion is overruled.

[2-4] Appellees move to strike out appellant's three assignments of error and the propositions thereunder as appearing in appellant's brief, because appellant's brief, in presenting said assignments, does not conform to the rules governing the preparation of causes for submission. The brief makes no pretense to copy the verbiage of the motion for new trial, made the basis of the first assignment of error; nor does it refer to that portion of the motion for new trial in which the errors are complained of, as required by the latter part of Rule 25 (142 S. W. xii).

Article 1612, Revised Statutes, as amended by chapter 136, Thirty-Third Legislature, makes the grounds assigned in the motion for new trial to constitute the assignments of error. The Courts of Civil Appeals have uniformly held that the rules for briefing cases contemplate that the assignments in the brief shall be true copies of the corresponding paragraphs of the motion for new trial, and not rewritten or reconstructed assignments or grounds. *Ruth v. Cobe*, 165 S. W. 560; *Coons v. Lain*, 168 S. W. 981; *Overton v. Colored Knights of Pythias*, 163 S. W. 1053; *Hayes v. Groesbeck*, 146 S. W. 321; *Smith v. Bogle*, 165 S. W. 35; *Dees v. Thompson*, 166 S. W. 56.

The assignment, as copied in the brief, complains of error of the trial court "in not submitting to the jury for its determination the issue of estoppel as requested by appellant in special issues Nos. 5, 6, and 7." The subject-matter of these proposed special issues requested covers 28 pages of the transcript, and by this brief assignment this court is asked to go through the transcript to discover whether the special charges should have been given. An inspection of bills of exception Nos. 1, 2, and 3, which

deal with this assignment, fails to disclose that the requested special charges were submitted to opposing counsel for examination and objection, as required by article 1973, Rev. Stat., as amended by chapter 59, Gen'l Laws, Thirty-Third Legislature. *Floegge v. Meyer*, 172 S. W. 195; *I. & G. N. Ry. Co. v. Jones*, 175 S. W. 490; *A. T. & S. F. Ry. Co. v. Hargrave*, 177 S. W. 509.

For reasons stated, the first assignment of error cannot be considered.

The second and third assignments in the brief are not copies of the corresponding grounds of error in the motion for new trial. The assignments in the brief do not refer to that portion of the motion for a new trial in which the errors are complained of as required by Rule 25. For reasons given in passing upon the first assignment, the second and third assignments cannot be considered.

We have carefully gone over the entire case and feel assured that no other judgment could have been entered. Finding no error in law apparent on the face of the record, the case is affirmed.

CURRIE v. GLASSCOCK COUNTY et al.
(No. 500.)

(Court of Civil Appeals of Texas. El Paso.
Nov. 4, 1915.)

1. HIGHWAYS — ENJOINING OPENING OF ROAD—REMEDY AT LAW.

Injunction is the proper remedy where the commissioners' court is proceeding without authority to open a first-class 60-foot road. *Vernon's Sayles' Ann. Civ. St. 1914, art. 6866*, giving appeal only as to adequacy of damages.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 165, 334; Dec. Dig. —64.]

2. HIGHWAYS — LAYING OUT—COMMISSIONERS' COURT—INJUNCTION.

If the commissioners' court in laying out a first-class 60-foot road is acting in substantial compliance with Rev. St. 1911, art. 6863, it cannot be enjoined, though the road would irreparably injure one's lands.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 165, 334; Dec. Dig. —64.]

3. HIGHWAYS — LAYING OUT—COMMISSIONERS' COURT—INJUNCTION.

The commissioners' court can be enjoined if in laying out a 60-foot road under Rev. St. 1911, art. 6863, it has transcended its authority or grossly abused its discretion.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 165, 334; Dec. Dig. —64.]

4. HIGHWAYS — LAYING OUT—COMMISSIONERS' COURT—INJUNCTION—PETITION.

The petition for injunction, alleging the commissioners' court in laying out a first-class 60-foot road has not laid it out in the most direct and practical route towards the county seat of the adjoining county, as required by Rev. St. 1911, art. 6863, but fraudulently, several miles to one side of such route, through plaintiff's lands, states grounds for relief.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 165, 334; Dec. Dig. —64.]

Appeal from District Court, Glasscock County; W. W. Beall, Judge.

Action by Lucy Currie, executrix against Glasscock County and others. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

James T. Brooks, of Big Springs, and Royall G. Smith, of Colorado, Tex., for appellant. Morrison & Morrison, of Big Springs, for appellees.

HARPER, C. J. Appellant, by petition duly verified, asked that the writ of injunction issue against Glasscock county, its county judge, and the members of the commissioners' court, restraining them from opening, laying out, and establishing a first-class 60-foot public road through certain inclosed lands. The court sustained general and special exceptions to the petition. Appellant refused to amend, and thereupon the suit was dismissed, from which judgment this appeal is perfected.

The allegations of appellant's petition essential to the issues presented here are as follows, to wit: That plaintiff, for herself and as executrix and trustee of the estate of James Currie, being minor children, filed this suit. Then alleged the ownership of the lands and described them; that same were fenced; that the said commissioners' court on October 13th made and entered an order appointing a jury of view to lay out a first-class road from the town of Garden City, the county seat of Glasscock county, to the line of said county in the direction of Sterling City, the county seat of Sterling county, Tex. Then alleged: That the said order provided that said road should be laid out 60 feet wide, to the greatest advantage to the public from said Garden City, the county seat of Glasscock county on the most direct and practicable route to the east line of said county, so that same can be traced with certainty; that said order was made and entered under the authority supposed to be conferred by article 6863, R. S. 1911. That said jury thereafter undertook to lay out such road, returned its report into the court, same was approved by the court, and said road so laid out was by order officially declared to be a public highway. That said road so laid out is not the most direct and practicable route to the eastern line of Glasscock county in the direction of Sterling City, as well as by the commissioners' court, when it approved the said report. That in truth and in fact the most direct and practicable route from Garden City to the eastern line of Glasscock county in the direction of Sterling City is practically due east, and that such road could have been laid out with very slight, if any, variation from such line while said road as so laid out runs practically southeast and is some five or six miles south of the point where the most direct and practicable route for such road should in-

tersect the eastern boundary line of Glasscock county, Tex., and an equal distance south of the most direct and practicable route from said intersection with the east boundary line of Glasscock county to Sterling City. That there are no obstacles that prevent the running of such road from Garden City to said eastern boundary line of Glasscock county, and that a first-class road could be run along said route at a much less expense to put and keep the same in good condition and repair than would be the cost of condemnation of lands required by the running of the road as it does according to said report. That the way said road runs according to the report of said jury of view as adopted by the commissioners' court as aforesaid, plaintiff's lands and also the lands owned and held by herself for herself and her minor children as aforesaid are greatly and materially damaged, and she and they will be subjected to a heavy expense in fencing and drilling wells and equipping the same with windmills and in taking to make their lands usable, and in addition to the value of the lands actually lost by being occupied by said road that the remaining lands will by reason of being separated and segregated, be greatly reduced. That, furthermore, said road as so run and declared to be a public highway was not surveyed nor defined with any certainty whatever, and neither said jury of view or said commissioners' court know or have ever known whether or not the lands described in said field notes, or alleged field notes, are those embraced in the road as brushed out, and that it is not known where any lines or corners of the surveys touched, crossed, and affected. That said road was simply laid out by guesswork and its whereabouts on the ground are uncertain and indefinite.

Plaintiff further specifically alleges: That said jury of view which so laid out said road made no effort whatever to lay same out along the most direct and practicable route to the said eastern line of said county; on the other hand, said body fraudulently and with the deliberate intent of running said road through the land of plaintiff and her children, when they well knew that such route was not the most direct and practicable route, but that such route would run practically due east, arbitrarily laid out said road as they did to make it connect with a prior road in Sterling county, Tex., which was not laid out in the most direct and practicable route to the western boundary line of Sterling county and in the direction of the county seat of said Glasscock county, but had been arbitrarily and fraudulently for the purpose of missing certain favored pastures diverted in a southwesterly direction when it should have run practically due west. That such running of said road in Glasscock county constitutes the grossest sort of abuse of the powers conferred upon said jury of view, and, instead of being in compliance

with, was in violation, not only of the order of the court appointing them, but also with both the letter and spirit of the law.

And plaintiff furthermore says: That the act of the commissioners' court of Glasscock county in approving the report of said jury of view, and its further act in ignoring the protest of this plaintiff, was a gross abuse of the powers conferred upon it of determining what was the most direct and practicable route to the eastern line of Glasscock county, and was an intentional fraud upon the rights of this plaintiff and her said minor children designed to give semblance of compliance with the law, when it was well-known to said commissioners' court that said road as so laid out was nowhere near the most direct and practicable route to the said east line of Glasscock county. That the approval of said report was intended to be effective as a finding that said road as described therein was the most direct and practicable route, and thereby conclude the plaintiff and her said minor children, and was knowingly made against all the evidence and physical facts, and was in truth and in fact made without reference to whether said road was such most direct and practicable route. That, by appealing from the order of said commissioners' court approving the awards of damages as made by the jury appointed to assess them, plaintiff could not get a review of whether or not the commissioners' court has abused the discretion given it, and that she has absolutely no remedy at law for this great injustice. That she and her children have an absolute constitutional right to keep and use their property as they see fit, and the commissioners' court of Glasscock county has no legal right to exercise the right of eminent domain upon the same and take it or any part of it for public use in the shape of a 60-foot first-class road to the eastern county line in the direction of the county seat of Sterling county against their wishes unless same is the most direct and practicable route thereto, which it is not, nor did they acquire such right by fraudulent approval of the report of the jury of view and thereby arbitrarily, fraudulently, and against all the facts, determining that it was such most direct and practicable route. That, unless restrained, the defendants will proceed to open said road and work it, and thereby accomplish an irreparable injury to plaintiff and her children, for which they have no adequate remedy at law.

[1] The first question is: Is the alleged action of the commissioners' court subject to review by the district court, or, as contended by appellee, is it simply an act within the discretionary powers of the commissioners' court, therefore not subject to be reviewed?

If the district court has jurisdiction under the statutes, or under its general equitable powers, appellant has adopted the proper remedy, injunction; for there is no provi-

tion in the statutes for an appeal except in the matter of the adequacy of the damages resulting from taking the land required for a 60-foot first-class road. Article 6866, Vernon's Sayles' Statutes. The district court has no authority to inquire into the question of the amount of damages to be paid for the land taken in this proceeding. *Schlinke v. De Witt County*, 145 S. W. 664.

[2-4] But appellant's cause of action, if she has one, is based upon the proposition that the appellees have undertaken to do that for which there is no authority of law, in that, the only statute giving the commissioners' court authority to lay out and establish the class of road attempted in this instance is contained in article 6863, R. S. 1911, which reads as follows:

"The commissioners' courts of the several counties shall see that at least one first-class road of the width prescribed by law is laid out and opened from the county seats of their respective counties on the most direct and practicable route to the lines of their county in the direction of the county seats of each adjacent county, where no part of another county intervenes between the county seats of such counties; or, if a border county, to meet the nearest road to the border; and, if any adjacent county is not organized, then in the direction of the center of such county. And the commissioners' court of a county to which one or more unorganized counties are attached for judicial purposes shall lay out and open at least two first-class roads sixty feet in width through the extent of each such unorganized county to intersect at right angles as nearly as may be at the center of the county, and to meet at the county lines similar roads of the adjacent counties. In counties now having public roads substantially complying with the preceding requirement as to course, the court shall be required only to give such roads the width of sixty feet and clear them of obstructions; such roads, however, shall not be laid out across orchards, yards, lots or graveyards, or within one hundred feet of a residence, without the consent of the owner; provided, that this law shall not apply to counties where there already exists a sufficiency of public roads."

If the commissioners' court in their attempt to open the road in question is acting in substantial compliance with this statute, the courts will not enjoin their action; but, if they are threatening to do that which transcends the authority given thereon, then the appellant has his remedy by injunction provided that by his allegations and proof it shall appear either that she is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to her, or in case irreparable injury to real estate is threatened, irrespective of any legal remedy at law. Article 4643, R. S. 1911; *Bourgeois v. Mills*, 60 Tex. 77. These are questions of fact to be alleged and proved, and, since the trial court sustained the demurrers to plaintiff's petition and dismissed his suit, the only further question before us is: Does appellant's petition contain such allegations of fact that, if proven, would entitle her to the relief prayed for?

The petition charges that the jury of view

has laid out the road in question fraudulently, capriciously, and arbitrarily, along a route known to them, and the commissioners' court, not to be the most direct and practicable route from the county seat of Glasscock county to the county seat of Sterling county, but is between five and six miles south of such direct line; that the most direct line is practically due east; and that there are no obstacles in a direct route to require any deviation therefrom. Further alleged that the road declared to be a public highway by the commissioners' court had not been surveyed nor defined with any certainty; that therefore no person knows whether the lands described in the field notes are the same as those embraced in the road as brushed out or not; therefore it will be impossible, if she must submit to the road, to keep it within any defined boundary.

That such a road, as the one sought to be established, would be prejudicial to appellant and do irreparable injury to the lands described in the appellant's petition, there is no doubt, in that, it would permanently disturb and disarrange a large body of land with its present arrangement of fences, etc.; and it is equally certain that to have a road laid out across such a body of land without being on and along the boundaries fixed for it, by the order of the court, would be void for uncertainty, therefore would be prejudicial or likely be so, for in the future, by an accurate survey, it might be determined that the lands covered by the road as now brushed out was not in fact the lands condemned for the purpose, and again it may leave the question of the proper amount of damages appellant is entitled to in doubt.

But, as we view the law, notwithstanding the fact that to lay out the road as proposed would be prejudicial to the appellant or would work irreparable injury, if the commissioners' court, having the statutory authority to lay out the road, was doing so in reasonable compliance with the statute, the only right appellant is given is reasonable and proper compensation for the lands taken for the road so established. *City of San Antonio v. Grandjean*, 91 Tex. 430, 41 S. W. 479, 44 S. W. 476. But as to whether the court in this instance is exceeding its authority under the statute, as to the particular place the road is to be located, and the regularity of its acts otherwise as charged, are questions of law and fact sufficiently raised by plaintiff's petition to require the court to hear the evidence and in person or by jury determine the fact.

It is well established by the decisions of our courts that the district courts, through their equitable jurisdiction, have the power to review and revise the exercise of the discretion vested in the commissioners' courts, in cases of this kind, where it is shown that such courts have grossly abused the discretion vested in them. *Porter v. Johnson*, 140 S. W. 469; *Bourgeois v. Mills*, 60 Tex. 76;

Schlinke v. De Witt County, 145 S. W. 660; Smith v. Ernest, 46 Tex. Civ. App. 247, 102 S. W. 129; Simkins on Equity, 483. The allegations of the petition bring this case within the rule announced by these authorities.

Until a final hearing, the appellant is entitled to her temporary writ enjoining the opening of the proposed road, and it is so ordered.

Reversed and remanded.

GRICE v. COOLEY, County Judge, et al.
(No. 7411.)

(Court of Civil Appeals of Texas. Dallas. Oct. 30, 1915.)

1. GUARDIAN AND WARD \S 162—COMMISSION OF COUNTY JUDGE—WHEN PAYABLE.

The commissions provided for by Rev. St. 1911, art. 3850, providing that there shall be allowed to the county judge a commission of one-half of 1 per cent. upon the actual cash receipts of each guardian, on the approval of the exhibits and final settlement of the account of such guardian, are payable on all cash receipts shown by any annual account of the guardian when such account is approved by the judge to whom it is presented, rather than of approval of the guardian's final account; the reference to the approval of the guardian's exhibits and final account being merely to fix the period of time when the county judge may tax his commissions.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 538, 539; Dec. Dig. \S 162.]

2. GUARDIAN AND WARD \S 162—COMMISSION OF COUNTY JUDGE—"EXHIBITS."

The word "exhibits," as used in such statute, refers to annual accounts.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 538, 539; Dec. Dig. \S 162.

For other definitions, see Words and Phrases, First and Second Series, Exhibits.]

Error from District Court, Kaufman County; F. L. Hawkins, Judge.

Action by Carrie S. Grice, guardian, against Honorable Thomas R. Bond, former County Judge, and James A. Cooley, County Judge, to retax certain costs. Judgments for defendants in the county court and district court, and plaintiff brings error. Affirmed.

W. Dorsey Brown, of Kaufman, for plaintiff in error. Jas. A. Cooley, of Kaufman, for defendants in error.

RASBURY, J. This proceeding as finally shaped was one commenced before Hon. A. H. Dashiell, special judge of the county court of Kaufman county, by Carrie S. Grice, guardian, against Hon. Thomas R. Bond, former county judge, and Hon. James A. Cooley, county judge, to retax certain costs allowed them as such officers. There was a trial and judgment in the county court, from which the guardian appealed to the district court, where there was also trial and judgment, from which the guardian has appealed to this court; the terms of the judgment being unimportant, since the issues to be determined by us are agreed upon.

[1] The issues of fact were all admitted in the court below, and the case, as indicated, is before us upon agreed issues, which are stated to be "to secure construction by the courts of article 3850, Revised Statutes 1911, in order that the guardian may know from judicial determination whether commissions of one-half of 1 per cent. are properly chargeable on actual cash receipts as shown by annual accounts of such guardian, or whether the county judge sitting and making the order approving the final settlement of the account of such guardian is entitled to such commissions upon all actual cash received during the pendency of such guardianship." The issue under the agreed statement of the parties, simply stated, is: When are the commissions provided for by article 3850 payable? It is the contention of appellant that they are not payable until the guardian's final account is approved. Appellees contend that they are payable upon all cash receipts shown by any annual account of the guardian, when such account is approved by the judge to whom it is presented. Omitting formalities, the article provides that the county judge, in addition to other specified fees, shall "be allowed * * * a commission of one-half of 1 per cent. upon the actual cash receipts of each * * * guardian, upon the approval of the exhibits and the final settlement of the account of such * * * guardian," provided only one such charge shall be made. Proceeding on the theory that the Legislature, when it enacted that such fees should be paid "upon the approval of the exhibits and the final settlement of the account" of the guardian, intended that full force and effect should be given to both provisions, we conclude that such commissions may be payable upon approval of the annual account or upon approval of the final account, depending upon when the guardian received the money upon which the commission is sought to be collected. For illustration, if, upon presentation of an annual account, it discloses that cash has been received by the guardian prior to such presentation and subsequent to any last annual account, such guardian would be entitled to the specified commissions upon the approval of the account so presented. On the other hand, if it appears from the guardian's final account that since his last annual account further cash has been received, he would be entitled to his commission thereon upon the approval of such final account. The reference to the approval of the guardian's exhibits and the approval of his final account we regard as merely fixing the period or time when the county judge may tax his commissions. By article 4186, R. S. 1911, guardians are required to present an annual account under oath showing, among other things, "a complete account of receipts and disbursements since the last annual account." Upon presentation of such annual

account, it is by subsequent provisions of the statutes made the duty of the then presiding county judge to conduct a hearing thereon, and, if he is satisfied that the account is correct, it is his duty to approve same. Having made it the duty of the county judge to approve such accounts, and having allowed a fee of one-half of 1 per cent. upon the "actual cash receipts" shown thereby, it surely follows, it seems to us, that the commissions are payable upon such approval, for the reason that they were clearly intended for the benefit of the officer performing the duty, and, having been so intended, it was never contemplated that he should forego his compensation until final settlement of the estate, particularly when final settlement might not come until after the lapse of many years and the possible death of the officer. We do not, as indicated, think the reference to final settlement at all meaningless. It is very probable that in many guardianship proceedings cash would be received by the guardian in the period intervening between his last annual account and the final account. If such cash was received, the county judge who heard and approved such final account would be entitled to the commission thereon, and the sole purpose, in our opinion, for any reference to final settlement, was to secure the officer in the payment of the fees accruing at that time and which could not be done under the provision covering annual accounts.

[2] We have treated the word "exhibits," in article 3850, as referring to annual accounts. While it may not be said that exhibit, either literally or in legal contemplation, means account, it is well known that accounts are often attached to pleadings as exhibits. Such custom, taken in connection with the reference in the same article to cash receipts required to be shown in annual accounts by article 4186, R. S. 1911, and the further fact that the annual accounts required of other fiduciaries are referred to as annual exhibits (articles 3241, 3242, R. S. 1911), are in our opinion sufficient basis for holding that annual accounts were intended.

The judgment is affirmed.

CARROLL et al. v. EVANSVILLE BREWING ASS'N. (No. 7415.)

(Court of Civil Appeals of Texas. Dallas. Oct. 23, 1915.)

1. APPEAL AND ERROR 842—REVIEW—ERROR APPARENT ON FACE OF RECORD.

An erroneous construction of the law applicable to the facts found is error apparent on the face of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316-3330; Dec. Dig. 842.]

2. MONOPOLIES 17—WHAT CONSTITUTE.

Vernon's Sayles' Ann. Civ. St. 1914, art. 7798, declares that it shall constitute a conspiracy in restraint of trade where any two or more

persons, firms, or associations engaged in buying or selling any article of merchandise, enter into an agreement to refuse to buy from or sell to any other person, and article 7799 declares that all trusts are prohibited. Article 7807 declares that any contract or agreement in violation of the law shall be absolutely void. Plaintiff entered into a contract with defendant whereby defendant agreed to purchase of plaintiff exclusively all beers which he might require in his business and sale. Held, that the contract was in violation of the monopoly statutes, and an action for moneys due thereunder could not be maintained.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

Appeal from Freestone County Court; G. W. Fryer, Judge.

Action by the Evansville Brewing Association against V. S. Carroll and others. From a judgment for plaintiff, defendants appeal. Reversed and rendered.

A. B. Geppert, of Teague, for appellants.

TALBOT, J. Appellee, a private corporation incorporated under the laws of the state Indiana, with its principal office and place of business in the city of Evansville, in said state, sued the appellant V. S. Carroll, as principal, and the other appellants, L. H. Powell and J. J. Beasley, as sureties, to recover a balance of \$698.75, due by the principal to appellee for beer sold, under a contract in writing bearing date June 1, 1914. This contract, after reciting that the appellant, Carroll, has contracted with the appellee to purchase all of the beers, both in wood and in bottles which he may require in his business and sell in Teague, Tex., and surrounding territory, at certain prices named, and that appellee would allow the said appellant a certain amount for empty beer bottles returned, stipulates that the appellant Carroll agrees in consideration of the covenants and agreements on the part of the appellee, to handle and sell the products of appellee exclusively, and not to sell any beer either in bottles or draught manufactured by any person, firm, or corporation other than appellee, and to pay appellee for the beer so purchased under said written contract upon demand. Said contract further provides that it shall be in force and effect for a term of one year from its date, and may be extended from year to year under the same terms and conditions, unless one of the parties shall give 30 days' notice in writing to the other before the end of any one year of his intention to terminate it; that the appellant Carroll shall pay all freight on beer and on empty casks and cooerage returned in carload lots, and also the difference on any empties returned in less than carload lots between the carload and the L. C. L. rate. The said contract further stipulates that the appellant Carroll shall take good care of any property that may come into his possession belonging to the appellee, while in his possession, and that in the event the said appel-

lant fails to purchase the beer manufactured by the appellee exclusively or refuses to pay for the goods purchased under the contract on demand or to perform any of the conditions on his part to be performed, the appellee shall have the right and privilege to immediately cancel and terminate the contract. At the time of the execution of said contract, the appellants Powell and Beasley, as sureties, joined the appellant V. S. Carroll in a bond or writing obligatory, in the sum of \$2,000, whereby they jointly and severally guaranteed to appellee the faithful performance of said contract by the said Carroll. The petition alleges that the appellee is a private corporation duly incorporated under the laws of the state of Indiana with its principal office and place of business in the city of Evansville, state of Indiana. It alleges the terms of the contract made the basis of the suit and the execution of said bond guaranteeing its faithful performance, making them exhibits. It also alleges that there is a balance of \$698.75 due appellee for beer purchased under said contract and appellant Carroll's failure and refusal to pay the same, but it does not allege that appellee had a permit to do business in Texas. The defendants answered by general demurrer, general denial and specially, among other things, that the contract set out in the appellee's petition shows upon its face that it is in violation of our anti-trust statutes and therefore absolutely void. A trial was had without the intervention of a jury, and judgment rendered in favor of appellee for the amount sued for, and the appellants appealed.

[1-2] The appellee has filed no brief in this court and the case is before us on brief of appellants. There is no statement of facts in the record, but the court, among other things, which, for the purposes of this opinion, we deem unnecessary to state, found, as shown by conclusions of fact filed at the request of appellants, that the contracts made the basis of the suit were executed by appellants and appellee, and that appellant Carroll therein agreed to purchase of the appellee "exclusively all beers which he should require in his business and sell in Teague, Tex., and surrounding country, at the price set out and agreed upon in said contract; that on June 14, 1914, appellee sold and delivered to appellant Carroll certain beers of the cash value of \$942.50; that thereafter the said Carroll paid thereon the sum of \$243.75, leaving a balance of \$698.75 still due; that in order to secure the payment of the purchase price of such beer as was sold under the contract in question the said Carroll made and executed a bond in the sum of \$2,000, with L. H. Powell and J. J. Beasley, the other appellants herein, as sureties thereon. The court further found that "the goods, consisting of beers, sold to appellant Carroll under the contract entered into between him and appellee were sold and delivered at

Teague, Tex.; that said goods when they arrived were stored in a warehouse at Teague, Tex., and offered for sale in said city, and that the shipment of beer involved in this suit did not constitute interstate commerce." Notwithstanding the unequivocal terms of the written contract declared on and the foregoing findings of fact, the court concluded, as a matter of law, that said contract was not in violation of the anti-trust laws of this state. In so concluding we think the court erred and that such error and the rendition of the judgment, as a result thereof, is "an error in law apparent on the face of the record." Article 7798 of Vernon's Sayles' Civil Statutes, declares that:

"Either or any of the following acts shall constitute a conspiracy in restraint of trade: 1. Where any two or more persons, firms, corporations or association of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity."

Article 7799 of said statute declares that:

"Any and all trusts, monopolies, and conspiracies in restraint of trade, as defined by our statutes, are prohibited and declared to be illegal."

And article 7807 declares that, any contract or agreement in violation of the provision of the chapter of the statute in relation to trust and conspiracies against trade shall be absolutely void and not enforceable either in law or equity.

Clearly the contract entered into by and between the appellant Carroll and the appellee, Brewing Company, constituted, under the first article of the statute quoted a conspiracy in restraint of trade. It obligated and bound the appellant Carroll to handle and sell the products (beer) of appellee exclusively and not to sell any beer either in bottles or draught manufactured by any other person, firm, or corporation. Thus the contract by its very terms violates the statute quoted, which denies to persons or corporations engaged in buying or selling any article of merchandise, produce, or commodity, the right to enter into an agreement to refuse to buy from any other person, firm, or corporation any article of merchandise, produce, or commodity. If such an agreement is entered into it is declared by said statute to be a conspiracy in restraint of trade; by the second to be illegal; and by the third any such contract is declared to be absolutely void. The trial court having found that the shipment of beer involved did not constitute interstate commerce, presumably upon evidence justifying such finding, no question of interstate commerce arises, and it is therefore apparent that the contract cannot be the foundation of the judgment rendered in appellee's favor. *Texas Brewing Co. v. Templeman*, 90 Tex. 277, 38 S. W. 27.

Appellants contend, in effect, that the court erred in overruling their general demurrer:

(1) Because it appears from the petition that appellee is a foreign corporation and it is not alleged that it had secured a permit to do business in Texas; (2) because the contract shows upon its face that it constitutes a conspiracy in restraint of trade in violation of our statute, and therefore illegal and void. In the view we take of the case, as expressed above, we need not consider and discuss these questions, as presented in the brief of appellants. The trial court having determined from the evidence adduced upon the trial below, and which has not been brought before this court by a statement of facts, that the goods sold under the contract, were sold and delivered to appellant Carroll, at Teague, Tex., and was not a transaction involving interstate commerce, committed fundamental error in not rendering judgment in favor of appellants. Such being the nature of the error, it is unnecessary to discuss any other question in the case, and it becomes our duty to set aside the judgment rendered in favor of appellee and here render the judgment that should have been rendered in the court below.

It is therefore ordered that the judgment of the county court be reversed and set aside, and that judgment be here rendered for appellants.

Reversed and rendered.

GILLESPIE v. WILLIAMS. (No. 7898.)
(Court of Civil Appeals of Texas. Dallas. Oct. 23, 1915.)

1. APPEAL AND ERROR — 272 — PRESENTATION BELOW — REFUSAL OF INSTRUCTIONS.

Assignments of error, complaining of the court's refusal to submit special charges to the jury, will not be considered, where appellant did not except to such refusal in proper time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611-1619; Dec. Dig. 272; Trial, Cent. Dig. § 680.]

2. DAMAGES — 78 — BUILDING CONTRACT — LIQUIDATED DAMAGES — PENALTY.

A provision of a building contract that the contractor should forfeit \$5 for each day after a certain date that the building remained uncompleted, was a provision for liquidated damages rather than for a penalty, where it appeared that the damages were difficult of ascertainment, and that the sum stipulated for was not grossly disproportionate to the amount of the actual damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 157-163; Dec. Dig. 78.]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

Action by George Williams against Joe R. Gillespie. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Lee R. Stroud, of Kaufman, for appellant. Huffmaster & Huffmaster, of Kaufman, for appellee.

RAINEY, C. J. Appellee Williams sued appellant Gillespie for a balance due him of

\$948.03, for the construction of a residence owned by appellant. Appellant answered admitting a balance due amounting to \$423.37, but claimed damages against appellee for failure to construct said building according to contract and for delay in finishing the building within the time agreed upon. Special issues were submitted to the jury, and upon the return of their verdict thereon judgment was rendered in favor of appellee for \$686.03. A motion for new trial by appellant having been overruled, he appealed.

[1] The first and second assignments complain of the refusal of the court to submit special charges to the jury. The appellant failed to except to this action of the court in proper time, therefore these assignments will not be considered by this court.

[2] In the contract between the parties for the building of the residence and after providing for the completion of the said building, by May 1, 1913, it further provides that:

"And for each and every day after the first day of May that the building shall remain uncompleted the said Williams shall forfeit to said Gillespie the sum of \$5.00, to be deducted from the contract price hereinafter stated."

The question arose on this provision whether it constituted and fixed an absolute sum in favor of appellant, or was it a mere penalty, i. e., the amount of damages sustained by appellant to be ascertained by the evidence? The appellant contends that the contract under the evidence clearly shows that he is entitled to the sum specified as liquidated damages, while, on the other hand, the appellee contends that appellant was only entitled to such sum as measured by the rental value of the premises caused by the delay. Appellant pleaded in the alternative for damages in the event the court held that under the contract he was not entitled to forfeiture as stipulated in the contract. The trial court evidently held that the evidence only raised the question as to damages, and that was to be measured by the rental value of the house. This, we think, is shown by the issue submitted on this question, which was, "What was the reasonable rental value of the house in question from May 1 to September 5, 1913?" This was the only issue presented by the court relating to the question of forfeiture. In this we think the court erred. The provision of the contract specifically states that the forfeit for delay shall be \$5 per day, if not completed by May 1st. Whether this fixes the amount as liquidated damages or as a penalty is a question for the court's determination, and—

"in construing this contract in that respect, the subject-matter contained in it indicates the intention of the parties." *Farrar v. Beeman*, 63 Tex. 175.

We think it appears from the evidence that the damages that flowed to appellant were such as were not easy of ascertainment,

and the sum fixed in the contract will be presumed to be a fair estimate for the compensation for damages that would accrue to appellee in case of delay. The evidence shows that there was no market rental value of such houses in Kaufman county; that there was inconvenience and discomfort incurred by appellant caused by the delay in not completing the building and by reason of loss of time and worry in superintending the construction of the building after the 1st of May and until September 5th. It would be hard to estimate in money what the amount of damage would be under such circumstances. We do not think it can be said that the sum fixed bears such a proportion to the actual loss as to construe the contract as fixing a penalty. In *Collier v. Betterton*, 87 Tex. 440, 29 S. W. 467, where the consideration for constructing a building was \$5,670, it was held that \$10 a day was approximately a very large sum to pay for the rent of a house. In this case, however, the consideration for construction was \$8,200, and only \$5 a day fixed for delay. There is quite a difference between the two. Besides, in that case, there was no evidence as to damages at all, while there was evidence of damages as to matters other than rent in the instant case. If appellant agreed that the beginning of the work should be delayed until January 25th, instead of December 26th, then appellee would be entitled to that much longer time for the completion of the house and the appellant allowed \$5 a day for the time delay after such reduction.

The court having failed to construe the contract according to its terms, and the evidence not showing circumstances warranting a different construction, we think the judgment not warranted by the evidence, and it is reversed and the cause remanded.

WILSON et al. v. DEARBORN et al.
(No. 6755.)

(Court of Civil Appeals of Texas. Dallas.
Oct. 30, 1915.)

1. MANDAMUS ⇨6—CONFLICT WITH INJUNCTION.

Where the trial court made final an order enjoining a sale of land on execution, mandamus to compel the sheriff to levy execution will not be issued until the order is set aside.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 36; Dec. Dig. ⇨6.]

2. HUSBAND AND WIFE ⇨87—MARRIED WOMEN—APPEAL BONDS.

A married woman, not even with the consent of her husband, can legally bind herself as surety on an appeal bond, and a bond on which she is a surety may be refused.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 346-353, 798; Dec. Dig. ⇨87.]

On motion for rehearing. Motion denied.
For former opinion, see 174 S. W. 296.

Adams & Stennis, of Dallas, for relators.
J. L. Gammon, of Waxahachie, for respondents.

RAINEY, C. J. [1] This is a motion for rehearing of an application for a writ of mandamus in cause No. 6581, 174 S. W. 296, which application was refused at the last term of this court. This motion was filed after the period fixed for filing of motions for rehearing had expired. But it is argued that the refusal was based upon false and perjured testimony, which petitioners claim can be shown on another hearing. This would be good grounds for setting aside the former judgment in this matter and a rehearing thereof, if the petition itself did not show it would be a useless proceeding. The former application was founded on the charge that Dearborn, sheriff, had refused to levy an execution duly issued by this court on certain lands pointed out by this applicant, etc. The application for rehearing shows that said executions had been subsequently placed in the hands of a constable, had been duly levied on the said land and advertised for sale; that an injunction had been procured from the district court restraining the sale of said land, by virtue of said execution, which injunction was upon hearing perpetuated by said district court and notice of appeal given by applicant. The judgment of the district court perpetuating the injunction being final, it precludes the issue of the writ of mandamus by this court until said judgment is set aside and annulled.

[2] The application prays in the event that a rehearing is not granted on the former application, that a mandamus be now issued against Carl Tankersley, district clerk, requiring him to approve an appeal bond executed in the injunction proceeding by applicants as principal, with P. C. Wylie and Mary Wilson as sureties. It was shown on the hearing of this issue that Mary Wilson, one of said sureties on said appeal bond, was a married woman, the wife of J. B. Wilson, and the refusal to approve said appeal bond was on account of Mary Wilson being a married woman, and therefore not a proper surety under the law. The question then arises, Can a married woman legally bind herself as surety on an appeal bond with the husband's consent, which was the case in this instance, unless in a matter involving her contract for necessities or her separate property? We think not. In the injunction proceedings Mary Wilson's separate property, nor her rights as a married woman, were in anyway involved. Under the law a married woman cannot make a valid contract binding upon her unless for necessities for herself and children, or for the benefit of her separate estate. The judgment appealed from in no way involving a contract by her for necessities for herself nor for the benefit of

her separate property, and she incurred no liability on the appeal bond.

In the case of *Cruger v. McCracken*, 87 Tex. 584, 30 S. W. 537, it was held that the signing by the wife of an appeal bond of the husband was void, which ruling is directly in point in this case, and adverse to the appellant's contention.

As we hold under the law that Mary Wilson is not a proper surety on the appeal bond, should we hold that the writ of mandamus should issue against the clerk? We think not. Our statute provides that to perfect an appeal a bond with two good and sufficient sureties should be tendered to the clerk, who shall approve the same. The duty of approving said appeal bond is imposed upon the clerk when the two sureties are good and sufficient. Such being his duty, he would violate the law to approve a bond not complying with its requirements. Mary Wilson being a married woman, she is not qualified under the circumstances of this case, and the clerk was justified in not approving the bond, and the mandamus is denied.

The motion is overruled.

BRADEN-ZANDER CONST. CO. et al v. SENG. (No. 5531.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 10, 1915.)

1. SALES \S 288—WARRANTY—WAIVER BY REJECTION OF GOODS.

Where a chattel mortgage securing the price of a cement mixer contained the provision that the buyers agreed to give the machine a fair trial within ten days after receiving it, and, if it was found not to have the claimed capacity, or they were not fully satisfied with it in every respect, they should have the right to refuse it by notifying the seller's agent of their intention to do so, the buyers, by not rejecting the mixer for breach of warranty as to its capacity within the ten-day period, waived their right to thereafter reject on such ground.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. \S 817-823; Dec. Dig. \S 288.]

2. SALES \S 287—CONTRACT—MODIFICATION.

Where the chattel mortgage, executed by the buyers of a cement mixer to secure the price, stipulated that they should reject for breach of warranty as to capacity within ten days, and the agent of the seller, by his requests and promises that they might return it, if unsatisfactory, later than that, caused the buyers to forego their right to reject within such period, such agent, in suit on the purchase-money notes assigned him by his principal, the seller of the mixer, could not be heard to say that he was not bound to permit rejection of the mixer after the ten-day period upon its failing to give satisfaction, since a subsequent agreement altering the terms of a written contract may be made by parol.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. \S 811-816; Dec. Dig. \S 287.]

Appeal from Bexar County Court for Civil Cases; John H. Clark, Judge.

Action by W. S. Seng against the Braden-Zander Construction Company and others.

Judgment for plaintiff, and defendants appeal. Reversed, and cause remanded.

T. H. Ridgeway, of San Antonio, for appellants. Geo. M. Mayer, of San Antonio, for appellee.

MOURSUND, J. Appellee Seng sued appellants upon five promissory notes, and to foreclose a chattel mortgage upon a cement mixer and appliances. The notes were payable to Waterloo Cement Machinery Corporation, and indorsed by said company to appellee, who was agent for the company in the transaction involving the sale of the cement mixer to appellants and the execution of the notes and mortgage.

Appellants pleaded that the chattel mortgage contained the following provision:

"It is understood by me that you guarantee that this mixer has the capacity claimed above. I agree to give this machine a thorough and impartial trial within ten days after receiving it. If it has not the capacity claimed above, or I am not then fully satisfied with it in every other particular, I am to have the right to refuse it by notifying you within said time of my intention to do so, in which event you are to give me shipping instructions and refund to me all payments made by me on said machine, including freight."

They pleaded further that immediately after receiving said mixer they gave it a fair trial, and found that it did not have the capacity of five cubic feet per batch, and would not perform the work as warranted by the company, and that they were not then fully satisfied with it in every other particular; that they notified Seng and the company of these facts within ten days from the time they received the machinery; that they were prevailed upon by Seng to keep the mixer and give it further trials, and pursuant to his requests they did retain the same and gave it numerous trials, but always found that it did not have the capacity warranted, and they were dissatisfied with it, and they so notified Seng; that at Seng's request they tried it up to some time in July, 1913, when they refused to try it further.

The court instructed a verdict in favor of appellee.

[1] There was evidence on the part of appellants raising the issue whether the mixer had the capacity warranted, but, as they pleaded they knew within the ten-day period that it did not have such capacity, it seems they waived their right to reject it on that ground by failing to do so within ten days. No amount of trials could increase the capacity thereof, and it cannot be contended that any persuasions or requests on the part of Seng caused appellants to fail to reject the mixer on the ground of want of capacity of five cubic feet per batch.

On the issue whether the mixer was satisfactory Zander testified:

"The notes and mortgage were not executed on the 11th day of May; they were executed a few days after that. After Joe Slavin got the

mixer to running a little, Mr. Seng called for a settlement, and I told him that we were not satisfied with the mixer, but he stated that the mixer was new and after it was worked a little while it would run better and would be all right and for us to go ahead and make the first payment and execute the notes, and he would see that the mixer would run all right. We then decided to give the machine a further trial before rejecting it. We then made the first payment and executed the notes and the mortgage. He dated them back to cover the time we had the mixer. After that the mixer would not work well, and I went to Mr. Seng again and told him about the matter and told him that it was unsatisfactory. I did this several times within the ten days after the notes were executed and within ten days after the date of the notes, and Mr. Seng stated that the machinery was new and would get limbered up after it was worked a while, and would be all right. He asked me to not turn the machinery back to him, as it would become known and would injure him in business in San Antonio, and upon his statements and requests we continued to try to operate the mixer. I went to him several times after that and told him that it was not satisfactory, and each time he would persuade me to keep it and try it again. Mr. Braden wanted to turn the machinery back long before we quit using it. When the first note became due Mr. Seng asked for a settlement. I told him that the machinery was unsatisfactory, and that we did not want to pay the note; that we did not want to have to sue foreign corporations to get our money back, and if we had to sue to get our money back, we would have to sue in the federal court, and I did not want to do that. Mr. Seng stated that he lived in San Antonio, and stated that he would make everything all right. I paid the note, \$48, and interest, under protest. I was persuaded to do this by Mr. Seng. He stated that the machinery would work all right, and if it did not work all right he would make everything all right."

[2] This testimony raised the issue whether Seng waived the clause requiring appellants to give notice within ten days of their refusal of the mixer on the ground that they were not fully satisfied with it in every particular. It cannot be contended that a subsequent agreement altering the terms of a written contract cannot be made by parol. If Seng, by his requests and promises, caused appellants to forego their right to reject the mixer within ten days, he cannot be heard to say that he will not be bound to permit its rejection when it fails to give satisfaction, although appellants did just what he asked them to do.

The judgment is reversed, and the cause remanded.

FT. WORTH & D. C. RY. CO. v. DECATUR COTTON SEED OIL CO. (No. 8213.)

(Court of Civil Appeals of Texas. Ft. Worth. July 3, 1915.)

1. RAILROADS — 411 — FENCES — STATUTE.

Vernon's Sayles' Ann. Civ. St. 1914, art. 6603, declaring that every railroad company shall be liable to the owner for the value of all stock killed or injured by the locomotives and cars of such company in running over their respective railways, that such liability shall exist in counties which adopt the stock law, prohibiting the running at large of domestic ani-

mals, but that if the railroad right of way is fenced, the company shall be liable only for injuries resulting from a want of ordinary care, has no application to the switchyards and station grounds, where the fencing of the tracks would endanger the safety of the railroad company's employes in coupling and uncoupling cars.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1400-1450; Dec. Dig. — 411.]

2. ANIMALS — 50 — STOCK LAWS — VIOLATION.

Where cattle escaped from the owner's inclosure through no fault of his, he was not guilty of a violation of the stock law prohibiting the running at large of animals.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 148-157; Dec. Dig. — 50.]

3. RAILROADS — 447 — INJURIES TO ANIMALS ON TRACKS — ACTIONS — INSTRUCTIONS.

In an action against a railroad company for the killing of cattle, the company contended that the cattle were either killed at a public crossing or while in its switchyards, which, under Vernon's Sayles' Ann. Civ. St. 1914, art. 6603, need not be fenced. The accident occurred within the limits of a town whose ordinances forbade the running at large of domestic animals, and the stock law was also in force therein. The jury were charged that if the cattle were not running at large with the consent and knowledge of the owner, then judgment should be against the railroad company. Held, that the charge was erroneous in allowing a verdict against the company, though the injury might have occurred on the public road, or in the yards, which need not have been fenced.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1642-1650; Dec. Dig. — 447.]

4. TRIAL — 296 — INSTRUCTIONS — CURE OF ERRORS.

Where an instruction, purporting to generally define the rights of the parties, omits defenses, the fact that other instructions present those defenses will not cure the error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. — 296.]

5. RAILROADS — 415 — INJURIES TO ANIMALS ON TRACKS — ORDINANCES.

Where a municipal ordinance, prohibiting the running at large of domestic animals, is enforced, a railroad company is under no obligation to keep a lookout for trespassing animals on its tracks in a switchyard which is not, by statute, required to be fenced.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1476-1482; Dec. Dig. — 415.]

6. TRIAL — 250 — INJURIES TO ANIMALS ON TRACKS — ACTIONS — INSTRUCTIONS.

A charge on the duty of a railroad company to give the crossing signals prescribed by Vernon's Sayles' Ann. Civ. St. 1914, art. 6564, is not appropriate in an action for the killing of cattle, unless they were killed on a crossing.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. — 250.]

7. RAILROADS — 442 — INJURIES TO CATTLE — ACTIONS — EVIDENCE.

In an action for the killing of cattle on railroad tracks, evidence as to where they were struck, based on the evidences found on the ground, is admissible.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1596-1607; Dec. Dig. — 442.]

8. APPEAL AND ERROR — 1050 — REVIEW — HARMLESS ERROR.

The admission of testimony as to whether a railroad track was fenced at a point other

than the place of the accident is harmless, in an action for the killing of cattle.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.]

9. TRIAL § 253—INJURIES TO CATTLE—ACTIONS—INSTRUCTIONS.

Where a railroad company claimed that the cattle were killed either on a public crossing or in its switchyards, which were not required to be fenced, a charge that verdict should be for plaintiff if the place of the accident was not fenced, unless it was within defendant's switch limits, is subject to criticism, as tending to exclude the defense that the cattle were struck on the public road.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.]

10. RAILROADS § 447—INJURIES TO CATTLE—ACTIONS—INSTRUCTIONS.

In an action for the killing of plaintiff's cattle, a charge that if defendant was not required to fence its tracks at the place where the cattle were hit, verdict should be for it, unless its agents and employes failed to use, in operating the train, such care as persons of ordinary prudence would have exercised, is too general in its terms, because it would permit the jury to construe as negligence the failure of the operatives of the train to keep a lookout for cattle, or to give signals to frighten them in the event of their presence, though the accident happened at a place where the tracks were not required to be fenced.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1642-1650; Dec. Dig. § 447.]

11. TRIAL § 251—INSTRUCTIONS—APPLICABILITY TO ISSUES.

A requested charge that there was no evidence showing the train was being run at excessive speed is properly refused, in an action for killing cattle, where excessive speed was not made a basis of recovery.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.]

Appeal from Wise County Court; E. M. Allison, Judge.

Action by the Decatur Cotton Seed Oil Company against the Ft. Worth & Denver City Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Thompson & Barwise, of Ft. Worth, and McMurray & Gettys, of Decatur, for appellant. L. D. Ratliff, R. F. Spencer, Jr., and W. C. Shults, all of Decatur, for appellee.

DUNKLIN, J. Four head of cattle belonging to the Decatur Cotton Seed Oil Company escaped from its feed pens near its oil mill in the town of Decatur at night, and, as a result of being struck by a train of the Ft. Worth & Denver City Railway Company within the corporate limits of the town, and at a point where the railway was not fenced, two of them were killed outright, and the other two were so badly injured that they afterwards died. The owner instituted this suit against the railway company to recover damages for the value of the animals, and from a judgment in favor of the plaintiff, the defendant has appealed.

In its amended original petition plaintiff

predicated its claim for damages upon allegations of negligence in the excessive speed of the train, in violation of an ordinance of the city of Decatur, in a failure of the operatives of the train to keep a proper lookout for the animals and in failing to ring the bell and blow the whistle, as required by law. In its answer defendant denied the allegations of negligence referred to, and further pleaded negligence on the part of the plaintiff in permitting the cattle to escape from the pens and wander upon the track. Defendant further alleged that the accident occurred within its switch limits in the town of Decatur, at a place regularly used by its employes in coupling and uncoupling cars; that the track was not fenced at that place, and defendant was not required by law to fence the same, by reason of the fact that so to do would endanger and impede its employes in the performance of the services necessary to couple and uncouple the cars. Defendant also alleged that the cattle were killed at a public road crossing, and denied that it was guilty of any of the negligence charged in the petition. By a supplemental petition plaintiff denied that the accident happened at a public road crossing, or within defendant's switch limits, and specially alleged that at the place of the accident the defendant was required by law to fence its right of way.

There was evidence tending to support the defendant's allegation that the cattle were struck on a public road crossing, and the further allegation that if not at such crossing, then they were struck within the defendant's switch limits in the town of Decatur, where it was necessary to leave the track unfenced in order to enable its employes to couple and uncouple cars with safety and without obstruction. Plaintiff introduced evidence tending to negative those allegations. According to testimony offered by the plaintiff, the cattle were killed north of the public road crossing.

Upon the issue whether or not in approaching said public road crossing the statutory signals required of locomotives were given in the manner prescribed, the evidence was conflicting.

It was agreed by counsel for both parties upon the trial that at the time of the accident Decatur was a duly incorporated town, having then in full force and effect a city ordinance prohibiting cattle from running at large within its corporate limits, and prescribing a penalty against owners, or those having the cattle in charge, for permitting them to run at large in violation of that ordinance; that said ordinance was, at the time in question, being enforced by the officers of the city of Decatur, and that the place of accident was within the corporate limits of said town.

[1-4] As amended in the year 1905, article

6603, Vernon's Sayles' Texas Civil Statutes, reads:

"Each and every railroad company shall be liable to the owner for the value of all stock killed or injured by the locomotives and cars of such railroad company in running over their respective railways, which may be recovered by suit before any court having competent jurisdiction of the amount. Such liability shall also exist in counties and subdivisions of counties which adopt the stock law prohibiting the running at large of horses, mules, jacks, jennets and cattle; provided, however, that in all cases, if the railroad company fence its road, it shall only be liable for injury resulting from a want of ordinary care."

Before being amended the original article did not contain the provision—

"such liability shall also exist in counties and subdivisions of counties which adopt the stock law prohibiting the running at large of horses, mules, jacks, jennets and cattle."

While the statute quoted does not, in specific terms, require the railroad company to fence its track, it is usually referred to in the decisions as having that effect, since, in the absence of a compliance with that statute, the railway company is held liable as an insurer against loss for the killing of cattle upon its track by its trains. According to the well-established rule of our decisions, that statute has no application within the switch limits of a railway company at and around its stations, where the fencing of the track would endanger the safety of its employees in coupling and uncoupling cars, and would impede their movements in performing that service. See *Tex. Cen. R. R. Co. v. Hico Oil Mill*, 128 S. W. 628; *I. & G. N. Ry. Co. v. Cocke*, 64 Tex. 151; *I. & G. N. Ry. Co. v. Dunham*, 68 Tex. 231, 4 S. W. 472, 2 Am. St. Rep. 484.

According to evidence offered by the plaintiff, the cattle escaped from the inclosure through no fault on the part of the owner. In *Texas & Pacific Ry. Co. v. Webb*, 102 Tex. 210, 114 S. W. 1171, it was held that under such circumstances the owner would not be guilty of a violation of the stock law prohibiting the running at large of animals in districts which had adopted the stock law. Upon the trial of the present suit the following instruction was given the jury by the court:

"Now, if you find and believe from the evidence that said cattle were running at large in the city of Decatur, Tex., in violation of a city ordinance of the city of Decatur, Tex., prohibiting cattle from running at large, with the knowledge and consent of the plaintiff, and in violation of said city ordinance, then you will find for the defendant. On the other hand, if you find and believe from the evidence that said cattle were not running at large with the knowledge and consent of the plaintiff, then in that event you will find for the plaintiff."

Error has been assigned to the latter portion of that instruction, in effect, that if the cattle were not running at large with the knowledge and consent of the plaintiff, then a verdict should be returned in plaintiff's favor. One of the criticisms presented to that instruction is, in effect, that it excluded all other defenses to the suit save and except

the one that plaintiff violated an ordinance of the city of Decatur by permitting its cattle to run at large. We are of the opinion that this assignment should be sustained for the reasons stated in the objection thereto just noted. If the animals were struck upon a public road crossing, or at a place within the switch limits of the defendant company where the safety of its employees required the track to be unfenced, then article 6603 of the statutes, quoted above, would have no application, and in order to entitle plaintiff to a recovery, it would be necessary for it to sustain some of the allegations of negligence shown in its petition. And it is no answer to this assignment that those defenses were submitted in other portions of the charge, since it cannot be determined which of the conflicting instructions was observed by the jury. *S. K. Ry. Co. v. Sage*, 98 Tex. 438, 84 S. W. 814; *Burgher v. Floore*, 174 S. W. 819, by our Supreme Court.

[5] Another paragraph of the court's charge reads:

"Should you find and believe from the evidence that the track at said place was not required to be fenced, but further find that defendant's agents and employees did not use such care in keeping a lookout ahead of the train, and blow the whistle and ring the bell, as a person of ordinary prudence would have done under the same or such circumstances, and that such failure, if any, was the proximate cause of the striking of said cattle, killing and causing the same to be killed, then you will find for the plaintiff."

One of the criticisms presented to this charge is that as the cattle were trespassers upon the track within the corporate limits of the city of Decatur in violation of the city ordinance, the operatives of the train had the right to assume that the animals would not be at large upon the track in violation of that ordinance, and it owed no duty to keep a lookout for the purpose of discovering whether or not the cattle were on the track, or to blow the whistle or ring the bell in order to frighten them away before their presence was discovered. By another assignment appellant complains of the refusal of its requested instruction No. 3, presenting that theory of the law. As noted already, it was agreed upon the trial that the ordinance had been enforced, and we have been cited to no evidence in the record tending to show that cattle might reasonably be expected upon the track at the time in controversy. Under those circumstances we are of the opinion that, if at the place where the accident happened, the railway company was not required to fence its track, then it owed no duty to keep a lookout to discover the presence of the animals upon the track, or to give signals to frighten them away upon the supposition that they might be there, but without any knowledge of that fact, and that the extent of the liability of the company under such circumstances would be for negligence in failing to avoid injuring the cattle after their presence upon or

near the track had been discovered, as presented in the requested instruction last referred to. See *F. W. & R. G. Ry. Co. v. Hudgens*, 43 Tex. Civ. App. 201, 94 S. W. 378; *M., K. & T. Ry. Co. v. Byrd*, 124 S. W. 738; *L. & G. N. Ry. Co. v. Cocke*, 64 Tex. 157; *Railway Co. v. Dunham*, 68 Tex. 231, 4 S. W. 472, 2 Am. St. Rep. 484.

[6] The court gave in charge to the jury the provision contained in article 6564, *Vernon's Sayles' Texas Civ. Stat.*, relative to the duty of railway companies in approaching a public road or street to ring the bell and blow the whistle at least 80 rods before the locomotive reaches the crossing. In no event would that instruction be applicable unless the cattle were killed on the public crossing, and, if applicable at all in the present suit, its force might be overcome by the contributory negligence, if any, on the part of the plaintiff in permitting its cattle to run at large in violation of the ordinance of the city of Decatur.

[7] There was no reversible error in permitting the witness Moss to testify where the cattle were struck, as complained in the first assignment. While it is true that he did not see them when they were injured, yet he based those answers upon the evidences found upon the ground, which, if true, would leave no doubt as to where the cattle were struck.

[8] While the testimony of the witness Grover Oats, which was to the effect that the right of way north of the depot is fenced up to the switches, may not have been admissible over the objection that it was irrelevant, the accident having happened south of the depot, yet we fail to see how it was prejudicial to appellant.

[9] By another assignment the jury were told, in effect, that if the defendant's track at the place of the accident was not fenced, a verdict should be returned for the plaintiff, in the absence of a further finding that such place was within defendant's switch limits where the track was not required to be fenced. There was some testimony to the effect that the cattle were struck at a public road crossing. The instruction is possibly subject to the criticism that the jury might have been misled to exclude the defense that the cattle were struck on the public road crossing, and upon another trial the instruction should be so framed as to avoid that criticism.

[10] Another paragraph of the court's charge reads:

"In the event that the defendant was not required to fence its track at the place where said cattle were hit and killed, and crippled and wounded so that they had to be killed if they were, then you will find for the defendant, unless you further find that the agents and employes of the defendant failed to use, in operating defendant's train, such care as a person of ordinary prudence would have exercised under the same or like circumstances."

This instruction was too general in its terms, and would permit the jury to construe as negligence the failure of the operatives of the train to keep a lookout for cattle, and to ring the bell and blow the whistle in order to frighten them in the event of their presence, but before such presence was discovered, even though the accident happened at a place where the statute did not require the track to be fenced, and was erroneous for the reasons already given.

[11] There was no reversible error in refusing to give the defendant's requested instruction, to the effect that there was no evidence to show that the train was running at an excessive rate of speed at the time of the accident, since that issue was not submitted to the jury as a basis for recovery.

Our views on questions presented in other assignments are sufficiently indicated in the foregoing conclusions, and a further discussion thereof is unnecessary.

For the reasons indicated, the judgment is reversed, and the cause remanded.

CITY OF BROWNSVILLE v. TUMLINSON. (No. 5510.)

(Court of Civil Appeals of Texas. San Antonio. Oct. 20, 1915. On Motion for Rehearing, Nov. 17, 1915.)

1. PLEADING \S 183—SUPPLEMENTAL ANSWER—NECESSITY.

Where a supplemental petition consisted solely of exceptions and denials, and alleged no new matter, there was no place in the pleadings for a supplemental answer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. \S 389-396; Dec. Dig. \S 183.]

2. APPEAL AND ERROR \S 1041 — HARMLESS ERROR—AMENDMENT OF PLEADINGS.

Where a pleading sought to be filed by defendant after its announcement of ready, although styled a supplemental answer, was in response to the amended original petition and was therefore an amendment, and the court permitted defendant to file a trial amendment, setting up new matter in defense of plaintiff's suit, it did not appear that defendant was injured by the court's refusal to permit defendant to withdraw its announcement of ready in order to file such so-called supplemental answer.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 4106-4109; Dec. Dig. \S 1041.]

3. PLEADING \S 199 — DEMURRER — TIME FOR DEMURRER.

If a general demurrer is well taken, it should be sustained at any stage of the proceedings.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. \S 464-469; Dec. Dig. \S 199.]

4. APPEAL AND ERROR \S 1040 — HARMLESS ERROR—REFUSAL TO RULE ON DEMURRER.

Defendant cannot complain of the court's refusal to rule on a general demurrer, unless it is well taken.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 4089-4105; Dec. Dig. \S 1040.]

5. APPEAL AND ERROR — 242—FUNDAMENTAL ERROR—REFUSAL TO RULE ON DEMURRER.

When the court refuses to rule on a general demurrer which is well taken, the case will be reversed for fundamental error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1417-1425; Dec. Dig. — 242.]

6. PLEADING — 228 — DEMURRER OR EXCEPTION.

A special exception which did not go to the form of the pleading, but asserted that defendant was not bound by the contract sued on, because it was an oral one, and that plaintiff therefore stated no cause of action, was a general demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 584-590; Dec. Dig. — 228.]

7. MUNICIPAL CORPORATIONS — 243 — CONTRACTS—FORM—ORAL CONTRACTS.

As Rev. St. 1911, arts. 769-771, authorizing cities to construct electric light plants and waterworks are silent as to how contracts with their customers shall be made, a contract by a city to furnish electric current was binding on the city, although oral; the superintendent who made the contract having special authority to make oral or written contracts.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 675-677; Dec. Dig. — 243.]

8. LICENSES — 39—REMEDY OF UNLICENSED PERSONS.

Where plaintiff intending to engage in the moving picture business, contracted with defendant for electric current with which to light his theater building and conduct a moving picture show therein, and defendant's failure to furnish such current delayed him in engaging in such business, he was not precluded from recovering damages sustained before engaging in the business, because he did not, at that time, have any license from the state to conduct such business, as he was not required to have a license before he engaged in the business, especially as the statute imposing an occupation tax upon the theater business was passed for the purpose of raising revenue, and he paid the tax the day he commenced business.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 76-78; Dec. Dig. — 39.]

9. EVIDENCE — 433 — PAROL EVIDENCE TO VARY WRITING—MISTAKE.

Where a written transfer by a partner of his interest in the partnership business did not include a transfer of claims due the firm, and it did not appear on the face of the instrument, or otherwise, that the instrument was intended to evidence a part only of the transaction, but, on the contrary, it was claimed that the failure to include a transfer of claims resulted from a mutual mistake, it could not be shown by parol that there was a transfer of such claims, as the rule that where the original contract was verbal and entire, and a part only reduced to writing, the parol part may be shown by oral evidence cannot be resorted to for the purpose of adding other property to that mentioned in a conveyance, when the parties undertake to make the written instrument cover the entire transaction; the remedy when a mutual mistake is made in describing the property transferred being to bring an action to reform the conveyance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1990-2004; Dec. Dig. — 433.]

10. REFORMATION OF INSTRUMENTS — 33, 36 — ACTIONS—PLEADING—PARTIES.

In an action on a claim due a partnership by one of the partners who had acquired the interest of the other partner in the partnership business, if it was desired to reform the instrument transferring such partner's interest so as

to include claims due the firm, the petition should have contained proper allegations, and the partner who made the transfer should have been made a party, so that the reformation of the instrument would be binding on him.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 122-139, 141-146; Dec. Dig. — 33, 36.]

11. DAMAGES — 23—BREACH OF CONTRACT—DAMAGES NOT WITHIN THE CONTEMPLATION OF THE PARTIES.

Where defendant's representative understood, when he contracted to furnish electric current to plaintiff for his theater building, that the business to be conducted therein was that of a moving picture show, it was not within the contemplation of the parties that a breach would cause damages on account of salaries to be paid members of a vaudeville troupe.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 53, 62; Dec. Dig. — 23.]

12. DAMAGES — 23—BREACH OF CONTRACT—DAMAGES NOT WITHIN CONTEMPLATION OF PARTIES.

Notice to defendant's representative, after the contract was made and before the breach, was not sufficient to entitle plaintiff to recover as special damages the amount paid to such vaudeville troupe.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 53, 62; Dec. Dig. — 23.]

13. DAMAGES — 176—BREACH OF CONTRACT—EVIDENCE—LOSS OF PROFITS.

In an action for breach of contract to furnish electric current for plaintiff's theater building, plaintiff, in testifying to his loss of profits, was not bound to estimate his loss for each night separately.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 461, 463, 471, 493; Dec. Dig. — 176.]

On Motion for Rehearing.

14. EVIDENCE — 442 — PAROL EVIDENCE TO VARY WRITING.

In an action by one member of a partnership on a claim due the firm, evidence held insufficient to show that the written transfer of the other partner's interest in the firm business, which was not in the record and did not include claims due the firm, purported to express only a part of the transaction, so as to authorize parol proof of the other part, especially where plaintiff expressly testified that the instrument was intended to cover the claims, but that they were omitted by mutual mistake.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1897; Dec. Dig. — 442.]

Appeal from District Court, Cameron County; W. B. Hopkins, Judge.

Action by T. R. Tumlinson against the City of Brownsville. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded.

T. A. Kinder and H. W. Williams, both of Brownsville, for appellant. F. W. Seabury, of Brownsville, for appellee.

MOURSUND, J. T. R. Tumlinson sued the city of Brownsville for \$1,399.70, with interest, alleged to be due because of the breach of a contract, whereby said city bound itself to furnish said Tumlinson and O. N. Boston with electric current for the purpose of lighting a theater building and conducting a moving picture show therein.

Plaintiff alleged that he had acquired Boston's interest in the claim sued upon. The damages claimed were: (1) Special damages in the sum of \$210, of which amount \$100 was paid to members of a vaudeville troupe under contract made before plaintiff ascertained that no electric current would be furnished, \$5 paid for advertising, and \$105 for loss of profits during the week for which said vaudeville troupe had been engaged; (2) net actual and necessary expenditures for substitution of another source of electricity during the 90 days the city refused to furnish same, amounting to \$689.70; (3) amount of loss of business and patronage, resulting from inferior service thus forced on Tumlinson & Boston \$500. Defendant answered by general demurrer, special exceptions, denials of the allegations of the petition, and specially pleaded that it had no notice or knowledge of any contract made by Tumlinson & Boston with any vaudeville troupe, or that he could not conduct the show unless he procured current, or that he would lose any profits if the current was not furnished. Defendant also pleaded that Tumlinson & Boston were indebted to it in the sum of \$26.75 at the time its representative, Burks, made the contract sued upon, but that Burks did not know of such indebtedness until after making the contract, and then, acting under an ordinance of the defendant authorizing him to cut off all electric current connected for patrons whose bills remained unpaid for more than five days, he disconnected the current at plaintiff's theater. Defendant further pleaded that, at the time the contract sued upon was made, Tumlinson & Boston had not procured a license for the purpose of running a theater, and therefore could not recover. Plaintiff, by supplemental petition, denied the allegations contained in the answer. Defendant, by trial amendment, alleged that Tumlinson & Boston were guilty of negligence in purchasing and installing a gasoline engine of inferior quality for the purpose of running a dynamo to produce electricity for their theater, and also in undertaking to operate such engine without being competent to do so, and that the damages were caused by such negligence on the part of Tumlinson & Boston. It also pleaded that plaintiff conducted his business on Sunday, in violation of law, and therefore should not be permitted to recover. By agreement these allegations were considered denied without any pleading being filed. The trial resulted in a verdict in favor of plaintiff for \$1,354.70, with interest from October 1, 1909, and judgment was entered in accordance with such verdict.

[1, 2] By the first two assignments of error complaint is made of the refusal to permit defendant to withdraw its announcement of ready, for the purpose of filing its first supplemental answer and "Adoption of its First Amended Answer." These assignments

are without merit. There was no place in the pleadings for a supplemental answer. The supplemental petition consisted solely of exceptions and denials, and did not allege any new matter. The pleading which was sought to be filed, although styled supplemental answer, was in fact an amendment, as it was in response to the amended original petition. Defendant was permitted to file a trial amendment, in which it set up new matter of defense to plaintiff's suit, and it does not appear that defendant suffered any injury by reason of the ruling complained of.

[3-7] By the third assignment appellant complains of the refusal of the court to permit it to present its general demurrer and a special exception after the parties had announced ready for trial and some of the jurors had been selected. If a general demurrer is well taken, it should of course be sustained at any stage of the proceedings, but defendant cannot complain when the court refuses to rule upon a general demurrer, unless it is well taken, and if it is, the case will be reversed for fundamental error. The special exception not ruled on by the court did not go to the form of the pleading, and was a general demurrer, for it asserted that because the contract sued upon was an oral one, the defendant was not bound thereon, and therefore plaintiff stated no cause of action. The same question was raised by objection to the evidence, and by the fourth assignment of error appellant contends that its objection to the admission of evidence of an oral contract should have been sustained. We are not cited to any statute or charter provision which required the contract to be made in writing. The statutes authorizing cities to construct electric light plants and waterworks are silent as to how contracts shall be made with their customers. Articles 769-771, R. S. 1911. The superintendent who made the contract, had express authority to make oral or written contracts. He reported the contract in his next monthly report. In the analogous case of drainage districts it has been held that contracts need not be in writing where the statute does not specify written contracts. *Mataorda Drainage District v. Gaines*, 140 S. W. 370; *Swearingen v. Drainage Dist.*, 142 S. W. 1006; *Hidalgo Dist. v. Swearingen*, 158 S. W. 211. See, also, *Cyc.* vol. 28, p. 666. We conclude there is no merit in the contention that the city is not bound by an oral contract, and that the petition was not subject to general demurrer because the suit was upon an oral contract, nor was it subject to general demurrer upon any other ground. It, therefore, follows that assignments 3 and 4 must be overruled.

[8] By the fifth assignment complaint is made because the court permitted plaintiff to testify to certain evidence of damages incurred prior to June 11, 1909. This testimony was objected to on the ground that plaintiff

could not recover such damages, because at the time they accrued he had no license from the state to conduct the business. This is not a case in which the plaintiff seeks to recover on account of a contract made in conducting a business without license, but one in which plaintiff, intending to go into business, made a contract for that purpose, which was breached by the other party. He was not required to pay an occupation tax until he engaged in the business, and this he claims he was prevented from doing until June 11th on account of the city's breach of the contract. The evidence warrants a finding that on June 11th, the very day on which he began business, he paid the occupation tax, but the receipt was not issued until June 30th. The receipt showed that the time for which payment was made began on June 11th. As the assignment does not relate to any damages save those claimed for the time preceding June 11th, we need not consider those accruing between June 11th and June 30th. The law does not preclude him from recovering the damages suffered by reason of the breach of the contract merely because he failed to pay the occupation tax for a period of time in which he was not engaged in the business. Even had this been a case where suit was brought for money due on account of the conducting of the business, it seems plaintiff could recover, as the statute imposing an occupation tax upon the theater business was passed for the purpose only of raising revenue. *Ft. Worth & D. C. Ry. v. Carlock & Gillespie*, 33 Tex. Civ. App. 203, 75 S. W. 931; *Watkins Land Mortgage Co. v. Thetford*, 43 Tex. Civ. App. 537, 96 S. W. 72; *Amato v. Dreyfus*, 34 S. W. 450; *Cyc.* vol. 25, p. 633. The assignment is overruled.

[9, 10] Plaintiff testified to the transfer by Boston of all of his partnership interest in the theater business to plaintiff, including all claims due the firm, and stated that the transfer was in writing. Afterwards plaintiff was recalled, and he then testified that he had found the transfer and ascertained that it did not include a transfer of the claims due the firm; that this was a mistake, for the entire agreement between him and Boston included the transfer to himself of all claims as well as all personal property. This testimony was objected to on the ground that there was no allegation in the petition to the effect that the word, "claims," had been left out of the transfer by mistake, and therefore the testimony was inadmissible. It was not shown by plaintiff that the instrument on its face purported to evidence only part of the transaction, nor does plaintiff's testimony show that they did not undertake to put in writing the entire trade between the parties. On the contrary his testimony shows that it was the intention of the parties to embrace in the written instrument the entire transaction, and that the failure to do this resulted from a mutual

mistake. Under such circumstances plaintiff cannot fall back upon the rule that where the original contract was verbal and entire, and a part only reduced to writing, the parol part may be shown by oral evidence. That rule was never intended for the purpose of adding other property to that mentioned in a conveyance when the parties undertake to make the written instrument cover the entire transaction. When a mutual mistake is made in describing the property transferred the remedy is to bring an action to reform the conveyance. *Clark & Plumb v. Gregory, Cooley & Company*, 87 Tex. 191, 27 S. W. 56; *Coverdill v. Seymour*, 94 Tex. 9, 57 S. W. 37. Plaintiff cannot prove his title to Boston's half interest in the claims by parol testimony conflicting with a written instrument by which the parties undertook to state their contract, and such parol evidence of ownership should have been excluded. If it was desired to reform the instrument for mutual mistake, and in the same suit recover thereon, the petition should have contained appropriate allegations, as contended by defendant, and in addition Boston should be a party to the suit, so that the reforming the instrument would be binding upon him. The sixth and seventh assignments of error are sustained.

[11, 12] Appellant contends that its representative, Burks, had no notice or knowledge that plaintiff had contracted with a vaudeville troupe for performances beginning June 1 and ending June 7, 1909, and that he would suffer loss if said troupe was unable to exhibit. The evidence shows that Burks had notice before the breach of the contract that the theater was intended to be used for vaudeville performances, and that a troupe had been procured by Tumlinson & Boston, but there is no evidence that he was informed, at the time or prior to the making of the contract, that the theater would be used for that kind of exhibitions. He testified that he knew they intended to use it for moving picture exhibitions. It cannot be held that it was within the contemplation of the parties that a breach would cause damages on account of salaries to be paid members of a vaudeville troupe, when it was understood that the business to be conducted was that of a moving picture show. Notice given after the contract is made, though prior to the breach thereof, is not sufficient to entitle a party to recover special damages for breach of contract. *Railway v. Belcher*, 89 Tex. 428, 35 S. W. 6; *Terrell, Atkins & Harvin v. Proctor*, 172 S. W. 1001. The eighth assignment of error is sustained.

[13] Appellee testified that his loss of profits during the time they ran the show without current from defendant was \$500. This was his estimate for the entire time, and he testified that at first the attendance was very good, but gradually fell off. It was not incumbent upon him to estimate his

loss for each night separately, nor would anything have been gained by having him do so. Appellant contends that appellee testified to a loss of \$15 per night, but admitted that there was no loss during several of the first nights, and therefore the evidence is uncertain. Appellee did not testify to his loss of profits being \$15 per night during the time he actually ran his show, but that he estimated his loss of profits at \$15 per night during the week the vaudeville troupe was not able to show on account of lack of lights. Had he sued for \$15 per day for the time he ran the theater with his own power, the amount would have been about \$1,100, instead of \$500. The jury must have found for loss of profits during such time in the sum of at least \$455, in order to arrive at its verdict, and we find that the testimony supports such finding, and overrule the ninth and tenth assignments of error.

The judgment is reversed, and the cause remanded.

On Motion for Rehearing.

Appellee has filed a remittitur covering the item of \$100 special damages mentioned in disposing of the eighth assignment of error, and his motion for rehearing is therefore directed entirely to the ruling made in sustaining the sixth and seventh assignments of error.

[14] He contends that the transaction between himself and Boston consisted of: (1) The sale of (a) realty, (b) corporeal personal property, (c) an interest in a partnership, (d) claims, accounts and other choses in action; (2) the agreement of Boston to make a cash payment and to assume the payment of the partnership debts; and (3) the dissolution, liquidation, and settlement of a copartnership. He contends that he corrected his testimony so as to show that such was the transaction, and that a valid parol transfer was made of the chose in action. He contends, further, that only a part of the entire transaction was reduced to writing, and that the written instrument does not purport to carry into effect, or express in writing, the entire transaction. The instrument does not appear in the record. Appellee designated it as a transfer, which mentions that Boston "deeds" to appellee all of his personal property, including the "Airdome," that he has nothing to do with the Airdome. He testified, further, that the understanding with Boston was that Boston was to "deed" over all the rights and claims and property, and he, Tumlinson, was "to assume all indebtedness on the thing"; that he did not know why the transfer of claims was not included in the instrument; that it was a mistake, a mistake by both of them; that he first found out that morning that the written transfer did not include expressly the word, "claims." This testimony does not show that any part

of the agreement was omitted except that relating to claims. The witness did not testify that the dissolution of the partnership was not provided for in the instrument, nor that the consideration was not fully set out, and it appears that while he uses the word, "deed" in lieu of "convey" or "transfer," the instrument not only conveys land, but also personal property. It is also apparent that the witness does not undertake to prove an oral contract of which only a portion was intended to be reduced to writing, but expressly says the writing was intended to cover the matter of claims, and that such matter was omitted only because of a mistake on the part of both parties. We cannot say from his testimony that the written instrument on its face purports to express only a part of the transaction, and his testimony shows affirmatively that the instrument was intended to cover the contract relied upon by him to show his ownership of the claim sued upon. It is frequently the case that only those portions of a contract are reduced to writing which evidence the transfer of land, or which evidence the consideration, and the rule relied upon by appellee is well recognized, but the facts do not bring this case within the rule.

It is of course true that often the written instrument is of such a nature that it shows conclusively, when considered with the testimony relating to the nature of the transaction leading up to its execution and delivery, that the entire agreement or contract was not intended to be embraced therein. But the testimony in this case fails to show such an instrument, but shows a "transfer" which might well have embraced the entire contract, and which appellee admits was intended to include the contract relied upon, and would have included same had it not been omitted by mistake.

The motion is overruled.

MISSOURI, K. & T. RY. CO. OF TEXAS v. LOVELL. (No. 8227.)

(Court of Civil Appeals of Texas. Ft. Worth. June 19, 1915. Rehearing Denied Oct. 16, 1915.)

1. RAILROADS Ⓒ443—OPERATION—CARE REQUIRED—LIABILITY.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 6803, providing that railroad companies shall be liable to the owner for the value of all stock killed or injured by the locomotive and cars of the company in running over their respective railways, and that, if the railway company fences its road, it shall be liable only for injuries resulting from a want of ordinary care, there is no prima facie case against the railway for the death of a horse which fell through a trestle on the defendant company's right of way, upon which it went through a defective fence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608-1620; Dec. Dig. Ⓒ443.]

2. APPEAL AND ERROR \S 907—PRESUMPTIONS—MATTERS NOT SHOWN BY RECORD—STOCK LAW.

Where the record of a case does not show whether the stock law prohibiting horses and other animals from running at large was in force, the court on appeal will presume that it was not in force.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2899, 2911–2916, 3673, 3674, 3676, 3678; Dec. Dig. \S 907.]

3. RAILROADS \S 425—INJURY TO ANIMALS—PROXIMATE CAUSE.

Where several horses got onto a railroad right of way through a defect in the fence, and were frightened by a train so that part of them broke through the fence, while others crossed a bridge over a stream, and one of the latter, after the train had passed, attempted to cross back over the bridge to rejoin its companions, and fell through and was so injured that it had to be killed, the attempt to recross the bridge was the proximate cause of the injury, and not any negligence of the railroad company in the construction or maintenance of the fences or bridge.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1527–1533; Dec. Dig. \S 425.]

Buck, J., dissenting.

Appeal from Clay County Court; W. T. Allen, Judge.

Action by G. W. Lovell against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reformed and affirmed.

Arnold & Taylor, of Henrietta, and C. C. Huff, of Dallas, for appellant. Wantland & Parrish, of Henrietta, for appellee.

BUCK, J. Appellee, as plaintiff, filed this suit in the county court of Clay county, alleging damages for the killing by defendant railway company of one brown mare of the alleged value of \$150, and injury to four other horses in the sum of \$20 each. He alleged that on or about the 22d day of August, 1914, these horses got out of the inclosure without his fault, and got on defendant's right of way, and became frightened at a passing train over defendant's railway, and that the unusual, violent, and negligent blowing of the whistle and sounding of the bell caused three of the animals to run into and through and over a fence extending from defendant's right of way to a certain culvert or bridge therein, and which were thereby cut, bruised, and injured in the sum of \$20 each, and that one of said horses was thereby caused to enter upon the said culvert or bridge, and was thereby scratched, bruised, and injured, to its damage in the sum of \$20, and that one brown mare was caused to go upon said culvert or bridge and get caught therein between the openings between the cross-ties, and was so seriously injured that the defendant's employes killed her.

No complaint is made of the judgment for \$330, except as to the item of \$150 for the mare killed. The defendant pleaded in the court below, and here urges, that because

said animal was not struck by any locomotive or car belonging to the defendant, and said injury and damage was not the result of, or caused by, any locomotive or car striking the animal, but that said injury and damage was caused solely by said animal going onto said bridge and falling between the cross-ties thereof, the defendant is not in law liable therefor.

[1] The evidence showed that at the place where the accident occurred the right of way runs east and west, and is crossed by a third-class public road running north and south; that the right of way is fenced, and that on the north side of the intersection of the right of way and the public road the railway company had theretofore kept and maintained a wire gap or gate, but that this gate was down at the time the horses entered the right of way from the north and was out of repair, and had been for some time previous thereto; that on the south side of the right of way there was another gate, which was closed; that a short distance from the intersection of the road with the right of way eastward there was a bridge or culvert some 25 or 50 feet long extending over a creek, and that from each end of the culvert, and on both the north and south sides thereof, there was a fence extending in an oblique direction to the right of way fence; that the culvert was from 10 to 15 feet from the ground, or the bottom of the creek.

John Choate testified:

"I was about 1,000 yards from the crossing when the east-bound local train came along going towards Denison. My attention was attracted by the loud whistling of the train. I looked down toward the train, and saw the train after it had passed the crossing, going toward the east, and it was right behind the horses, whistling as loud and as fast as it could and was shooting out steam that was blowing right out behind the horses. It ran some of the horses through the right of way fence that leads up to the culvert and clear on beyond east of the culvert, and three of the horses ran through the right of way fence over into the place owned by Mr. Bear, and three of them ran into the right of way fence west of the culvert, and turned back down inside of the right of way. In this way three of the horses were left in the right of way, and three of them in Mr. Bear's pasture, and the only way that the three in the right of way could get back to where they came from, or to where the others were, was for them to either go through the right of way fence or to follow the right of way fence onto the culvert and go over the culvert."

Henry Sebert testified in the main as did the last-named witness as to how the horses got through the fence or fences, except that he testified that after the east-bound train had passed the three horses which had got by the culvert and were still in the right of way turned back, and that:

"Between the time the west-bound passenger came and the east-bound passenger came I saw the other horses, two of them in the right of way, and three of them in Mr. Bear's pasture

or field. They were all cut up pretty badly. I don't know how this mare got onto the trestle, as I did not see her go there. * * *. My judgment is that the train could not have passed over her and left her in that condition. The only way that the three horses that I saw on the east side of the culvert could have gotten back to where they came from or to where the other horses were would have been to go over that culvert or through the right of way fence."

From this testimony it would appear that one east-bound train passed before and one after the west-bound train.

C. C. Harbison, section foreman, testified for the defendant:

"Our crew killed the mare after she had been dropped from the bridge. I saw the mare at the time she went onto the trestle. I was a good ways off, but at the time she went over the trestle the train was not there. She fell through the trestle without the train striking her, and no train struck her at all. When she went onto the trestle she was going back from where she had come—back to where the other horses were. The only way she had to get back was to go over the trestle or through the right of way fence."

It will be seen from the evidence quoted, which is supported by other evidence in the case, that, so far as the mare that was killed is concerned, the injury to her, which resulted in her death, was caused by an attempt on her part to walk the trestle in an effort to get back to the west side thereof, and that in doing so she fell through and was so badly injured that she had to be killed. It is evident from the testimony in the case, and we so find, that she was not killed by coming in contact with a locomotive or train of defendant railway, and therefore there is not shown a prima facie case of liability on the part of the railway, as provided in article 6603, Vernon's Sayles' Tex. Civ. Stat., which reads as follows:

"Each and every railroad company shall be liable to the owner for the value of all stock killed or injured by the locomotives and cars of such railroad company in running over their respective railways, which may be recovered by suit before any court having competent jurisdiction of the amount. Such liability shall also exist in counties and subdivisions of counties which adopt the stock law prohibiting the running at large of horses, mules, jacks, jennets and cattle: Provided, however, that in all cases, if the railroad company fence its road, it shall only be liable for injury resulting from a want of ordinary care."

[2] The record is silent in this case as to whether or not the stock law prohibiting horses and other animals from running at large was in force in Clay county at the time of the accident. Therefore we are justified in concluding that it was not. But it is provided in the article of the statute above quoted that:

"If the railroad company fence its road, it shall only be liable for injury resulting from a want of ordinary care."

It is not contended by appellee that the defendant company is liable absolutely for the injury complained of, or that his action is predicated upon this article. It is urged that, if the railroad company failed to exercise ordinary care to prevent injury to the

mare in question, it would be liable under the common law, and he cites, among other cases, the case of *Railway Co. v. Dixon*, 49 Tex. Civ. App. 506, 109 S. W. 978, which holds, in effect, that where a railroad company erects a fence along its tracks it owes to the adjacent owners the duty to exercise ordinary care to keep the fence in proper condition, and that, where it fails so to keep its fence, and horses, escaping, get onto the track and are frightened by a train, and run onto a bridge and are injured by falling through the bridge, the negligence in not keeping the fence repaired is the proximate cause of the injury, and that the railroad company is liable therefor. It is further held in that case that, where a railroad company fences its right of way, it assumes the duty of keeping it in proper condition and repair, and that the gate into the right of way may be treated as a part of the right of way fence. This latter holding is limited to cases where, as in this case, it is not shown that the gate was installed for the benefit of the adjacent landowner.

It is held in *Railway Co. v. Hughes*, 68 Tex. 290, 4 S. W. 492, and other cases construing article 4528, Revised Statutes of 1895, which in the main contains the provisions now in article 6603, supra, that, while no absolute liability results when the right of way is not fenced, unless there is a physical contact of the moving engine, or a part of the train, with the animal killed or injured, yet that a liability might arise on account of negligence, although there is no contact of the animal with the moving train. The opinion in the *Dixon* Case goes on to say:

"The railway company has seen fit to fence its right of way, and, if by its negligence it has permitted the fence to become defective and stock to wander upon the track, it presents a case in which it is not the absence of the fence that makes it liable, but a case in which its negligence was the proximate cause of injury. When the track is not fenced, animals upon it or near it have the means of escape from injury which do not exist when the track is fenced on both sides; and, when such is the case, animals, which are permitted to enter upon the right of way and track between the two fences are more exposed to danger and more liable to sustain injury than would be the case if they were not confined to the narrow limits of the right of way."

[3] But can we say that in the instant case the plaintiff has alleged such negligence as would make the railway company liable, and, if so, does the evidence sustain such allegations? Plaintiff alleged negligence of the defendant in the following language:

"That there is no fence, cattle guard, or obstruction to prevent stock from passing over said dirt road going south and on said right of way from the north, nor from going upon defendant's said right of way and railroad track, both easterly and westerly, and, in fact, upon reaching said right of way over said dirt road from the north, such stock could find no outlet, except upon and over said right of way or to return north over said road, and plaintiff says that the failure to have a fence or cattle guard or obstruction from the intersection of

said dirt road fences with defendant's right of way fences on the north side of said right of way to the defendant's railroad, and proper cattle guards, is negligence on the part of defendant, and that by leaving the matter in the condition it is now and was in at the date of the injury herein complained of, without such fence, cattle guards, or obstruction, formed and created a 'trap' or 'pocket' to catch or ensnare stock onto said right of way and between the said railroad track proper and the wire fences of defendant on the north and south side thereof, all of which plaintiff says is negligence, and the proximate cause of plaintiff's stock getting upon said right of way and being killed and injured, as further alleged herein."

In subsequent paragraphs plaintiff alleges the construction of the fences at either extremity of the trestle or bridge or culvert connecting with the right of way fences at either end and on both sides, and alleges that such construction constitutes a "pocket" or "trap" for stock which have come on the right of way through said open gate or because of the absence of the gate. He further alleges negligence in the construction of the trestle, in that the ties are so placed that they permit the hoofs and limbs of horses and cattle to slip or pass between them.

We find nothing in the record to suggest that the trestle in question was negligently constructed, or constructed differently from those commonly used. If the death of the mare in question had been caused at the time of the passing of the east-bound train, and when three of the horses got over into the field north, and three others, including the mare in question, either got through both of the fences on the north side of the trestle and joining the ends of the trestle with the right of way fence, or passed over the trestle itself, and the witnesses seem to leave the matter in doubt as to which means was employed, we would feel justified in sustaining the judgment as to the \$150 item, and to hold that the act of the railway company, and those in charge of its engine, in causing the engine to whistle, blow off vast quantities of steam, and the ringing of the bell, thereby frightening the animals, and causing them to run through the fences and onto the trestle, was the proximate cause of the injuries; but the damage complained of as to this particular item, it does not seem, at least to the majority of the court, could have been reasonably anticipated. It appears that the mare which was killed, as well as two others of the horses, at the time the horses were frightened at the approach of the east-bound train, and caused to run eastward from the intersection of the public road and the right of way, and down the right of way north of the track, managed, either by going through the fences connecting the ends of the trestle with the right of way fence or over the trestle, to escape the danger from the approaching train, and after the passing of the train turned back westward, and that the mare in question, in attempting to go back westward over the trestle, fell through the interstices

between the ties, and received the injuries necessitating her being killed. In the judgment of the majority, this accident and injury was not such as resulted in direct sequence from any negligence of the railway company alleged by plaintiff, but was due to an independent and nonconcurring cause, to wit, the unusual and not to be anticipated notion that the mare took to undertake such a hazardous feat. Moreover, the majority are not satisfied that the evidence is sufficient to show notice to the defendant of the condition of the north gate.

Therefore, in the judgment of the majority, the railway company in no event could be liable for the value of the animal killed. The judgment of the trial court is reformed so as to exclude the item of \$150, and, as thus reformed, is affirmed in the sum of \$80, with interest at 6 per cent. from date of judgment. The costs of this appeal are adjudged against appellee.

Reformed and affirmed.

BUCK, J. (dissenting). I cannot agree with the views expressed in the majority opinion, nor in the disposition of this case. If the railway company is liable for the injuries sustained by the horses which ran through the fences to escape from what, no doubt, seemed to them an approaching monster, emitting loud and frightening noises, and belching forth clouds of smoke and steam, then it seems to me that no less is it liable for the death of the mare in question, which, having escaped from the threatening and imminent danger, as she saw it, followed the natural promptings of her equine nature to get back to her companions by the only means of egress that presented itself. To one who knows horses and understands their habits it would seem that, under the circumstances, it must have been reasonably anticipated that in all probability she would have attempted to do the very thing she did do, not realizing the danger from the gaps in the walkway selected until after she started on to the trestle, and it was too late to turn back. I believe the accident in question is a result which naturally flows in a continuous sequence from the negligence of the railway company in permitting its gate or gap into its right of way to be down or get out of repair, or in failing to have fences and cattle guards on either side of the intersecting public road, thereby inviting loose stock to enter upon such right of way. The case of *Railway Co. v. Dixon*, cited in the majority opinion, is believed to be directly in point, and to support the judgment of the trial court as to this item of damage. Appellee also cites *Railway v. Benaist*, 122 S. W. 587, *Railway Co. v. Harris*, 3 Willson, Civ. Cas. Ct. App. § 224, *Railway Co. v. Mitchell*, 4 Willson, Civ. Cas. Ct. App. 261, 17 S. W. 1079, and *Railway Co. v. Cooper*, 75 S. W. 329, all of which in more or less degree upon the point in issue support the Dix-

on Case. In the last-cited case, by this court, Judge Speer says:

"The evidence shows that the animal was killed within the appellant's station grounds in the town of Miami, and at a place where it is not required by law to fence its right of way. *Railway Co. v. Blankenbecker* [18 Tex. Civ. App. 240] 35 S. W. 331, and authorities cited. In such case it is incumbent upon the plaintiff to prove more than the mere killing; he must prove that it was negligently done. But this does not mean negligence of the train operatives alone, for any negligence of the defendant proximately causing the injury will suffice to establish liability. In this case the testimony tended to show negligence in the construction and maintenance of some stock pens and wing fences, forming what the witnesses denominate a 'pocket' that was dangerous to stock, and which was the occasion of appellee's mule being caught upon the track and killed. Negligence in this respect might be sufficient to show liability."

It is my opinion that the judgment of the trial court should be in all respects affirmed.

**CATTLEMENS TRUST CO. OF FT.
WORTH v. WILLIS, District
Judge, et al. (No. 8340.)**

(Court of Civil Appeals of Texas. Ft. Worth.
Oct. 9, 1915. Rehearing Denied
Nov. 13, 1915.)

**1. COURTS ⇐207—COURT OF CIVIL APPEALS
—ISSUANCE OF PREROGATIVE WRIT—PROHIBITION.**

Under Const. art. 5, § 6, providing for division of the state into supreme judicial districts, and establishment of a Court of Civil Appeals in each district, which shall have appellate jurisdiction extending to all civil cases of which the district courts and county courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law, and *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1592, giving Courts of Civil Appeals the power to issue writs of mandamus and all other writs necessary to enforce their jurisdiction, the Court of Civil Appeals has power to issue a writ of prohibition to protect its jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⇐207; Prohibition, Cent. Dig. § 65.]

**2. COURTS ⇐207—COURT OF CIVIL APPEALS
—ISSUANCE OF WRIT OF PROHIBITION.**

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1591, relating to judgments of the Court of Civil Appeals, a judgment of the Court of Civil Appeals, affirming a money judgment of the district court, with damages for delay, is the judgment of the appellate court, and not that of the district court, though it be remitted to the district court for enforcement; hence prohibition will lie to prevent another district court enjoining enforcement of the judgment.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⇐207; Prohibition, Cent. Dig. § 65.]

**3. COURTS ⇐207—ISSUANCE OF PROHIBITION
—JURISDICTION OF COURT OF CIVIL APPEALS.**

Where a judgment of one district court against a resident of another district, after being affirmed by the Court of Civil Appeals, was sought to be enjoined by a district court lying outside of the supreme judicial district over which the Court of Civil Appeals had jurisdiction, prohibition against the defendant and the judge of the district court in which injunction was sought may be issued by the Court of Civil Appeals; such defendant having been party to

the original suit, and both having appeared and answered.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⇐207; Prohibition, Cent. Dig. § 65.]

**4. COURTS ⇐207—COURT OF CIVIL APPEALS
—ISSUANCE OF PROHIBITION.**

In view of Const. art. 5, § 6, giving Courts of Civil Appeals power to issue all necessary writs, the Court of Civil Appeals of one district may issue a writ of prohibition against a district court of another district and parties residing in another district to prevent interference with its judgment.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⇐207; Prohibition, Cent. Dig. § 65.]

5. PROHIBITION ⇐12—GROUNDS OF DEFENSE.

In view of Rev. St. 1911, arts. 4643, 4653, providing for the return of writs of injunction before the court where the action is pending, a writ of prohibition, issued to prevent one district court from interfering with the judgment of another district court, which had been affirmed by the Court of Civil Appeals, will not be denied on the ground that the court in which injunction was sought would properly administer the law according to the facts.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 61; Dec. Dig. ⇐12.]

Petition by the Cattlemens Trust Company of Ft. Worth for a writ of prohibition against Frank Willis, District Judge, and another. Writ issued.

A. H. Kirby, of Ft. Worth, for petitioner.
J. W. Payne, of Ochiltree, Newton P. Willis, of Canadian, and George W. Steere, of Ft. Worth, for respondents.

CONNER, C. J. This is an application on the part of the Cattlemens Trust Company of Ft. Worth against J. M. Blassingame, of Ochiltree county, and against Hon. Frank Willis, judge of the Thirty-First judicial district, for a writ prohibiting the said Blassingame from further prosecuting and the said judge from a further hearing of a writ of injunction issued by order of said judge on September 1, 1915, restraining an execution sale of certain lands belonging to Blassingame situated in Ochiltree county. The application for the writ is based upon the following undisputed facts:

On June 15, 1914, the Cattlemens Trust Company recovered a judgment by default in the district court of Tarrant county against the defendant J. M. Blassingame for the sum of \$869.40, being the principal, interest, and attorney's fees specified in a promissory note declared upon in that case. Blassingame, though duly served, made default, but later, on September 12, 1914, sued out a writ of error from said judgment to this court, at the time filing a supersedeas bond, with A. W. Thurman, S. C. Brillhart, Sharman Jines, and A. M. Jines as sureties. Blassingame, however, failed to file the record in this court, or otherwise prosecute his writ of error with effect, as required by the terms of his supersedeas bond, whereupon the Cattlemens Trust Company, pursuant to the terms of our statute on the subject, filed

its motion in this court praying for an affirmance of the judgment and a recovery of 10 per cent. damages for delay. In answer to the motion to affirm, Blassingame filed in this court a pleading to the effect that shortly prior to the institution of the suit in Tarrant county by the Cattlemens Trust Company he (Blassingame) had instituted a suit in Ochiltree county, where he resided, to cancel for fraud the note which was the foundation of the suit and judgment in Tarrant county; that the case in Ochiltree county had been tried upon the issues made by the pleadings in that case, and that he (Blassingame) had recovered a judgment canceling the note; that the Cattlemens Trust Company had duly prosecuted an appeal from the Ochiltree county judgment to the Court of Civil Appeals for the Seventh Supreme Judicial District, where it was alleged the appeal was then pending. The prayer was that the motion to affirm be dismissed, or in the alternative that this court postpone judgment on the motion until after disposition of the appeal from Ochiltree county by the Court of Civil Appeals for the Seventh Supreme Judicial District. After due consideration, we held, in effect, as will be seen from our published opinion (*Blassingame v. Cattlemens Trust Co.*, 174 S. W. 900), that the facts set up by Blassingame in answer to the motion constituted a good plea in abatement only, and not a good plea in bar of the action in Tarrant county, and that, Blassingame having failed, after due notice of the Tarrant county suit, to therein plead said matter of abatement, such matter could not be given effect for the first time in this court, and that the same would not constitute cause to refuse the prayer of the motion to affirm, or to grant Blassingame's prayer for a postponement of our action until after the determination of the appeal from the district court of Ochiltree county. The motion to affirm was accordingly, on, to wit, January 23, 1915, granted by us, and this court duly entered its judgment in favor of the Cattlemens Trust Company for the amount adjudged in its favor below, together with the further sum of 10 per cent. thereon as damages for delay and all costs of the proceedings, against Blassingame and the said sureties upon his supersedeas bond. From this judgment of affirmance Blassingame later sued out a writ of error to our Supreme Court, but the writ was dismissed by that court on the ground of a want of jurisdiction. Yet later, on, to wit, the 23d day of June, 1915, the mandate of this court was regularly issued and transmitted to the district court of Tarrant county, directing the enforcement of our said judgment. The district court of Tarrant county thereupon regularly issued execution, directed to the sheriff of Ochiltree county, commanding him to make the sums of money adjudged by this court, which execution was levied upon lands belonging to

Blassingame situated in Ochiltree county, and such lands were advertised for sale on September 2, 1915.

Thereafter, to wit, on or about August 1, 1915, Blassingame presented to the presiding judge of the district court of Tarrant county a petition praying that said judgment in said court and said execution sale be enjoined. In this petition Blassingame, in substance, set up the facts, so far as necessary to here state, as we have hereinbefore recited them, asserting the superiority of the judgment in the district court of Ochiltree county, and further averred that he had been misinformed as to his right or duty to plead the institution of the prior suit in Ochiltree county in the suit in Tarrant county, and that he had omitted to plead such matter in abatement upon the advice of his attorneys. The district judge of Tarrant county, to whom the petition was presented, indorsed his fiat thereon, commanding the Cattlemens Trust Company to appear before him on August 11, 1915, and show cause why the temporary writ of injunction prayed for should not be granted. The Cattlemens Trust Company appeared, and on a hearing of the motion, on, to wit, the 26th day of August, 1915, Hon. Ben M. Terrell, judge of said district court of Tarrant county, entered his order stating that:

"The court, having heard and fully considered said application, is of opinion that same should be in all things denied and refused; and it is accordingly so ordered, adjudged, and decreed."

It does not appear that any appeal was taken from the order last named. The next step on the part of Blassingame was the presentation by him on the 1st day of September, 1915, of a petition to Hon. Frank Willis, respondent herein, judge of the district court of the Thirty-First judicial district, seeking to enjoin the threatened execution sale hereinbefore mentioned and the said judgment upon which it rested. The petition set up the institution of the conflicting judgments, as hereinbefore recited, and the fact of the appeal pending in the Seventh supreme judicial district, omitting any reference to the proceeding in this court which resulted in the judgment of affirmance we have described, and the prayer was that the sheriff of Ochiltree county be "restrained and enjoined from further executing or enforcing said judgment of Tarrant county district court until the decision of the honorable Court of Civil Appeals of Amarillo in this case, and that on final hearing hereof said judgment be made perpetual, and for general and special legal and equitable relief." Hon. Frank Willis indorsed his order upon the petition granting the issuance of the temporary writ of injunction as prayed for, and it is to further proceedings under the writ of injunction issued pursuant to said order that the relator, the Cattlemens Trust Company, now interposes its petition for a writ of prohibition, as stated in the begin-

ning of this opinion. The respondents Blassingame and Willis, in obedience to the notice of this court to show cause why the writ should not issue, have appeared and filed written answers. There is no denial of the material facts stated; the contention of respondents constituting in its essence a mere denial, for various reasons, of a power in this court to issue a writ of prohibition such as sought in this case.

[1] While it seems to be true, as respondents insist, that no Court of Civil Appeals in Texas has ever issued such a writ, yet we have no doubt of the power of such court to do so in a proper case. Section 6, article 5, of our Constitution, after providing for a division of Texas into supreme judicial districts, and for the establishment of a Court of Civil Appeals in each of said districts, declares, among other things, that such courts "shall have appellate jurisdiction coextensive with the limits of their respective districts, which shall extend to all civil cases of which the district courts or county courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law." Said section of the Constitution further specially provides that said Courts of Civil Appeals "shall have such other jurisdiction, original and appellate, as may be prescribed by law." Later the Legislature, in defining the jurisdiction of the Court of Civil Appeals, among other things, enacted that:

"The said courts and the judges thereof shall have the power to issue writs of mandamus and all other writs necessary to enforce the jurisdiction of said courts."

See Vernon's Sayles' Texas Civil Statutes, article 1592.

Clearly the legislative act quoted was authorized by the terms of the Constitution also quoted, and has all the force that could be given to it, had the same been specifically embodied in the Constitution itself. So that it seems apparent to us that there is no force in the contention that we are without constitutional power to issue a writ of prohibition. And, as we think, in a proper case it is wholly immaterial whether the jurisdiction exercised by a Court of Civil Appeals in the issuance of such a writ be classified as "original" or as "appellate." Whatever be the proper classification of the power, it is clear that this court and all other Courts of Civil Appeals have been expressly given jurisdiction to issue any writ known to the law found to be necessary to enforce the jurisdiction of the court. The question therefore is: Does the said petition of respondent Blassingame, and the said action thereon of the respondent Hon. Frank Willis, constitute attacks upon the jurisdiction of this court? We think they do.

[2] As we construe the judgment enjoined, it is the judgment of this court, and not that of the district court, as respondents contend, and as was incorrectly represented in the pe-

tition for the injunction. It is so, as we think, in form and in substance. The judgment decrees the payment by the respondent Blassingame and the sureties on his supersedeas bond, not only of the amount adjudged against Blassingame below, but also of the certain sum of 10 per cent. of the judgment of the district court as damages, besides the costs of this court, for all of which it is directed that execution may issue. The fact that under the statute the judgment is certified to the court below for observance, and that the execution enjoined was issued out of that court, instead of from this court direct, does not alter the character of the judgment, or change the basis of its legal effect. Its vital force has its source in the power vested in this court and in issuing the execution the lower court only acted in a ministerial capacity. As to this it had no discretion, but was required to obey the mandate of its superior in authority. *Burck v. Burroughs*, 64 Tex. 445; *Moore v. Chamberlain*, 152 S. W. 195. Such judgment, too, perforce of the statutes and decisions of this state was final (*Vernon's Sayles' Texas Civil Statutes*, article 1591; *Cole v. State* [Sup.] 170 S. W. 1036; *Gray v. Eleazer*, 48 Tex. Civ. App. 417, 94 S. W. 911), and a writ as here sought for restraining an unauthorized interference with a final judgment of this court must, in its very nature, constitute an aid to our jurisdiction.

It is doubtless true that in certain exceptional cases a court of equity would entertain an action in the nature of an original suit to restrain a judgment of a trial court, even after affirmance, as, for instance, upon proper allegations of subsequently discovered fraud or perjury in its procurement. But here we have no such state of facts presented. The material facts, in substance, are those that might have been presented in the district court of Tarrant county, which rendered the judgment by default, and which were later in fact presented to this court, as before stated, in opposition to the motion to affirm on certificate. If, after a litigant has had his day in court and exhausted his legal remedies in both the trial court and on appeal, he can avoid the orderly effect and operation of the final decree against him by invoking the aid of other and inferior courts on the same state of facts, then indeed it would be idle for a court of final jurisdiction to attempt an exercise of its power. Such a construction of the law would deprive this court of all real power, contrary to the manifest purpose of the Constitution and Legislature in declaring that our judgments in cases such as the one before us should be final. See *McCrimmin v. Cooper*, 37 Tex. 423; *Kendall v. Mather*, 48 Tex. 585. We think it plain, therefore, that the writ of injunction issued out of the district court of the Thirty-First judicial district constitutes an attack upon the jurisdiction of this court, and that

as against any objections thus far noticed the writ of prohibition herein sought will lie to restrain the district court of Ochiltree county from interpreting our said judgment or from interfering with its proper execution. See *Hovey v. Shepherd*, 105 Tex. 237, 147 S. W. 224; *State v. Spokane Co. Super. Ct.*, 8 Wash. 591, 36 Pac. 443; *State v. Whitney*, 66 Fla. 24, 63 South. 299; 82 Cyc. 609, text (e); *State v. Drew*, 38 La. Ann. 274; *In re State*, 18 La. Ann. 102.

[3] It is further insisted, however, that inasmuch as Ochiltree county, where the respondent Blassingame resides and where the land levied upon is situated, and the Thirty-First judicial district, are beyond the territorial limits of this supreme judicial district, we are for this, if for no other, reason without power to issue the writ prayed for. But if otherwise authorized to issue the writ, we do not think this contention is maintainable. The writ sought by relator is in character very similar to the writ of injunction. As to the respondent Blassingame the very same result is to be brought about. As to him, at least, the only difference is in name. As against the other respondent, Hon. Frank Willis, the writ is sought and operative only as the judicial officer at this time authorized to perform the functions of the district court of Ochiltree county. As against him the real purpose of the writ sought is to restrain the threatened action of that court, whosoever may happen to be its presiding judge. Such writs were designated in the common law as writs of prohibition, as contradistinguished from writs of injunction, and our authorities have adhered to that nomenclature. But in nature and judicial results obtainable there can be but little, if any, difference between writs of injunction and writs of prohibition. This being true, we see no reason why we should not, in this case, apply the familiar rule relating to writs of injunction, to wit. that an injunction operates against all persons, their agents and attorneys, who were parties to the cause, whether they reside within or without the territorial jurisdiction of the court awarding the writ. See *Alexander v. Tolleston Club*, 110 Ill. 65; *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, 94 Am. St. Rep. 932; *Frank v. Peyton*, 82 Ky. 150; *Jennings Bros. v. Beale*, 158 Pa. 283, 27 Atl. 948; 22 Cyc. 785. The respondent Blassingame was a party to the judgment that he now seeks to enjoin. He, as also the respondent Willis, voluntarily appeared before this court and answered in this proceeding, thus submitting themselves to our jurisdiction, and hence, as we think, cannot be indulged in now saying that we are without power to make and enforce such orders as the other facts before us authorize.

[4] Moreover, for a yet better reason, perhaps, we are of opinion that in the respect now under consideration our power is not limited

to the territorial limits of our judicial district. While the Constitution already quoted in general terms limits our appellate jurisdiction to the territorial limits of this district, it is apparent from the whole, when considered in connection with the legislative grants of power, that we have full authority to conclude litigation and render final judgments in causes, such as here in question, arising in our judicial district and properly brought before us. Such power, in accord with the very familiar rule of construction, carries with it by necessary implication the power to issue such process as may be essential to the maintenance of the integrity and vital force of our final decrees. Otherwise the supremacy evidently intended by the Constitution is meaningless. It follows, if necessary to the end, that such process, in the absence of any specific inhibition, will be operative anywhere within the limits of the sovereign power by virtue of which this court exists. Any doubt of this that can arise from a construction of the Constitution alone is dissipated by the statute quoted and already referred to several times, which gives to this court power to issue the extraordinary writs therein named. As stated, the enactment of this statute was clearly authorized by section 6 of article 5 of the Constitution, and the statute expressly authorizes this court to issue all writs necessary to enforce our jurisdiction, whether in doing so we are in the exercise of original or appellate functions, and without any territorial limitation as to the operation of the writs when issued. It follows, we think, that such writs, when issued in a proper case, must, except perhaps in cases having no application here, be obeyed by all persons and courts of inferior jurisdiction or authority in this state.

[5] Several other objections have been urged by the respondents, but they are, we think, of minor importance, easily answered, and hardly require discussion. We should however, perhaps briefly notice the further insistence that the proper remedy of the relator was to present its complaint in the district court of the Thirty-First judicial district; the contention being that it must be assumed that the court issuing the injunction would properly administer the law upon the facts. As to this contention, it is to be observed that, even if the judgment enjoined should be construed as a judgment of the district court of Tarrant county, as respondents insist, and if the district judge of the Thirty-First judicial district had any authority at all to direct the issuance of the writ, it was returnable to and triable before the district judge rendering the judgment. See Revised Statutes, articles 4643 and 4653. In such cases the law evidently contemplates that the court rendering the judgment shall be the judge of its validity. The reason for this rule is of special force, we think, in

cases where the judgment attacked is that of this court. In certain cases and under certain regulations, that need not be here specified, our Constitution and laws have vested in the Supreme Court the power to modify or annul the decrees of this court. The grant of such power in the Supreme Court necessarily excludes all authority from courts of inferior jurisdiction to do so. In the case in which the enjoined judgment was rendered, the Supreme Court itself formally declared that it was without power to revise the judgment. How, then, is it to be supposed that the district court of the Thirty-First judicial district, or the judge thereof, has power to do so? In such cases the remedies urged by respondents have no application. See *State v. Spokane Co. Sup. Ct.*, 8 Wash. 591, 36 Pac. 443; *State v. Superior Court*, 5 Wash. 518, 32 Pac. 457, 771; *Kirby v. Superior Court*, 68 Cal. 604, 10 Pac. 119; *High, Extr. Rem.* § 781; *State v. Elkin*, 130 Mo. 90, 30 S. W. 337, 31 S. W. 1037.

We conclude that relator, the Cattleman's Trust Company, is entitled to the relief specified in its complaint, and that the writ of prohibition should issue as prayed for; and it is so adjudged.

BOLT et al. v. STATE SAVINGS BANK OF MANCHESTER, IOWA. (No. 8221.)

(Court of Civil Appeals of Texas. Ft. Worth. July 3, 1915. Rehearing Denied Oct. 16, 1915.)

1. ALTERATION OF INSTRUMENTS —BILLS AND NOTES —378—BONA FIDE PURCHASERS—DEFENSES—ALTERATION.

Any change by a party thereto without the consent of the opposite party in the personality, number, or relation of the parties to an instrument constitutes a material alteration, which will avoid the instrument, even in the hands of an innocent purchaser.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 158-189; Dec. Dig. —20; *Bills and Notes*, Cent. Dig. §§ 985-992; Dec. Dig. —378.]

2. PLEADING —205—DEMURREE—SPECIAL EXCEPTIONS.

Where, in an action on a note, the fourth paragraph of the answer alleged that the name of V. was added to the note after defendants signed it, that V. never signed the note and hence the note sued on was not the obligation of defendants, and that the note had been materially altered since its execution by defendants, an exception stating that plaintiff "specially excepts to the fourth section of said answer, * * * for the reason that the same as pleaded, constitutes no legal defense," though special in the sense that it pointed out the particular paragraph of the answer to which it was directed, amounted to no more than a general demurrer, as it set up no specific reason why the answer failed to set up a defense.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 491-493, 495, 496, 498-510; Dec. Dig. —206.]

3. PLEADING —34, 205—CONSTRUCTION—DEMURREE.

As against a general demurrer, such paragraph of the answer was good, since, in passing

upon a pleading as against a general demurrer, the court must consider everything as properly alleged which by any reasonable construction may be embraced within the allegations made, and the allegations that the alteration was not made with defendant's consent, and that it was made by a party to the note, might be implied, if necessary.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 574, 66-74, 491-493, 495, 496, 498-510; Dec. Dig. —34, 205.]

4. ALTERATION OF INSTRUMENTS —25—ACTIONS ON NOTES—PLEADING.

If a material alteration in a note after its execution was made with the consent of the makers or ratified by them, plaintiff, suing upon the note, should have presented such consent or ratification by a proper plea, it being in the nature of a plea of confession and avoidance, and the same was true if the alteration was not made by a party to the suit.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 216-229; Dec. Dig. —25.]

5. APPEAL AND ERROR —1050—HARMLESS ERROR—ADMISSION OF IMMATERIAL EVIDENCE.

Though, in an action by a bank on a note purchased by its president, his testimony as to the extent of his powers might be objectionable, an inquiry into his powers was not apparently material, as the bank, by suing upon the note, ratified his act in purchasing it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. —1050.]

6. TRIAL —85—RECEPTION OF EVIDENCE—OBJECTIONS TO EVIDENCE GOOD IN PART.

Assignments of error complaining of the overruling of objections to a witness' answers must be overruled, where a part at least of the answers was admissible, and the objections went to the entire answers.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 222, 223-225; Dec. Dig. —85.]

7. SALES —124—RESCISSION FOR FRAUD—RETURN OF PROPERTY RECEIVED.

Persons induced by fraudulent and material misrepresentations to purchase a horse could sue for a rescission of the contract of sale, but must first return the horse or show good cause for their failure so to do.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 303-312; Dec. Dig. —124.]

8. EVIDENCE —434—SALES —355—PAROL EVIDENCE TO VARY WRITING—PROOF OF CONSIDERATION.

A purchaser of a chattel, when sued for the purchase price, may, in support of a plea of failure of consideration, rely upon material misrepresentations by the seller concerning the chattel, either express or implied, which were relied upon by him, and parol proof of such misrepresentations is not objectionable as varying the terms of the note given for the purchase price, as the consideration is always open to proof.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2005-2020; Dec. Dig. —434; *Sales*, Cent. Dig. §§ 1025-1043; Dec. Dig. —355.]

9. SALES —428—ACTION FOR PRICE—DEFENSES—MISREPRESENTATIONS.

Such misrepresentations can be invoked as a defense, not upon the theory of fraud and deceit practiced upon the purchaser, but because they are in law warranties and constitute a part of the contract of sale of which the note was also a part, and, if misrepresentations are war-

ranties, they do not cease to be such, though fraudulently made.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1214-1223; Dec. Dig. ¶423.]

10. EVIDENCE ¶400 — PAROL EVIDENCE TO VARY WRITING.

A seller may by a written contract with a buyer limit his warranty of the article sold, and, in the absence of fraud, accident, or mistake, parol evidence is not admissible to vary or contradict this contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1778-1793; Dec. Dig. ¶400.]

11. EVIDENCE ¶441—EXCLUSION OF ORAL REPRESENTATIONS.

If a written warranty by the seller of a horse was executed as a part of the contract of sale, and spoke the real agreement of the parties, a stipulation therein that it was the only contract or guaranty excluded any warranty not contained therein, and operated to exclude evidence that the buyers were induced to buy by false and fraudulent representations that the horse was young and sound.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. ¶441.]

12. SALES ¶251—ACTION FOR PRICE—DEFENSES—MISREPRESENTATIONS.

In the absence of a written warranty constituting a part of a contract of sale, proof of material misrepresentations inducing the purchaser to buy is admissible, and it is immaterial whether such misrepresentations were fraudulently made, as they could be invoked and considered as warranties and equally binding upon the sellers, whether made in good faith or fraudulently.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 710; Dec. Dig. ¶251.]

13. SALES ¶124—RESCISSIION FOR FRAUD—RETURN OF PROPERTY RECEIVED.

While ordinarily, where a purchaser elects to rescind, he must return the property purchased, yet he need not do so if it be worthless.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 308-312; Dec. Dig. ¶124.]

14. CONTRACTS ¶10—WARRANTIES—MEETING OF MINDS.

Where a warranty by the seller of a horse was not executed at the time of the execution of a note for the purchase price, but, without the knowledge and consent of the buyers, was merely deposited with a local bank by an agent of the seller, it had no binding effect; there being no meeting of the minds, and the seller having no legal right to impose a measure of damages to which the buyers never agreed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. ¶10.]

15. SALES ¶38—WARRANTIES—FRAUD.

Though a warranty was executed at the time of the execution of a note for the purchase price of a horse, and therefore was a part of the contract of sale, its binding effect would be destroyed by extraneous fraud in the procurement of the note, as fraud sufficient to nullify the note would be equally as forceful as an avoidance of the warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65-77, 85; Dec. Dig. ¶38.]

Appeal from District Court, Nolan County; W. R. Spender, Special Judge.

Action by the State Savings Bank of Manchester, Iowa, against R. K. Bolt and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

See, also, 145 S. W. 707.

Woodruff, Christian & Woodruff, of Sweetwater, for appellants. Beall & Douthitt, of Sweetwater, for appellee.

CONNER, C. J. The State Savings Bank of Manchester, Iowa, instituted this suit against R. K. Bolt, C. Voss, and nine others to recover upon a promissory note which, with its interest, aggregated the sum of \$3,648, at the date of the trial below. The note had been given for the purchase money of a horse that had been sold to Bolt and others by W. A. Lang & Co., to which company "or bearer" the note was made payable.

The defendants, among other things, answered, in substance, that the plaintiff bank was not the real owner of the note; that it had not paid any consideration therefor; and that the suit by it was really for the benefit of W. A. Lang & Co. The defendants further alleged that the note had been fraudulently procured by W. A. Lang & Co. by means of certain false and fraudulent representations relating to the condition and quality of the horse which were set up in the petition. Among other things, it was charged that the horse was represented to be sound and free from disease; that this representation was false; and that, in fact, the horse was badly diseased and wholly worthless, having died some time after the purchase. The defendants further alleged that the plaintiff bank, if, indeed, it was the owner of the note, had full notice of the fraud alleged at the time of its purchase, if any. They also alleged that the note had been fraudulently changed and altered since its execution by them by the addition of the name of C. Voss thereto. Other allegations and defenses need not be here mentioned.

The trial upon the issues indicated resulted in a judgment for the plaintiff bank, and the defendants have appealed.

Appellant's first assignment of error complains of the court's action in sustaining the plaintiff's exception to paragraphs 3 and 4 of the defendants' answer which set up forgery and alteration of the note upon which the suit was founded. The paragraphs of the answer mentioned are as follows:

"(3) Further answering herein, defendants say that the name of C. Voss, alleged to have been signed to the notes herein sued, is a forgery; that defendant C. Voss never at any time executed said notes or either of them, nor authorized any one else to sign or execute same for him or sign his name thereto; hence defendant C. Voss says that he is not liable on the notes herein sued on, and in this prays judgment of the court.

"(4) These defendants further say that the name of C. Voss was added to said notes after they had signed the same; that C. Voss never signed the notes these defendants executed at all; hence the notes herein sued on were not the obligations of these defendants; that said notes had been materially altered since the execution of same by defendants, if defendants executed same at all, which they deny. And of this pray judgment of the court."

To which the plaintiff urged the following exceptions, which were sustained by the court:

"Plaintiff especially excepts to the third section of defendant's said answer, and that part thereof attempting to set up the forgery of the name of C. Voss to the notes sued on herein, and because said C. Voss is no longer a party to this suit. Plaintiff specially excepts to the fourth section of said answer, and says that the same should be stricken out, for the reason that the same, as pleaded, constitutes no legal defense to the plaintiff's cause of action."

[1] While the authorities are not entirely harmonious, we think it may be stated that very generally, and particularly in this state, the rule is that any change by a party thereto, without the consent of the opposite party, in the personality, number, or relation of the parties to an instrument, constitutes a material alteration which will avoid the instrument, even in the hands of an innocent purchaser, and it was specifically held in *Harper v. Stroud*, 41 Tex. 367, that the fraudulent addition of a name to a promissory note by the holder without the consent of the other party to the note constituted a material alteration, the court there stating, among other things:

"We think the modern authorities, with but few exceptions, agree that the addition by the payee or holder of a name of a person as joint and several maker of a note, after it has been completed, issued, and negotiated, without the consent of the original makers, discharges them from liability on the note"—citing a number of authorities.

See, also, to the same effect, *Daniel on Negotiable Instruments*, vol. 1, §§ 806-809; *Id.* vol. 2, § 1373; *Ford v. First Nat. Bank of Cameron*, 34 S. W. 684; *Matson v. Jarvis*, 133 S. W. 941; *Rhodes v. Turpin* (Tenn.) 57 S. W. 354; *Texas Printing & Lithographing Co. v. Smith*, 14 S. W. 1074; *Adams v. Faircloth*, 97 S. W. 507.

[2-4] While appellee insists that the exceptions quoted are special, it seems quite manifest to us that they amount to no more than general demurrer. They are special alone in the sense that they point out the particular paragraphs of the defendants' answer to which the complaint is directed, but no specific reason is set up why the answers fail to set up a defense, and, as against a general demurrer, we think the answers were good, and that the court erred in his ruling. The answer made by the appellee in its brief is to the effect that there was no error in the ruling complained of, for the reason that "C. Voss was not a party to the suit, by reason of a formal dismissal, which was evident of record," and that "a forgery neither adds to nor takes from, and could not in any way affect the liability on the obligations of appellants on the notes." It must be conceded, we think, that neither the exceptions nor the reply of appellee gives light on the specific reasoning of the trial court which led to the ruling under consideration. The undoubted rule is that, in passing upon a pleading as against a general demurrer, it is

the duty of the court to consider everything as properly alleged which by any reasonable construction may be embraced within the allegations made. See *Gibbens v. Bourland*, 145 S. W. 274; *Hoechten v. Standard Home Co.*, 157 S. W. 1191.

In the fourth paragraph of the defendants' special answer it was distinctly alleged that the alteration complained of had been made since the execution of the note by the defendants, and that the alteration consisted of the addition of the name of C. Voss. It may possibly have been thought that it should have been alleged that the alteration had not been made with the consent of the defendants, and had been made by a party to the note, but appellee urged no such objections in its exceptions, nor here, and, as against the general demurrer, we think these allegations, if necessary, are to be implied. If, in fact, the material alteration was made after the execution of the note, as alleged, and the defendants consented thereto, or ratified it, the answer setting up such consent or ratification would be in the nature of a plea of confession and avoidance, which it would be necessary for the plaintiff to have presented by proper plea, and the same general proposition seems applicable to a want of a specific allegation that the alteration was made by a party to the suit. It is said in 2 Cyc. p. 232, note 27:

"Upon an alteration after execution the presumption is that it was made by a party claiming under the instrument. Therefore it is not necessary that the answer should allege what is thus presumed."

On the whole, we conclude, as before stated, that the court erred in the ruling discussed, and that because thereof the judgment must be reversed, and the cause remanded.

[5, 6] The numerous remaining assignments, we think, may be disposed of in a brief and general way. L. Matthews testified that he was the president of the plaintiff bank, and, as such, had purchased the note in controversy; that he was the only officer of the bank who had anything to do with the purchase; that he had full power to make the purchase; and that no other officer of the bank knew anything about the circumstances of the purchase. While, under certain circumstances, it might be objectionable for a witness to state the extent of his powers, yet in the present case, whatever may have been the powers of the president originally, the bank sues upon the note, thus ratifying the act of the president in the purchase, and an inquiry into his original powers is not now apparently material. It may be, and possibly should be, said to be objectionable for the witness to have undertaken to state that he knew the knowledge possessed by other officers of the bank, or to state, either directly or indirectly, the contents of the letters or written communication upon which the plaintiff relied as showing its good faith in the purchase, without

accounting for their nonproduction; yet the objections urged went to the entire answers, part of which, at least, we think, was admissible, and, the objection not being good as to the whole, the assignments relating to these questions must be overruled.

[7-9] The fifth, ninth, tenth, eleventh, thirteenth, fifteenth, seventeenth, and eighteenth assignments of error in some form relate to a warranty purporting to have been executed by W. A. Lang & Co., and, among other things, pleaded by the defendants. In view of the fact that the defendants did so plead the warranty, the majority wish to express the view that, if through fraudulent and material misrepresentations the purchasers were induced to purchase the horse, they could have sued for a rescission of the contract of sale. If they had elected to pursue that remedy, it would have been incumbent upon them to first return the horse, or else show good cause for their failure so to do. But they did not elect that remedy. They elected to stand upon the contract and plead a failure of consideration of the note. According to the weight of the authorities, a purchaser of a chattel, when sued for the purchase price, may, in support of a plea of failure of consideration, rely upon material misrepresentations by the seller, either express or implied, concerning the chattel, which were relied upon by the purchaser, and parol proof of such misrepresentations is not objectionable as varying the terms of the promissory note given for the purchase price of the article, since it is but proof of the consideration of the note; the consideration of a conveyance being always open to proof. 3 Ruling Case Law, p. 947, § 143. But such misrepresentations so relied upon by the purchaser can be invoked by him as such a defense, not upon the theory of fraud and deceit practiced upon him, but because they are in law warranties, and constitute a part and parcel of the contract of sale, of which the purchaser's note was also a part. Essentially the purchaser is allowed to offset damages for breach of the seller's contract against the seller's demand for the purchase price of the chattel. If such misrepresentations are warranties, they do not cease to be such, even though they were fraudulently made. 35 Cyc. 378, 379. By reason of the fact that such misrepresentations are warranties, it is held in some of the states that they cannot be pleaded as constituting a failure of consideration of the contract for the purchase price, but, in order to be available to the purchaser when he has elected to abide by the contract as made and is sued for the purchase price, must be pleaded as a counterclaim for damages. See *Pryor v. Ludden & Bates Southern Music House*, 134 Ga. 288, 67 S. E. 654, 28 L. R. A. (N. S.) 267, and notes.

[10] It is also well settled that the seller may, by written contract with the buyer,

limit his warranty of the article sold, and that, in the absence of pleading and proof that, though fraud, accident, or mistake in the drafting or in the execution of the contract, it does not speak the real agreement of the parties, parol evidence is not admissible to vary or contradict its terms. 35 Cyc. 379.

[11] If the written warranty given by the seller of the horse and pleaded by defendants was executed as a part of the contract of sale, and if it speaks the real agreement of the parties thereto, then the stipulation therein reading, "This is the only contract or guarantee given us," would, even if this suit was by the payees of the note, exclude any warranty not contained in that instrument, and hence would operate to exclude any evidence that the defendants were induced to buy the horse by representations that the horse was sound and young, etc., and that the same were false and fraudulently made.

[12] Even if such written warranty was not a part of the contract of sale, while proof of material misrepresentations which induced defendants to buy would be admissible against plaintiff if it was not a bona fide holder of the note for value and before maturity, yet whether such misrepresentations were fraudulently made would be immaterial, since they could be invoked and considered as warranties, and therefore equally as binding upon the sellers, whether made in good faith or fraudulently.

But on this subject the writer wishes to say that the warranty extends only to the general fitness and capacity of the horse to perform the purpose for which he had been purchased. Lang & Co. were not made parties, nor any recovery against them sought. The plaintiff bank was not a party to the warranty, and no recovery on the warranty was prayed for, and the purpose of the defendants in pleading the warranty is not very clear. But the pleading as a whole clearly manifests that the defendants were not "standing on the contract" of seeking its enforcement in any of its phases, but, on the contrary, were repudiating the contract in toto on the ground of fraud. The plaintiff bank, however, seems to have availed itself of the warranty in support of the contention that the warranty provided the only measure of damages available to the defendants in this case, and the writer thinks perhaps it will be sufficient to say on this subject in a general way that, in the absence of fraud, if the representations relied upon amount merely to a mistaken assertion of the horse's condition and capacity as asserted in the warranty, then the warranty, it seems under the following cases, will constitute the defendants' measure of damages, and their only relief would be to avail themselves of the remedy the warranty provides, which was the return of the horse and the acceptance of another in his place. See *Oltmanns Bros. v. Poland*, 142 S. W. 653; *Wisdom v. Nichols*,

etc., Co., (Ky.) 97 S. W. 18; *Shearer v. Gaar*, etc., Co., 41 Tex. Civ. App. 89, 90 S. W. 684; *Walters v. Akers* (Ky.) 101 S. W. 1179; *Holbert v. Sanzenbacher*, 159 S. W. 1054; *Haynes v. Plano Mfg. Co.*, 36 Tex. Civ. App. 567, 82 S. W. 532; *Crouch v. Leake*, 108 Ark. 322, 157 S. W. 390, 50 L. R. A. (N. S.) 774. But the writer thinks that we are prevented from now so declaring the law, for the reason that defendants alleged fraud in the procurement of the note upon which the plaintiff sued that extended beyond the limits of the warranty, and the jury in their verdict, in answer to special issues, expressly so found. In this view of the case the warranty will not prevent the relief sought by the defendants in this case in event it should be found that the plaintiff was not a purchaser before maturity and for value and without notice of fraud, for in such event the defendants might elect to affirm the contract and sue upon the warranty, or, as they do, seek to defeat the recovery upon the note by reason of the fraud committed in its procurement. As stated in *Blythe v. Speake*, 23 Tex. 430, quoting from the headnote:

"A party defrauded in a contract has his choice of remedies. He may stand to the bargain and recover damages for the fraud, or he may rescind the contract, return the thing bought, and recover back what he has paid."

See, also, cases cited in 15 Ency. Dig. Tex. Rep. 463, § O; 3 Ruling Case Law, p. 947, § 143.

[13-15] In this connection it will perhaps be well to add that, while ordinarily, where the purchaser elects to rescind, he must return the property purchased, yet he need not do so if it be worthless. *Wintz v. Morrison*, 17 Tex. 372, 67 Am. Dec. 658. It should perhaps be further said that the defendants, among other things, pleaded to the effect that the warranty, in fact, had not been executed at the time of the execution of the note; that, without their knowledge and consent, it had been merely deposited with a local bank by the agent of W. A. Lang & Co. If this allegation be true, the warranty would have no binding effect in any event; as in such case there would be no meeting of the minds of both parties to the contract, and the vendor would have no legal right to impose a measure of damages to which the defendants never agreed. Even should it be found, contrary to the contention of the defendants, that the warranty was executed at the time of the execution of the note, and therefore part of the contract declared upon, then also its binding effect would be destroyed by the establishment of extraneous fraud in the procurement of the note; for fraud sufficient to nullify the note would be equally as forceful to operate as an avoidance of the warranty part of the same contract.

No other assignment presents questions we think it necessary to discuss, but, believing that what we have said constitutes a suffi-

cient guide upon another trial, it is ordered that for the errors first discussed the judgment must be reversed, and the cause remanded.

PHILLIPS v. NEWSOME (No. 8281.)

(Court of Civil Appeals of Texas. Ft. Worth. June 26, 1915.)

1. FIXTURES §21—STATIONARY ENGINE.

Where defendant bought real estate on which was a cotton gin, and at the time of such purchase there was in the building a stationary engine bolted to a concrete bed five feet deep, which had been prepared for that purpose, the shaft from the engine being attached to the building, the engine was a fixture, title to which passed to defendant with the land.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 47-56; Dec. Dig. §21.

For other definitions, see *Words and Phrases*, First and Second Series, *Fixture*.]

2. FIXTURES §21—BONA FIDE PURCHASER—CHATTEL MORTGAGE—RECORD NOT BINDING.

Defendant, having purchased land without knowledge of a recorded chattel mortgage on an engine, permanently attached to the ground, held by the seller of the engine to defendant's grantor, took clear title to the engine upon purchasing the real estate without searching the chattel mortgage records, since it is the policy of the law that title to real estate shall appear upon the records designated for that purpose.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 47-56; Dec. Dig. §21.]

3. FIXTURES §27—CONTRACT AGAINST FIXATION—VALIDITY.

The mortgagor and mortgagee of personal property can, as between themselves, validly contract that such property shall not become a fixture on its attachment to real estate.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 5, 22, 25, 44, 45, 54; Dec. Dig. §27.]

Appeal from District Court, Bosque County.

Action by D. F. Phillips against J. L. Newsome. Judgment for defendant, and plaintiff appeals. Affirmed.

Carlock & Carlock, of Ft. Worth, for appellant. H. E. Trippet, of Hico, for appellee.

CONNER, C. J. This is an appeal from a judgment perpetuating a temporary writ of injunction issued out of the district court of Bosque county to restrain the sale of a certain stationary steam engine, alleged to constitute a part of the permanent fixtures of certain gin property and lots owned by the appellee, Newsome. The levy and threatened sale was by the appellant, Phillips, as constable of precinct No. 2 of Bosque county, by virtue of an order of sale issued out of a justice court in favor of the Southern Trading Company and against the Eubanks & Henry Gin Company, the order having been issued in accordance with the terms of a judgment foreclosing a chattel mortgage upon the engine mentioned.

There is but little, if any, conflict in the material facts. In substance, they are that in August, 1911, the Southern Trading Com-

pany of Texas sold the engine in question to the Eubanks & Henry Gin Company, the latter company at the time executing a chattel mortgage upon the engine to secure the payment of part of the purchase money. The mortgage, among other things, contained a recital that the engine—

"shall not become a fixture attached to any realty but shall remain as personal property, the title to remain in the Southern Trading Company of Texas until fully settled for as herein provided."

The mortgage was seasonably and duly recorded in the chattel mortgage record of Bosque county, to which the Eubanks & Henry Gin Company took the engine and used it in the construction and operation of a cotton gin on lots 1, 3, 4, 5, 6, 8, 9, 11, 12, 13, and 14, in block 5, in the town of Iredell. Later, to wit, in 1912, the Eubanks & Henry Gin Company not having paid their mortgage debt at its maturity, the Southern Trading Company of Texas instituted its suit against the gin company in the justice court of precinct No. 2 of Bosque county, and prosecuted it to a judgment in their favor, foreclosing the mortgage before mentioned; and, as stated, it is by virtue of this judgment that the enjoined order of sale was issued. In August, 1912, however, prior to the entry of the judgment above mentioned in favor of the Southern Trading Company, the appellee, J. L. Newsome, purchased the lots and gin property before mentioned, paying a valuable consideration, and received a warranty deed. At the time of this purchase he was without any actual notice of the claim of the Southern Trading Company, or of its chattel mortgage.

[1] In reviewing the proceedings below we are called upon, by the assignments of error, to determine whether the engine at the time of appellee's purchase of the gin was personal property, as appellant contends, or whether it constituted a part of the realty, as appellee insists, and this question depends upon the further question of whether, at the time of appellee's purchase, the engine had become so attached to the real property as to become a fixture thereon. The evidence may be said to be conflicting upon this point, but, tested by the ordinary rules, we can but think that the evidence fully sustains the trial court's holding, to the effect that the engine had become a fixture and constituted a part of the real property upon which it was situated. The appellee testified that the engine upon which the levy had been made was a part of the gin machinery at the time he bought the gin; that it was pointed out to him as a part of the gin and connected therewith at the time; that it was bolted to the floor, that is, bolted to the concrete foundation; that if the engine was taken out of the gin, it would destroy the usefulness of the gin; that a concrete foundation, thought to be five or six feet in the ground, had been prepared for the bed of the en-

gine, and that the engine is fastened to the concrete foundation by bolts; that the shaft that runs from the engine is fastened to the house. The evidence as a whole undoubtedly tends strongly to show that the engine was originally attached to the other gin property with a view of its permanent location, and, unless it must be otherwise held because of the record of the chattel mortgage in favor of the Southern Trading Company, there can be no question but what the engine in controversy became a permanent fixture upon the lots upon which the gin property was located so that the title and possession of the same passed to the appellee with the deed that he received therefor. See Tiedeman on Real Property (3d Ed.) § 13; Jones on Chat. Mortgages (5th Ed.) § 123; Brown v. Roland, 11 Tex. Civ. App. 648, 33 S. W. 275; Jones v. Bull, 85 Tex. 136, 19 S. W. 1031; Watson v. Markham, 33 Tex. Civ. App. 476, 77 S. W. 660; Sinkler v. Comperet, 62 Tex. 476; Cole v. Roach, 37 Tex. 419; McJunkin v. Dupree, 44 Tex. 501.

[2, 3] We also think that the court below properly concluded that appellee was not affected by the terms of the mortgage under which the Southern Trading Company claimed, or of its record. While as between the parties to the mortgage it is undoubtedly true that the character of the property may be fixed by a contract, that is, the purchaser may estop himself from claiming the property as a part of the realty by reason of a subsequent attachment thereof to the soil, but appellee was not a party to the mortgage contract under consideration. He was not affected by the provision that the engine should not become a part of the realty, and was without knowledge of it. As against the mortgagor, appellee was a purchaser in good faith and without notice and had the right to view the property in accord with its apparent condition and character at the time of his purchase. Among other things, after a review of the authorities, it is said in the case of Ice, Light & Water Co. v. Lone Star Engine & Boiler Works, 15 Tex. Civ. App. 694, 41 S. W. 835:

"The better opinion is that a purchaser of the realty is bound only to take notice of the record title of the realty, and is not in any way bound to examine the records for chattel mortgages, for he is not affected by the record of the chattel mortgage upon fixtures on such realty."

The case of Tibbetts v. Horne, 65 N. H. 242, 23 Atl. 145, 15 L. R. A. 56, 23 Am. St. Rep. 31, is a case quite similar to the one now under consideration, and it is there said:

"There is no principle of public policy to be subserved by fostering the claim of one man to the enjoyment and exercise of a right and interest in and over the real estate of another, at variance with the record title and apparent ownership. But, on the other hand, the policy of the law of this state is that the public records * * * should show the true state of the titles. * * * Whatever may be the rights or the nature of the interest in respect to such property * * * as between the original parties to the contract, * * * it seems to be well settled

that a building, erected as the one in question was, could become a fixture, and a part of the freehold, so as to pass by the deed of the owner of the land to a bona fide purchaser without notice."

In this state, as in other jurisdictions, the policy of our law is that the title to real estate shall appear upon the records designated for that purpose, so that all may know in whom the legal title is vested, and appellee, having purchased in good faith and without actual notice of the trading company's mortgage or claim, was not bound to search the chattel mortgage records. He, therefore, took the engine in controversy free from the claim now asserted against him. See, in addition to the cases cited, *Jones on Chattel Mortgages* (5th Ed.) § 127; *Ginners Mut.*, etc., v. *Wiley*, 147 S. W. 632; *Taylor v. Lee*, 139 S. W. 910; *Hopwell Mills v. Savings Bank*, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235; *Binkley v. Forkner*, 117 Ind. 178, 19 N. E. 753, 3 L. R. A. 33.

We conclude that all assignments of error must be overruled, and the judgment affirmed.

TEXAS FIDELITY & BONDING CO. v. BROWN et al. (No. 5532.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 10. 1915.)

1. APPEAL AND ERROR — 578 — RECORD — STATEMENT OF FACTS — SUPPLEMENTAL STATEMENT.

A statement of facts was approved in time. A supplemental statement of facts disclosing that the court in rendering judgment considered testimony admitted over objection, and without any ruling thereon, was made without any motion in the trial court to correct the statement of facts, but a motion was filed in the court on appeal for an order permitting the supplemental statement to be filed and considered as a part of the statement of facts. *Held*, that the supplemental statement could not be considered, for a party is entitled to know what is considered by the court, and to have an opportunity to preserve proper bills of exception thereto.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2572; Dec. Dig. § 578.]

2. MECHANICS' LIENS — 313 — BUILDING CONTRACTS—BONDS—LIABILITY.

A stipulation in a building contractor's bond that, if the obligee receives notice of the fact that any claims for labor or materials remain unpaid, he shall withhold payment from the principal of any money due or to become due until payment of such claims, is for the protection of the surety and does not empower the obligee to pay such claims as he sees proper to pay, whether there is liability therefor or not, and charge the same to the surety.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 656; Dec. Dig. § 313.]

Appeal from District Court, Bexar County; W. F. Ezell, Judge.

Action by A. A. Brown against J. J. Lawler and others. There was a judgment for plaintiff against defendants, and in favor of defendants Texas Fidelity & Bonding Company and another, against defendant named,

and the Bonding Company appeals. Reversed and remanded for another trial.

Hertzberg, Barrett & Kercheville, of San Antonio, and Bebout & Penland, of Waco, for appellant. John Sehorn, of San Antonio, for appellees.

CARL, J. Appellee, Dr. A. A. Brown, sued J. J. Lawler, Abraham Schroeder, and the Texas Fidelity & Bonding Company, alleging: That Brown, on August 24, 1912, entered into a written contract with Lawler by the terms of which Lawler undertook to furnish all labor and material and to erect and complete for Brown a two-story house in San Antonio; the consideration to be paid Lawler therefor being \$4,250. That to secure the faithful performance on the part of said Lawler to erect and complete said building in accordance with the plans and specifications, Lawler, as principal, and the Texas Fidelity & Bonding Company and Abraham Schroeder as sureties, on August 28, 1912, executed to Brown a certain bond in the penal sum of \$1,400, conditioned, in substance, that should he, the said Lawler, erect and complete said building in accordance with the plans and specifications, then the obligation was to be void, etc. That thereafter Lawler began the work of erecting the aforesaid building and partially completed the same, but on October 12, 1912, abandoned the work of erecting said building and refused to continue the job. That at the time said Lawler abandoned the job, Brown had paid him on said contract the sum of \$1,348. That on October 14, 1912, Brown notified the Texas Fidelity & Bonding Company and Abraham Schroeder, sureties, of the default on the part of Lawler, and called upon them to erect and complete the building, which they refused to do. Whereupon said Brown undertook to finish the work of completing the building. That in doing this finishing work Brown expended the sum of \$4,342.70, the said Brown claiming damages in the sum of \$1,486.20, being the difference between the contract price therefor and what it cost plaintiff to complete the building. The Texas Fidelity & Bonding Company answered, alleging that they were not liable because the plaintiff had not been damaged in any amount, and denied that the expenditures made by Brown were reasonable and necessary to complete the building, alleging that plaintiff did not carry out the conditions of his building contract with Lawler, overpaid him, made changes in the plans, alleging that the sums spent by Brown in completing the building was greatly in excess of the reasonable value of said services and material, and alleging further that the suit was filed more than six months after the date fixed for the completion of the work; that said Brown paid out amounts to Lawler, or to others for Lawler, for which no lien could have

been fixed against the property and for which the said Brown was not personally responsible.

Said Schroeder answered, denying all of the allegations contained in plaintiff's petition. Said Lawler answered, alleging changes in the plans and specifications after his abandonment, which increased the cost of the building and further alleging:

"That he fully performed his contract, and that plaintiff refused to permit him to finish the building under the plans and specifications."

The cause was tried before the court without a jury, January 6, 1915, and judgment rendered in Dr. Brown's favor against Lawler, Schroeder, and the surety company, jointly and severally, for \$1,400, the amount of the bond, and for \$20.24 against Lawler. The bonding company and Schroeder were given judgment over against Lawler for any sums they might have to pay. The bonding company has perfected this appeal.

It was shown that it cost to complete the house, according to the statement of facts, the sum of \$4,728.55, or \$478.55 more than the contract price. Appellant therefore contends that the judgment is unsupported by the evidence at least to the extent of the difference between \$478.55 and \$1,400, the amount for which judgment was given. But while E. P. Behles, the architect, was on the stand, objection was made to his testifying to certain accounts and vouchers as to time of labor and amounts due therefor because it was shown that there was a foreman, and it was urged that he was the proper man to make such proof. The court thereupon said he would permit the witness to testify that he (architect) approved those accounts and issued vouchers on them. Behles then said he signed the pay sheets; that every laborer and carpenter signed his name to the amount shown on the pay sheets. Objection was made to the witness testifying that these accounts and pay sheets were correct, because the witness testified that he did not keep the time, but same was taken from the foreman's book. These accounts total about \$1,010.25. After some further colloquy, the court said:

"We will just withhold the admission of those at this time. * * * Mr. Sehorn: But, your honor, we have not got the foreman here. Mr. Hertzberg: We have him here. Mr. Sehorn: The contract specifies that Mr. Behles shall do those things. The Court: I am inclined to think it is sufficient, but will withhold it until the foreman testifies. And thereafter M. T. Eckles, the witness referred to in the foregoing testimony as the foreman in charge of the work, was placed upon the stand by the defense, but no questions were asked him by either party, concerning the pay rolls and the amount paid laborers. In rendering the judgment herein, the court considered the foregoing testimony of the witness Behles as sufficient evidence of the amount expended by the plaintiff, Brown, for labor in the completion of the building mentioned in the pleadings, and the judgment of the court was based upon the fact that the foregoing sums of money mentioned in the vouchers copied hereinabove were expend-

ed by plaintiff Brown for labor in the completion of the building."

[1] The above matters do not appear from the statement of facts which was approved by the trial court on April 29, 1915, and filed in this court on April 30, 1915, but appear from matters sent up to this court in which the trial court certifies that same took place as a part of the trial and same were considered in arriving at the judgment entered. This supplemental statement of facts has not been filed in this court, but a motion has been filed asking that we enter an order permitting same to be filed and to be considered as a part of the statement of facts. It does not appear that any motion was filed in the trial court to correct the statement of facts, or that any order to that effect was ever made, but it is sought to ingraft the same upon the statement of facts upon the certificate of the trial judge. That certificate says:

"Counsel for defendant knew the papers were omitted, but was of the opinion they were not introduced, and still contends they were not, but counsel for plaintiff overlooked the fact that they were not copied in the statement of facts when he agreed to and signed the same, and the statement of facts had been so agreed to by the parties, when presented to me and was therefore approved by me without examining the same."

If a statement of facts can be corrected by timely proceedings in the trial court, that has not been done in this instance; and the injurious consequences of such proceeding as this need no more concrete example than this furnishes, for the parties were cut off from the opportunity to further urge their objections or to preserve a bill of exception. Certainly litigants have a right in every instance to know what is considered by the court and to have an opportunity to preserve proper bills of exception thereto. As the record stands, the judgment is unsupported by the evidence. This makes it necessary for us to reverse the judgment and remand the cause for trial.

[2] Another matter is urged upon which we will express our opinion, in view of another trial. It is contended that, after Lawler quit this job, Brown voluntarily paid a number of his debts for material, etc., which were not capable of being fixed as liens against the property, and that no attempt had been made to fix them as liens upon the property; also, that the property was the homestead of Dr. Brown and no such liens could have been fixed upon it for that reason.

Appellee contends that, even if the claims could not have been fixed as liens, they were at least capable of being made liens upon the balance of the funds remaining in the owner's hands under the building contract. But appellant asserts that if the owner pays debts voluntarily, after abandonment by the contractor, and which debts of the contractor so paid could not have been fixed as liens against the property, the owner makes such payments at his own peril and cannot charge the same against the contractor's bondsmen.

This is what the courts have held. *First Baptist Church v. Carlton*, 173 S. W. 1179; *Slade v. Amarillo Lumber Co.*, 93 S. W. 475; *Loneragan v. S. A. Loan & Trust Co. et al.*, 101 Tex. 63, 104 S. W. 1061, 106 S. W. 876, 130 Am. St. Rep. 803; 27 Cyc. pp. 304, 307; *Am. & Eng. Ency. Law*, vol. 20, pp. 491, 492.

The bond contains, as a proviso before liability shall attach, this clause:

"If, at any time during the prosecution of the work specified in said contract to be performed, there comes to the notice or knowledge of the obligee, the fact that any claim for labor performed or for materials or supplies furnished to said principal in or upon said work, remain unpaid, * * * the obligee shall withhold payment from the principal of any money due or to become due to the principal under said contract until the payment of such claims."

It is clear that this clause was placed there for the protection of the bonding company and certainly did not clothe the owner of the building with the power to pay such claims as he saw proper to pay, whether there was liability therefor or not. The bond was given to protect the owner against the legal claims for which he or his property might become liable, and was never intended to clothe the obligee therein with power to go out and pay debts for which neither he nor the bonding company was liable and then charge that up to the bonding company.

The judgment of the trial court is reversed, and the cause is remanded for another trial.

FINNIGAN-BROWN CO. v. ESCOBAR et al. (No. 438.)

(Court of Civil Appeals of Texas. El Paso.
Nov. 11, 1915. On Rehearing,
Nov. 24, 1915.)

1. APPEAL AND ERROR ~~79~~—DECISIONS REVIEWABLE—NECESSITY OF FINAL DETERMINATION—"FINAL JUDGMENT."

Where a corporation sued two persons to recover title and possession of goods, which persons answered denying the allegations of the petition, and averring by cross-action that the goods were the property of another, for whom they were holding as bailees, such other and another person intervening, claiming the goods, judgment, making no disposition, either directly or by implication, of plaintiff's claim to the goods, being merely that it take nothing against an original defendant, and proceeding to adjudicate the rights of the interveners and defendants, could not be appealed from, since such judgment was not a "final judgment," which is the awarding of the judicial consequences attached by the law to the facts, a final determination of the rights of the parties resulting from the ruling made, from which alone an appeal will lie, except in instances especially provided by law granting the right to appeal from certain interlocutory orders and judgments.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 459-462; Dec. Dig. ~~79~~.

2. APPEAL AND ERROR ~~79~~—DECISIONS REVIEWABLE—NECESSITY OF FINAL DETERMINATION—FINALITY THROUGH VERDICT.

Where, in suit to recover title and possession of personalty, in which defendants and interveners claimed interests in the property, the judgment failed to adjudicate, directly or by

implication, as to the plaintiff's claim to the goods, the fact that the verdict of the jury determined such claim did not by implication render the judgment an appealable final determination, since the verdict was not sufficient for that purpose and must have been followed by the judgment pronouncing its legal consequences.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 459-462; Dec. Dig. ~~79~~.

Appeal from District Court, El Paso County; Dan M. Jackson, Judge.

Suit by the Finnigan-Brown Company against Leon Escobar and another to recover title and possession of goods. From a judgment that plaintiff take nothing against Escobar, and adjudicating the rights of interveners, plaintiff appeals. Appeal dismissed.

Finnigan-Brown Company, a corporation, filed suit against Leon Escobar and T. J. Woodside to recover title and possession of certain hides and skins. A writ of sequestration was sued out by plaintiff, and the property seized thereunder. In due time the same was replevied by plaintiff. Woodside and Escobar answered, denying the material allegations of the petition, and by cross-action averred that the hides and skins were the property of Wincelao Garcia, for whom they were holding it as bailees, and asked judgment over against the Finnigan-Brown Company and the sureties upon its replevin bond for the value of the property. Woodside thereafter filed a disclaimer of any interest in the property, except a lien thereon for freight and customs duties paid out by him upon the importation of the same from Mexico, and asked that upon trial he be decreed a lien to secure the moneys so expended. Victor Martinez intervened, claiming a portion of the hides and skins sued for by plaintiff, and asked that he have judgment therefor or their value. Garcia likewise intervened, claiming all of the hides and skins, and prayed judgment therefor or their value. The jury, by its verdict, found that the Finnigan-Brown Company was entitled to certain of the hides and skins of the value of \$6,994.81; that Martinez was entitled to some of the hides and skins, valued at \$3,895.57, and that Garcia was entitled to some of the skins, valued at \$6,804.23. It appears from a recital in the judgment that the hides and skins were sold after replevy, and the proceeds thereof were in the hands of the Finnigan-Brown Company.

Judgment was entered as follows: (1) That the Finnigan-Brown Company take nothing against Escobar. (2) That Martinez and Garcia respectively recover of the Finnigan-Brown Company and the sureties upon its replevin bond, the value, with interest, of the hides found by the jury to belong to them respectively. (3) That Woodside recover certain amounts against the Finnigan-Brown Company, Martinez, and Garcia; the amounts

adjudged against the respective parties being in proportion to their ownership of all of the property in controversy; the judgment reciting that it was agreed by the parties that judgment should be so rendered in Woodside's favor for the moneys paid out by him. (4) That Martinez, Garcia, and Woodside take nothing against Escobar. From the judgment so rendered this appeal is prosecuted.

Coldwell & Sweeney, of El Paso, for appellant. C. L. Vowell, Walthall & Gamble, and T. O. Lea, Jr., all of El Paso, for appellees.

HIGGINS, J. (after stating the facts as above). [1] 1. The appeal must be dismissed for want of finality in the judgment. The rule is that appeals lie only from final judgments. The only exception is in some instances specially provided by law, granting the right to appeal from certain interlocutory orders and judgments. See cases cited, 1 Michie, Ency. Dig. 394, 395. A judgment is not final so as to authorize appeal therefrom unless disposition has been made of all of the parties; all issues raised determined, and the case disposed of as completely as the court had power to do. See cases cited, 8 Michie, Ency. Dig., pp. 156 and 161.

A final judgment is the awarding of the judicial consequences which the law attaches to the facts. It is final only when the decision or sentence of the law is pronounced by the court upon the matter contained in the record. *Eastham v. Sallis*, 60 Tex. 576. No complete disposition is made, directly or by implication, of the issue raised by the Finnigan-Brown Company's suit for the hides and skins. The judgment in favor of Martinez and Garcia only disposes of the proceeds of those the jury found belonged to them. It does not adjudge to the Finnigan-Brown Company the hides the jury found belonged to it, nor the proceeds thereof; neither does it adjudge the company not entitled thereto. Unless this be done, directly or by necessary implication, the judgment cannot be final. The hides having been sold and the proceeds thereof being in the hands of the Finnigan-Brown Company, it followed upon the jury's verdict that it was entitled to judgment for its share of such proceeds. But:

"It is not enough to make a final judgment that we can see that the court ought to have rendered one. What the court did must have amounted to a final determination of the rights of the parties resulting from the ruling made." *Land & Loan Company v. Winter*, 93 Tex. 560, 57 S. W. 39; *Trammell v. Rosen* (Sup.) 157 S. W. 1161.

[2] It is argued by appellees that this case is analogous to those authorities which hold a judgment final which disposes of an issue by necessary implication only; for example, a cross-action not expressly mentioned and

adjudicated. *Trammell v. Rosen*, supra, and cases there cited; also *Davies v. Thomson*, 92 Tex. 391, 49 S. W. 215. We can see no similarity between this line of authority and this case. There is nothing in this judgment from which it could be in any wise inferred that the court had judicially found for or against the Finnigan-Brown Company the right to any part of the hides or their proceeds. The verdict of the jury alone was not sufficient. It must have been followed by the judgment of the court pronouncing the legal consequence of the verdict. *Trammel v. Rosen and Land & Loan Co. v. Winter*, supra.

Appellees also request, if it be determined the judgment is not final, that this court reform the same and make it so. This cannot be done. The defect affects the jurisdiction of this court, and we must dismiss the appeal.

2. In view of what has been said, it is unnecessary to determine whether or not it is essential to the finality of the judgment that judgment should likewise have been entered upon Woodside's disclaimer that the Finnigan-Brown Company take nothing against him. It may be said, however, in view of further proceedings in the case, that it is best and proper to do so. *Gullett v. O'Connor*, 54 Tex. 408; *Mignon v. Brinson*, 74 Tex. 18, 11 S. W. 903.

In *Gullett v. O'Connor*, supra, it was held under the facts there presented, that it would be presumed the cause had been dismissed as to a defendant who had disclaimed and as to whom no disposition was made in the judgment. But upon the facts reflected by the record here it may well be doubted whether any such presumption could be indulged. *Mignon v. Brinson*, supra.

Dismissed.

On Rehearing.

In the original opinion it was said:

"In view of what has been said, it is unnecessary to determine whether or not it is essential to the finality of the judgment that judgment should likewise have been entered upon Woodside's disclaimer that the Finnigan-Brown Company take nothing against him."

In this sentence the word "recover" should have been used for "take nothing." It is accordingly now so corrected, and with this correction the motion for rehearing is overruled.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. ASTON. (No. 7394.)

(Court of Civil Appeals of Texas. Dallas. Oct. 16, 1915. Rehearing Denied Nov. 20, 1915.)

1. RAILROADS \Leftrightarrow 390—INJURY TO PERSON ON TRACK—DISCOVERED PERIL.

Where a pedestrian stepped in front of a train approaching a depot without realizing its nearness to him, and in attempting to escape fell, and his left leg was cut off by the wheels of the engine, and where the engineer, though he

saw the pedestrian fall and applied the emergency brakes, acted on the assumption that he had not been struck and released the brakes, in consequence of which the train continued to move forward, and mangled the right leg so as to necessitate its amputation, the railroad company was liable, under the doctrine of discovered peril, for loss of the right leg.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1324, 1325; Dec. Dig. ¶390.]

2. RAILROADS ¶390—INJURY TO PERSON ON TRACK—DISCOVERED PERIL—KNOWLEDGE—EVIDENCE.

The evidence in an action for such injuries was sufficient to charge the engineer with negligence, where it showed that he saw plaintiff fall to the ground or lying on the ground in close proximity to the track and train, and knew before the right leg was run over that he was in peril, and failed to use the means at his command to stop the train and avoid the injury, though it did not show that he knew that plaintiff would certainly be injured unless the train was stopped.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1324, 1325; Dec. Dig. ¶390.]

8. NEGLIGENCE ¶83—DISCOVERED PERIL—KNOWLEDGE.

The doctrine of discovered peril has no application, in the absence of actual knowledge by the person inflicting the injury of the peril of the person injured in time to avoid the injury by use of the means at hand.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. ¶83.]

4. NEGLIGENCE ¶134—PROOF—CONJECTURE.

Negligence cannot be established by mere conjecture without evidence of actual negligence or of facts from which it can be inferred.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. ¶134.]

5. TRIAL ¶260—INJURY TO PERSON ON TRACK—REFUSAL OF INSTRUCTION COVERED.

Where, in a pedestrian's action for loss of both legs from being run over by a train at a depot, the court instructed that, if plaintiff attempted to cross the track directly in front of the train, and the engineer did not see him until the front of the engine had passed him, that if the engineer then applied the brakes, and that if, after plaintiff fell, it appeared to the engineer that he was in the clear, and not in further danger, and the engineer used the care of a person of ordinary prudence, he could not be held to have discovered that plaintiff was in imminent peril, it was not error to refuse an instruction that if plaintiff attempted to cross in front of the moving train, and the engineer did not see him until the pilot beam of the engine was about even with him, that if it then appeared that he was falling away from the engine, and not in danger, and that if the engineer thereupon released his brake, allowing the train to continue moving forward, and in so doing acted as a man of ordinary prudence, he could not be held to have discovered that plaintiff was in imminent peril; the instruction given being substantially the same as the one refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. ¶260.]

6. TRIAL ¶263—REQUESTS FOR INSTRUCTIONS—GIVING ONE OF SEVERAL.

Where a party requests two special instructions on the same issue, and the court selects and gives one, the party cannot complain of the refusal of the other.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 662, 663; Dec. Dig. ¶263.]

7. APPEAL AND ERROR ¶1060—HARMLESS ERROR—ARGUMENT OF COUNSEL.

In an action for injuries from being run over by a train, argument of plaintiff's counsel to the effect that the reason why the engineer and fireman were not present as witnesses was because they could not explain why they did not stop the train when they knew that plaintiff had fallen in front of same, and that "the engineer saw plaintiff when he was down on the rail * * * in front of the engine," if improper, did not require a reversal, where it did not appear that defendant was injured thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. ¶1060.]

Appeal from District Court, Hill County; Horton B. Porter, Judge.

Action by Tom Aston against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Perkins, of Dallas, Walter Collins, of Hillsboro, and Scott & Ross, of Waco, for appellant. Shurtleff & Cummings, of Hillsboro, for appellee.

TALBOT, J. This suit was brought by the appellee to recover damages for personal injuries inflicted upon him through the negligence of appellant's servants in charge of and operating one of its trains. By an amended petition filed May 22, 1914, appellee alleged, in substance, that he was injured while crossing the appellant's railway track in the town of Hubbard City, on or about the 26th day of January, 1914, the injury consisting of the loss of both of his legs. He alleged in said petition facts which would constitute him a licensee on appellant's track at the time and place of the accident, and that the defendant's employes were guilty of negligence in approaching said place at an unusual rate of speed, and in failing to ring the bell on the engine as it approached said place where appellee was injured, the same being at its depot in said town of Hubbard City; that after he got upon the track he observed that the train was not running at the usual and customary rate of speed, but was running at a high and unusual rate of speed, and that on account of that fact he was in imminent peril of being struck by said train; that when he realized his position he became greatly frightened and excited, and in attempting to get off the track fell and attempted to fall off of said track; and that his body did fall over the rail, but his feet and legs were cut off at or near the knees. He further alleged that at the time he fell the engine ran over only one of his legs, and that said injured leg remained upon the track, and that the engine and tender and the trucks of one of the coaches passed over said leg; that in an effort to remove his body from the track, and in throwing his body and limb around, his other foot and leg, which up to that time had remained uninjured, was

thrown upon the track, and before the train stopped the wheels of one of the coaches passed over said limb and injured it so that it was necessary to have the same amputated. He further alleged that the engineer in charge of said train saw him fall in front of said engine by the side of the track, and therefore knew of his perilous position by said track, and continued to move the said engine and train after the perilous position of the said plaintiff was known to said engineer, when the said engineer could, by the use of the means at his command, have stopped the said engine and train with safety to himself and to said train and to those on board the same, and that, if said engine had been stopped after the engine and tender alone had passed over plaintiff, one of his limbs would have been saved, but that the said engineer, knowing the perilous position of plaintiff, continued to cause said engine and train to move, although he well knew that the plaintiff had fallen in front of said engine and was in a position of imminent peril, and would likely be injured, unless said train was stopped; that the failure to stop said train after discovering the perilous position of the appellee was the proximate cause of the loss of his right leg. Defendant answered, denying each and all of the allegations of negligence set forth in plaintiff's petition, and averred that on the occasion in question it operated its train in the usual and customary manner at the usual and customary rate of speed at the time and place in question, and arrived at the station in question on its schedule time; that the plaintiff, Tom Aston, with a full knowledge that the defendant's said train and locomotive was approaching said place, deliberately stepped upon its said railroad track upon which said train and locomotive was running, in front of said moving locomotive, at a distance not more than eight or ten feet in front thereof; that said Aston was guilty of contributory negligence in going upon said railroad track at said time and place; that he was so close to the moving locomotive at the time that he entered upon said railroad track that it was impossible for those in charge of its locomotive to have stopped the same before reaching a point where the said Aston entered upon said track; that it rang its bell, sounded its whistle, and had its electric headlight burning as it approached said station in the usual and customary manner; that said Aston both saw and heard said train, and knew that it was approaching said station at said time; and that he recklessly, and without due regard for his own safety, and with a full knowledge of the danger which he would encounter by going upon defendant's track in front of its engine, deliberately went upon said track. The defendant railroad company specifically denied that its engineer in charge of said train knew of plaintiff's perilous position at the time he

saw plaintiff at the side of the track, and it denied that plaintiff was in a position of peril at said time, or that it continued to operate and cause said locomotive and train to move with any knowledge of the plaintiff's being in a position of peril, and it denied that said engineer at any time after the locomotive passed the plaintiff lying upon the ground by the side of the track possessed any knowledge that he was in a position where he would likely be injured unless the train was stopped. Plaintiff, by supplemental petition, denied the affirmative facts alleged by the defendant railroad company. The record discloses that both of plaintiff's feet and legs were crushed, the left by being run over by the engine drawing defendant's train and the mail and baggage car, and the right by other coaches in the train in the rear of said engine, mail and baggage cars. The case was submitted to the jury impaneled to try the same upon special issues, and their findings were such as to preclude a recovery, except those upon the issues submitted in relation to discovered peril. They found, and the evidence warranted such findings, that the defendant's engine injured one of the plaintiff's legs, the left leg; that after the engine drawing defendant's train passed plaintiff the plaintiff was in a position of imminent peril, and that the defendant's engineer operating the engine was aware of plaintiff's position and imminent peril; that after said engineer discovered and became aware of the position and imminent peril of the plaintiff, he could have stopped the train by the use of the means at his command with safety to himself and to his train and to those on board of said train in time to have avoided injury to plaintiff's other foot—right foot; that the failure of the defendant's engineer to stop the train in time to avoid injury to plaintiff's right foot and leg was negligence and the proximate cause of the injury to said right foot and leg; that at the time plaintiff was lying upon the ground near defendant's railroad track, and was observed in that position by defendant's engineer as the engine passed plaintiff, said engineer realized that, if plaintiff remained in the position he was then in, he would probably be injured by the wheels of one of the rear cars if the train did not stop at that time and place; that plaintiff's right foot and leg were so injured by being run over by defendant's cars that it became necessary to amputate the same; and that plaintiff had sustained damages thereby in the sum of \$10,000. The jury further found, in response to question asked by the court, that the plaintiff was not guilty of negligence which contributed to his injury.

Appellant groups in its brief its sixteenth, eighteenth, twenty-eighth, twenty-ninth, and thirtieth assignments of error. These assignments assert respectively that the trial court erred in refusing a special charge request-

ed by defendant directing the jury to return a verdict in its favor, in overruling its objections to the court's charge in submitting the issue of discovered peril, in overruling a motion made by defendant to have judgment entered in its favor upon the findings of the jury, in overruling a motion made by appellant to set aside the findings of the jury upon the issues submitted in relation to discovered peril, and in granting the plaintiff's motion to have judgment entered in his favor upon the findings of the jury. Appellee objects to a consideration of the assignments and propositions thereunder, for the reason claimed, among others, that they present different questions of law, and are not followed by such statement as is required by the rules. The statement in support of the assignments does not strictly comply with the requirement of the rules, but we think the assignments themselves and the propositions propounded thereunder present the same question of law for our decision, and, especially in view of the fact that we have reached the conclusion that the judgment of the lower court should be affirmed, the assignments will be considered.

[1] It is claimed that the court erred in the several rulings complained of by the assignments because the evidence was insufficient to authorize the submission to the jury of the issue of discovered peril, and does not sustain the findings of the jury upon that issue. In this view of the evidence we do not concur.

The plaintiff testified:

"When I reached that gravel walk that night and saw the train down south of me, there was no alarm or signals of any kind given. It was a dark night, and I could not tell by looking at the headlight of the train or any part of it that I could see where the train was. * * * When I stepped into the track, I noticed the train was right on me. I could see the pilot right at me, it seemed to me. It scared me so bad I could not hardly tell you what happened. I fell off from between the tracks; fell out on the east side of the track. When I first fell, the train caught my left leg and cut it off or run over it. My leg was on the east rail. The engine and tender and the mail car and the baggage car passed over it, and the front end of the negro coach struck my right leg. The negro coach was behind those other cars. I could not explain how it got caught. I hardly know what I was doing at the time it got caught. I was lying with my head from the track, and when it struck my right leg it just changed ends with me and threw my head back toward the track. I cannot say how come me not to get off the track when my first leg was cut. I made an effort to get off. I was not able to get away. When this last coach I have testified about caught me, it caught the right leg. The right leg was last cut. It was run over and just mangled from my ankle, plumb up close to my knee. That knee was afterwards amputated."

El. Pecot, the appellant's fireman on the engine which ran over appellee, testified by deposition as follows:

"In coming into the station with my train headed toward Corsicana on the night of the accident, I would be on the left side of engine, on the side next to the station. I first noticed Tom Aston on the night before he was injured when

he attempted to cross the track. He was about three feet from the left rail when I first saw him. When I first saw him standing up, I do not remember the distance he was from the engine. I saw him before he attempted to cross. He was on the left side of the track, and we were going north. The engine was just a short distance, probably 20 feet, from him when I saw him standing there. I saw him when he stepped upon the track. My engine was about 8 or 10 feet from him when I saw him step upon the track. The engine and train went to the street crossing just north of the depot before it stopped; that is the engine's stopping place. When I say he stepped upon the track, I meant he stepped immediately in front of the engine, between the two rails. I hollered to the engineer to stop her at that time. The engineer applied his emergency brakes, but the train did not stop entirely. When I hollered to the engineer to stop her, he immediately applied his emergency brakes, which of course, gradually brought the engine to a stop. Of course, the engine did not come to a standstill, but gradually got slower, and I asked him [the engineer] if he hit a man, and he said not."

This witness further testified, in effect, that after he called to the engineer to stop and the speed of the train was slackened, the engineer released the air brake, and the engine and train moved about the distance of two or three coach lengths, and stopped at the regular stopping place at the station; that there were five cars in the train; and that when the train stopped he immediately took his torch, and, in company with the engineer, who slightly preceded him, went back and found the plaintiff, who had attempted to cross the railroad track, lying on the ground on the opposite side of the track from the side he got upon it.

T. Stovall, the appellant's engineer, in charge of the engine which injured appellee, testified by deposition as follows:

"I could not say that I saw Tom Aston before he was injured. I first saw him when he fell out on the ground. The engine at that time was south of the Main street crossing. That is north of the depot down about the freight house between the two crossings. My engine was about 2½ or 3 coaches from the ticket office at the time that occurred. Tom Aston was in the neighborhood of 30 feet from me when I first saw him. Aston had fallen out when I first saw him. I do not know whether he had been struck at all by the engine when I first saw him. I recall the fireman saying something just before I reached there. I set my emergency brake immediately after that. That was all I could do."

He also testified:

"With reference to what rate of speed my train was moving that night after I passed the first crossing south of the depot, I will say I made application there for the station stop. I had braked applications for station stop; enough to make the regular station stop. I had my engine under full control. When I saw Mr. Aston, he was on the right-hand side of the track. His body was not on the ground, but it was going to the ground. He was not standing erect; he was down. Just about the time I saw him, Mr. Pecot said, 'Did you hit that man?' * * * I saw Mr. Aston, and that made me apply the brake. * * * My train very nearly stopped when I applied my air brake at that time. I moved about three cars' length, I suppose, from where Aston was on the ground. At the time I saw him on the ground I thought he had not been struck or run over. That was the

reason that I released my brakes. As soon as my engine stopped, I saw Mr. Aston. I immediately lit my torch and ran back to see if the man had been hurt."

R. L. Horn stated, in substance, that he lived at Hubbard City, and was working at the ice factory stationary engine when the accident in question occurred, and that he was at the depot that night; that as the appellant's train approached the station he noticed the engine coming to a stop; that it was slowing down too much to stop at the regular stopping place; that he then heard the engineer when he pushed the air in emergency, and heard him when he released the air; that he slowed down almost to a stop, and then released the air and worked steam up to the regular stopping place. He further said that, according to his estimate, the train was going from the time it crossed the street up to the point where it struck the plaintiff between six and seven miles an hour, and that it was going slow after the emergency brakes were put on; that he did not know it to be true as an engineer that the emergency applied to a train of that character running only six or seven miles an hour would stop the train instantly almost; that when the air is put in emergency it won't stop the train immediately. He stated, however, that the application of the emergency brakes would stop a train of five or six coaches on a level track running five, six, or seven miles an hour in about eight or nine feet; that the engineer in charge of the engine that struck the plaintiff could have stopped the train in a distance of nine feet after striking him if he had wanted to do so.

Thus it appears that, when the appellant's engine struck appellee, he fell to the ground, and that after so falling, or as he was in the act of falling, to the ground, the engineer operating the engine saw him; that at this particular instant the engineer could have stopped the train in a distance of nine feet by application of the emergency brakes, but that, instead of making use of such brakes, upon the assumption that the plaintiff had not been struck, he released the air and allowed the train to move two or three car lengths to the usual stopping place at the railway station. The engineer said himself that he had his engine under full control. He further said, as has been shown, that:

When he first saw the plaintiff, he was about 30 feet from him; "that he was on the right-hand side of the track; that his body was not on the ground, but it was going to the ground. He was not standing erect, he was down."

Again he said:

"At the time I saw him [plaintiff] on the ground I thought he had not been struck or run over. That was the reason that I released my brakes."

Had the engineer made use of the means at his command after plaintiff's left foot and leg had been crushed by the engine, it is clear that the train would have been stopped at such time as to have avoided the injury

to his right foot and leg, and, according to the findings of the jury upon questions not involved in the issue of discovered peril, a recovery precluded. But such means were not used, and as a result thereof plaintiff's right foot and leg, evidently in his efforts and struggle to free himself from the perilous position in which he was placed, got upon the iron rail of the railroad track and was crushed and injured to such an extent that amputation was necessary.

[2-4] The contention of appellant, as we understand, is to the effect that, although the engineer saw the appellee falling to the ground immediately at the railroad track about the front of the engine, yet there is nothing in the evidence to justify the conclusion that he realized that appellee would be injured if the train was not then stopped, and hence the doctrine of discovered peril does not apply. And the propositions, among others, are asserted:

That "the engineer must have realized that, if Aston remained in the position he was then in, he would be injured, unless the train was brought to an immediate stop," and "that the engineer in charge of defendant's locomotive, at the time and place in question, did in fact realize that Tom Aston was in peril as he lay by the side of defendant's railway track when the engineer was passing him, cannot be shown or established by mere conjecture, nor inference; and when such fact is shown only by conjecture or inference, no liability is shown, and the issue of discovered peril does not arise."

It is well settled that:

The doctrine of discovered peril "has no application in the absence of actual knowledge, on the part of the person inflicting the injury, of the peril of the party injured, in time to avoid the injury by the use of the means and agencies then at hand. If he had no such knowledge, the new duty was not imposed, though it be clear that by the exercise of reasonable care he might have acquired same." *Railway v. Breadow*, 90 Tex. 26, 36 S. W. 410.

It is also well-established law that, where there is no evidence of negligence or fact from which negligence can be inferred, it is not permissible to indulge in mere conjecture. But to state broadly, as in effect appellant does in his second proposition quoted above, that it cannot be established by inference that the appellant's engineer on the occasion in question realized that the plaintiff, Aston, was in peril as he lay by the side of appellant's railway track when the engineer was passing him is not, in our opinion, sound. Mere conjecture cannot be indulged, but, if there are facts in evidence from which negligence reasonably can be inferred, a finding of negligence will be authorized and supported by the evidence. It was not necessary to sustain a charge of negligence on the part of the appellant on the doctrine of discovered peril that its engineer actually knew or realized that injury would result to appellee if the train was not stopped. The duty to use the means at his command to stop the train with the view of avoiding injury to appellee instantly arose when the engineer discovered that he was in

a position of such danger as that he would probably be injured if the train was not then stopped. That the engineer did not make use of the means within his power consistent with the safety of the train and those aboard of it to then stop the train is conclusively shown by the testimony, and from the facts and circumstances in evidence it is clear that the jury was authorized to infer and find that the engineer, having seen appellee falling to the ground, or lying on the ground, in close proximity to the railroad track and moving train, knew or realized, before appellee's right foot and leg were run over and crushed, that he was in peril of being injured by the moving train, and guilty of culpable negligence in failing then to use the means at his command to stop the train and avoid such injury. The facts were sufficient to charge the engineer with knowledge or realization of the perilous position of the appellee, and it was not essential to appellee's right of recovery on the issue of discovered peril that the engineer knew that he would certainly be injured unless the train was stopped. *Railway Co. v. Vallejo*, 102 Tex. 70, 113 S. W. 4. In the case just cited the Supreme Court held that there was no duty on the part of the railway employees discovering a small child about the railway tracks of the appellant, but in no danger in its position from the moving train, to stop same and remove the child to a place of safety, but in discussing the question of the railway company's duty said:

"If there had been probability that by the continued movement of the train injury would be inflicted on the boy the duty to stop the train would have arisen, but no such result was indicated by the facts."

In the case at bar the engineer knew of the dangerous proximity of the appellee to its moving train, and the facts in evidence were sufficient to indicate to the engineer at the time he saw appellee falling to the ground that he would probably be injured by a continued movement of the train.

The next assignments of error present the same questions of law just discussed, and are disposed of by what we have already said.

[5] The twenty-third assignment of error complains of the court's refusal to give the following special charge:

"If you believe from the evidence in this case that plaintiff attempted to cross defendant's track directly in front of its moving train, and that defendant's engineer did not see plaintiff until he was about even with the pilot beam or cylinder of the engine, and that at the time the plaintiff appeared to the engineer to be falling away from the engine, and that said engineer in charge of the engine thought that plaintiff fell away from the track and was not in danger of being run over by the train, and if you further believe that said engineer thereupon released his brake and allowed the train to move on to its usual stopping place, and after the

engineer first saw the plaintiff he acted as a man of ordinary prudence and care would have acted under the same or similar circumstances, then the engineer cannot be held to have discovered the plaintiff in 'imminent peril.'"

There was no error in refusing to give this charge. At the request of the appellant the court charged the jury as follows:

"If you believe from the evidence in this case that the plaintiff attempted to cross defendant's track directly in front of its moving train, and that defendant's engineer did not see plaintiff until the front of the engine had passed him, and he was in a falling position, and that the engineer immediately upon seeing plaintiff applied his brakes, and if you further believe from the evidence that after plaintiff fell it appeared to the engineer that he was in the clear, and was not in danger of being struck or further injured by the train, and after seeing the plaintiff the engineer used such care as a person of ordinary prudence would have used under the same or similar circumstances, then you are instructed that the engineer could not be held to have discovered plaintiff in imminent peril."

[6] The special charge requested and given is equivalent to or practically the same as the one requested and refused, and appellant has suffered no injury by the refusal of the one made the basis of this assignment of error. Besides, it is a well-established rule of practice in this state that, if two special charges are requested covering the same issue, and the court selects one and gives it in charge, the appellant is in no position to complain of the refusal of the other. *Railway v. Ford*, 118 S. W. 1137.

[7] The two remaining assignments of error are grouped and complain of certain remarks of counsel for the appellee in his closing argument to the jury. These remarks were, in substance, that the reason why the engineer and fireman were not here as witnesses so the jury could look at them was because they could not explain why they did not stop the train when they knew plaintiff had fallen down on the track in front of the moving train, and that "the engineer saw plaintiff when he was down on the rail of defendant's track in front of the engine." We are not sure that, under the facts of this case, the remarks of counsel here complained of were not within the scope of legitimate argument, but, if they were not, we are not prepared to say that they resulted in such injury, if any, to appellant as to authorize a reversal of the case. The assignments are therefore overruled.

We think the evidence supports the findings of the jury upon which the judgment appealed from was based, and that no material or reversible error is appointed out by the assignments.

The judgment of the court below is therefore affirmed.

Affirmed.

JOSEY et al. v. MASTERS. (No. 1512.)
(Court of Civil Appeals of Texas. Texarkana.
Nov. 4, 1915.)

1. SEQUESTRATION — 13 — RIGHT TO PROPERTY — CLAIMANT — JURISDICTION — WAIVER OF OBJECTION.

Where, in an action brought in T. county for the title possession of a horse, plaintiff alleges that the horse is in the possession of defendant S. in D. county, and one J. presents, to the officer levying the writ of sequestration in D. county, his affidavit and claim bond to try the right of property in the horse, which the officer then delivers to him as expressly authorized by Vernon's Sayles' Ann. Civ. St. 1914, art. 7769 et seq., it is the duty of J., if the property is not in his possession when levied on, to see to it that the affidavit and claim bond are returned to a court in D. county as required by articles 7776 and 7777; and when he neglects this duty he will be deemed to have waived his right to object that these papers were not returned to the proper court, and that judgment was taken against him and the sureties on his bond in the action in T. county.

[Ed. Note.—For other cases, see Sequestration, Cent. Dig. §§ 17-20; Dec. Dig. ¶13.]

2. APPEAL AND ERROR — 934 — PRESUMPTION — JURISDICTION — POSSESSION OF PROPERTY.

On appeal in such case, after it has been taken from the justice court to the county court by certiorari, it will be presumed, if necessary to support the trial court's ruling, that J. admitted that the property was in the possession of S. when levied on, where the application for writ of certiorari is not a part of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3782; Dec. Dig. ¶934.]

3. SEQUESTRATION — 20 — CLAIMANT — NOTICE.

In such case, J. and his sureties were chargeable with knowledge that the officer had sent such papers to the justice court in T. county, from which the writ of sequestration was issued, instead of to a court in D. county, and also with the fact that such justice court had jurisdiction under Vernon's Sayles' Ann. Civ. St. 1914, article 7778, to hear and determine the case, where the assessed value of the property did not exceed \$200.

[Ed. Note.—For other cases, see Sequestration, Cent. Dig. §§ 42-49; Dec. Dig. ¶20.]

4. COURTS — 24, 25 — JURISDICTION — CONSENT.

Jurisdiction of the subject-matter cannot be conferred by the consent of parties, but where the court has jurisdiction of the subject-matter the parties may by consent confer jurisdiction over their persons.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 76-80; Dec. Dig. ¶24, 25.]

Appeal from Titus County Court; Sam Porter, Judge.

Action brought in justice court by T. T. Masters against R. H. Josey and others. From a judgment for plaintiff in the county court, defendants appeal. Affirmed.

Seb F. Caldwell, of Austin, for appellants.
T. C. Hutchings, of Mt. Pleasant, for appellee.

WILLSON, C. J. Appellee sued one Scullin in a justice court of Titus county for the title possession of a certain horse, which he alleged was in Scullin's possession in Dallas

county. A writ of sequestration issued out of said justice court at appellee's instance was levied on the horse in Dallas county. Appellant Josey thereupon presented to the officer (the sheriff) who levied the writ his affidavit and claim bond, with appellants J. O. Hart and D. A. Bradshaw as sureties, for the purpose of trying the right of property in the horse, which the sheriff then delivered to him, as authorized by the statute. Article 7769 et seq., Vernon's Statutes. The affidavit and bond were not returned by the officer, with a copy of the writ, to a court in Dallas county having jurisdiction to try the question as to the right of property in the horse, as required by the statutes (articles 7776, 7778), but same were by the sheriff returned with the original writ to the justice court of Titus county, where judgment by default was rendered in favor of appellee against Josey, and also against the other appellants as the sureties on his claim bond. The cause having been removed to the county court of Titus county by means of a writ of certiorari issued at the instance of appellants, it was there tried de nova, and judgment was rendered in appellee's favor against appellant Josey for the horse and against Josey and the appellants J. O. Hart and D. A. Bradshaw as sureties on his claim bond, and against J. E. Hart and H. A. Hood, sureties on the certiorari bond, \$200 and \$20 additional as a penalty allowed thereon by law.

The only issue tendered by appellants in the county court, so far as the record before us shows to the contrary, was one questioning the jurisdiction of the justice court of Titus county to try the right of property in the horse, on the ground that, the writ having been levied in Dallas county, the courts of that county alone had power to try that question. The contention presented by the issue tendered was based on article 7776, Vernon's Statutes, which required the officer who made the levy in Dallas county, when he received Josey's affidavit and claim bond, to indorse on the bond the value of the property as assessed by himself, and then to return same with a copy of the writ to a court in Dallas county "having jurisdiction according to the value of the property as assessed by said officer," and article 7777 of said Statutes, which required said officer to return the original writ to the justice court of Titus county after indorsing thereon that claim to the property had been made and oath and bond given, "stating by whom, the names of the sureties, and to what justice or court the bond had been returned." Appellee excepted to the issue tendered, on the ground that, using his language, "the defendants invoked the jurisdiction of this court and caused this case to be brought to this court and caused this plaintiff to be cited to appear and prosecute this suit in this court." The court below sustained the exception. Whether he

erred in so doing or not, is the only question presented in appellants' brief.

The claim bond as approved by the sheriff contained a recital that he had assessed the value of the horse at \$200.

[1-4] In the affidavit for the writ of sequestration it was alleged that the horse was in the possession of Scullin, the defendant in the suit, and in the writ of sequestration he was described as being in Scullin's possession. Otherwise there is nothing in the record sent to this court showing who had possession of the horse at the time he was levied upon. If he was not then in appellant Josey's possession, it was Josey's duty, as determined by the Supreme Court in *Zurcher v. Krohne*, 63 Tex. 122, to see to it that the affidavit and claim bond were returned to the proper court. And see *Chappell v. Ferrell*, 54 S. W. 1074; and *Deware v. Elevator Co.*, 17 Tex. Civ. App. 394, 43 S. W. 1048. As appellants in their application for the writ of certiorari which is not a part of the record sent to this court, may have admitted that the horse was in Scullin's possession at the time he was levied upon, this court should assume, if it is necessary to do so to support the ruling made by the trial court, that they did make such an admission. If it was Josey's duty to see to it that the papers were sent to a court in Dallas county having power to hear and determine the question as to the right of property in the horse, appellants were chargeable with knowledge of the fact that the sheriff had not done that, but, instead, had sent same to the justice court in Titus county from which the writ of sequestration was issued. They also were chargeable with knowledge of the fact that said justice court had jurisdiction to hear and determine such a question where the assessed value of the property did not, as in this instance, exceed \$200. Article 7778, Vernon's Statutes. It is well settled that, if a court is without power because of the subject-matter thereof to hear and determine a suit, the parties thereto cannot by consent confer jurisdiction on it to try same; but it is well settled that, if a court has jurisdiction of the subject-matter, the parties may by consent confer on it the power over their persons necessary to enable it to try the cause. It appears from the record before us that the affidavit and claim bond were returned to and filed in the Titus county justice court June 29, 1914; that no action in the cause was had in that court until the September term thereof, when it was continued to the October term; and that at the October term it was continued to the November term, when the judgment appealed from was rendered. Under these circumstances, we think the trial court was warranted in the conclusion he must have reached that appellants were in the attitude of having waived the right they had to have the cause tried in Dallas coun-

ty, and, having waived the right, were not entitled to complain because it was tried in Titus county. Therefore the judgment is affirmed.

HALL v. RAY. (No. 7321.)

(Court of Civil Appeals of Texas. Dallas. Nov. 6, 1915.)

1. APPEAL AND ERROR ⇨499—PRESENTATION FOR REVIEW — EXCLUSION OF EVIDENCE — BILLS OF EXCEPTIONS.

Where bills of exceptions to the exclusion of evidence do not disclose the objections made to the evidence excluded, the ruling cannot be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2295-2298; Dec. Dig. ⇨499.]

2. APPEAL AND ERROR ⇨569—BILL OF EXCEPTIONS—SIGNATURE OF JUDGE—NECESSITY.

Bills of exceptions taken to the exclusion of evidence could not be considered on appeal, where they were not signed by the presiding judge.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2530-2545; Dec. Dig. ⇨569.]

3. EVIDENCE ⇨471—CONCLUSION OF WITNESSES.

A question inquiring of defendant whether he had any agreement with plaintiff whatever or gave him any right to the property in controversy was not objectionable as calling for a conclusion.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. ⇨471; *Witnesses*, Cent. Dig. § 833.]

4. APPEAL AND ERROR ⇨1050—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of a witness' testimony over an objection that it was a statement of a conclusion, if error, was harmless, where the witness had already given substantially the same testimony without objection.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. ⇨1050.]

5. PARTNERSHIP ⇨336—EXISTENCE OF PARTNERSHIP—INTEREST IN LAND—EVIDENCE.

In an action for a partnership accounting in respect to two tracts of land bought by defendant in his own name, wherein he denied the existence of partnership, the testimony of the attorney who had acted for plaintiff and defendant in connection with various transactions and was familiar with their dealings with each other that he did not know or hear of plaintiff's ownership in the lands in controversy was properly admitted.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 797; Dec. Dig. ⇨336.]

6. APPEAL AND ERROR ⇨1027—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of such evidence, if error, was harmless where it appeared that the same verdict and judgment would have been rendered had the evidence been excluded.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4033; Dec. Dig. ⇨1027; *Trial*, Cent. Dig. § 124.]

7. APPEAL AND ERROR ⇨742—PRESENTATION FOR REVIEW—ADMISSION OF EVIDENCE.

An assignment of error complaining of the admission of evidence could not be considered on appeal, where it was not followed by a statement from which it could be determined

whether the court erred in admitting the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. ¶ 742.]

8. PARTNERSHIP ¶336—ACCOUNTING—EVIDENCE.

Where, in an action for an accounting in respect to a general partnership in land deals, defendant denied the existence of such partnership, but claimed that plaintiff had been interested with him in special land trade contracts, the defendant's testimony that prior to the date on which the alleged general partnership was entered into he and plaintiff had made a number of trades together and divided the profits was properly admitted.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 797; Dec. Dig. ¶ 336.]

9. APPEAL AND ERROR ¶1060—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of defendant's testimony that prior to the date of the general partnership the existence of which was in controversy he and plaintiff had made a number of land trades together and divided the profits on same, if error, was harmless, where plaintiff had testified to similar, if not the same, transactions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. ¶ 1050.]

10. APPEAL AND ERROR ¶742—ASSIGNMENT OF ERROR—PROPOSITION.

An assignment of error under which no proposition is submitted will not be considered on appeal, where it does not sufficiently disclose the point insisted on to be a proposition within itself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. ¶ 742.]

11. APPEAL AND ERROR ¶742—ASSIGNMENT OF ERROR—STATEMENT.

An assignment of error will not be considered on appeal where the statement subjoined thereto is wholly insufficient to support same and enable the Supreme Court to determine without an examination of the record whether error was committed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. ¶ 742.]

12. PARTNERSHIP ¶336—ACCOUNTING—EXISTENCE OF PARTNERSHIP—BURDEN OF PROOF.

In an action for an accounting in respect to a general partnership, wherein defendant denied the existence of such partnership, the burden of proof was on plaintiff.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 797; Dec. Dig. ¶ 336.]

13. TRIAL ¶255—INSTRUCTIONS—REQUEST—BURDEN OF PROOF.

In an action for an accounting in respect to a general partnership in land, wherein defendant denied the existence of such partnership, but claimed that he and plaintiff had participated in several land trades in respect to which he asked an accounting, the court's failure to charge that the burden was on defendant to establish the causes of action which he set up in his favor was not error, in the absence of a request for such an instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. ¶ 255.]

14. TRIAL ¶339—VERDICT—CORRECTION.

Where, in an action for an accounting in respect to a general partnership, defendant denied the existence of such partnership, and set up special partnerships in respect to which he asked an accounting, and according to plaintiff's admission and the uncontradicted evidence an item to which defendant was entitled had been

overlooked by the jury, the court properly called the jury's attention to same, and directed that they return to the jury room and correct the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 791-794; Dec. Dig. ¶ 339.]

15. APPEAL AND ERROR ¶743—PRESENTATION FOR REVIEW—VERDICT—EVIDENCE.

On appeal in such case plaintiff's contention that defendant admitted and that the undisputed evidence showed that he was entitled to an item not allowed by the verdict could not be considered, where the page or pages of the voluminous statement of facts containing such admission and evidence was not given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2999, 3011; Dec. Dig. ¶ 743.]

16. COSTS ¶32—PREVAILING PARTY—PARTNERSHIP ACCOUNTING.

Where defendant in such case recovered on both phases of the case involved, he was entitled to recover all costs, though plaintiff recovered some items in controversy in the accounting.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 108-132; Dec. Dig. ¶ 32.]

Appeal from District Court, Navarro County: H. B. Daviss, Judge.

Action by C. J. Hall against D. W. Ray. From judgment for defendant, plaintiff appeals. Affirmed.

McClellan & Prince and J. S. Callicutt, all of Corsicana, for appellant. Lawrence Treadwell and Richard Mays, both of Corsicana, for appellee.

TALBOT, J. The appellant, Hall, sued the appellee, Ray, in the district court of Navarro county, Tex., the substance and effect of his allegations being, so far as is necessary to state, that about the 1st of February, 1910, he entered into a verbal contract of general partnership with appellee by which they were to engage in the purchase and sale of lands as an investment, for speculation, and upon commission for others; that at the dissolution of the alleged partnership the firm owned an undivided half interest in the Noble tract of 150 acres of land and the Watson tract of 450 acres, and that he owned a one-fourth interest in the two tracts; that, by reason of other partnership transactions, an accounting, for which he prayed, would disclose that appellee was indebted to him in the sum of several thousand dollars. Appellant alleged further that, while the deeds to the Noble tract and the Watson tract were made directly to appellee and vested the legal title in him alone, and that while the consideration and all obligations therefor had been paid and assumed entirely by appellee, yet that this was in pursuance of an agreement appellant had with appellee, by which, if appellee bought land for the firm and paid the consideration, then he was to take the title to the property in his own name, in trust, and as a security to secure said purchase money, with ten per cent. interest thereon. Appellant prayed for a dissolution of the alleged partnership, for an accounting

of all partnership matters and distribution of the partnership assets, and for judgment fixing his interest in the lands aforesaid and establishing his interest therein, for costs, and for general and special relief. Appellee, Ray, denied appellant's claim of general partnership, as well as his claim of an agreement that the Noble and Watson tracts were bought for the firm, and the deeds were taken in his name, as security for the purchase money and obligations which he had paid and assumed in the purchase of said tracts of land. He also denied that appellant had any character of title, interest, or equity in said two tracts of land. Appellee charged that during the year 1910, as well as for several years prior to that time, both appellee and appellant, being engaged in land trading, would occasionally, from time to time, have special partnership transactions with reference to specific land trades, and that appellee and appellant had several of such special partnership transactions during the year 1910, and that upon an accounting thereof appellant would be found liable to appellee, and for which judgment was prayed. The case was tried in April, 1912, and submitted to a jury upon special issues. All of the questions submitted were answered, the result of which was that the jury found for appellee against appellant upon his contention of a general partnership, and against his contention that appellee was liable to him in any sum; also found that appellant had no interest whatever in the Noble and Watson tracts of land. They also found, as was admitted by appellee, that there were certain special partnership transactions between February 1, 1910, and January 31, 1911, and that after an accounting thereof appellant was indebted to appellee in the sum of \$150.57. Judgment was entered in accordance with the findings of the jury, and appellant prosecuted this appeal. The appellant did not claim, but in effect denied, the existence of any special partnership transaction with appellee during the year of the alleged partnership. He did not claim that either the Noble or Watson tract was acquired under any special partnership agreement, but rested his claim of interest in said tracts on his alleged general partnership agreement with the appellee.

There is no assignment of error presented in appellant's brief which charges that the findings of the jury are unsupported by the evidence. The questions raised relate solely to the admission and exclusions of certain testimony and supposed errors in the submission of certain issues to the jury, charges upon the burden of proof, the excessiveness of the amount found in favor of appellee upon the accounting, and in adjudging all costs of the suit against appellant.

[1] The first, second, fifth, seventh, eighth, thirteenth, and fourteenth assignments of error complain of the action of the trial court in excluding certain testimony offered by the

appellant. The bills of exceptions taken to the exclusion of the testimony are insufficient under the rules and decisions of our appellate courts to authorize a review of the court's rulings. The bills fail to show the ground of objection made to the evidence offered or the ground or grounds upon which it was excluded. It is settled by numerous decisions of the appellate courts of this state that, when the bills of exceptions do not disclose the objections made to the evidence excluded, the ruling cannot be considered on appeal. *Johnson v. Crawl*, 55 Tex. 571; *Texas Progressive Lumber Co. v. Railway Co.* (Sup.) 155 S. W. 175; *Brewing Co. v. Dickey*, 20 Tex. Civ. App. 606, 49 S. W. 935; *Grinnan v. Rousseaux*, 20 Tex. Civ. App. 19, 48 S. W. 58, 781; *Railway Co. v. Jones* (Civ. App.) 60 S. W. 978; *Railway Co. v. Jarrell*, 38 Tex. Civ. App. 425, 86 S. W. 632; *Porter v. Langley* (Civ. App.) 155 S. W. 1042. The bills of exception reserved to the rulings of the court complained of by appellant do not purport to quote the language used by appellee's counsel in objecting to the admission of the evidence excluded; nor does it appear what particular objection was made to its admission, or whether only a general objection was made thereto. They simply state that the appellee objected to the testimony or that appellee's objections thereto were sustained, and hence the ruling of the Supreme Court in *Waller v. Leonard*, 89 Tex. 510, 35 S. W. 1045, is not applicable. *Grinnan v. Rousseaux and Railway Co. v. Jarrell*, *supra*.

[2] The fourth and ninth assignments of error, which complain of the exclusion of testimony offered by appellant in the trial court, cannot be considered, because not supported by any bill of exception. We find in the transcript what purports to be bills of exception taken to the action of the court in excluding the testimony here in question, but neither of the bills is signed by the judge who presided at the trial of the case. It not appearing by the signature of the judge that the bills relied on were approved and allowed by him, they cannot be considered.

For similar reasons, the tenth assignment of error complaining of the action of the court in rejecting certain testimony of the witness T. D. Pierce, tendered by the appellant, cannot be considered, and the ruling reviewed. The bill of exception referred to in support of this assignment relates to the ruling of the court in admitting certain testimony of appellant's witness E. L. McCluney, over appellant's objection, and in no way relates to any testimony tendered by his witness T. D. Pierce.

[3] Appellee's attorney asked the appellee while testifying in his own behalf the following question: "Did you have any agreement with him, Hall, whatever, or give him any right in the Noble and Watson tracts?" To which the witness replied: "No, sir." This question and answer were objected to by ap-

pellant, and they are made the basis of his third assignment of error. The question was objected to because leading and called for the conclusion of the witness as to what right the appellant had in the Noble and Watson tracts of land, and the answer because it was but the conclusion of the witness upon a vital issue, which it was the province and duty of the jury to determine from all the evidence in the case. We are inclined to the opinion that the question was leading, but do not believe it called for the conclusion of the witness. Under the pleadings and pertinent testimony which had already been admitted, whether appellee had agreed verbally with appellant that he should have an interest in the two tracts of land referred to became a very material, if not the leading and controlling, issue in the case, and the statement of the witness to the effect that he had made no such agreement with the appellant was the statement of a fact, and not merely his conclusion.

[4] But, conceding for the sake of the argument that the question was leading, and that it called for the conclusion and opinion of the witness, still the error must be regarded as harmless, and as furnishing no sufficient ground for a reversal of the case, for the reason that the witness Ray had already given substantially the same testimony as that elicited by the question without objection. Ray, among other things, testified, in substance, as follows:

"I paid \$35 an acre for the Noble place. In paying for the Noble tract, Hall put in some bank stock, which he wanted to get rid of, and which Noble accepted, and I agreed that this could be done, and I paid Hall in money the value of said stock. We figured on the Noble tract while we were figuring on the Henderson county place [owned by Ray]. A few days before we traded Hall told me he had heard from Maske Bros., and that they would not give but \$6,250 for the farm, and I refused to take it. Hall said, if I would take \$6,250 for it, he would sell it for Maske Bros., and make a \$500 profit, and then we would divide the profits. I told Hall I would take it, and would take the money I got from Maske Bros. and buy another place, and we [Hall and Ray] would look after both places and divide the profits, if we sold them that year [from January, 1910, to January, 1911]. I did not have any other contract or partnership with Hall at that time. I never did agree with Hall that he was to have a half interest in property purchased by me during that year. I did not have any agreement whatever with Hall by which he was to have any right or interest in the Noble and Watson tracts. The Noble transaction did not happen after Hall and I went together. In answer to your question as to whether or not the Noble and Maske trades occurred after the inauguration of a partnership, I will say there was not any inauguration of a partnership. The morning of January 20, 1911, was the first time Hall ever claimed he had an interest in the Noble tract."

[5] Appellant's sixth assignment of error is as follows:

"The court erred in allowing the defendant's attorney to answer the following question: 'Do you know or hear of Hall [plaintiff] having any ownership in this land, that is, the 150-acre tract and the 450-acre tract?' To which ques-

tion said counsel answered: 'No sir, I didn't know anything about him having an interest in it.' This evidence of said counsel was permitted over appellant's objection."

The bill of exception taken to this ruling shows that appellant objected to the testimony admitted for the reason that it was not admissible to show by appellee's attorney that he did not know or hear of appellant's ownership of the lands in controversy; that the knowledge of the witness Treadwell, appellee's attorney, as to appellant's interest in said lands, could not and did not disprove such interest therein. We think, under the facts in evidence, this testimony was admissible as a circumstance to be considered by the jury, together with other evidence, in determining whether or not it had been agreed between appellant and appellee that appellant should have the interest in the lands as claimed by him. It seems, as contended by appellee's attorney, that the witness Treadwell had been the attorney for the appellee, Ray, appellant, Hall, and Watson, from whom what is called by the witnesses the Watson tract was acquired, from time to time, and had procured loans for each of the parties, and was familiar with their transactions and title to and interest in various properties, including the lands in controversy. After appellee, Ray, had purchased the Noble place, and the deed had been executed to him alone, a trade was put on foot and negotiated between Ray, on the one hand, and Watson, on the other, whereby Ray was to convey to Watson a half interest in the Noble place, and Watson was to convey a half interest in an adjoining tract of 450 acres held by him. These negotiations were pending for some period of time, and, in addition to making the trade, new loans had to be either made or assumed by the respective parties and adjusted. Appellant, Hall, had an entire and complete familiarity with this transaction from first to last, and testified that he was interested therein to the same extent as was appellee, Ray, and that said trade was brought about as a result of the joint efforts of Ray and himself, on the one hand, and Watson, on the other. In the entire transaction Treadwell was the attorney for Ray, or Ray and Hall, and Hall, as well as Ray, constantly conferred and consulted with Treadwell, who drew the deeds, with reference to the matter, and until its consummation. Treadwell was also attorney for Watson in the transaction, as was known to all the parties at interest. Appellee, Ray, was contending, and testified to that effect, that the appellant, Hall, on January 20, 1911, for the first time, claimed that he had an interest in the Watson and Noble tracts of land, or at least in the Noble tract, and the witness Treadwell, having been the attorney for appellant, appellee, and Watson, and familiar with their transactions and the interest claimed by appellant and appellee in the different tracts of land, was clearly in position of

having known or heard of any claim asserted by appellant to the lands in question, and if, under the facts and circumstances shown, no interest in said lands was claimed by him during the time the various transactions affecting said lands were occurring it was competent, it seems to us, to show that fact by the witness Treadwell.

[8] But if technically the testimony was inadmissible, we are not prepared to say that its admission was such a denial of the rights of the appellant as was reasonably calculated to cause, and did cause, the rendition of an improper verdict and judgment in the case. Unless we can so say, the error furnishes no ground for a reversal of the case. Rule 62a (149 S. W. 2d 101). The testimony bearing upon appellant's claim to and interest in the lands involved in his controversy with appellee was fully developed, and it is not claimed that the evidence, independently of that here complained of, was insufficient to warrant the findings of the jury and the judgment based thereon. Such a claim, if made, could not be sustained. We feel very sure from the record sent to this court that the same verdict and judgment as were rendered would have been rendered had the court excluded, instead of admitting, the testimony under consideration.

[7-9] The eleventh assignment of error charges that the court erred in allowing the appellee, Ray, to testify that for five or six years prior to February 1, 1910, "the date this partnership between plaintiff and defendant was entered into," he and the plaintiff had made a number of trades together and divided profits upon the same. This assignment is not followed by a statement from which we may determine whether or not the court erred in admitting this testimony, and hence, under the rules, is not entitled to consideration. However, from our knowledge of the testimony acquired in the investigation of other questions raised, there was no error in this action of the court. The appellant claims an interest in the property involved in the suit by reason of an alleged general partnership agreement entered into between himself and appellee. The appellee denied that any such agreement was ever made, but claimed that appellant, from time to time, had been interested with him in special contracts relating to land trades. The alleged contract of general partnership was not in writing, and, as bearing upon the issue raised, proof was admitted by the court as to the character and kind of dealings which had existed between the parties prior to the date of the alleged general partnership agreement. It occurs to us that this was pertinent testimony upon the issue to which it related, but whether it was or not appellant is in no position to insist upon a reversal because of its admission, for the reason that prior to the ruling admitting said testimony he himself had testified to similar, if not the same,

transactions antedating his alleged agreement of general partnership.

[10, 11] The twelfth assignment of error is, not briefed as required by the rules, and will not be considered. There is no proposition submitted under it, and the assignment does not sufficiently disclose the point insisted upon to be considered a proposition within itself. But, if the assignment could be regarded as presenting the proposition insisted upon by appellant, still the statement subjoined thereto is wholly insufficient to explain and support the same, and enable us to determine whether or not error was committed in the ruling complained of without an examination of the record. Such manner or method of briefing a case is clearly violative of the rules.

[12] Assignments 15, 16, 17, and 21 assert that the court erred in submitting certain issues to the jury for their determination; the eighteenth that the court erred in placing the burden of proof upon the plaintiff; and the nineteenth that—

"the court erred in refusing to charge the jury that the burden of proof was upon the defendant, D. W. Ray, to establish any and all of the causes of action which he was setting up in his favor and against the plaintiff and as to any of the contentions he was making with regard to the property involved in this suit."

A consideration of these assignments, as are all of the appellant's assignments, is objected to because they are not briefed as required by the rules. The objections here urged are well taken. There is no proposition submitted under either of the assignments, they cannot properly be considered as presenting propositions within themselves, and there is no sufficient reference to or quotation of the evidence or proceedings in the case to explain and support said assignments or to enable us to determine whether or not error was committed by the court in either of the rulings complained of, without an examination of the statement of facts and other portions of the record sent to this court. This we are not required to do. But, if we were called upon or disposed to consider the assignments, we are not prepared to say there was error in any ruling of the court called in question by the assignments. On the contrary, we conclude from the investigation of the record we have made that the action of the court in the several particulars to which the assignments relate was correct. The issues submitted and of which complaint is made were controverted and pertinent issues for the determination of the jury, and no just complaint can be made of the manner and form of their submission. The burden of proof as placed by the court was properly laid upon the appellant.

[13] Neither the assignment of error 19, complaining of the refusal of the court to "charge the jury the burden of proof was upon the defendant, D. W. Ray, to establish any and all of the causes of action which he

was setting up in his favor and against the plaintiff," nor the statement accompanying it, shows that a special charge to that effect was requested by appellant and refused, or points out any pleadings or evidence calling for such an instruction. At most, it only can be said that the error, if error, was one of omission, and cannot be made a ground for reversal unless a proper special charge supplying the omission was asked by appellant.

[14] The twenty-second assignment of error is as follows:

"The court erred in submitting to the jury, under section 14, question 12, after the jury had returned a verdict into court, and same had been received by the court, instructing them that they had overlooked one item of \$500 against the plaintiff in the McCluney-Borders deal, for which he had not accounted to the defendant, and instructed the jury to charge this amount against plaintiff. This was done over the plaintiff's objection after the verdict had been rendered and received, and, further, the plaintiff objected thereto because the uncontroverted evidence showed that there was an item of \$25 received by the defendant from Moseley and Telly, which the defendant admitted he had received and had in his possession, and admitted that it was the partnership property of the plaintiff and defendant, and the court refused to instruct or charge this uncontroverted item of \$25 against the defendant."

It does not appear that there was any error in this action of the court. The statement in the assignment to the effect that the first verdict was "received" by the court is not correct. It does not appear that such verdict was received and filed. But this was regarded as unimportant. The court charged the jury thus:

"You are instructed that, in the matter of accounting between C. J. Hall and D. W. Ray, under the instructions of the court in (14) question twelfth, you have overlooked one item of \$500 commission on the McCluney-Borders deal, which C. J. Hall in his pleading admits, and which the evidence shows without dispute that C. J. Hall received, and for which he has not accounted to D. W. Ray. You will therefore return to your jury room and properly incorporate this item in your accounting, and reform your verdict in answer to said (14) question twelfth, accordingly."

It is not denied by the appellant that this was an admitted item in his pleadings, nor does he deny that the uncontroverted evidence showed that the appellant had received the amount of said item and had failed to account to appellee therefor. The complaint is that the court should not, after the jury came into court with their verdict, and it was discovered that said item had been overlooked, and not considered by the jury in arriving at their verdict, have sent the jury back with the direction to consider and allow said item. There was no error in this action of the court. The appellee's right to have the item of \$500 charged to appellant in the accounting prayed for by appellant not being disputed, it was entirely proper for the court to decline to receive the

first verdict brought in by the jury, and direct them, as was done, to allow appellee said item. Had the item been overlooked until the court was called upon to enter judgment upon the jury's findings, the item being an undisputed one to which appellee was entitled in arriving at the state of the accounts between himself and the appellant, it would have been the duty of the court then to take it into account and allow it in the judgment rendered. This being true, clearly there was no error in instructing the jury to correct their verdict in respect to said item.

[15] It is further contended by appellant that the undisputed evidence shows that in arriving at the state of the accounts between himself and the appellee he should have been allowed an item of \$25, which was not allowed, and therefore the judgment rendered is excessive in that amount. The appellee denies that appellant's right to this item of \$25 was shown by the undisputed evidence, and appellant in his brief fails to point out and show that such was the character of the evidence. We find it is stated in the statement made under the twenty-second assignment of error, just discussed, that:

"The evidence shows without conflict that Ray was indebted to the firm of C. J. Hall & Co. in the sum of \$25 received by him from Moseley and Telly. He admits this himself."

But the page or pages of the statement of facts where the evidence may be found showing without conflict that appellant was entitled to allowance of said item of \$25 is not given, nor is the page of the statement of facts or record showing the admission claimed given. The statement of facts sent to this court contains 379 pages, and the testimony of the appellee, Ray, covers many pages, the exact number of which we have not ascertained, but to search the statement of facts or go over the testimony of Ray to ascertain whether or not appellant is correct in his statement to the effect that appellee admitted that he was entitled to be credited with the \$25 in question, or that the evidence showed such right without conflict or dispute, would involve so much time and labor that it would be entirely unreasonable and out of the question to expect us to enter upon any such investigation.

[16] The contention that the trial court erred in taxing the costs against appellant also will be overruled. The appellee recovered upon both phases of the case involved, and was entitled to recover all costs. The fact that appellant recovered some of the items in controversy in the accounting did not entitle him to recover any part of the costs.

The judgment of the court below is in all things affirmed.

LUBBOCK STATE BANK et al. v. H. O. WOOTEN GROCERY CO. et al.
(No. 8215.)

(Court of Civil Appeals of Texas. Ft. Worth.
June 5, 1915. Rehearing Denied
Oct. 16, 1915.)

1. VENDOR AND PURCHASER ⇐261 — BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE.

Purchasers for value and without actual notice of previous transfers of vendor's lien notes are, as against unrecorded transfers of such notes, bound only by their actual knowledge or notice appearing from the records.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 674-686, 688-695; Dec. Dig. ⇐261.]

2. VENDOR AND PURCHASER ⇐261—VALIDITY—ISSUANCE.

Where a purchaser, who had given vendor's lien notes in payment, retransferred the land on condition that she should be discharged from payment of such notes, and the vendor retained the notes, the notes are on reissue thereafter valid as against the vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 674-686, 688-695; Dec. Dig. ⇐261.]

3. VENDOR AND PURCHASER ⇐261 — BONA FIDE PURCHASER—NOTICE.

A vendor of land, who received in payment 10 vendor's lien notes, transferred notes 2, 3, and 4 without executing any instrument in writing, and no written evidence of such transfers was recorded. Thereafter the vendee, being unable to meet the notes, retransferred the land on consideration that the vendor should assume and become liable to pay all debts and obligations against it. Subsequently by written agreement duly recorded notes 1 and 5 of the vendor's lien notes were disposed of to another. Thereafter the property was again sold, the vendor receiving 10 other vendor's lien notes. By this conveyance, which was not recorded, the grantee assumed payment of all outstanding indebtedness. The husband of the vendor transferred the last series of notes to plaintiffs in error, assuring them that the land was subject to no other lien except that of notes 1 and 5. The conveyance of notes 1 and 5 recited that the last 5 of that series had been fully paid, and that the second, third, and fourth notes should be an inferior lien to 1 and 5. *Held*, that the holder of the last series of vendor's lien notes had a lien superior to that of the holder of notes 2, 3, and 4 of the first series; there being nothing in the record to give constructive notice, and there being nothing to cast suspicion on the statement of the husband.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 674-686, 688-695; Dec. Dig. ⇐261.]

4. VENDOR AND PURCHASER ⇐261—REGISTRATION STATUTES.

As the purchase of a vendor's lien note carries with it as an incident the lien, and the latter is within the registration statutes, one desirous of protecting his lien should secure a written assignment and record it.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 674-686, 688-695; Dec. Dig. ⇐261.]

Error from District Court, Taylor County; Thomas L. Blanton, Judge.

Action between the Lubbock State Bank and others and the H. O. Wooten Grocery Company and others. There was a judgment for the latter, and the former bring error.

Affirmed in part, and in part reversed and rendered.

Sayles, Sayles & Sayles, of Abilene, and Benson & Spencer, of Lubbock, for plaintiffs in error. Kirby, Scarborough & Davidson and H. A. Tillett, all of Abilene, for defendants in error.

CONNER, C. J. This contest involves the relative value of certain vendor's lien notes, each party claiming priority of liens upon the N. W. ¼ of section 14, Lunatic Asylum land situated in Taylor county, Tex. The contest arises out of the following state of facts, as shown by the trial court's conclusions and by an agreed statement found in the record, viz.: On August 11, 1910, the quarter section of land mentioned was owned in the separate right of Mrs. May Braddy. She on that day, joined by her husband, M. T. Braddy, conveyed the land to Eliza Gregg, for which Mrs. Gregg executed her 10 promissory notes, numbered from 1 to 10, respectively, for \$640 each and payable yearly after November 1, 1910. The deed reserved the vendor's lien to secure the payment of the notes, and it was recorded on the 27th day of August, 1910. In September following this conveyance, Mrs. Braddy transferred notes 2, 3, and 4 of the above series to certain of the defendants in error to secure certain indebtedness on the part of Mrs. Braddy due them, respectively. These transfers were not evidenced by any instrument in writing, nor was any written evidence of these several transfers ever recorded. After this, to wit, on the 24th day of November, 1911, Eliza Gregg reconveyed the quarter section of land in question to May Braddy for a recited cash consideration of \$100, and the further consideration that May Braddy "assume and become liable to pay all debts and obligations that may be held against" the land. This deed of reconveyance further recited that the land was reconveyed "because of grantor's inability to pay the outstanding notes against the land." This deed was duly recorded on November 25, 1911. Thereafter, to wit, on February 12, 1912, as we must find from the court's specific finding and the agreed statement, M. T. and May Braddy executed a written transfer to Simmons College of notes 1 and 5 constituting a part of the series of notes executed by Mrs. Gregg. The transfer refers to the 10 notes executed by Mrs. Gregg as shown in the deed to her, recites that the last 5 of the series "have been fully paid," and "are fully canceled and released," and that "the second, third, and fourth * * * for full value in hand paid * * * are hereby made a second and inferior lien to the two notes * * * assigned, * * * and said second lien notes are so indorsed." This written assignment was duly recorded on February 13, 1912. Thereafter, on January 15, 1913, May Braddy, joined by her husband,

M. T. Braddy, conveyed the quarter section of land mentioned to W. F. Braddy, who gave therefor his 10 promissory notes, numbered from 1 to 10, respectively, for \$350 each, and "assumed the payment of all outstanding indebtedness." This deed was never recorded. The notes of this series which also reserved a lien on the land mentioned were made payable to M. T. Braddy, and he thereafter, before maturity and for a valuable consideration, conveyed all of the series to the respective plaintiffs in error. To each of plaintiffs in error to whom the series were so successively transferred, M. T. Braddy personally represented at the time of the transfer that the notes of the series "were the only liens against said land (the quarter section hereinbefore mentioned) except \$1,300 due Simmons College." It was further agreed, and the court so finds, that none of the holders of this series in fact examined the records of Taylor county, and that "except for such notice, if any, as may have been given by the records of Taylor county and deed to W. F. Braddy," they are each "bona fide holders in good faith for value."

On the above state of facts, the court concluded as a matter of law that the notes held by Simmons College constituted a first lien upon the quarter section of land in question, and that notes 2, 3, and 4 of the Gregg series of notes owned by defendants in error constituted a second lien, and that the notes given by W. F. Braddy as hereinbefore mentioned and owned by plaintiffs in error constituted the third lien. Judgment was rendered in accordance with the conclusion so stated, and the owners and holders of the second series of vendor's lien notes executed by W. F. Braddy have sued out this writ of error against the owners and holders of notes 1, 2, 3, and 4 of the first series executed by Mrs. Gregg.

All parties agreed that Simmons College is entitled to priority of lien, and that the judgment in favor of Simmons College to that effect is correct. The real contest is between the owners of notes 2, 3, and 4 of the Gregg series, and the owners of the second series of notes given by W. F. Braddy. As to these notes we think the court erred in his conclusion of law, and that the plaintiffs in error, as owners of the W. F. Braddy series of notes, are entitled to priority over the defendants in error, who are owners, as stated, of notes 2, 3, and 4 of the Gregg series.

[1-3] It must be admitted, we think, that the plaintiffs in error, as purchasers of the W. F. Braddy notes before maturity and for value, are entitled to a priority of lien claimed by them as against the unrecorded lien of defendants in error, unless, as the court below evidently concluded, the records of Taylor county were sufficient to give plaintiffs in error notice of the liens claimed by defendants in error. See *Henderson v. Pilgrim*, 22 Tex. 464, and cases hereinafter

cited. The doctrine of constructive notice, which is the reliance of defendants in error in the present case, is said to be a harsh one arising out of motives of public policy in the enactment of our registration statutes. See *Call v. Hastings*, 3 Cal. 179, and *Vizzard v. Taylor*, 97 Ind. 90. By the application of the doctrine of constructive notice it often happens that great injury is brought about to a purchaser of lands, mortgages, or other property, whose actual good faith cannot be questioned. No sympathy, however, is to be extended to a purchaser who is plainly notified by the proper record of an opposing claim. The law imposes upon him the duty of examining the records whether he actually does so or not, and a failure to examine the records, and to thus receive actual notice of the opposing claim or right, is his own fault, and it may be well said that he deservedly sustains any loss that results. Ordinarily, too, the doctrine has been so extended as that actual knowledge on the part of a subsequent purchaser of facts sufficient to put a prudent person on inquiry will affect him with notice of all that the inquiry would have developed. But regardless of the question as to how far, if at all, the principle last mentioned can be made to apply in this case, it is apparent that no knowledge of any character other than as must be imputed to plaintiffs in error from the records of Taylor county was shown. On the contrary, plaintiffs in error were expressly assured by M. T. Braddy that the only prior lien was the one in favor of Simmons College. Nothing appears to cast suspicion upon this statement. He was husband and agent of the wife in the transfer of the notes and a grantor in the deed to the maker. We find nothing to suggest that plaintiffs in error were guilty of bad faith in failing to inquire of May Braddy, the wife, or that an inquiry from her would have resulted in information conflicting with the husband's statement. Mere carelessness in this respect will not amount to bad faith in the absence of cause for suspicion. *Larzelere v. Starkweather*, 35 Mich. 96.

Indeed, it is admitted, as well as expressly found by the court, that plaintiffs in error were bona fide purchasers for value and without notice of the claims of the defendants in error, who own notes 2, 3, and 4 of the Gregg series, "except such notice, if any, as may have been given by the records of Taylor county and deed to W. F. Braddy." The only recitation in the W. F. Braddy deed relied upon, or that can be relied upon, to show notice that notes 2, 3, and 4 of the Gregg series were outstanding, is the recitation that W. F. Braddy "assumed the payment of all outstanding indebtedness." This would very naturally be referred by each several purchaser of the W. F. Braddy notes to notes 1 and 5 of the Gregg series held by Simmons College. This is especially true in view of M. T. Braddy's assurance, to the ef-

fect that these latter notes were the only ones that were outstanding. The records of Taylor county exhibited but little, if anything, more forceful in the way of notice. There was no transfer of notes 2, 3, and 4 of record, and no recitation in any deed through which plaintiffs in error claimed requiring such conclusion.

It is insisted that May Braddy's assumption of all outstanding indebtedness in the deed of reconveyance by Mrs. Gregg so requires. But not so. The deed does not declare that the Gregg notes have been conveyed. The notes were "outstanding" as to Mrs. Gregg. None of them, so far as the record shows, were then surrendered and delivered up to Mrs. Gregg, and the "assumption" was entirely consistent with the idea that Mrs. Gregg so required, in view of their nondelivery to her, as a protection to a subsequent circulation of her notes, or as formal assurance that they were yet in possession of May Braddy. It is insisted that it is unreasonable to infer that Mrs. Braddy would "assume" the payment of notes still held by her. But it is to be borne in mind that she did do so as to at least part of the notes, for it is not pretended that notes 6, 7, 8, 9, and 10 of the Gregg series ever passed out of Mrs. Braddy's hands, and the argument based on the assumption of Mrs. Braddy applies to all notes of this series alike. Indeed, it is not an unreasonable inference that at the time of the reconveyance Mrs. Braddy held and retained all of the Gregg notes, with the knowledge or consent of Mrs. Gregg, either because they were not at the time readily obtainable for surrender or immediate destruction, or with a possible view on Mrs. Braddy's part of a subsequent transfer in the nature of a reissuance of the notes which she could lawfully do and which would be effective in the hands of a purchaser as against the land and Mrs. Braddy at least. See 2 Daniel on Negotiable Instruments, § 1233. This appears in fact to have been done as to part of the notes, for the assignment of notes 1 and 5 to Simmons College was on February 12, 1912, following the reconveyance of Mrs. Gregg on November 24, 1911. In defendants in error's brief before us it is argued that this transfer took place on February 5, 1911. While the written transfer to Simmons College as it appears in the statement of facts bears this date immediately above the signature of M. T. Braddy and May Braddy the acknowledgment bears the date of February 12, 1912, and its record was on February 13, 1912. The formal agreement of the parties hereto, as found in the record, is that:

"Hereafter (viz., after the reconveyance by Mrs. Gregg on November 25, 1911) on the 5th day of February, 1912, M. T. Braddy and May Braddy executed the following instrument to Simmons College."

The instrument is then set out. The court's finding on this subject is "that on the 5th day of February, 1912, M. T. Braddy and

wife, May Braddy, executed the following instrument to Simmons College," and this finding is not questioned by any assignment of error. So that it must be held that the transfer to Simmons College did not precede, but was subsequent to, Mrs. Gregg's reconveyance. But to close the subject we conclude that the inferences to be drawn from the mere assumption of Mrs. Braddy in the reconveyance to her are far too inconclusive to amount to notice to the subsequent purchaser of the W. F. Braddy notes that notes 2, 3, and 4 of the Gregg series had been assigned, notwithstanding M. T. Braddy's assurances of contrary effect.

The only other recitations relied upon as constituting the necessary notice are those found in the transfer to Simmons College. To repeat, this instrument contains no declaration that notes 2, 3, and 4 of the Gregg series had been "conveyed," at any time or to any person. It merely recited that the last five notes of the series had been "fully paid" and canceled, and that "the second, third, and fourth, for full value in hand paid, * * * are hereby made a second and inferior lien to the two notes * * * assigned, * * * and said second lien notes are so indorsed." None of these recitations are necessarily inconsistent with the conclusion that all of the series were actually held by and subject to the control of May Braddy. If so, she could, as an inducement to the sale of notes 1 and 5, cancel the last five of the series and postpone the lien of notes 2, 3, and 4 to that of Simmons College. The recitations favor, rather than otherwise, the conclusions that Mrs. Braddy held and controlled all of the notes at the time. She purported to deal with them all as the owner. She sold two. She in effect canceled five, and constituted three a second lien. This she certainly had no right to do if notes 2, 3, and 4 had been conveyed and held by others. It is significant, too, that the terms used relating to notes 2, 3, and 4 are used in the present tense. They are not that the notes had been made "second and inferior liens" and had been "so indorsed," but that they "are hereby" so made, and that they "are so indorsed." As if to render the view of the recitations here presented at least forceful, we find, as shown in the statement of facts and nowhere questioned, the following indorsement on note 4 of the Gregg series, viz., "This note is hereby made a second lien on the land herein described this February 5, 1912." Signed at right angle with the indorsement is the name, "May Braddy." Note No. 3 has the same signature and indorsement, except that the date is given as "February 5, 1911," the indorsement on note No. 2 is dated "February 5, 1912," but the name of May Braddy does not appear to have been signed.

In the respects pointed out this case is to be distinguished from that of Waggoner v. Dodson, 96 Tex. 415, 73 S. W. 517, so urgent-

ly relied upon by defendants in error. In that case there was an unequivocal recitation that the grantor in the deed, under whom the defendant was claiming as an innocent purchaser without notice of an unrecorded deed to another, had theretofore conveyed the land, and the Supreme Court held that such recitation was distinct notice that the title was not in the grantor under consideration, and that he therefore could convey none. Here, there was no recitation of a conveyance of notes 2, 3, and 4 of the Gregg series; such conclusions can only be reached by inferences of uncertain, shifting character. The rule without doubt is that purchasers for value and without actual notice of previous transfer who have not examined the record are only affected by construction with notice of such facts as appear upon the record. As to them no duty of inquiry beyond this exists, unless the recitations of the record are such as to plainly impose the duty. See *Adams v. West Lumber Co.*, 162 S. W. 974, writ of error denied 165 S. W. xv; *First Nat. Bank of Aubrey v. Chapman*, 164 S. W. 900; *Hassard v. May*, 152 S. W. 605; *Drumm Comm. Co. v. Core*, 47 Tex. Civ. App. 216, 105 S. W. 843; *Moran v. Wheeler*, 87 Tex. 179, 27 S. W. 54; *Southern Bldg. & Loan Ass'n v. Brackett*, 91 Tex. 44, 40 S. W. 719; *Buchanan v. Wren*, 10 Tex. Civ. App. 560, 30 S. W. 1077; *Turner v. Grobe*, 44 S. W. 898; *Rotan v. Maedgen*, 24 Tex. Civ. App. 558, 59 S. W. 585; *Racouillat v. Rene*, 32 Cal. 450. It was held by this court in *Bank v. Chapman*, supra, following *Willson v. Denton*, 82 Tex. 535, 18 S. W. 620, 27 Am. St. Rep. 908, that the ordinary rule of constructive notice, such as putting a purchaser upon inquiry, has no application to a purchaser of negotiable paper for value before maturity. In such cases the question is one of bona or mala fides only. If in such cases the purchaser is without notice of facts sufficient to show bad faith on his part, he takes the paper free from any and all undisclosed defenses arising subsequent to the notes' execution. The right here insisted by defendants in error is to satisfy their notes out of the land in question to the entire exclusion of plaintiffs in error, if need be, thus, to that extent, seeking to strip the notes held by plaintiffs in error of all or a material part of their value. In this respect the effect and nature of the defense or right asserted is the same as if the attack was directly upon the notes given by W. F. Braddy and purchased by plaintiffs in error.

[4] It was distinctly held in *Henderson v. Pilgrim*, 22 Tex. 464, and reaffirmed in *Moran v. Wheeler*, 87 Tex. 179, 27 S. W. 54, that the purchase of a vendor's note carries with it, as an incident, the lien, and that the latter is within our registration statutes. It was said of the note and parties under consideration in the latter case:

"It was within the power of the plaintiff to have taken a written assignment of the vendor's lien, and to have placed it upon record as the law required, and thus to have secured himself against the acts of the original owner of the lien. The land and mortgage company had no such opportunity for guarding against the wrong; and it must be held that he who neglects the performance of a duty enjoined, or the exercise of a privilege granted for his security, must suffer the loss, rather than one who was not in a position to secure that protection."

These observations apply with very potent effect to the case now before us. Defendants in error had it in their power to require written transfers to them and to have had such transfers recorded. Had they done so, they would have given an unmistakable notice to all the world that they were the owners of and claiming the lien they now assert, and thus have rendered legally impossible any injury by reason of fraud on the part of May Braddy, or of her agent, M. T. Braddy, in representing that no such lien existed. But, not having done this as it was their legal duty to do, we cannot, on the one hand, in their behalf indulge mere inferences of unsatisfactory character to supply what should have been otherwise plainly shown, and, on the other hand, require of plaintiffs in error the acceptance of doubtful warnings which should have formally and certainly appeared upon the public records.

We conclude that the judgment in favor of Simmons College should not be disturbed, but that, as to plaintiffs and defendants in error, the judgment should be reversed, and judgment here rendered for the plaintiffs in error establishing the priority of their liens over the lien of defendants in error. Judgment is rendered accordingly.

ETHERIDGE et al. v. CAMPBELL* (No. 7370.)

(Court of Civil Appeals of Texas. Dallas.
Oct. 16, 1915. Rehearing Denied
Nov. 20, 1915.)

1. CONTINUANCE \S 20—GROUNDS—ABSENCE OF WITNESSES—DILIGENCE.

The denial of a continuance sought because of the absence of witnesses who were outside the state and the procurement of whose testimony would cost several hundred dollars was not erroneous, where no diligence was shown to procure the testimony of such witnesses, though applicants set up as their excuse for want of diligence the failure of the adverse party to comply, until the case was called for trial, with an order requiring a bond for costs.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 74-93; Dec. Dig. \S 26.]

2. TRESPASS TO TRY TITLE \S 39—EVIDENCE OF TITLE—TRANSFER OF NOTES.

Where, in an action of trespass to try title, the question of title depended on whether the former owners of the property in controversy had transferred vendor's lien notes retained by them, it appeared that several years had elapsed, and that positive evidence relative to the details of such transfer was not obtain-

able, it was not error to admit the testimony of a witness that he was in the employ of such former owner when it made an assignment for the benefit of creditors, and that he assisted in preparing a statement of its assets, which statement was intended to be accurate and complete, and that, to the best of his recollection and understanding, the notes were not among such assets, but had been transferred by indorsement to the person through whom plaintiff claimed.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 54; Dec. Dig. ¶39.]

8. TRESPASS TO TRY TITLE ¶41 — TITLE — TRANSFER OF NOTES—SUFFICIENCY OF EVIDENCE.

Evidence in an action of trespass to try title, wherein the question of title depended on whether the former owners of the property had transferred, prior to making an assignment for the benefit of creditors, vendor's lien notes retained by them, held to show that the notes had been transferred.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 62, 63; Dec. Dig. ¶41.]

4. VENDOR AND PURCHASER ¶261—LIEN—ASSIGNMENT.

Where a deed reserved a vendor's lien securing the purchase-money notes, and a trust deed authorizing appointment of trustee was executed as additional security, the action of the grantor's successor in interest in the land in appointing a trustee and the sale of the property under the trust deed after the notes had been transferred to a third person was unauthorized and conveyed no title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 674-686, 688-695; Dec. Dig. ¶261.]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Trespass to try title by L. W. Campbell, Jr., against I. G. Etheridge and others. From judgment for plaintiff, defendants appeal. Affirmed.

Etheridge, McCormick & Bromberg, of Dallas, for appellants. Gilbert H. Irish and L. W. Campbell, both of Dallas, for appellee.

RAINEY, C. J. This is an action of trespass to try title to recover lots 1 and 2 in block 168, Dallas Land & Loan Company's addition No. 3 to Oak Cliff, now a part of the city of Dallas. The suit was instituted by appellee, and appellants filed a general denial and plea of not guilty. The cause was tried by the court without the intervention of a jury, and a judgment was rendered in favor of appellee, from which this appeal is taken.

[1] Error is assigned to the action of the court in overruling appellants' motion for continuance. The suit was filed in November, 1913. At the December term, 1913, an order was entered requiring appellee to give a bond for costs. No action to comply with this order by appellee was taken until the June term, 1914, when the case was called for trial, when the appellee announced ready. Whereupon the appellant moved to dismiss the case upon the ground that the rule for costs had not been complied with. Thereupon the appellee asked leave to be

permitted to comply therewith, which was granted by the court, and a sufficient bond was then filed. The court declined to dismiss the case, and appellants then orally presented their motion for continuance for the want of the testimony of the two Hollingsworths, through whom appellee claims, by whom they could show that said lots had been purchased by them for a consideration in part of deferred payments, which contract they had abandoned; that it would cost several hundred dollars to procure the testimony of said parties, one of whom was in Toronto, Canada, and the other in Atlanta, Ga.; that appellants did not wish to incur the expense of procuring said testimony in view of the uncertainty of appellee making a cost bond. There was no diligence shown to procure said testimony, and the delay by appellee in complying with the rule requiring a bond for costs is not a sufficient excuse for want of diligence. *Railway Co. v. Styron*, 66 Tex. 421, 1 S. W. 161.

In the case just cited it was said by Mr. Stayton, J., that:

"The pendency of a contest as to the sufficiency of the affidavit in lieu of a cost bond was no excuse for the failure to use the necessary means to procure the evidence, and, besides, appellant knew that the appellee might comply with the rule for costs at any time by giving the proper cost bond."

The trial court did not err in overruling the motion for continuance.

[2, 3] The evidence shows that the two lots in controversy were on September 22, 1890, deeded to the Hollingsworth Bros. by the Dallas Land & Loan Company, the then owners, the consideration being \$150 cash, and four notes executed by said Hollingsworth Bros., one for \$100, payable in six months, and three for \$250 each, payable, respectively, September 22, 1892, September 22, 1893, and September 22, 1894, said deed containing a reservation of the vendor's lien, and as additional security a deed of trust was executed to E. L. Snodgrass. The deed was signed by T. L. Marsalls, as president, and E. L. Snodgrass, as secretary, of said company, and the same was duly recorded in 1890. The Hollingsworth Bros. never paid said notes or either of them, but abandoned their contract and left the state. On June 9, 1891, the Dallas Land & Loan Company made to C. E. Bird, as assignee, a general assignment for the benefit of creditors. On July 21, 1892, C. E. Bird, assignee, deeded to T. L. Marsalls all of said property then held by him. On July 21, 1910, Marsalls deeded to David Scott the land in controversy. Scott on August 23, 1910, deeded to I. G. Etheridge. Marsalls and Scott on June 2, 1913, conveyed the lien and notes to Etheridge. Snodgrass, as trustee under the Hollingsworth Bros. deed of trust, resigned, and Etheridge appointed J. H. Addison as substitute trustee; such substitution being au-

thorized by said deed of trust. On July 1, 1913, Addison sold said lots at public sale, and on July 15, 1913, deeded same to I. G. Etheridge. On May 2, 1912, Hollingsworth Bros. deeded said lots to J. R. Campbell, and on September 23, 1913, J. R. Campbell deeded to L. W. Campbell, Jr. Appellee also holds a release from George J. Bryan, to whom it is claimed the Hollingsworth Bros. notes were transferred.

As to who owns the better title in this controversy, we think, must be determined from the evidence in relation to what disposition was made of the Hollingsworth Bros. notes. There is nothing to show that they were ever paid or in any way settled by the Hollingsworths. The deed from the Dallas Land & Loan Company having reserved a lien on the two lots to secure the payment of the notes, the superior title remained in said company, subject to said notes being paid or settled by said company disposing of them to another party. There is evidence to the effect that these lots were included in another tract traded to one George J. Bryan by the Dallas Land & Loan Company, and in said transaction with Bryan the Hollingsworth notes were settled. James A. McAleer, who at that time was a bookkeeper, cashier, and general office man of the Dallas Land & Loan Company, testified as follows:

"I remember the occasion when the Dallas Land & Loan Company made an assignment for the benefit of its creditors. I was in its employ at that time. The schedule of the assets and liabilities of that company was prepared in its office by Mr. E. L. Snodgrass and myself. We prepared it with the intention of having it strictly accurate. E. L. Snodgrass was then the secretary of that company. He lives in Dallas now. He did the principal work of preparing this schedule. I assisted him. I had charge of the notes that belonged to the Dallas Land & Loan Company. I had charge of the cash and the books. I have seen the schedule of the assets and liabilities on one or two occasions on record at the courthouse. I believe this schedule was accurate, and that it contained all the assets and liabilities of the company. Some seven or eight years ago I had an idea of buying those Hollingsworth notes if I could find the owner, but I could not find the owner. I did not know where he was, and no one seemed to know where he was; and I went to the courthouse to see if these notes on the lots were listed in the schedule, and whether those notes were shown as standing against the property at the time. I found no record of those notes in the schedule."

Being asked whether he was prepared to state whether he had any recollection on the subject or not as to why the notes were not listed, the witness responded:

"My recollection of the transaction was that that property where the Hollingsworth lots were situated was a part of the acreage conveyed to Geo. J. Bryan, and there was a settlement with Geo. J. Bryan in that sale or purchase with reference to the lots we had sold out of it, and in that settlement I believe that those notes and the cash received on those lots had been accounted for to him." "As to whether or not there was, in fact, the settlement I have just mentioned between Dallas Land & Loan Company and Geo. J. Bryan on his purchase of that part of the third addition, will say the settle-

ment—I saw it being prepared, and it was prepared in writing or in figures. That was a statement made in figures. That statement was made upon the basis of the amount of money coming to the Dallas Land & Loan Company from Geo. J. Bryan. Being asked to state if he remembered just what that statement consisted of, and who prepared it as nearly as he could remember, the witness responded: 'My recollection is that the instrument was prepared—the figures were prepared by Bryan T. Barry and T. L. Marsalis, and passed over to me for entry on the books.' The statement was made showing the amount of— to show the amount of the balance to be paid by Geo. J. Bryan after he had been given credit on the purchase money for the amount of money and notes on certain lots which had been sold prior to the acreage. As to what became of the Hollingsworth notes, my recollection and understanding was that they were turned over to Geo. J. Bryan by indorsement. As to what was done with the Hollingsworth notes, my memory at this time would not enable me to swear definitely what was done with them. I have merely stated my recollection as to what was done at the time, and which I believe to be true. That recollection is that the Hollingsworth notes were turned over to Geo. J. Bryan in a settlement of the account, coming from him to the Dallas Land & Loan Company, and giving him as a credit upon that amount. My recollection is that for six months prior to the time of the assignment made by the Dallas Land & Loan Company, on or about the 1st of January, 1891, that company was insolvent. I can give no reason for that, and it was that the officials of the Dallas Land & Loan Company, the president, had been considering about that time the advisability of making an assignment, and put it off as long as he could. At that time the company was struggling and borrowing money, but I would not say that it was insolvent at the time, but it was in a shaky condition. It was then borrowing money and struggling along. At that time attempts were made to sell land belonging to the company then known as the Midway addition, and now known as Rosemont, Winnetka, and the Annex. There were 300 acres, and a vigorous attempt was made to sell it in order to procure money for the upholding of the business of the Dallas Land & Loan Company. With reference to what the company was doing in the matter of its vendor's lien notes along the same time, will say there was a constant attempt to keep up the sale of the vendor lien notes, which was generally fairly successful until the financial crisis, caused, I believe, by the failure of Baring Bros. about that time, which caused a stringency of money, and it became almost impossible to sell vendor lien notes then."

This testimony was objected to by the appellants. Under the circumstances of this case, the length of time that had elapsed, etc., the court did not err in admitting the testimony. Taking said testimony as true, with the further testimony that they were not scheduled in the assignment made by the company for the benefit of creditors, and were not mentioned or specified in the deed by the assignee, Bird, conveying the property back to Marsalis, we conclude that said notes had passed out of the possession of said Land & Loan Company.

[4] If said company had disposed of said notes, the most that can be said of title in them is that it was held in trust for the owners of said notes, and the transfer of the lien and notes by Marsalis and Scott to Etheridge conveyed no title to the land, or the

notes, and the appointment by Etheridge of Addison as trustee and the sale under the trust deed was unauthorized and conveyed no title to the land. If the said notes had been transferred to Bryan, as the evidence indicates, under his release in favor of the Hollingsworth Bros. of his interest therein, as Hollingsworth Bros. deeded to Campbell the lots in controversy, Campbell has the better title, and the trial court did not err in so holding.

The judgment is affirmed.

**FIRST NAT. BANK OF PLAINVIEW et al.
v. McWHORTER et al. (No. 839.)**

(Court of Civil Appeals of Texas. Amarillo.
Nov. 6, 1915.)

1. HUSBAND AND WIFE — 257—WIFE'S SEPARATE ESTATE—COMMUNITY PROPERTY.

Rev. St. 1911, art. 4621, as amended in 1913 (Acts 33d Leg. c. 32, § 1 [Vernon's Sayles' Ann. Civ. St. 1914, art. 4621]), providing that all property of either spouse acquired before marriage and afterwards by gift, devise, or descent, as also the increase of all lands so acquired shall be the separate property of the spouses, although the wife shall have the sole management, control, and disposition of her separate property during marriage, provided the husband joins in the manner prescribed by law in the conveyance of her separate real estate, and Rev. St. 1911, art. 4622 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4622), providing that all property acquired by either the husband or wife during marriage, except that which is the separate property of either one or the other, shall be deemed the common property of both, and during coverture be disposed of by the husband only, do not change the rule that property acquired during coverture from the use of the wife's separate property becomes the property of the community.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 543-552; Dec. Dig. — 257.]

2. FRAUDULENT CONVEYANCES — 137—CONVEYANCE BY HUSBAND TO WIFE.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 3968, providing that no gift of any goods or chattels shall be valid unless by deed or will duly acknowledged, or unless actual possession shall have come to and remained with the donee, or some one claiming under him, grass seed raised by a wife upon her separate real estate will not be considered as against the husband's creditors, to have been a gift to her by her husband, where actual possession thereof was not given to the wife.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 432-437; Dec. Dig. — 137.]

3. TRIAL — 140—QUESTIONS OF FACT—CREDIBILITY OF WITNESSES.

A case wholly dependent upon uncorroborated testimony of a party interested in the litigation, though unopposed by other witnesses, is for the jury, and they have the right to weigh the credibility of the witness.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. — 140.]

4. EVIDENCE — 317—EVIDENCE BASED ON HEARSAY.

In trover by a wife for grass seed seized for her husband's debts, evidence by plaintiff as to the value of such seed, based upon information

received by her through others, was inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. — 317.]

5. EVIDENCE — 143—ADMISSIBILITY—MARKET VALUES.

In trover, testimony as to market value of certain grass seed was inadmissible as being too weak to be considered, where the witness based his estimate on the value of seed which had passed inspection by a seed association, and the record showed that the seed in question had not gained that standard, and the witness admitted on cross-examination that he was not familiar with the situation at that time, had not known of any sales, and had been too busy to give the matter any thought.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 424, 426-428; Dec. Dig. — 143.]

Appeal from District Court, Lubbock County; W. R. Spencer, Judge.

Action by Kate H. McWhorter and others against the First National Bank of Plainview, Tex., and others, in trover and conversion for grass seed. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

Mathes & Williams, of Plainview, and J. E. Vickers and Benson & Spencer, all of Lubbock, for appellants. Bean & Klett and W. H. Bledsoe, all of Lubbock, for appellees.

HENDRICKS, J. In 1913, B. O. McWhorter, the husband of Kate H. McWhorter, was indebted to the appellant the First National Bank of Plainview, as surety upon two promissory notes, in an amount between \$9,000 and \$10,000. In September, 1914, the bank sued B. O. McWhorter upon the notes and caused the levy of a writ of attachment upon certain Sudan grass seed. This litigation is an independent suit of the husband, with the wife, Kate H. McWhorter, in trover and conversion for the value of the seed, alleging that it was the separate property of Mrs. McWhorter, and that the same was not liable for the debts of B. O. McWhorter. The court peremptorily instructed the jury that the seed constituted the separate property of the wife, leaving the question of value only for the consideration of the jury, which they assessed at \$9,380.25, afterwards reduced by remittitur in the sum of \$1,810.

Both parties treat the real estate upon which the Sudan seed was raised as the separate property of the wife; and the understanding between the husband and wife, by virtue of which the latter claims she acquired the Sudan seed as her separate property, is testified to as follows, the substance of which we reproduce:

Mr. McWhorter had a little farm up there. I also had one. He said to me one day, "Mattie, I think I shall rent the farm this year." I said, "No, that I did not want mine rented, that I might farm my own," and that I wanted to plant it in Sudan seed. He agreed to finance it for me, and I told him that I would have the boys (meaning their children) properly work

the ground as much as possible, "and agreed to put it in cultivation for my own benefit." He purchased the seed for planting and I had an agreement that later, when the seed were sold, "I would keep a memorandum of what he was out on the seed and the entire crop and when I sold it I would repay him." I had a man to plow the land and get it in shape to plant, and my two sons cultivated it. I agreed to pay the older boy \$20 per month and the smaller boy \$10, to be paid to them when the seed was sold. Mr. McWhorter showed the boys how to manage the crop, and a few times went to the field for that purpose, but never worked the same. When the seed was thrashed, I had it brought to the house, placed in a small garage upon the place; and, when the crop was growing, I had it looked after with a view of having it entered in the Sudan Seed Association, and also had the same inspected by the inspectors at the Experimental Farm, and instructed my son to join the association so that the seed could be sold by it; and after the seed was thrashed, and before I had put it into the association, it was levied upon before the association building was ready for the reception of the seed.

The husband did not testify in the case.

The appellant bank assigns that the court erred in peremptorily instructing the jury to find that the seed was the separate property of the wife, and under the assignments the following propositions are presented:

"The credibility of the witness is a question for the jury, and it was error for the court to assume the truthfulness of plaintiff Kate H. McWhorter's unsupported testimony. * * *

"The undisputed evidence shows that the said seed were produced by the labors of the husband and wife, and their minor children, and the mere agreement between the husband and wife, before the seed was planted, could not have the effect of changing the law of marital property rights. * * *

[1] At the threshold of the case appellee presents an exposition of the amended acts of 1913 to article 4621, with reference to the rights of married women, insisting that on account of the change of the law there is a change of the title of this character of property. Under this act, as formerly, all property, real and personal, of either spouse, acquired before marriage, and afterwards, by gift, devise, or descent, "as also the increase of all lands thus acquired," shall be the separate property of the spouses. This amendment does say:

"During marriage * * * the wife shall have the sole management, control and disposition of her separate property, both real and personal," provided the husband joins in the manner prescribed by law for the conveyance or incumbrance of her separate real estate; "and the joint signature of the husband and wife shall be necessary to a transfer of stocks and bonds belonging to her or of which she may be given control by this act."

It further says:

"Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband."

Article 4622, following 4621, just quoted from, provides, as before, that:

"All property acquired by either the husband or wife during marriage, except that which is

the separate property of either one or the other, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only," with the addition, "provided, however, the personal earnings of the wife, and rents from the wife's real estate, the interest on bonds and notes belonging to her and dividends on stocks owned by her shall be under the control, management and disposition of the wife alone, subject to the provisions of article 4621, as hereinabove written."

Of course, if you start with the assumption that this statute makes the products raised upon the wife's real estate the separate property of the wife, instead of community property, this case is ended in favor of the wife; but we are unable to give the statute the interpretation suggested. If it were not for the settled channels of the law, dug deep by successive interpretations heretofore made, the question might at least become debatable. The statute does give the wife the management, control, and disposition of her real property, provided that the husband, when it comes to the disposition, joins in the conveyance; and, if he should refuse to join under article 4621, the district court, upon satisfactory proof that the conveyance would be advantageous to her interest, may grant her the permission to convey. To give the wife the management and control of the real estate, and not give her the real incidents and fruits of that control, might, in an ethical sense, appear contradictory; and though it has appeared to a great many in this state that the construction that, although the thing itself may be separate property, but that which grows out of it and is produced upon it and which makes property really beneficial is community, is an incongruous interpretation; but the Supreme Court of this state has placed the same upon what it has conceived a broader ground, as to the meaning of the old statute and the result of the community partnership, and the presumed labors of each between husband and wife. In the early case of *De Blane v. Lynch*, 23 Tex. 29, where it was held that crops grown upon the separate property of the wife, and by the labor of her slaves, were community property, the Supreme Court said:

"The principle which lies at the foundation of the whole system of community property is that whatever is acquired by the joint efforts of the husband and wife shall be their common property. * * * It is true that in a particular case satisfactory proof might be made that the wife contributed nothing to the acquisitions; or, on the other hand, that the acquisitions of property were owing wholly to the wife's industry. But from the very nature of the marriage relation the law cannot permit inquiries into such matters. The law therefore conclusively presumes that whatever is acquired, except by gift, devise, or descent, or by the exchange of one kind of property for another kind, is acquired by their mutual industry. If a crop is made by the labor of the wife's slaves, on the wife's land, it is community property, because the law presumes that the husband's skill or care contributed to its production; or that he, in some other way, contributed to the common acquisitions."

It may be that on account of the wife's management and control of her separate real estate the presumption that the husband's labor or skill contributed to the production of the crops grown thereupon might not prevail, but the presumption that he still contributes to the common acquisitions and the community partnership, in a general sense, of course, prevails, article 4622, as amended by the Legislature of 1913, still says that all property acquired by the husband or wife during marriage shall be deemed the common property and during the coverture may be disposed of by the husband only; and article 4621, as amended, still prescribes that the property acquired only by gift, devise, or descent, constitutes the separate property of each. Hence the status of the title of the common property, and of the separate property by gift, devise, or descent, we think under this statute continues to remain the same. It would have been easy for the Legislature to have said that the "increase" of separate real estate shall include the products grown upon the same without leaving it to a strained construction by the courts to abrogate the settled rule imbedded in the law by many decades of interpretation. The court of the Second district has in effect given the amended statute the same interpretation as we give it. *Tannehill v. Tannehill*, 171 S. W. 1050; *Scott v. Scott*, 170 S. W. 273.

[2] As to the issue whether the transaction constituted a gift, it is the law of this state that the question, whether particular property is separate, or community, must depend upon the existence or nonexistence of the facts, which by the rules of law give character to it, and not merely upon the stipulations of the parties that it shall belong to one class or the other. *Kellett v. Trice*, 95 Tex. 160, 66 S. W. 51. Justice Williams said in that case:

"It has been held in several cases that the husband and wife cannot, by their mere agreements, alter the character given to property by the law acting upon the facts under which it is acquired. *Cox v. Miller*, 54 Tex. 27; *Green v. Ferguson*, 62 Tex. 529."

He also said:

"It is true that, in the acquisition or afterwards, the husband may give to the wife all his interest in property, and thus, by gift, make it hers; but at last this would be true only because the facts defined in the law exist and the separate right is derived through a gift, the husband having full power over the community estate."

If the products of Mrs. McWhorter's farm are prima facie community property, the acquisition of title of the husband's half interest must have been a gift, otherwise the title remained in the community; and, if the record in this instance does not conclusively prove a gift, the trial court necessarily erred in his peremptory instruction.

"No gift of any goods or chattels shall be valid unless by deed or will, duly acknowledged or proven up and recorded, or unless actual pos-

session shall have come to, and remained with, the donee or some one claiming under him." Article 3968, Vernon's Sayles' Rev. Civil Statutes.

This statute precludes symbolical or constructive possession; actual possession must come to, and remain with, the donee or some one claiming under him. *Love v. Hudson*, 24 Tex. Civ. App. 377, 59 S. W. 1127; *Eldridge v. McDow*, 132 S. W. 518. We are not deciding that acts of control and manifestations of ownership over articles in heavy bulk would not constitute actual possession, if the other elements, intention to give, and relinquishment by the donor of dominion over the property to the donee, are shown. It is elementary that an unexecuted parol promise to give is void. It is the fact of delivery and relinquishment of dominion that converts the unexecuted and revocable purpose to give into a complete gift. If the products of the farm, which are to be severed, constitute the community property, it cannot be doubted that at least, after severance, the husband had the management, control, and disposition of such products, and it is equally true that such products would be "chattels" within the statute quoted. Hence the intention of the husband to give, and the delivery by him into the actual possession of the wife, must be conclusively shown to take a case of this character from the jury.

In the case of *Little v. Birdwell*, 21 Tex. 609, 73 Am. Dec. 242, our Supreme Court, quoting from the Alabama Supreme Court, said:

"Verbal sales and gifts, between husband and wife, ought not to be admitted, unless on clear and satisfactory proof that the property was divested out of the vendor, and vested in the vendee."

It may be that the true rule in such cases is that such proof is that character of evidence, which, in order to be conclusive, leaves no room for ordinary minds to debate as to the inference to be deduced. *Lord v. Insurance Co.*, 95 Tex. 216, 66 S. W. 290, 56 L. R. A. 593, 93 Am. St. Rep. 827, where a brother gave his sister an insurance policy. The jury in this case would have had the right to weigh the relationship of the parties, the fact that the wife, vitally interested in the litigation, is testifying on the main issue in the cause, and that the husband's testimony is neither offered nor its absence excused; and to further consider whether the arrangement or agreement testified to by her was merely an attempt to change the status of community into separate property, without including the idea of a gift, which would be void under the decisions cited and quoted from. When she informed her husband that if he would finance the crop and that she would superintend it, employ the boys to cultivate it, and reimburse him out of the crop, the crop to be hers, we are unable to say that such an agreement conclusively exhibits an intention to give—a pure benefaction upon the part of the husband—

even with the aid of the testimony that the increase of other separate property was considered her property; nor do we think that the testimony by her of her acts conclusively shows that the seed was actually delivered into the possession of the wife.

"A mere intention, or naked promise to give, without some act to pass the property, is not a gift. There exists the locus penitentie so long as the gift is incomplete and left imperfect in the mode and manner of making it. * * * The donor must part, not only with the possession, but with the dominion of the property." *Chevallier v. Wilson*, 1 Tex. p. 161.

[3] The courts of this state have established the principle that a case wholly dependent upon the uncorroborated testimony of a party interested in the litigation, though unopposed by other witnesses, is for the jury, and they have the right to weigh the credibility of the witness. *Rayner v. Posey*, 173 S. W. 249, and numerous cases cited, including one by the Supreme Court of the United States. There may be exceptions to this rule, but we believe the general rule would apply to the character of case manifested in this record.

The trial court erred in the peremptory instruction.

[4] The appellant also assigns error to the action of the court in permitting the testimony of Mrs. McWhorter, on the market value of the Sudan seed. The bill of exceptions we find as the basis of this assignment is one which exhibits testimony, in effect, that she had endeavored to keep posted as to the value of Sudan seed, and had been making investigations and inquiries with reference to the value, and had heard the matter "discussed," and believed that she knew as much about it as any lady could know. What the "discussions" were in regard to value—whether between parties offering to sell or purchase, witnessed by her first hand, or whether they were mere speculative opinions of others—is not shown on cross-examination. To pass upon a close question of qualification as presented by this bill is unnecessary, for the reason that a cross-examination of the witness (not shown in the bill) discloses that all she knew about the market value is what she heard other people say, which is the serious complaint of appellant, but with no further objection to the testimony, or motion to strike, presented. If the witness had no personal knowledge of the value of the seed, but her opinion was based merely upon what others informed her as to the value of the same, the testimony is based upon the unaccredited statements of others, and is hearsay. Such testimony with such basis is improper. *Railway v. Maddox*, 75 Tex. 305, 12 S. W. 815; *Railway v. Arnett*, 40 Tex. Civ. App. 73, 88 S. W. 448; *Railway v. Crowley* (Civ. App.) 86 S. W. 342; *Railway Co. v. Hughes*, 44 Tex. Civ. App. 137, 98 S. W. 410; *Wigmore on Evidence*, vol. 1, § 719, pp. 915, 916.

[5] The testimony of the witness Corey, on market value, assailed by appellant, was improper. We interpret his testimony of value as having been based upon the value of seed which had passed inspection and was entitled to admission in the Sudan Grass Seed Association, under the rules of that association, which he said was worth 60 cents per pound. This record does not show that this seed had gained that standard. He further said, on cross-examination, that he was not familiar with the situation at that time, and that he had not known of any sales, and had been too busy to give that matter any thought.

We are not holding the testimony improper because he had no personal knowledge of sales; a witness may acquire some knowledge of market value from competent sources of information without direct knowledge and without the charge of hearsay. *Wigmore on Evidence*, supra. But this testimony is too weak to be considered.

The solution of the questions in regard to the inadequacy of the pleadings and the burden of proof, as bearing upon the issue of the gift by the husband to the wife, in violation of the rights of creditors, probably becomes academic in view of the reversal, as the record upon another trial, and the case by its development, will probably be different.

The cause is reversed and remanded for a new trial.

AHEARN v. STATE. (No. 3691.)

(Court of Criminal Appeals of Texas. Oct. 27, 1915. On Motion for Rehearing, Nov. 24, 1915.)

HOMICIDE—§49—MURDER—MANSLAUGHTER.

That decedent called accused a bastardly son of a bitch did not raise the issue of manslaughter, on the theory that the language was insulting towards accused's mother, though accused testified that he shot decedent because of the insulting remark.

[Ed. Note.—For other cases, see *Homicide*. Cent. Dig. § 73; Dec. Dig. §49.]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Robert Ahearn was convicted of murder, and he appeals. Affirmed, and motion for rehearing overruled.

W. W. Nelms, of Dallas, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant appeals from a conviction of the murder of Robert Burns, his punishment being assessed at 25 years in the penitentiary.

We have carefully read the statement of facts. We think the testimony, without any doubt, is ample to sustain the conviction. There is but one question to be discussed. Appellant claims that the evidence raised, and the court should have submitted, man-

slaughter. We are clearly of the opinion that the appellant's contention cannot be sustained.

Appellant was a waiter in an all-night restaurant. Just after midnight the deceased, Burns, with a companion, went into the restaurant to get a meal. They sat down at the eating counter. One of the state's witnesses, Mr. Conner, among other things, testified: That the head waiter directed appellant to wait on Burns and his companion. Appellant said, "Let them sons of bitches get out of here; I am not going to give them two orders." Burns said, "F—k them, Bob;" and appellant replied, "You cannot f—k me, you son of a bitch; you haven't got enough money—" That appellant then went right in front of Burns, the narrow counter, about two feet wide, only separating them, and said to Burns: "God damn you, if you want to start something, crack down." That other words passed between them, and appellant whipped out a six-shooter, and pointed it in the face of the deceased, when another one of his companion waiters told him to put up the gun and have no trouble. Very soon he snapped the pistol once in deceased's face, and then immediately fired at him three times in succession; one ball striking him in the temple, going into his head and brains, which resulted in his death very soon afterwards. It appears that each used epithets towards the other; each calling the other, with profane language, a son of a bitch.

Appellant himself testified that during the wordy profanity and indecent language, one towards the other, the deceased, Burns, said to him, "You G—d d—n bastardy son of a bitch, if you will come outside, I will kill you;" and I said, "Burns, there is no use for any argument or any trouble;" and he said, "Yes, G—d d—n you, you bastard;" and that when Burns said that it made him mad, he lost control of himself, and shot and killed him. He says, "I shot him because he called me a bastardy son of a bitch." Mr. Fox testified he asked appellant why he shot deceased, and he replied, "'I shot him because he said I was a son of a bitch;' he didn't say anything else." The testimony of several other witnesses shows that appellant was very mad with Burns at the time.

Appellant claimed that this language was insulting towards his mother, which raised the issue of manslaughter. This court, in a case very similar to this (Fitzpatrick v. State, 37 Tex. Cr. R. 33, 34, 38 S. W. 806), expressly held that, where the deceased in that instance said to the appellant, "You G—d d—n mother-f—g son of a bitch," did not raise manslaughter; that "this was

merely an insult to the defendant himself, and not in the nature of a slander or insult towards a female relation." Also in Trevino v. State, 72 Tex. Cr. R. 91, 161 S. W. 108, this court expressly held that, where the deceased said to the appellant that he "was the son of a whore and disgraced," this was no insult towards his mother, and did not raise manslaughter. This court has also repeatedly in a large number of cases held that to call another "a son of a bitch," or "a G—d d—n son of a bitch," is no insult to the appellant's mother, and does not raise manslaughter.

The judgment is affirmed.

On Motion for Rehearing.

In his motion for rehearing appellant calls our attention to an inaccurate statement in the original opinion on one point. In stating Mr. Conner's testimony, we stated he testified that the head waiter directed appellant to wait on Burns and his companion. This should have been on two negroes instead of deceased and his companion. What we quoted that appellant then said was directed to the head waiter about the negroes. To that statement deceased remarked as quoted in the opinion. However, we gladly make the correction to which appellant calls our attention.

Appellant next complains of this statement in the original opinion: "The testimony of several other witnesses shows that appellant was very mad with Burns at the time," claiming that this is not in accordance with the statement of facts. We have again read the statement of facts, and on this point it shows that said witness Conner, who was the first introduced by the state, on this subject, testified: "He (appellant) seemed to be in an ill humor. He looked more like a demon than anything else. He seemed to be very angry. He seemed to be excited then." On cross-examination on this point this witness, among other things, said: "He (appellant) appeared to be enraged when I looked at him. When I looked at this man he appeared to be angry, enraged and terribly excited." Mr. McKellar, the next witness for the state on this point, on cross-examination, testified: "I don't know that Ahearn appeared to be excited at the time the shots were fired, but he was sorter angry looking." Mr. Luth, the state's next witness, on re-direct examination testified: "Ahearn never seemed to become angry before that time when they used that language." This testimony is all of the testimony on the subject of appellant being mad, except what appellant testified himself, which is stated in the original opinion.

The motion is overruled.

LUNA v. STATE. (No. 3788.)

(Court of Criminal Appeals of Texas. Nov. 8, 1915.)

1. CRIMINAL LAW § 1092, 1099 — BILLS OF EXCEPTION—FILING AFTER ADJOURNMENT—NECESSITY FOR ORDER.

Where the statement of facts and bills of exception in a criminal case were filed after adjournment of court, without an order entered for the purpose, they will not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2866-2880, 2919; Dec. Dig. § 1092, 1099.]

2. CRIMINAL LAW § 866 — MISCONDUCT OF JURY—VERDICT BY LOT.

Where, in a prosecution for theft, to decide the term of imprisonment the jurors agreed to put down what each juror thought was right, add it up, and divide by 6, which resulted in 7½ months as the punishment, but, after debating the matter, the jury concluded not to follow such result, but to give defendant 6 months' imprisonment, and so wrote their verdict, in the absence of showing that before their first attempt to settle the verdict by lot the jury bound themselves to stand by it, such conduct of the jury presented no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2063; Dec. Dig. § 866.]

Appeal from Brooks County Court; J. A. Brooks, Judge.

Cayetano Luna was convicted of theft, and he appeals. Affirmed.

J. W. Wilson, of Falfurrias, for appellant.
C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted for the theft of a gun; the allegation being that the gun was worth \$15.

[1] The statement of facts and bills of exception cannot be considered. They were filed after adjournment of the court, and without an order entered for that purpose; therefore they will not be noticed in the disposition of the case. This about disposes of the record and questions presented in it.

[2] There is one question that perhaps we might notice; that is, the misconduct of the jury, or rather the fact that the jury determined their verdict by lot. This is set out in a bill of exceptions; but it is also made a part of the motion for a new trial, with appended affidavits. The affidavits show that, after the jury retired to consider their verdict, they had not agreed or determined among themselves exactly the length of imprisonment in the county jail. To settle this they agreed among themselves to put down what each juror thought was right, add it up, and divide by 6. This brought 7½ months as the punishment. After discussing the matter a while, they concluded not to follow this, but decided they would give appellant 6 months in the county jail, and so wrote their verdict. It is not shown that the jury, before they added up and divided the number of months, bound themselves to stand by this verdict or quotient. Instead

of giving appellant 7½ months, they finally, after discussion, agreed to give him 6 months.

We notice this, because it may be it should be considered independent of the bill of exceptions, on account of the affidavits attached to the motion for new trial. But as presented there is shown no error from any viewpoint.

The judgment will be affirmed.

PARK v. STATE. (No. 3630.)

(Court of Criminal Appeals of Texas. June 25, 1915. On Motion for Rehearing, Nov. 17, 1915.)

1. LARCENY § 55—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of theft.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. § 55.]

On Motion for Rehearing.

2. CRIMINAL LAW § 200—SEPARATE OFFENSES—BURGLARY AND LARCENY.

Under Pen. Code 1911, arts. 1317, 1318, providing that one who commits burglary, and who while in the house burglarized commits any other offense, shall be punished for burglary, and for the other offense, a theft committed at the same time and in the same transaction of a burglary is separate from the burglary, and accused may be convicted of both.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 347, 386-409; Dec. Dig. § 200.]

3. INDICTMENT AND INFORMATION § 137 — QUASHING INDICTMENT—GROUNDS—FORMER JEOPARDY.

That an indictment charges the same offense charged in another indictment under which accused has been convicted is not ground for quashing the indictment, but accused, to raise the point, must plead former jeopardy.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.]

4. CRIMINAL LAW § 730 — TRIAL — MISCONDUCT OF STATE'S ATTORNEY.

The act of the state's attorney in asking, on the cross-examination of accused on trial for theft committed at the time of his commission of a burglary, if he had not been convicted of the burglary was not reversible error, where the court sustained an objection to the question, and at accused's request at the time directed the jury not to consider the question, as it had nothing to do with the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.]

5. CRIMINAL LAW § 1119 — MISCONDUCT OF STATE'S ATTORNEY—BILL OF EXCEPTIONS.

A bill of exceptions, complaining of the remark of the state's attorney when a witness presented and identified an instrument, "They are just taking up the time of the court for nothing," presents no reversible error, where it does not show how and in what way the remark affected accused's case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2927-2930; Dec. Dig. § 1119.]

6. CRIMINAL LAW § 1119 — MISCONDUCT OF STATE'S ATTORNEY—BILL OF EXCEPTIONS.

A bill of exceptions, showing that accused excepted to the remark of the state's attorney,

after a witness had stated that he did not know the value of automobile tires: "Well, stand aside; if you have not sense enough to know the value of automobile tires, you can go"—presents no reversible error, where it does not attempt to show that accused was injured by the remark.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2927-2930; Dec. Dig. ¶ 1119.]

7. CRIMINAL LAW ¶1120—RULINGS ON EVIDENCE—BILL OF EXCEPTIONS—SUFFICIENCY.

A bill of exceptions which recites that, at the conclusion of the testimony of a witness, counsel for accused moved to strike out all the testimony of the witness because not qualified as an expert to testify, and that the motion to strike was overruled, to which ruling accused excepted at the time, but which does not show what the testimony of the witness was, does not show reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. ¶ 1120.]

8. LARCENY ¶45 — EVIDENCE — ADMISSIBILITY.

Where, on a trial for the larceny of Federal Rubber Company tires, some of the witnesses called the tires "Goodrich tires" the testimony of a witness, detailing a conversation with accused and a third person about the stolen tires, was properly received in evidence, though the witness, after detailing the conversation, stated that he believed that the third person said that the tires were "Goodrich tires."

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 135, 136; Dec. Dig. ¶ 45.]

9. CRIMINAL LAW ¶1051—QUESTIONS REVIEWABLE.

Under Code Cr. Proc. 1911, art. 938, providing that the court, on appeal, must presume that the venue was proven in the trial court, unless it affirmatively appears to the contrary by bill of exception, the court on appeal will not consider the question of venue not raised in the case, and no bill of exception taken on that question.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. ¶1061.]

Appeal from District Court, Bastrop County; Ed R. Sinks, Judge.

F. L. Park was convicted of theft, and he appeals. Affirmed, and motion for rehearing overruled.

G. O. Brown, of San Antonio, Aaron Burleson, of Smithville, and John T. Duncan, of La Grange, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of the theft of some automobile tires of more than the value of \$50, and his punishment assessed at the lowest prescribed by law.

This is a companion case to 3631 against the same appellant, for burglary, this day decided. 178 S. W. 516. The burglary case was tried first. Much of the testimony is the same in both cases. We have carefully read, studied, discussed, and compared the testimony in each case, one with the other. The testimony in this case is much fuller and of additional facts from what was proven in the burglary case. For instance, in this case the waybill was produced, identified, and introduced in evidence, and the witnesses testified

thereabout; it was not introduced in the burglary case. So was other documentary evidence introduced herein which was not introduced in the burglary case.

[1] We think it unnecessary to detail the evidence herein. There is no bill of exceptions in the record, nor is the motion for new trial therein. The only question raised in this court, and so stated by appellant's attorneys in oral argument when the case was submitted, is whether or not the evidence was sufficient to sustain the verdict; his contention being that it is not. We are of opinion it is. The testimony in this case was sufficient to show, and the jury authorized to find and believe: That the alleged stolen tires were shipped over the Missouri, Kansas & Texas Railway Company of Texas from Dallas, by the shipper on April 14, 1914, to the consignee at Houston in a through shipment, in car 70181, M., K. & T., waybill No. 1761. That the train on which this car was hauled was hauled by a crew from Dallas to Waco. That appellant received it at Waco and hauled it to Smithville, reaching Smithville at 1:20 p. m. April 16th, where he turned over his papers, including said car and its contents, to the local agent there. After reaching Elgin, going to Smithville with this train, appellant told his engineer that he had this car, that it contained automobile attachments, and that the bottom of the door of the car had rotted off. The car reached Houston, hauled by the third crew from Smithville to Houston on April 17th, and when it reached there the seals of the car were shown to be unbroken, but the door of one side was rotted out some 10 to 12 inches, so that a person could pull the door open from the bottom, get in the car, take out the tires, and then get out without breaking the seals. That shortly after this car had been hauled from Smithville he and one Terrell, in Smithville, approached Mr. Eggleston, an automobile man there, went into Eggleston's place of business, called him back privately, and asked him if he did not want to buy some automobile tires. Eggleston replied no. They discussed the matter awhile, but on this occasion, when Eggleston asked where he got the tires, he told him that he had pulled the car door open, swung it open from the bottom and had gotten the tires out of a car. After Eggleston refused to buy them, he asked if there was any place there they could hide them, and Eggleston told him, "No." Another witness testified that about 12 o'clock at night appellant, said Terrell, and one Thurmond hired his buss. The three got in it and had him drive down to the stock pens at the railroad in Smithville. When they reached the stock pens the three got out, were gone about five minutes, and brought back what the witness described and the jury were clearly authorized to believe were automobile tires, put them in the buss, and

themselves got back therein. That they drove back towards town again, but before they got there they stopped, all three got out, taking the automobile tires with them, and disappeared. Some of the automobile tires which were shipped in this car and stolen therefrom were afterwards traced to and found in San Antonio and recovered by the railroad. A San Antonio party bought these tires from one Billy Edwards. About this time Phillips loaned Edwards \$50, who gave the money to Fred Thurmond, one of the parties who was with appellant and Terrell the night they got the tires when they drove to the stock pens, Edwards stating that the \$50 was to pay Terrell for tires that he and appellant were in trouble about, and that he paid the money to Thurmond on the order of Terrell therefor. This is a mere outline of some of the testimony. Taking it as a whole, we think it amply sufficient to sustain the verdict. Whether appellant took the tires from the car while it was standing in the yard at Smithville, or took them from the car before he reached Smithville, would be immaterial, for wherever he first took the stolen property he is substantially and reasonably shown to have been in possession thereof with others at Smithville, and hence, under the law, could be convicted in Bastrop county, where he was tried and convicted.

This writer is of the opinion that the evidence in the burglary case, while not as full as in this case, was sufficient to sustain the verdict in that case.

After most careful consideration we have reached the conclusion that the evidence is sufficient to sustain the verdict in this case, and the judgment is affirmed.

On Motion for Rehearing.

After the rendition of the original opinion herein, appellant's motion was granted for a certiorari to bring up copies of his motion to quash the indictment and his motion for a new trial and his bills of exceptions, which were omitted from the original transcript. The clerk complied and sent up an additional record containing these papers, which are now before us, and they have been duly considered.

[2, 3] Appellant's motion to quash the indictment gives as the only reason therefor "that on yesterday, February 1, 1915, this defendant was tried and convicted in State v. F. L. Park, No. 2040, in this court, for the offense of burglary of a railroad freight car, charged to have been in possession of J. T. Hungate," who is the agent of a certain railroad company, and given two years in the penitentiary, and claiming that he cannot be twice put on trial for the same offense. This case charges him with theft, not burglary. A conviction for theft committed at the same time, in the same transaction of burglary, is not the same offense, and accused can be convicted of both, as expressly provided by our statute. P. C. arts. 1317,

1318, and cases cited thereunder. Besides, even if they were the same offense, it would be no ground to quash the indictment, but must be properly pleaded as jeopardy.

Appellant again, in his motion for rehearing, as was done when this cause was at first submitted, earnestly contends and argues to a considerable extent that the evidence was insufficient to sustain the verdict. Each member of the court has read and studied the evidence. We adhere to the original opinion that the evidence was sufficient.

[4] In his first bill of exception it is shown that the state's attorney asked appellant, on cross-examination, for the purpose of impeachment, if he had not the day before been convicted of burglary. He objected to this question. The court sustained the objection and, at his request, at the time, instructed the jury that they were not to consider the question at all; that it had nothing whatever to do with the case one way or another. Notwithstanding this, appellant excepted to the mere asking of the question. This bill presents no reversible error. *Martoni v. State*, 167 S. W. 351, and authorities there cited; *Sweeney v. State*, 146 S. W. 883, and authorities there cited.

[5] Appellant's next bill, after the proper style and the usual "Be it remembered," states that "the following proceedings were had, to wit. Then follows more than two pages of typewritten matter, which consists of questions asked, objections made, ruling of the court, answers of the witness, and the remarks of the attorneys for both sides. On the first page the only thing we can see that he complains of to which he excepted is that, in a brief argument, when the witness Vann presented and identified the original waybill for the shipment of the tires alleged to have been stolen, this remark of one of the state's attorneys was made: "They are just taking up the time of the court for nothing." How and in what possible way that injuriously affected appellant's case we are unable to see, and he in no way attempts to show in the bill, and, of course, it presents no reversible error. On the next page of this bill and what follows on the page following, there appears to be nothing to which appellant excepted at the time, and no error is presented thereby.

[6] His next bill is in form exactly similar to the preceding one. It appears from it that the state introduced Harry Young for the purpose of attempting to prove the value of the alleged stolen tires. The witness did not qualify so as to testify to the values, and did not testify to the values. The closing remark of the prosecuting attorney after the witness had stated that he did not know the value so as to testify to it was this:

"Well, stand aside; if you have not sense enough to know the value of automobile tires, you can go,"

—and to this remark appellant excepted, but no reason is given, and no possible injury is

attempted to be shown to appellant by the attorney's remark.

His next bill is in the same style exactly. This bill shows nothing whatever was testified to by the witness Campbell to which he excepted. On cross-examination the appellant's attorneys asked him this question: "Did he tell you who got those tires at the place where you found them? [two additional tires found in shop at rear of Bexar Hotel]." The state's counsel objected. The court sustained the objection, and the defendant excepted. This in no way showed any reversible error.

[7] His next and last bill after the style of the cause states:

"At the conclusion of the testimony of Mr. J. W. Vann, a witness for the state, counsel for defendant moved the court to strike out all the testimony given by said witness as to the value of the tires, because he is not qualified, not an expert, and knows nothing about the value of tires. The motion to strike out was overruled, to which ruling of the court defendant excepted at the time."

This, as it is presented, shows no reversible error. It in no way shows what the testimony of the witness was, or anything other than as quoted above.

[8] The next matter presented in this same said last bill is this:

"When the state had rested, counsel for defendant moved the court to strike out all the testimony of the witness Eggleston in regard to the conversation he had with defendant, F. L. Park, and William Terrell, because that conversation was about some Goodrich tires, when all of the state's testimony shows that the tires alleged to be stolen were Federal Rubber Company tires; also moved the court to instruct the jury to return a verdict for defendant, because the state had failed to make out a case. The motions were overruled. Defendant excepted."

This, as presented, shows no error; but, if we could look to the record otherwise for the testimony of Eggleston, it would clearly show, in connection with the other testimony in the case, that the conversation appellant and Terrell had with him was unquestionably about the stolen tires. Eggleston, after detailing in full material testimony, says that, in the conversation with Terrell regarding the tires, "I believe he said they were Goodrich tires." Another witness says that some others called them Goodrich tires, but the testimony of other witnesses shows that they were not Goodrich tires, but Federal Rubber Company tires. Even, if it had been conclusively shown that they were Federal tires, it would not justify the court to strike out his testimony because he said he believed Terrell said they were Goodrich tires. All that would be a matter of argument before the jury. The jury was entitled to the evidence, together with the other records, so as to properly pass upon the questions submitted to them.

[9] In the original opinion, we said that, whether the appellant took the tires from the car while it was standing in the yards at Smithville, or from the car before he reached

Smithville, would be immaterial, for wherever he first took them he is substantially and reasonably shown to have been in possession thereof with others at Smithville, and hence, under the law, could be convicted in Bastrop county, where he was tried and convicted. Appellant contends that, as the indictment charges that the property was taken from the possession of Hungate, who was the local agent of the company at Smithville in Bastrop county, if the property was taken by appellant before it reached the possession of Hungate at Smithville, the conviction could not be sustained, because the theft would not have been from Hungate. What was said by the court in the original opinion was wholly unnecessary, and was on the question of the venue. The question of venue was not raised in the case, and no bill of exception, which is required by the statute, was taken on that question at all, so that, whether the statement by the court in the original opinion was correct or incorrect, it has nothing to do with the merits of the case, nor with the question of venue, as that question was not raised, as required by the statute. C. C. P., art. 938.

The motion is overruled.

HAND v. STATE. (No. 3744.)

(Court of Criminal Appeals of Texas. Oct. 27, 1915. Rehearing Denied Nov. 17, 1915.)

1. CRIMINAL LAW — 478 — OPINION EVIDENCE—COMPETENCY OF EXPERTS.

A graduate chemist of several years' experience, who at the time was a city chemist, and who made an analysis of the stomach of a man killed by poison, and found strychnine sulphate therein, was qualified to express an opinion as to how much strychnine sulphate would produce the death of a man.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1065, 1066; Dec. Dig. 478.]

2. HOMICIDE — 164 — EVIDENCE — ADMISSIBILITY.

On a trial for poisoning a man who died on July 3d, where defendant contended that deceased was a sickly man, and might have committed suicide on account of despondency caused by ill health, evidence that he had worked for a witness for nearly a year, extending up to June 25th, when he was excused on leave of absence, and that during all of such time he never lost a day on account of sickness or for any other cause, was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 318; Dec. Dig. 164.]

3. HOMICIDE — 166 — EVIDENCE — ADMISSIBILITY.

On a trial of a woman for killing a man with whom she had been living, where the case depended on circumstantial evidence, evidence that, when she and deceased rented rooms from a witness, she told the witness that deceased was a millionaire, and that after his death she said he was a pauper, and would have to be buried by the city, at the same time saying that she had \$30,000 in a bank, was admissible, it appearing that she had no such amount in that or any other bank, but that she then had \$2,400 of deceased's money, since, in a case depending solely on

circumstantial evidence, the mind seeks to explore every possible source from which any light, however feeble, may be derived.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 320-331; Dec. Dig. § 166.]

4. CRIMINAL LAW § 406—EVIDENCE—STATEMENTS BY DEFENDANT WHILE UNDER ARREST.

On a trial of a woman for killing a man with whom she had been living, an officer who after deceased's death went to his rooming place to make an investigation testified that he found \$2,400 in money shown to have belonged to the deceased; that defendant had some \$330 in a purse which she claimed as hers; that he searched the rooms, and, not finding the remainder of the money, informed defendant that he would take her to the city hall to be searched; that she then admitted that she had the money, reached down into her stocking, and handed the officer \$2,100; that she claimed deceased gave her the money, and said she had a will, but that she had left it at another place; but that later she pulled off her shoe and took the will out of the bottom of her shoe. *Held* that, the money having been found by reason of her statements made at the time, this testimony was admissible, even though defendant had been under arrest at the time, which was not shown to be the case.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 785, 804-917, 920-927; Dec. Dig. § 406.]

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

Sallie Hand, alias Sallie Wheeler, was convicted of murder, and she appeals. Affirmed.

L. B. Camp and L. A. Lawhon, both of San Antonio, for appellant. Joe H. H. Graham, Asst. Dist. Atty., of San Antonio, and C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of administering strychnine poison to Eugene Savoy in sufficient quantity to cause his death. That Savoy died of strychnine poisoning is shown beyond peradventure of a doubt, but appellant earnestly insists that the evidence is insufficient to show that she administered it to him.

An able presentation of both the theory of the state and defendant is made by the attorney for the defendant and the attorneys for the state. After a careful review of the testimony, we are of the opinion the circumstances shown are sufficient to sustain the verdict. The court instructed the jury that it was a case depending on circumstantial evidence in a well-prepared charge. Appellant makes no complaint of the charge, and, viewing the evidence as we do, we will not disturb the verdict.

[1] There are several bills of exception in the record; the first complaining that Herman Nester was permitted to testify as to his opinion as to how much strychnine sulphate would produce the death of a man. The witness qualified as an expert, being a graduated chemist of several years' experience, and at the time he testified being city chemist of the city of San Antonio. He made

the analysis of the stomach of the deceased, and testified to the finding of six-tenths of a grain of strychnine sulphate in the body of the dead man.

[2] One of the contentions made by appellant was that deceased was a sickly man, and therefore may have committed suicide on account of despondency caused by his ill health. The evidence shows that deceased and appellant became acquainted in June, and that they lived together from about July 3d until the day of his death. Appellant objected to Henry Fink, Jr., being permitted to testify that deceased had been in his employ for nearly a year, extending up to June 25th, when deceased was excused on leave of absence; that during all the months deceased was in his employ he never lost a day on account of sickness or any other cause. The court did not err in admitting this testimony.

[3] Appellant, at the time she and deceased rented rooms from one of the witnesses, told the witness that deceased was a millionaire. After his death she said deceased was a pauper, and would have to be buried by the city, at the same time saying she had \$30,000 in the Frost National Bank. The record would clearly show she had no such amount of money in that or any other bank, but did have some \$2,400 of deceased's money in her possession at the time she said he was a pauper. This being a case depending on circumstantial evidence, the testimony was admissible, for, as said by this court in *Noftlinger v. State*, 7 Tex. App. 307, in a case depending wholly upon circumstantial evidence, the mind seeks to explore every possible source from which any light, however feeble, may be derived.

[4] Shortly after the death of Eugene Savoy, Officer Lancaster went to his rooming place to make an investigation. He said he found about \$2,400 in money; that appellant had some \$330 in a purse, which appellant claimed was hers. He searched the premises, and, not finding the remainder of the money, he informed appellant he would take her to the city hall and have her searched. She then admitted she had the money, and reached down in her stocking and handed the officer some \$2,100. She claimed that deceased had given her the money. The officer asked her if she had a will, and she said she had, but that it was at a residence near the San Antonio & Arkansas Pass depot. Later she pulled off her shoe and took the will out of the bottom of the shoe. Appellant objected to this testimony on the ground that she was under arrest. There is nothing in the record to show that she was then under arrest, nor that she was arrested on that occasion even after the money was found. The money was found by reason of her statements made at the time, and this would render the testimony admissible even if she had been under arrest.

There was no error in overruling the motion requesting the court to instruct the jury to return a verdict of not guilty. As herein before stated, the facts and circumstances were sufficient to authorize a verdict of guilty.

The judgment is affirmed.

FREEMAN v. STATE. (No. 3690.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915. Rehearing Denied Nov. 17, 1915.)

1. CRIMINAL LAW — 368 — EVIDENCE — RES GESTÆ.

On a trial for assault with intent to murder, evidence that, while defendant and another were assaulting the prosecuting witness, a third person told them not to do it, was admissible as res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 812, 814, 815, 821; Dec. Dig. —368.]

2. HOMICIDE — 257 — ASSAULT TO MURDER — ACTS CONSTITUTING.

On a trial for assault with intent to murder, the evidence was sufficient to show that F., in a drunken condition, went where defendant and others were working; that his conduct and language to them were such as to be considered insulting; that some of them attacked him, and he hastily retreated; that, while they were pursuing him, defendant and another of his assailants threw rocks or bricks at him, one or more of which struck him on the head, felling him to the ground, and breaking or crushing his skull; that he lay there helpless until taken to the hospital by an officer; that it was several days before he recovered consciousness, and much longer before he was able to leave the hospital. Held, that the evidence was sufficient to support a conviction for assault with intent to murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 543-552; Dec. Dig. —257.]

Appeal from District Court, Bell County; John D. Robinson, Judge.

R. Freeman was convicted of assault with intent to murder, and he appeals. Affirmed.

Clem C. Countess, of Belton, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of assault with intent to murder and assessed the lowest punishment.

[1] He has only one bill of exception. The substance of it in full is: That the state's attorney asked one witness, "State to the jury, what, if anything, Mr. Thrillkill said to Stephens and Freeman at the very time they were throwing at Fagg?" and the witness answered: "He said, 'Ernest, don't do that. Raleigh, don't do that.'" And he asked another witness "Didn't you hear Thrillkill tell Stephens don't do that, and Raleigh don't do that?" and the witness answered, "Yes." His objection to this was it was irrelevant, immaterial, and prejudicial and inadmissible because hearsay. We think it was admissible as res gestæ. It was addressed to appellant, and the other party Stephens, "at the very time they were throwing at Fagg," the as-

saulted party, and at the very time the offense charged was being committed by them. Branch, Cr. Law, § 339, p. 198.

[2] Appellant's able attorney made a forcible and earnest oral argument, when this case was submitted, and, in addition, has filed a lengthy brief, which we have fully considered, ingeniously contending that the evidence was insufficient to show his intention to murder, that the assault was with a deadly weapon, that he participated in the assault, that the injuries of the assaulted party were caused by the assault, or that he was in a position to inflict them. We have carefully studied the whole evidence, and think none of his contentions are tenable. The testimony on some points is conflicting, but we think amply sufficient to sustain the verdict. It was sufficient to show, and cause the jury to believe, that Fagg, the assaulted party, in a drunken condition went into the back part of a hotel where appellant, said Stephens, and others were employed and at work; that his conduct and language to them was such as to be considered insulting; that some of them attacked him, and he hastily retreated out of the hotel through the back premises across an alley; that, while they were pursuing him and he running from them they each, appellant and Stephens threw rocks or bricks at him, one or more of which struck him in the head felling him to the ground, breaking or crushing his skull; that he lay there helpless and unconscious until later taken by an officer to a hospital; that it was several days before he recovered consciousness, and much longer before he was able to leave the hospital.

The court gave a correct charge to which there is no exception, submitting every issue to the jury requiring them to find every fact essential to his guilt beyond a reasonable doubt, before they could convict.

The judgment is affirmed.

ROBISON v. STATE. (No. 3707.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915. Rehearing Denied Nov. 17, 1915.)

1. LIBEL AND SLANDER — 148 — PRIVILEGED COMMUNICATION.

Where, upon being questioned by the brother concerning statements made by him that he had had sexual intercourse with the sister, defendant asserted the truth of the charge, and, when asked if he would make a statement to that effect, agreed to do so in the presence of some one else as a witness, and under that arrangement went with the brother to a justice before whom he made and swore to the statement that he had had such intercourse, the statement was slander, since it was not a privileged communication.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 407-411; Dec. Dig. —148.]

2. LIBEL AND SLANDER — 144 — REPETITION — REQUEST.

The repetition of a slander made by the originator thereof at the request of the person

slandered and with an assertion of its truth is slander.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 403; Dec. Dig. ¶144.]

3. LIBEL AND SLANDER ¶156—EVIDENCE—SUFFICIENCY.

In a prosecution for slander, evidence held to show that the slander was uttered maliciously.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 437-441; Dec. Dig. ¶156.]

4. LIBEL AND SLANDER ¶148—MALICE—PRIVILEGE.

Malice on the part of defendant in communicating a slander destroyed his privilege under an otherwise privileged communication.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 407-411; Dec. Dig. ¶148.]

5. LIBEL AND SLANDER ¶156—MALICE—HOW SHOWN.

Malice destroying such privilege may be shown by the style and tone of the slanderous statement, or that publication was made without exercising care and diligence to ascertain the truth.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 437-441; Dec. Dig. ¶156.]

6. WITNESSES ¶330—SLANDER—MEDICAL EXAMINATION.

In a prosecution for slander in asserting illicit relations with a woman, it was not error to exclude the question on cross-examination of the woman whether she would submit to a medical examination to disclose the truth, since such examination could not show with whom intercourse was had, nor could the witness be legally compelled to undergo such examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106-1108; Dec. Dig. ¶330.]

7. CRIMINAL LAW ¶801—MISDEMEANOR—TRIAL—READING CHARGE.

It is not mandatory in misdemeanor cases to read, before argument, the charge to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1947; Dec. Dig. ¶801.]

8. CRIMINAL LAW ¶922—NEW TRIAL—ERROR IN CHARGE—FAILURE TO EXCEPT.

Where, in a prosecution for misdemeanor, defendant does not except to the charge when presented to him, before being read to the jury, he cannot raise the question for the first time on motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210-2218; Dec. Dig. ¶922.]

Appeal from Hamilton County Court; J. L. Lewis, Judge.

J. H. Robison was convicted of slander, and he appeals. Affirmed.

Langford & Chesley, of Hamilton, and Mears & Watkins, of Gatesville, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of slander, and prosecutes this appeal. The alleged slander is based upon an affidavit made by him before E. Brooks, justice of the peace, in which he stated on oath "that he had been going with Miss Elmer Stephens on and off for about one year. I had free intercourse with her as often as I wanted to during all that time." Proper innuendo

averments are contained in the complaint and information. A number of questions are raised in the motion for a new trial, but appellant's counsel, in able oral argument before this court and in the brief filed, discussed but one question, and that is that the affidavit was made under circumstances which made it a privileged communication, or qualified privileged communication. However, he stated that he did not waive the other questions raised, and in the event we held against him on this contention, he asked that we pass also on all other questions in the record. The record before us would disclose that Joe Martin, in a conversation with George Smith, had told Smith that Miss Stephens was pregnant; that Robison (appellant) had a baby on the road; and Robison had received a letter from Miss Stephens' father to come and get the girl or take a shotgun, or words of similar import. Mr. Wolf, learning such a report was in circulation, informed Mr. Stephens of the report, and that Joe Martin was circulating it. Mr. Stephens told his son Harrison Stephens, and Harrison Stephens went to see appellant about the report that Martin was circulating. He says, knowing that appellant (Robison) had been going with his sister, and believing that the report put in circulation by Martin was a slander, he went to see appellant about the matter, and asked him how he considered the character of his sister, and appellant replied that it was bad; that he then asked appellant if he would make a statement of what had occurred between him and the girl, and he said he would if some one else was called as a witness. Harrison Stephens and appellant then went to Justice Brooks, when appellant made the statement recited in the complaint, and swore to it.

[1] Appellant contends that these circumstances rendered the statement privileged and no prosecution could be based thereon, and cites us to the cases of Davis v. State, 22 S. W. 979, Hix v. State, 20 S. W. 550, and McDonald v. State, 164 S. W. 831, as sustaining such contentions. We do not think they have any application to a case of this character. In Hix's Case the facts show that Mr. Wilkerson had heard that Hix had slandered his daughter by making certain statements. A meeting was arranged, and at that meeting Hix denied ever having repeated the language he heard, but told Mr. Wilkerson "that his wife had been informed by Allen Glascoe that Dr. Zachary had said that Miss M. E. Wilkerson had miscarried." Thus it is seen that Hix disclaimed having ever repeated the statement to any one and gave the source of his information, and merely repeated to the father what he had heard in order that the father could discover and bring to justice the slanderer. This was held privileged, of course, and not the basis for a slander charge against Hix. There

was no proof that Hix had repeated the slander, or that he had done more than Mr. Wolf did in this case, and that was, give to the father information by which he could seek out and discover the slanderer, if a slander had been uttered, and no one contends that Mr. Wolf's acts would render him liable to a criminal prosecution.

In Davis' Case the facts are not stated, but the case was reversed because of a variance in the complaint and information. However, in the opinion it is stated: "Being pressed by the father of the girl," he said to the father, "he had seen his daughter engaged in an illicit act with one H. Keeling," citing Hix v. State, supra. And the opinion shows that the remark was not made in the presence of any other person. We are not informed what the facts in that case were, but if the remark made by Davis was originating a slander, was in fact false, even if spoken to him alone, we are of the opinion that a charge of slander could be based thereon, and this court has so held in several cases since that opinion was rendered. In McDonald's Case the facts show that Whynan went to McDonald and asked what was the trouble between him and his wife. McDonald at first declined to state, but upon Whynan insisting he told Whynan that he had heard that his wife was having sexual intercourse with divers persons, and J. R. Wagner had told him (McDonald) that eight different men had had intercourse with his (Whynan's) wife. The record discloses that McDonald had made this statement to no other person, but simply told Whynan what he had heard, upon being pressed. He also told Whynan that he, McDonald, had also had intercourse with his wife. In the opinion it is shown the slander charge was based on what McDonald told Whynan he had heard, and not on what McDonald himself stated of his own knowledge, and the opinion states, in holding the alleged communication privileged, "we are not discussing that part of his communication to Whynan that he himself had had sexual intercourse with Mrs. Whynan, if false." It was thus made plain in that opinion, if the basis for the alleged slander, had been what McDonald himself had stated as true, and it in fact was false, it could be made the basis for a charge of slander. These are all the cases cited by appellant on this question. In Davis v. State, 167 S. W. 1108, this court held that though one went to another to inquire about a matter, and the person thus approached should himself utter a false and slanderous statement, affirming the truth, a prosecution could be based thereon.

But the facts in this case are wholly different from the facts in either of the above-cited cases. In this case it is shown, and appellant in his testimony on the trial admits, he told Joe Martin what Martin told Smith. This was the origin of the slander, if slander it be. When Wolf told Mr. Ste-

phens what Joe Martin was circulating, Stephens had no knowledge that appellant was the originator of the statements alleged to be slanderous. And as the statements of Martin coupled appellant's and his daughter's name, what was more natural than appellant should be applied to to aid the family of the girl in refuting the slander being circulated by Martin. But when applied to, appellant, being aware of the fact that he originated the report, and had told Martin all Martin was telling, does not inform the family of the girl that he had done so, but proceeds to amplify the slanderous report, and make statements that he knew were false, if false—statements he knew would damn the girl in the eyes of the public. And not content to make the statement to the brother, he suggests a third person being present, and to this third person, called in at his suggestion, he proceeds to make an affidavit to this third person, alleging: "I had free intercourse with Elmer Stephens as often as I wanted to." The rules of law, under such state of facts, is that the rule of privilege does not apply where there has been a previous unprivileged publication by the defendant of the same or similar libel or slander, which causes the inquiry to be made, for in that case it is the defendant by his own wrongful act who brings it on himself. Odgen on Slander, p. 294.

[2] In Cyc. vol. 25, p. 371, the rule is stated to be: Where a person originates a slander and afterwards repeats it in answer to a question by the person slandered, in the presence of a third person brought by him for the purpose of hearing the answer, the repetition is slander.

In Griffith v. Lewis, 7 Q. B. 61, the court held: "Where plaintiff inquired of defendant if he had accused her of using false weights in her trade, and defendant, in the presence of a third person, answered, 'to be sure I did. You have done it for years.'" It was held to be a slander for which an action would lie. See, also, Watson v. Nicholas, 6 Humph. (Tenn.) 174; Nott v. Stoddard, 38 Vt. 25, 88 Am. Dec. 633, and cases cited. It is thus seen where one who originates the slander, repeats it in the presence of others, and asserts it to be within his personal knowledge, the statement not being true, is slander. There is a broad difference between such an allegation, and a statement by the person approached that he had heard another say so and so, and does not claim to have any personal knowledge of the matter. While this exact question has never before been before this court in so far as we have been able to ascertain, yet we are not without precedent in the decisions of this state. In the case of Davis v. Wells, 25 Tex. Civ. App. 155, 60 S. W. 566, one of our Courts of Civil Appeals had a similar question before them, and they held it libelous and that an action would lie thereon, they saying:

"If it should be determined that the communication is privileged, exemption from liability will not exist if it was made upon express malice or with a want of good faith."

In this case there can be no question of good faith. Appellant alleged that he had carnal knowledge of the girl, and on the witness stand he asserts this to be true, and the court instructed the jury:

"That if you believe from the evidence that the said Elmer Stephens, at the time of the alleged imputation of want of chastity, if you find such imputation was made by defendant, was guilty of the acts set out in the information in this case, or that at said time, the said Elmer Stephens was not a chaste and virtuous woman, you will acquit the defendant, whether you believe such want of chastity resulted from sexual intercourse with the defendant or some other person."

The jury under such charge must have found that the appellant's statement was false, else they would not have convicted him, and as he alleged he had carnally known the young lady, it is apparent, if false, such statement could not have been made in good faith.

[3] Counsel insisted though that even though the communication was not privileged, it ought to be held qualifiedly privileged; that is, the evidence must show that malice existed in the mind of defendant at the time he made the false statement. The court so instructed the jury in his charge, telling them:

"In order to entitle the state to a conviction in this case the alleged imputation of a want of chastity in the said Elmer Stephens, if made by the defendant, must have been made either maliciously or wantonly. Therefore, I further charge you that although you may believe from the evidence, beyond a reasonable doubt, that the defendant did impute to the said Elmer Stephens a want of chastity by saying of and concerning her the things set out in the information in this case, yet, if you believe from the evidence that such things, so set out in said information, if said by the defendant, was not said either maliciously or wantonly; or if you have a reasonable doubt thereof, you will acquit the defendant."

In other parts of the charge the court defined the words "wanton" and "malicious." And the evidence will support a finding that the statement was maliciously made.

[4, 5] It is true appellant testified on the trial he had no ill will towards any of the Stephens family, but his acts and conduct contradict his words. He had been going with Miss Stephens. Her father commanded her to stop going with appellant. She informs appellant that he can come to see her no more—that her father forbids. The father says appellant had been getting drunk, and engaging in other unseemly conduct, and this was the reason for forbidding him to come to his home. As soon as appellant is informed he was forbidden the house, he hunts up Joe Martin and puts this slander in circulation, and, when questioned about it, reiterates and affirms it to be true. He admits the young lady was at this time associating with his sisters and the best peo-

ple in the community. All the witnesses say that prior to the time appellant put this calumny in circulation, Miss Stephens' general reputation for virtue and chastity was good, and they had never heard it questioned; that she moved in the best circles of society. This would authorize the jury to find that appellant acted with malice, if they believed his statement to be false; and the general rule is, as stated in Cyc.:

"Malice on the part of defendant destroys his privilege. Such malice may be shown by the style and tone of the libelous statement, or by the fact that publication was made without exercising care and diligence to ascertain the truth."

In this instance there was no question of exercising care and diligence to ascertain the truth of the statement. Appellant knew at the time he made the statement it was false, if it in fact was untrue; and the jury so found under proper instructions, and, so holding, there was no error in admitting the affidavit in evidence.

The bills in regard to admitting in evidence the statement of Wolf to Mr. Stephens: The questions propounded to W. L. and Az Henderson, as qualified and approved by the court, present no error. It was permissible to show the bias and interest of the two Hendersons, and the fact that Mr. Wolf gave Mr. Stephens the information he did was necessary to be shown to obtain a thorough comprehension of the case.

[6] When Miss Elmer Stephens was on the witness stand, on cross-examination appellant propounded to her the question: "If she was willing to undergo a medical examination to determine who was telling the truth in the matter." The state objected to the question, and the court sustained the objection. Appellant does not state in the bill what the answer of the witness would have been, nor what he expected it to be, nor that if she agreed to undergo an examination what he believed would be the result. We might infer that he hoped the examination would demonstrate she had had intercourse with some man, but this would not indirectly tend to prove that appellant was the person with whom she had intercourse. We have always held that where a medical examination has been held, the physicians were properly permitted to testify to the conditions found, but a court can hardly be expected to stop a trial and hold it in abeyance while such an examination is being conducted. Such a request ought to be timely made, if made in good faith, that such an examination can be held without delaying the court in its orderly proceedings. We can see no reason why the appellant should not be permitted to make such request, and that the young lady be given an opportunity to permit the examination or refuse to do so. This would be a matter that the court could not force her to undergo, but she might be given the opportunity to do so,

if agreeable with her; but, the request for such a proceeding in this instance being propounded in the midst of the trial, we cannot say the court erred in his ruling in refusing to permit the trial to be delayed for such an inquiry at such a time.

[7, 8] The court did not read his charge to the jury before argument, but did submit it to counsel before reading it to the jury. This is a misdemeanor case, and, as before held by this court, it is the better practice to read the charge to the jury, as in felony cases, before argument, but this is not mandatory in misdemeanor cases. Appellant would have the right to except to the charge when presented to him, but the record shows he reserved no exception to it when he was given an opportunity to read it, and not doing so at that time, complaint could not be made for the first time in the motion for a new trial. When he was given an opportunity to read it, before it was read to the jury, then was the time for him to make his objection and request any corrections he desired.

The court did not err in refusing the peremptory instructions to acquit, nor err in refusing to give the special charge asking the court to instruct the jury, that as a matter of law, the affidavit made by appellant was a privileged communication.

The judgment is affirmed.

TAYLOR v. STATE. (No. 3670.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915. Rehearing Denied Nov. 17, 1915.)

1. WEAPONS \S 17—CRIMINAL PROSECUTIONS—SUFFICIENCY OF EVIDENCE.

On a trial for unlawfully carrying a pistol, evidence on the whole case and on the issue as to whether defendant was a traveler *held* sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. \S 20, 22-33; Dec. Dig. \S 17.]

2. CRIMINAL LAW \S 1159—APPEAL—REVIEW—QUESTIONS OF FACT.

Where the evidence was sufficient to sustain the verdict, whether defendant or the witnesses for the state were to be believed was a matter for the jury and the trial court alone.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3074-3083; Dec. Dig. \S 1159.]

3. CRIMINAL LAW \S 1038—APPEAL—RESERVATION OF GROUNDS OF REVIEW—INSTRUCTIONS.

No error with respect to the refusal of requested charges was shown, where the transcript failed to show that defendant excepted to the charge and requested the submission of his special charges before the charge was read to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2646; Dec. Dig. \S 1038.]

4. WEAPONS \S 17—CRIMINAL PROSECUTIONS—INSTRUCTIONS—"TRAVELER."

On a trial for unlawfully carrying a pistol, an instruction that a "traveler" was a person making a trip from one county to another, and away from his home, with the intention of being away on some business or journey out of

his ordinary pursuit, and that a mere incidental delay connected with his journey did not prevent him from being a traveler within the law, did not correctly state the law and was properly refused.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. \S 20, 22-33; Dec. Dig. \S 17.]

5. CRIMINAL LAW \S 1099—APPEAL—RECORD—MATTERS PRESENTED FOR REVIEW.

In a motion for new trial in a criminal case, defendant attacked the verdict on account of the action of the jury *de hors* the record and for alleged improper argument of the county attorney, and also for newly discovered evidence. All of these matters were specially contested and controverted by the county attorney, and the court heard evidence thereon, but this evidence was not shown by the record. Defendant's bills of exceptions were filed long after the adjournment of the court. *Held*, that such matters were not so presented as to be reviewable, since, in order to be reviewed, such matters must be presented by a proper statement of facts, filed during term time, showing what the testimony was.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2886-2880; Dec. Dig. \S 1099.]

6. CRIMINAL LAW \S 1092—BILLS OF EXCEPTION—ALLOWANCE.

Where no exception was taken at the time to alleged improper remarks of the county attorney and the matter was not called to the judge's attention until two weeks after the trial, and then by a motion for a new trial, and the county attorney contested the matter and specially denied using the language charged, the judge properly refused to allow a bill of exceptions to such remarks.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2803, 2829, 2834-2861, 2919; Dec. Dig. \S 1092.]

Appeal from Coryell County Court; H. E. Bell, Judge.

W. O. Taylor was convicted of unlawfully carrying a pistol, and he appeals. Affirmed.

Watt L. Saunders, of Gatesville, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was indicted and upon trial convicted for unlawfully carrying a pistol. The lowest punishment was assessed.

[1] He claimed and testified: That he lived at Waco, in McLennan county, and owned a farm in Coryell county, which he looked after. That on October 13, 1914, he went from Waco to his farm to attend to various matters of business there, carrying with him in his grip the large dark-handled Colts 45 pistol which his brother-in-law had requested him to bring to him. That at no time during this trip did he carry it on his person. After arriving in Coryell county, he stayed all night with Mr. Rubarth. The next morning he went to Mr. Moore's to see him about his rent and other things, which he did, and there, that morning, took the pistol out of his grip, put it in Moore's buggy, told Moore about it, and requested him to deliver it to his brother-in-law, which was shown to have been done. That he neither saw nor had that pistol again. That is not the pis-

tol he is charged with carrying. That day, and the following, he is shown, and admits, to having gone around to various places in the neighborhood to see various persons and attended to various matters of business. That day, among other places, he went to another brother-in-law's, Clyce Parsons,' to see him about business matters. That Clyce was not then at home, but his wife was. She invited him, and he went into her house, sat down, talked to her about his troubles, and wanted to see her husband about some business matters, and also phoned while he was there. She testified she passed behind him while he was sitting, and his back was to her while he was phoning, and she saw his pistol scabbard sticking out underneath his coat and the shape of a pistol under his coat; that his coat was pulled up tight when he was phoning; that she smelled whisky on his breath, and she said, "he tried to get close to me and acted like he was drunk." After leaving Clyce Parsons,' the next day he went around to various other places seeing different persons about matters of business, and in his rounds shortly before he took a mail hack, and went into Clyce Parsons' field where Clyce was at work to see him about some business matter. While there Clyce told him he did not want him to come to his house drunk any more, scaring his wife, and that his wife thought he had a gun on at the time. That he (appellant) pulled back his coat, and the witness swore, "I saw the white handle of a pistol. * * * It was small." Again: "Yes, I saw him with a pistol on. He pulled back his coat, and I saw it. It was in his hip pocket." Appellant had his grip with him at this time. After talking to Clyce in his field a few minutes, the witness told him the mail hack from Purmela to Levita was coming over the hill, and appellant went and caught it. Appellant swore he had no pistol on the day before when at Mr. Parsons' house, nor in Parsons' field when Parsons swore he did, saw it, etc.

[2] The evidence was clearly sufficient to sustain the verdict on the whole case and also on the issue of his claim that he was a traveler at the time he carried the pistol. The jury believed the state's witness, and did not believe appellant. This was for the jury alone and the lower court.

[3] The judge gave a charge correctly submitting every issue made by the evidence. Appellant made no objection whatever to the charge at the time. He, however, requested two special charges which the court refused; but, as said by this court in the recent case of *Younger v. State*, 173 S. W. 1040:

"The transcript fails to show that appellant excepted to the court's charge before being read to the jury and a request at that time for the submission of his special charges."

Hence, as presented, no error is shown. However, his first, on the issue of his carrying said pistol to his brother-in-law, was clearly on the weight of the evidence, and

about a different pistol from that which he was charged with carrying. Besides, the court, in first telling the jury the law, correctly charged that:

"It is not a violation of the law to merely carry a pistol on one's way to deliver same to its owner."

And in submitting the case for a finding told them, if they believed beyond a reasonable doubt he carried the pistol at the time and place alleged, to find him guilty, unless he was at the time carrying it on his way to deliver it to its owner. And again affirmatively submitted this issue in his favor telling the jury, if you believe he was merely on his way to deliver the pistol to its owner, acquit him and find him not guilty.

[4] In his second special charge he requested the court to tell the jury that a traveler "is a person making a trip from one county to another, and away from his home with the intention of being away on some business or journey out of his ordinary pursuit, and that a mere incidental delay connected with his journey does not prevent him from being a traveler in the meaning of the law." This is not the law. *Williams v. State*, 169 S. W. 1154; *Younger v. State*, supra. Besides, the court gave a correct charge on the subject and submitted that issue in the same way as the above question of carrying the pistol to its owner was submitted.

Appellant's application for a continuance was wholly insufficient, under the statute, showed a clear lack of diligence, and, besides, the evidence of the witness was wholly immaterial to any issue in the case.

The court's charge more than once told the jury that the burden of proof was upon the state to prove appellant guilty beyond a reasonable doubt before they could convict him. It is not susceptible of the construction that it required him to establish either of his defenses beyond a reasonable doubt. The reverse of this is true.

[5] In his amended motion for a new trial he urged some grounds attacking the verdict on account of the action of the jury de hors the record; also, on the ground of claimed improper argument of the county attorney; and also for what he claimed was newly discovered evidence. All of these matters, as well as every other ground of his motion and bills of exceptions, were specially contested and controverted by the county attorney in his sworn plea in answer thereto. The record shows that when the court heard his said motion, and the contest thereof, he heard evidence thereon. What that evidence was, whether by affidavit or oral testimony, or both, is not shown by the record. All his bills of exceptions were filed long after the adjournment of the court. Under such circumstances, none of these matters are presented in such a way that we can review them. It has been the uniform holding of this court at all times, in a long line of de-

cisions, that such matters, in order to be reviewed by this court, must be presented by a proper statement of facts on the subject, filed during term time, showing what the testimony was. One of the leading cases is *Black v. State*, 41 Tex. Cr. R. 185, 53 S. W. 116, and some of the others are collated in *Graham v. State*, 73 Tex. Cr. R. 28, 163 S. W. 730.

[8] There was certainly no error in the judge refusing to allow appellant a bill of exceptions to the claimed remarks of the county attorney when it was conclusively shown that no exception was taken thereto at the time. The matter was not called to the judge's attention until two weeks after the trial, and then by his amended motion for new trial. As stated, the county attorney contested this matter, and specially denied he used the language charged.

We have not discussed separately each of appellant's many assignments, though we have considered all of them. No error is pointed out that would authorize or require this court to reverse this case.

The judgment is affirmed.

ELLIS v. STATE. (No. 3792.)

(Court of Criminal Appeals of Texas. Nov. 3, 1915.)

CRIMINAL LAW § 956—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A new trial on the ground of newly discovered evidence, based on an affidavit that the affiant heard the witness inform accused that he had heard another say that accused was not the party guilty of the theft, will be denied, where the absent witness was in jail and could have been produced as could the affiant, and accused made no sufficient excuse for not having called such witness before, claiming that he merely forgot.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2373-2391; Dec. Dig. § 956.]

Appeal from Wood County Court; R. E. Bozeman, Judge.

George Ellis was convicted of misdemeanor theft, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of misdemeanor theft, and his punishment assessed at a fine of \$50 and two days in jail.

There is no bill of exceptions in the record.

Appellant contends that the evidence is insufficient to sustain the conviction. We have carefully read it, and, in our opinion, it is not only sufficient but clearly shows appellant's guilt.

No other question is raised in such way that it can be considered, unless it be his contention that claimed newly discovered evidence would require a new trial. The state

contested his motion on all the grounds raised, and especially on this ground. His claim on this ground is based on the purported affidavit of G. Q. Willis, which is attached to his motion, to the effect that he (Willis) heard Almer Byars tell George Ellis that he (Almer Byars) heard Allen Rhodes say that he (Allen Rhodes) saw Henry Adams with the said, or alleged, stolen flour, and that he had nothing to do with the alleged theft of same. Appellant in his motion said that Almer Byars, while they were both confined in the county jail at Quitman, told him that he heard Allen Rhodes say that Allen Rhodes saw Henry Adams with the alleged stolen sack of flour, and that defendant had nothing to do with the theft of the same; that he knew of this claimed witness before and at the time of his trial, but that he and his friends had forgotten the name of the witness who used said language; and that, if he had not forgotten the name of the witness, he would have had him testify at the trial. He claimed he could not get the affidavit of the witness to accompany his motion. As stated, the state by the county attorney vigorously contested appellant's motion, and among other things attached the sheriff's affidavit to his contest, wherein the sheriff swore that he had the said witness Almer Byars confined in the Wood county jail on a charge of theft at the time the motion for a new trial herein was overruled, and that he was later that morning carried to the poor farm four miles from town to serve his sentence on said charge; that appellant's attorney had access to said Byars, and that he could have had him present on the hearing of his motion but did not ask for his presence; that the said G. Q. Willis was also in the jail at said time on a complaint out of the state of Oklahoma charging him with theft; and that Willis had been trying to get a lawyer to sue out a writ of habeas corpus and talked to appellant's attorneys before he made said affidavit in this case.

Under all the authorities, the court clearly was justified in overruling his motion for a new trial. Section 1149, White's Ann. C. C. P., and the cases there cited.

The judgment is affirmed.

EDWARDS v. STATE. (No. 3774.)

(Court of Criminal Appeals of Texas. Nov. 3, 1915. Rehearing Denied Nov. 17, 1915.)

1. CRIMINAL LAW § 511—EVIDENCE—ACCOMPLICES—CORROBORATION.

In a prosecution for cattle theft, evidence of corroboration held sufficient to connect defendant with the offense and to justify conviction on an accomplice's testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1123-1137; Dec. Dig. § 511.]

2. CRIMINAL LAW — 508 — EVIDENCE — ACCOMPLICE'S TESTIMONY.

Where a theft is established, a conviction may be had on accomplice testimony on proof of facts and circumstances tending to connect accused with the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1099-1123; Dec. Dig. ¶ 508.]

3. CRIMINAL LAW — 829 — TRIAL — INSTRUCTIONS.

The refusal of requested charges covered by those given is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ¶ 829.]

Appeal from District Court, Austin County; Frank S. Roberts, Judge.

Robert Edwards was convicted of cattle theft, and he appeals. Affirmed.

Duncan & Duncan, of Bellville, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of cattle theft, and his punishment assessed at two years' confinement in the state penitentiary.

[1, 2] Wesley Shelly testified for the state, and testified he and appellant entered the pasture of Mr. E. B. Wilson, roped a cow, and took her to the home of appellant. There they butchered her, and divided the meat. He says they buried the entrails near the place where the cow was butchered, and he carried the head and hide with him in his buggy, and he buried the head on his place; that he agreed to take the hide to town and sell it, and they were to divide the money received for the hide. He then testified to selling the hide to Mr. Barder on Monday following, and says that appellant sent him word by King Jackson to purchase him some flour and other articles and send them to him by Louis Brown.

Mr. Barder testified he purchased a red cowhide from Wesley Shelly, and paid him \$6.40 for the hide; that Mr. Palm brought a cow's head there and fitted it to the hide; that it was the same color as the hide, and fitted the hide he had purchased. There was no brand on the hide, but there was a hole on the hip of the hide about six inches square. This head had been found on Shelly's place, where he admitted he had buried it.

King Jackson testified that appellant, upon learning that he was going to town, requested him to tell Wesley Shelly to send him his flour by Louis Brown. How appellant knew Shelly would be in town that morning is not disclosed, unless Shelly's testimony is true.

Ed Kirkpatrick testified that on that Monday he sold Wesley Shelly two sacks of flour, two buckets of lard, 25-pound sack of salt, and a can of oil.

Louis Brown testified that on that Monday Wesley Shelly got him to carry to appellant a

sack of flour, a bucket of lard, and something else in a sack; he did not remember what it was.

It is thus seen that Wesley Shelly sold the hide of the stolen cow to Barder, and a part of the property purchased with the proceeds of the stolen property is traced direct to appellant. This certainly tends to connect him with the theft. A jury would naturally inquire: How did he know Shelly would be in Bellville that day, how did he know he would have the money to buy the flour, and why on that day of all days did he send him word to send his flour? Appellant admits getting these articles, and admits sending word by King Jackson to send him the flour by Louis Brown, and that Louis Brown brought the flour and articles and delivered them to him, but he undertakes to explain that he had borrowed \$10 from Herman Granon, and had loaned Shelly \$5 of this borrowed money. But when Herman Granon was called as a witness, he said he did loan appellant \$10, but said it was about three years before the date of this theft, and this would not explain why appellant knew Shelly would be in Bellville on that Monday with money to buy flour. Shelly also testified that the entrails and an unborn calf were buried on appellant's place, at a certain place, describing it. Officers went to this place and found where a hole had been dug, and they say there was a fearful scent in the hole, but no entrails were found and no unborn calf, but within about 100 yards of appellant's house the body of an unborn calf was found. Joe Arnold testified he was living on Mr. Wilson's place and was looking after his cattle; that he missed three or four of these cattle the latter part of December or first of January. One was a red cow. She was fat and large, and was with calf at the time he missed her. The cow had broad horns. He further testified he examined the hide found at Barder's; that, taking into consideration the color and size of the cow, the hide looked to him to be about as good a comparison as could be found anywhere. He tells of other facts and circumstances that led him to believe it was Wilson's cow. Thus a cow is shown to be missing, independent of the testimony of Wesley Shelly, and facts and circumstances are proven that would support the conviction of Shelly, as the horns and head and fresh beef were found on his place. And we think, when a portion of the proceeds of the sale of this stolen cow is traced direct to appellant, and other circumstances in the case, the testimony, independent of the testimony of Shelly, tends to connect appellant with the theft. The necessary corroborating testimony does not have to show in and of itself that appellant was guilty of stealing the cow. After it has been proven that a cow had been stolen, all it was necessary to prove, independent of the accomplice's testimony,

were facts and circumstances that tended to connect him with the crime. In *Jernigan v. State*, 10 Tex. App. 549, this court, speaking through Judge Hurt, said:

"This \$100 bill, being the proceeds of the sale of the cattle, can be and is familiarly termed the fruits of the crime, and occupies the same relation as a means of proof in a great many cases as the possession of recently stolen property does to theft. In this case the bill constitutes the fruits of the theft. It follows, therefore, that if the defendant is shown to have had guilty possession of or connection with this bill, that fact would be a strong corroboration of the accomplice. Two things are necessary, however, to make the transaction criminal: (1) This must be the bill for which the cattle were sold; (2) the defendant must not only have been informed of that fact, but that the cattle were stolen, thus constituting the bill a fruit of the theft."

It is shown by the undisputed testimony, independent of the testimony of the accomplice, that the flour and lard received by appellant were fruits of the crime. Now does the evidence measure up to the second requirement? It does not have to be proven by positive testimony, but can be shown by circumstantial evidence. Independent of the testimony of the accomplice, by King Jackson, it is shown that appellant knew that Shelly would be in Bellville that day with money to buy the flour, etc. How did he know this fact? Shelly did have the money received from a sale of the stolen hide. He gets and keeps these proceeds of the stolen property. When told that Shelly had said he (Shelly) had sold him a part of the beef in payment of a debt due by Shelly to him, he denies Shelly was indebted to him in any sum, and yet the flour and lard are found in his possession. The evidence justifies a finding that, when he received these articles, he knew they were the proceeds of the hide of the stolen animal. This is the sole contention briefed by appellant's counsel, and we are frank to admit that it is not entirely free from difficulty, but a careful study of the record convinces us the corroboration is sufficient.

[3] The court gave six of the special charges requested by appellant, and they, together with the court's main charge, fully covered the issues in the case, and it was not therefore necessary to give the other two special charges requested.

The charge on alibi is clothed in language frequently approved by this court, and is not subject to the criticism that it assumes facts against the defensive theories. It was only necessary that the corroborative testimony "tended to connect the defendant with the offense charged"; it was not required that such testimony connect the defendant with the crime. If such proof was made, independent of the testimony of the accomplice, there would be no need of the accomplice testifying.

The judgment is affirmed.

SMITH v. STATE. (No. 3776.)

(Court of Criminal Appeals of Texas. Nov. 3, 1915.)

1. CRIMINAL LAW §1090—APPEAL—BILLS OF EXCEPTION.

The impropriety of overruling a motion for continuance cannot be reviewed without a bill of exceptions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2853, 2789, 2803–2822, 2825–2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.]

2. CRIMINAL LAW §1097—APPEAL—STATEMENT OF FACTS—NECESSITY.

The sufficiency of the evidence to sustain a conviction cannot be considered without a statement of facts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2862, 2864, 2926, 2934, 2938, 2939, 2941, 2942, 2947; Dec. Dig. § 1097.]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Noce Smith was convicted of theft, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was given a misdemeanor punishment under a felony indictment charging him with theft of personal property.

[1] Motion for a continuance was overruled, and that is assigned as error in the motion for new trial. Appellant failed to reserve a bill of exception; therefore this matter cannot be considered.

[2] All the other matters in the motion for new trial pertain to the sufficiency of the evidence and matters growing out of the evidence, which cannot be considered without the testimony. The record does not contain a statement of facts.

The judgment will be affirmed.

MCGEE v. STATE. (No. 3770.)

(Court of Criminal Appeals of Texas. Nov. 3, 1915.)

CRIMINAL LAW §1102 — STATEMENT OF FACTS—TIME OF FILING.

Where there was no order in the record authorizing a statement of facts to be filed after adjournment of county court, a purported statement of facts must be stricken.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1102.]

Appeal from Tarrant County Court; Jesse M. Brown, Judge.

Sam McGee was convicted of crime, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of adultery, and fined \$100.

There is no order in the record authorizing a statement of facts to be filed after the

adjournment of court. There is in the record what purports to be a statement of facts filed on the 20th day after the court adjourned. The Assistant Attorney General's motion to strike out the statement of facts under the circumstances must be sustained.

There is no bill of exceptions in the record. In the absence of a statement of facts and bill of exceptions, no question is raised which can be reviewed.

The judgment is affirmed.

BACKUS v. STATE. (No. 3741.)

(Court of Criminal Appeals of Texas. Nov. 3, 1915.)

1. CRIMINAL LAW \S 1092—RECORD—BILLS OF EXCEPTION—APPROVAL BY TRIAL COURT.

Bills of exception cannot be considered on appeal, where the trial court refused expressly to approve them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2803, 2829, 2834—2861, 2919; Dec. Dig. \S 1092.]

2. CRIMINAL LAW \S 982—IMPEACHMENT—ARRESTS FOR MISDEMEANORS AND FELONIES.

The state on the cross-examination of accused filing a plea for suspension of sentence on conviction may show that he had been repeatedly arrested for various misdemeanors and once for felony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2500, 2501; Dec. Dig. \S 982.]

Appeal from District Court, El Paso County; W. D. Howe, Special Judge.

E. C. Backus was convicted of knowingly having in his possession a forged instrument with intent to pass the same, and he appeals. Affirmed.

Weeks & Vowell, of El Paso, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was indicted on two counts—the first for forgery; the other for knowingly having in his possession a forged instrument with intention to pass the same. Only the second count was submitted, and he was found guilty on that count, and his punishment assessed at the lowest prescribed by law.

Appellant claims that the evidence was insufficient to sustain the conviction. We have carefully read the statement of facts, and, in our opinion, the testimony was sufficient to sustain the conviction, and we would not be authorized to reverse the case on that ground.

[1] There is in the record what might otherwise be considered bills of exception, but the court refused expressly to approve them. Hence they cannot be considered.

[2] There is one which complains that the court permitted the state to ask him and required him to answer on cross-examination that he had been repeatedly arrested for various misdemeanors and once for a felony. The court, in approving the bill, expressly

states that the appellant did not except when he overruled his objections to that character of testimony. The appellant filed his proper plea seeking the suspension of a sentence in case he was convicted. Even if he had excepted to the action of the court, it would present no error, because on his plea for suspended sentence said testimony was admissible. *Williamson v. State*, 167 S. W. 360; *Conatser v. State*, 170 S. W. 314.

The judgment is affirmed.

BETHANY v. STATE. (No. 3773.)

(Court of Criminal Appeals of Texas. Nov. 3, 1915.)

1. FORGERY \S 34—INDICTMENT—VARIANCE BETWEEN PURPORT CLAUSE AND INSTRUMENT.

Where the purport clause in an indictment alleges the instrument forged to have been the act of one or more named persons, while the instrument set out by its tenor is the act of more or less persons than alleged, the variance is fatal, especially in the absence of any innuendo or explanatory averments as to the nature of the instrument and its character.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. \S 85-102; Dec. Dig. \S 34.]

2. FORGERY \S 28—INDICTMENT—REQUISITES—PURPORT CLAUSE.

An indictment for forgery need not state in the purport clause the names to the instrument forged.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. \S 66-70, 74-76; Dec. Dig. \S 28.]

Appeal from District Court, Austin County; Frank S. Roberts, Judge.

Horace Bethany was convicted of forgery, and he appeals. Reversed, and prosecution ordered dismissed.

Johnson, Matthaël & Thompson, of Bellville, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of forgery; his punishment being assessed at two years' confinement in the penitentiary.

The Assistant Attorney General confesses error on the variance between the purport and tenor clauses. The indictment alleges that Horace Bethany, naming the date and county, did unlawfully without authority, and with intent to injure and defraud, willfully and fraudulently make a certain false instrument in writing, purporting to be the act of another, to wit, purporting to be the act of Willie Smith, which said false instrument is to the tenor as follows. Then follows the instrument itself, signed by Horace Bethany, Richard Bethany, and Willie Smith.

[1] The indictment was attacked in the lower court on motion in arrest of judgment. Without taking up these matters seriatim, there are no innuendo or explanatory averments in the indictment with reference to the count in the indictment. It seems under the authorities that, where the purport clause unnecessarily alleges the instrument to be

the act of one or more named parties, and the instrument set out by its tenor is the act of more or less parties than are alleged in the purport clause, the variance is fatal. This is the rule aptly stated by Mr. Branch in his work on Criminal Law, in section 382. There are quite a number of cases cited by Mr. Branch in support of this statement of the law. It is unnecessary, we think, here to recapitulate these cases. Mr. Branch has done so, and they will be found there collated. It is also stated by the same writer, in the same section, that if the indictment undertakes to allege whose act the instrument purports to be, any variance between the purport and tenor clauses will be fatal. He also collates quite a number of authorities under this statement of the law.

[2] It was not necessary to have stated in the purport clause the names to the instrument, but, having done so, and the instrument set out by its tenor shows it was signed by additional parties to those alleged in the purport clause, it seems, under the authorities, that this would be a fatal variance, especially in the absence of any innuendo or explanatory averments as to the nature of the instrument and its character.

There are other interesting questions in the case, and some serious doubt about the sufficiency of the evidence, but those are not discussed in view of the above holding.

The judgment will be reversed, and the prosecution ordered dismissed.

WILLIAMS v. STATE. (No. 3740.)

(Court of Criminal Appeals of Texas. Nov. 3, 1915.)

CRIMINAL LAW §1092, 1099—BILLS OF EXCEPTION—STATEMENT OF FACTS—TIME OF FILING.

The court on appeal from a conviction in the county court cannot consider bills of exception and statement of facts filed within 20 days after adjournment of the term, where the record contains no order allowing the filing thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2866-2880, 2919; Dec. Dig. §1092, 1099.]

Appeal from Jasper County Court; C. C. Brown, Judge.

Shepherd Williams was convicted of carrying a pistol, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of carrying a pistol in violation of the statute, his punishment being assessed at a fine of \$100.

The bills of exception and the statement of facts were both filed after the adjournment of the term of court. The record contains no order allowing the filing of these papers; therefore they cannot be considered. Where appeal is taken from the county court,

under the decisions in this state, it is necessary that an order of 20 days be entered of record. Without this the statement of facts or bills of exception cannot be considered, although filed within 20 days. Such has been the uniform ruling of the court. Without these matters before the court, there is no question that can be revised.

The judgment will therefore be affirmed.

BAGLEY v. STATE. (No. 3725.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915. Rehearing Denied Nov. 17, 1915.)

1. CRIMINAL LAW §595—CONTINUANCE—ABSENCE OF WITNESSES—MATERIALITY OF TESTIMONY.

On a trial for selling intoxicating liquor in prohibition territory, one witness testified that he purchased a bottle of whisky from defendant about 9:30 a. m., and another, after dark, about 7:30 in the evening. Another witness claimed to have purchased whisky about dark. The court's qualification of a bill of exceptions indicated that the sales were made on February 27th. *Held*, that the refusal of a continuance because of the absence of witnesses who would have testified to defendant's whereabouts between 10 a. m. and 5:30 p. m., on February 26th, was not error, as their testimony would not have been material to any issue in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 1323-1327; Dec. Dig. §595.]

2. CRIMINAL LAW §780—INSTRUCTIONS—TESTIMONY OF ACCOMPLICES.

If, on a criminal trial, the evidence suggested that witnesses for the state were accomplices, the court should have charged the provisions of Code Cr. Proc. 1911, art. 801, providing that a conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed, and that the corroboration is not sufficient if it merely shows the commission of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. §780.]

3. CRIMINAL LAW §507—INSTRUCTIONS—TESTIMONY OF "ACCOMPLICE."

Where a sheriff agreed with B. to pay him for each bootlegger he might aid him in catching, and, pursuant to such agreement, B. purchased whisky from defendant, he and the sheriff were not "accomplices" within the rule governing accomplices' testimony, in view of Pen. Code 1911, art. 602, providing that the fact that a person purchases intoxicating liquor from one who sells it in violation of the provisions of that chapter shall not constitute such person an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096; Dec. Dig. §507.]

For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

4. INTOXICATING LIQUORS §141—CRIMINAL OFFENSES—PURSUING BUSINESS OF SELLING LIQUOR.

That defendant may have been in some other business would not prevent him from pursuing the occupation of selling liquor to all who applied to him.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 151; Dec. Dig. §141.]

Appeal from District Court, Harrison County; P. O. Beard, Special Judge.

Tom Bagley was convicted of pursuing the business of selling intoxicating liquor in prohibition territory, and he appeals. Affirmed.

Lane & Lane, of Marshall, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of pursuing the business of selling intoxicating liquor in prohibition territory, and his punishment assessed at three years' confinement in the state penitentiary.

A motion in arrest of judgment was filed, insisting the indictment alleged no offense against the laws of this state. In the brief filed by appellant's counsel, this question is not presented. We judge that upon further examination of the indictment appellant's counsel ascertained it was in language frequently approved by this court, and that this court had held that such indictment charged the offense alleged.

[1] Appellant insists that the court erred in overruling his application for a continuance on account of the absence of the witnesses A. L. Hayden and Wirt Hope. By these witnesses he states he expected to prove that each of them were with appellant on the 26th day of February from 10 o'clock in the morning until 5:30 o'clock in the afternoon, and during that time he did not sell any whisky to Jess Richardson nor O. W. Blueher. In approving the bill of exceptions, the court states:

"The evidence shows that neither Wirt Hope nor A. L. Hayden were in the city of Marshall, Harrison county, on the 27th day of February, and knew nothing of the sales of liquor to either Jess Richardson or O. W. Blueher on the 27th."

If appellant expected to prove his whereabouts on the 26th and the evidence on the trial shows that the sales, if any made, were made on the 27th, and not the 26th, the testimony would be material to no issue in the case. Again, the witness Richardson testified he purchased one bottle of the whisky about 9:30 in the morning, and the other after dark, about 7:30 in the evening. Blueher testified he purchased the whisky he claimed to have bought about dark. So if Hayden and Hope would testify they were with appellant from 10 o'clock to 5:30 and he sold Richardson and Blueher no whisky during that time, it would in no sense dispute the state's testimony, nor have any tendency to show it was not true. The record disclosing the testimony would be material to no issue in the case, the court did not err in overruling the motion for a new trial on this ground.

[2, 3] This case was tried the 14th day of

last April, and no exceptions were reserved to the charge of the court as given, although there were several special charges requested. Special charge No. 1 seems to have been embodied in and made a part of the court's main charge; at least, it is fully covered by the court's charge. The other special charges requested relate to accomplice testimony, and requests the court to instruct the jury that Jess Richardson, O. W. Blueher, and Sheriff Sanders were accomplices, under their testimony, and requested the court to apply the law of accomplices' testimony to their evidence. Appellant refers to article 801 of the Code of Criminal Procedure. If the evidence suggested these men were accomplices, then, of course, the provisions of article 801 ought to have been given in charge to the jury, but article 602 of the Penal Code provides:

"The fact that a person purchases intoxicating liquor from one who sells it in violation of the provisions of this chapter shall not constitute such person an accomplice."

Richardson testified he purchased one bottle of whisky from appellant on the 27th about 9:30 in the morning, and purchased another bottle on the same day about 7:30 in the evening. He testified the sheriff had agreed to pay him \$25 for each bootlegger he might detect, provided the sheriff was placed in such position he might see the sale made. Sheriff Sanders testified he made that agreement and saw appellant make the sales to Richardson. Appellant insists that, notwithstanding the above provision of the Code, the fact that Sanders had agreed to pay Richardson \$25 for each bootlegger he might aid him in catching would render them accomplices, bringing them both within the rule governing accomplices' testimony. This was decided adversely to appellant in *Walker v. State*, 72 S. W. 401, soon after the adoption of article 602. In that case, this court, speaking through Judge Davidson, held:

"Alexander was the purchaser, and Hightower was president of an anti-saloon league, who employed Alexander to ferret out violations of the local option law; and it may be conceded that Alexander induced appellant to sell him the whisky for the purpose of instituting criminal proceedings against him. * * * It is a sufficient answer to all these questions to say that, under the facts, * * * neither of the witnesses is an accomplice"—citing the above provision of the Code.

The rule as thus announced has been adhered to. See *Branch's Criminal Law*, § 554.

[4] Appellant at the same time may have been a cattle buyer, but this would not prevent him from also pursuing the occupation of selling liquor to all who applied to him, and this he seems to have done. *Fitch v. State*, 58 Tex. Cr. R. 366, 127 S. W. 1046.

Judgment affirmed.

WILBURTON v. STATE. (No. 3786.)

(Court of Criminal Appeals of Texas. Nov. 8, 1915.)

1. CRIMINAL LAW — 1069—APPEAL—CONDITIONS PRECEDENT—PASSING OF SENTENCE.

An appeal does not lie until sentence has been pronounced on accused found guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2691-2699; Dec. Dig. — 1069.]

2. CRIMINAL LAW — 1099—RECORD—STATEMENT OF FACTS—TIME OF FILING.

Accused, sentenced at a term subsequent to the term at which he was convicted, has 90 days after sentence in which to prepare and file a statement of facts, and a statement of facts filed within that time must be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. — 1099.]

3. CRIMINAL LAW — 928—TRIAL—MISCONDUCT OF JURY.

Where, on a trial for forgery of an indorsement on a draft for \$76.50, the prosecuting witness testified that he had not indorsed the draft nor signed the names thereto, the statement of a juror, before a vote was taken by the jury, that he knew that the prosecuting witness would not swear another man into the penitentiary for \$75, was not the giving of additional testimony, and a motion for a new trial on that ground was properly denied, in the absence of anything to indicate that the juror had ever known the prosecuting witness before being impaneled on the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2263-2271; Dec. Dig. — 928.]

4. CRIMINAL LAW — 1159—VERDICT—CONCLUSIVENESS.

A conviction on conflicting testimony and sustained by testimony will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. — 1159.]

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

J. A. Wilburton was convicted of forgery, and he appeals. Affirmed.

Butler L. Knight and Russell B. Wine, both of San Antonio, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of forgery, and his punishment assessed at two years' confinement in the state penitentiary.

[1, 2] The sentence was not pronounced on appellant at the term of court at which appellant was tried, but he was sentenced at a subsequent term of court. As no appeal would lie until sentence was pronounced, appellant had 90 days after sentence in which to prepare and file a statement of facts. As the statement of facts was filed within the time required by law after the pronouncing of the sentence, the motion to strike out the statement of facts is overruled. However, the record contains no bills of exception, and, as presented to us, there are but two questions we can review: (1) Did the court err in refusing to grant a new trial because the

jury received additional testimony; and (2) will the testimony sustain the verdict?

[3] To the motion for a new trial is attached the affidavit of one of the jurors, who says:

"My name is C. L. Gruzevski, one of the jurors who sat on the case of State v. J. A. Wilburton charged with forgery in Thirty-Seventh judicial district court, Bexar county, Tex., and I make the following affidavit: I incidentally remarked to said defendants' counsel, a day or two after said case was tried, that one of the jurors made the statement in the jury room that he knew that Ed Gutzeit would not swear another man into the penitentiary for \$75. This statement was made before a vote was taken. I do not know the juror's name making said positive statement, but he was a large, tall man."

This is all the affidavit and all the remark that it is claimed was made. Jurors, of course, necessarily discuss the testimony, and for one of the jurors to say "that he knew Ed Gutzeit would not swear another man into the penitentiary for \$75" is but an expression of the witness in regard to the testimony adduced on the trial. Appellant was charged with forging the name of Gutzeit Bros., Ed Gutzeit, to an indorsement on a draft for \$76.50, guaranteeing the payment of the draft. So the issue to be decided in the case was whether or not appellant had forged those names to the draft. Ed Gutzeit was a witness in the case and had testified that he had not indorsed the draft nor signed the names thereto. There is nothing in the affidavit to indicate the juror had ever known Ed Gutzeit before being impaneled on the jury. He had heard him testify, and for him to say he knew Gutzeit would not swear another man in the penitentiary for \$75 was but an expression of his opinion on the testimony adduced on the trial. This was not giving additional testimony, and the court did not err in overruling the motion for new trial on this ground.

[4] On the question of the sufficiency of the testimony, we will say there was a sharp issue as to whether Ed Gutzeit signed the \$76 draft. He positively swore he did not sign the \$74 draft, and said that was a forgery also, but paid it to help appellant out of trouble. Appellant swore that Gutzeit signed both of them. Experts were called, and Mr. Lentz, a banker, testified that, in his opinion, the signature to that draft and one to a check admitted to have been written by Gutzeit was the same, but was the only one who so testified. Mr. Matthews, another banker, said there was some similarity, but he could not say they were the same. Mr. Halle testified, "The handwriting seems to differ," while Mr. Boetz testified that the signature to the alleged forged check was not the signature of Gutzeit.

With this conflict in the testimony, we cannot say the jury were not justified in returning the verdict they did return.

The judgment is affirmed.

DURLEY v. STATE. (No. 3785.)
(Court of Criminal Appeals of Texas. Nov. 3, 1915.)

1. CRIMINAL LAW §1170—RULINGS ON EVIDENCE—PREJUDICIAL ERROR.

Where, on a trial for cattle theft, a state's witness confessed that he was a thief and that he had aided accused in the theft, the exclusion of evidence on cross-examination that the witness had attempted to get a third person to aid in stealing cattle was not prejudicial, especially where the witness had already testified on the direct that he had talked with the third person about going with him and accused to steal cattle, and that the third person had refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.]

2. CRIMINAL LAW §829—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY INSTRUCTIONS GIVEN.

Where the court gave a proper charge on an issue, it was not necessary to give a special requested charge thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.]

Appeal from District Court, Upshur County; J. A. Ward, Judge.

Dave Durley was convicted of cattle theft, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of cattle theft, and his punishment assessed at two years' confinement in the penitentiary.

[1] Pomp Boren testified as a witness for the state, and stated that he, appellant, and Jake Bolton had stolen the cow. In a bill of exceptions it is shown that after the witness had been excused appellant recalled him, and desired to ask him:

"Did you not, just a short time before the killing of this Brawley cow, have a conversation with Early Skinner, in which just you and Early Skinner were together, in which you stated to him or asked him to go with you to kill some cattle, and he refused to do it?"

The court sustained the objection, and of this action of the court appellant complains. The witness Boren had confessed he was a thief, and had aided in the theft of the Brawley cow, and to prove that he desired to get Skinner to aid in stealing other cattle would not add to his moral turpitude. In addition to this, the record discloses that on direct examination he had testified that while rabbit hunting he had talked with Early Skinner about going with him and appellant to steal cattle, and Early Skinner had refused. So that the testimony sought to be elicited would have been but a reiteration of what he had already testified to when first called as a witness.

[2] The only other bill of exceptions in the record complains of the action of the court in overruling his motion for a new trial, and in it—the only other question than that discussed above—is that the charge of the court on alibi placed the burden on

defendant to prove this defense. This paragraph of the charge is not subject to such criticism, and is in language frequently approved by this court. And, having given this charge, it was not necessary to give the special charge requested on that issue.

The judgment is affirmed.

FONDREN v. STATE. (No. 3766.)

(Court of Criminal Appeals of Texas. Nov. 3, 1915. Rehearing Denied Nov. 17, 1915.)

1. CRIMINAL LAW §1091—QUESTIONS REVIEWABLE—STATUTORY PROVISIONS.

Under Code Cr. Proc. 1911, art. 938, providing that the court on appeal shall presume that the venue was proven in the trial court unless made an issue therein, and it affirmatively appears to the contrary by bill of exceptions signed and allowed by the trial judge, a bill of exceptions, complaining of refusal to charge to acquit because the venue had not been proven, does not show that the venue was made an issue during the trial and presents no question for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2824, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091.]

2. CRIMINAL LAW §508—ACCOMPLICES—INCOMPETENCY—EXTRINSIC EVIDENCE.

Under Code Cr. Proc. 1911, art. 791, declaring that persons charged as principals, accomplices, or accessories cannot be witnesses for one another, and article 792, authorizing the court to interrogate a person offered as a witness to ascertain whether he is competent to testify, accused charged with gaming may not complain because the state proved that a witness called by accused was indicted for committing the same offense with accused, especially where the court erroneously permitted the witness to testify for accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1099-1123; Dec. Dig. § 508; Witnesses, Cent. Dig. §§ 244-248.]

3. CRIMINAL LAW §1170½—RULINGS ON EVIDENCE—PREJUDICIAL ERROR.

The state may, to disqualify accused's witness under Code Cr. Proc. 1911, arts. 791, 792, prove that he was also indicted for the same offense, and the mere fact that the court in permitting the state to prove that fact erroneously stated that the evidence was admissible to affect the credibility of the witness was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.]

4. GAMING §72—CRIMINAL OFFENSES—"PRIVATE RESIDENCE."

Pen. Code 1911, art. 548, making card playing in any place other than a private residence occupied by a family an offense, makes it an offense to play cards in the private room of a boarder at a hotel or boarding house; the boarder being a single man and no family occupying the room.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 168-186; Dec. Dig. § 72.

For other definitions, see Words and Phrases, First and Second Series, Private Residence.]

Appeal from Tyler County Court; Tom F. Coleman, Judge.

Pink Fondren was convicted of gaming, and he appeals. Affirmed.

Joe W. Thomas, of Woodville, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of gaming, and his punishment assessed at a fine of \$12.50.

Will Harris testified:

"I live at Warren, Tex. I am deputy sheriff of Tyler county, and was on January 16, 1914. I remember the occurrence on the night of January 16, 1914, where two parties and myself found Pink Fondren and Albert Pennington and Joe Williford. This occurred in an old store building and warehouse used one time by George Wooley; the back used as warehouse. It is composed of two rooms, the front room used at one time as a cold drink stand. We found the door on north side of back room barred and paper in the keyhole. We came around to the window and couldn't get in on that side. Got a stick, then got out my knife and cut a hole in an old comfort that was used as a blind over the window. It was a cheap comfort, with the cotton scattered in it, and you could see through it; cost about 75 cents or \$1. They had two boards placed edge on edge at the bottom of the quilt as a dead fall. I could see motions of cards through the comfort, and after I cut it I could see them good. They were playing cards. I know they were playing cards. I watched them about 15 minutes, until I got tired."

[1] While the case was being presented to the jury, and after the evidence had closed, appellant requested the court to instruct the jury to return a verdict of not guilty on the ground that the venue had not been proven. This contention would have been sound had not article 938 of the Code of Criminal Procedure been amended in 1897. By that article it is now provided this court, on appeal, shall presume that venue was proven in the court below, unless such matters were made an issue in the court below, and it affirmatively appears to the contrary by bill of exceptions properly signed and allowed by the trial judge. The only bill in the record relating to this matter is one reserved to the failure of the court to give this special charge. This in no way evidences that venue was made an issue during the trial of the case, and, in fact we take the record as a whole, the statement of facts evidences that no such issue was made on the trial, but the whole case proceeded upon the theory that the house in Warren in which the deputy sheriff of Tyler county says he found appellant and two others gaming was in Tyler county. *Barker v. State*, 47 S. W. 980. While it may be said that there is no one who swore positively that the house, in which the card playing is said to have taken place, was in Tyler county, yet the jury, under the facts and circumstances in this case, would have been authorized to so find had that been made an issue and the court submitted it to the jury in his charge.

[2, 3] By the above testimony it is seen that the state's witnesses testified that appellant, Albert Pennington, and Joe Williford were playing together. When the defendant called Joe Williford as a witness, the state objected and proved by him that he

was under indictment for the same offense. The objection to the witness testifying should have been sustained. Article 791, C. C. P., specifically declares that Williford was not a competent witness for defendant. Article 792 provides that evidence may be introduced to prove him an incompetent witness. Consequently, there was no error in permitting the state to introduce evidence that Williford was indicted, charged with the same offense. The only error committed was in permitting the witness to testify after the state had made this proof. As the defendant called Williford as a witness, he will not be heard to complain that the state offered proof showing that he was an incompetent witness. And especially has he no ground of complaint, since the court erroneously overruled the objection and permitted the witness to testify at his instance.

As to Albert Pennington, it was permissible for the state to seek also to disqualify him as he was also indicted for the same offense. However, there was no error in permitting him to testify for the defendant, as he testified he had paid his fine. When he was convicted and paid his fine, this removed the bar of incompetency as a witness. The fact the court said he would permit the state to make the inquiry to affect the credit of the witnesses does not render the inquiry improper; it was only giving a wrong reason. The testimony was not admissible to affect their credit, but was admissible on the issue of whether or not they were competent to testify as witnesses for appellant. As before stated, the court erred in permitting Williford to testify for defendant after the proof had been made, but there was no error in permitting Pennington to testify as he showed he had paid the penalty. As the defendant got the benefit of both the competent and incompetent witness, it is a matter of which he cannot be heard to complain.

[4] Appellant contends that, if he did play at a game of cards (which he denies), it was in his room in Poland's boarding house. W. L. Poland testified:

"I lived in Warren, Tex., on the night of January 16, 1914. Was then, and my family are now, running the boarding house at Warren. I have two houses, about 100 yards apart. One we live in, and the other I use for my boarders to room in, and the house in question where Joe Williford and Dick Barclay slept at that time was then used by me as a sleeping apartment for my boarders, and Joe Williford occupied the middle room, slept there and had all his clothes, a grip, etc., in that room, also at that time a man named Geo. Crone had his household goods in that room of Joe Williford. He asked me to let him store them in there for a few days, and I let him do so. They were moved in about two weeks, just so soon as he could get him a house. Joe Williford used that room just as any boarder uses a room to live and sleep in; it was his private room. He had been working and boarding with me about two or three months using the room in that manner."

Counsel cite a great many old authorities holding that it is no offense to play in one's room at a boarding house, but he apparently

does not recall that this is no longer the law in this state. The statute now provides, and has provided for several years, that card playing in any place, other than a private residence occupied by a family, is an offense. See Pen. Code, art. 548, as amended in 1901. Since the amendment of that article of the Code, it has always been held to be an offense to play cards in the private room of a boarder at a hotel or boarding house. In this case it was not contended that appellant was a married man, and his family resided in the room. All of the record demonstrates that no family occupied the room. The evidence of the absent witness was therefore material to no issue in the case, and the facts it was alleged could be proven by him were not contested, and were proven by Mr. Poland and other witnesses, and if true would be no defense.

The judgment is affirmed.

GARCIA v. STATE. (No. 3778.)

(Court of Criminal Appeals of Texas. Nov. 3, 1915.)

GAMING § 72—CRIMINAL OFFENSES—"PRIVATE RESIDENCE."

A railroad box car set flat on the ground is not a "private residence" within the statute punishing gaming, where the car was only occupied by men who did their own cooking in the car and ate their meals therein and slept therein.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 168-186; Dec. Dig. § 72.

For other definitions, see Words and Phrases, First and Second Series, Private Residence.]

Appeal from Lee County Court; John H. Tate, Judge.

Miguel Garcia was convicted of gaming, and he appeals. Affirmed.

Wm. O. Bowers, of Giddings, for appellant. P. J. Alexander, Co. Atty., of Giddings, and O. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of gaming, and the lowest fine imposed.

The evidence, without question, is amply sufficient to sustain the conviction. Appellant contends that the evidence shows that where the gaming occurred was a private residence occupied by a family, and hence the conviction cannot be sustained. We think his contention is untenable. On this issue the evidence shows that appellant and several other Mexicans were caught gambling with cards in a railroad box car without wheels and set flat on the ground. The section boss testified that he and his family occupied two such cars, where they ate, slept, and lived; that where these Mexicans, including appellant, were caught gambling, was in another box car 250 feet distant from the cars occupied by him and his family; that

all those Mexicans except one were bachelors; that one was a married man, but his wife was in Mexico; that these Mexicans did their own cooking in the car occupied by them and ate their meals therein and also slept therein; that none of them ate or slept or had their meals prepared in the cars occupied by him and his family.

We had occasion, in the recent cases of Stallings v. State, 170 S. W. 159, and Sloan v. State, 170 S. W. 153, to discuss the statute and what in contemplation of our present law was a private residence occupied by a family in which card playing could be indulged without violating the law. We also cited and discussed many cases decided by this court. Under the statute as it now is and said decisions, we think that the car where appellant and his associates were gambling was not a "private residence" occupied by a family, nor was it the private residence of the section foreman and his family. See, also, Fondren v. State, 179 S. W. 1170, this day decided. We think the case of Hipp v. State, cited by appellant, 45 Tex. Cr. R. 200, 75 S. W. 28, 62 L. R. A. 973, is not applicable to this case.

The judgment is affirmed.

COLEMAN v. STATE. (No. 3743.)

(Court of Criminal Appeals of Texas. Oct. 27, 1915. State's Rehearing Denied Nov. 24, 1915.)

1. CRIMINAL LAW § 595—CONTINUANCE—ABANDONMENT AFTER SEDUCTION AND MARRIAGE—EVIDENCE—MATERIALITY.

In a prosecution for abandonment after seduction and marriage, the testimony of a witness, on account of whose absence a continuance was sought, and who if present would testify that before the alleged seduction he saw prosecutrix and a person other than defendant in the act of sexual intercourse was material on the issue of the virtue and chastity of prosecutrix, especially where there was evidence of other improper conduct by prosecutrix.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 1323-1327; Dec. Dig. § 595.]

2. CRIMINAL LAW § 598—DENIAL OF CONTINUANCE—DILIGENCE.

The denial, for lack of diligence, of a continuance in a criminal case because of the absence of a witness was erroneous, where it appeared that once before the witness had failed to attend court, and an attachment had been issued, and he had been placed under bond, after which he attended court regularly, and that when he failed to appear on the first day of the present term, defendant had other process issued to him, and it did not appear that, though the witness had left the state, defendant knew, or had reason to believe, that he had gone.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.]

3. HUSBAND AND WIFE § 313—ABANDONMENT AFTER SEDUCTION AND MARRIAGE—EVIDENCE.

Where, in a prosecution for abandonment after seduction and marriage, the evidence showed that both prosecutrix and defendant had dark hair and were of dark complexion, that

prosecutrix's baby and uncle both had red hair and were of ruddy complexion, and that the uncle had for several years prior to the alleged seduction made his home with the father of prosecutrix, it was error to exclude the testimony of a witness that on a certain occasion he saw a woman, whom he believed from facts stated to be prosecutrix, sitting in the uncle's lap.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1110; Dec. Dig. ¶313.]

4. HUSBAND AND WIFE ¶302 — ABANDONMENT AFTER SEDUCTION AND MARRIAGE—OFFENSE.

It is not essential to the right to prosecute for abandonment after seduction and marriage that the marriage shall have taken place after indictment, but is sufficient that a complaint charging seduction shall have been filed, a warrant issued, and defendant arrested.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1100; Dec. Dig. ¶302.]

5. HUSBAND AND WIFE ¶313 — ABANDONMENT AFTER SEDUCTION AND MARRIAGE—EVIDENCE.

In a prosecution for abandonment after seduction and marriage, defendant's evidence that he married prosecutrix under duress, and not voluntarily, and that he immediately brought suit to annul the marriage, alleging duress as grounds for annulment, was admissible to rebut the presumption arising from the marriage that he was guilty of seduction.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1110; Dec. Dig. ¶313.]

6. HUSBAND AND WIFE ¶313 — ABANDONMENT AFTER SEDUCTION AND MARRIAGE—EVIDENCE—DIVORCE DECREE.

In a prosecution for abandonment after seduction and marriage, a decree, divorcing defendant from prosecutrix, not being binding on the state, was not admissible in evidence.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1110; Dec. Dig. ¶313.]

Appeal from District Court, Bowie County; H. F. O'Neal, Judge.

Bascom Coleman was convicted of abandonment after seduction and marriage, and appeals. Reversed and remanded.

J. S. Crumpton, of New Boston, for appellant. Hugh Carney, Dist. Atty., of Atlanta, and C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of abandonment after seduction and marriage and his punishment assessed at 6 years' confinement in the state penitentiary.

The testimony of appellant would show that he admitted having sexual intercourse with the young lady on a number of different occasions, but he most emphatically denies it was under promise of marriage, or that he was ever engaged to marry her. This is the second appeal in this case, the opinion on the former appeal being reported in 71 Tex. Cr. R. 20, 158 S. W. 1137. As the opinion in that case states the evidence rather fully, we deem it necessary to state only that portion of the testimony rendered necessary in passing on the various bills of exception.

[1] The first bill relates to the court overruling his second application for a continu-

ance. This continuance was sought on account of the absence of W. S. Strain. He states the witness would swear if present that:

"In July, 1911, while on the road leading from Oak Grove to the house of prosecutrix, he observed prosecutrix and one whom he took to be Put Bodwell in the act of sexual intercourse."

This is prior to the time that prosecutrix says appellant led her astray under a promise of marriage. The materiality of this testimony is made more apparent by other testimony in the record.

Emmett Phillips testified he went with the prosecutrix, prior to the date of the alleged seduction, to church and other places; that she permitted him to place his arms around her, hug, and kiss her. Wesley Hazlewood testified that prosecutrix had willingly permitted him to kiss her on divers and sundry occasions. J. R. Morrison testified he had occasion to go to the home of prosecutrix to see her father, Mr. Burton; that no one else was at home except prosecutrix, and she was dressed in man's clothes, and pulled a razor out of her pocket; that he asked her if she was fixing to shave, and she merely laughed; that on another occasion he was driving by the home of prosecutrix, and he saw her dressed in men's clothes sitting astride of the water shelf on the gallery, in about 15 steps of the public road, and in plain view of the road. Morrison says his daughters were with him on this latter occasion, and one of them remarked, "I will swear to God, Hattie," when Hattie, prosecutrix, replied, "I am not ashamed;" that he saw her dressed in men's clothes on other occasions. This all occurred prior to the alleged seduction, and one of the contentions of appellant is that the prosecutrix was not a chaste and virtuous woman at the time of and prior to the date on which he was charged with this offense. At this date Miss Hattie was 19 or 20 years of age. If he could have followed this testimony with the testimony of the witness Strain, it is readily seen how material it would have been on the issue of the young lady's virtue and chastity.

[2] The court overruled the application on account of lack of diligence. It appears from the record that once before the witness had failed to attend court, and an attachment was issued and he was placed under bond and, after being placed under bond, had attended court regularly, and was present at the term of court immediately preceding the one at which the trial was had. On the first day of this term of court, the witness failing to appear, appellant at once had other process issued for him to Bowie county. In the contest to the motion, it is shown that since the last term of court, the witness Strain had gone to Oklahoma. If appellant knew, or was shown to have been made aware, of any fact that would put him upon inquiry whereby he could have ascertained that the

witness had gone to Oklahoma, then certainly he would have been lacking in diligence. While the fact is shown that the witness had perhaps gone to Oklahoma at the time the last process was issued at the beginning of this term of the court, yet there is nothing in the record that would suggest that appellant was aware of the fact, or in possession of any fact that would put him upon inquiry so as to ascertain that fact. He had had the witness placed under bond to attend court, the witness had attended the two terms immediately preceding the term of the court, and we think the continuance should have been granted; for it is shown that upon a former occasion the witness had testified to the statement appellant states he desired to prove by him, which was upon a most material issue in the case, and, if true, would entitle appellant to an acquittal.

[3] On the trial of the case, while the prosecutrix was testifying, appellant proved by her that the color of her hair was black or dark; that she was dark-skinned, and that appellant also had dark hair and was of dark complexion. He then proved by her that the baby, which at the time of this trial was between 2 and 3 years old, had red hair and was of light or ruddy complexion, and was freckled. He also proved that Bud Wolfe was red-haired and had a ruddy complexion, and was making the home of the father of prosecutrix his home at the time of and for several years prior to the alleged seduction; that she was about 20 years old at the time, and that Bud Wolfe was about 24 years of age; that he was her uncle. After making this proof he called G. C. Sargent as a witness, who, if he had been permitted, would have testified:

"That he had occasion to stop in front of the home of the parents of the prosecutrix after night during the year 1911, and that he looked through a window in said home and saw Bud Wolfe, a man whom he recognized. Later a woman came by and the said Wolfe caught hold of her and pulled her down in his lap. That the witness was well acquainted with the Burton family. That he knew that there were only two grown women that resided on said place, to wit, the prosecutrix and her mother. That he knew that it was not her mother, and that, taking the size and features and because of his acquaintance with the prosecutrix, he took it to be she that was sitting in the lap of the said Wolfe, and that to the best of his knowledge, it was prosecutrix that he saw in the lap of the said Bud Wolfe."

The court erred in sustaining objection to this testimony. The fact that Bud Wolfe was her uncle would go to the weight to be given the testimony and not its admissibility, and whether or not his testimony sufficiently identified the prosecutrix in this case as the woman sitting in his lap would also be upon the weight to be given it, and not go to its admissibility. He states facts that, if true, would render it morally certain that it was the prosecutrix in Wolfe's lap on that night.

[4] Appellant seems to contend that the

marriage must have taken place after indictment found before a prosecution could be maintained for abandonment after seduction and marriage. This is not a correct construction of the statute. A prosecution is begun by the filing of the complaint charging him with the offense. It is the offer of marriage that must take place before pleading to an indictment for the offense. The facts in this case would show that a complaint was filed, charging appellant with seduction, warrant was issued, and he was arrested. If those steps are taken, and appellant married her to avoid a prosecution for seduction, and then abandoned her without cause, he could be prosecuted for abandonment after seduction and marriage, and the bills raising these questions present no error.

[5] However, when it is proven that a complaint has been filed; that appellant was arrested thereon; that he subsequently married the girl, and the prosecution for seduction dismissed, this evidence would have a tendency to prove him guilty of having seduced the girl, and if appellant desired to introduce testimony that, instead of marrying the girl voluntarily, he was forced and compelled to do so, he should be permitted to do so to rebut the presumption arising from the marriage that he was guilty of seduction. The state's testimony would have appellant admitting his guilt to the father, and voluntarily marrying the girl after prosecution was begun, and then abandoning her. The appellant contends that he did not admit his guilt to the father or any other person; that he told the father he had never been engaged to the prosecutrix, and refused to accompany the father to his home, and that he was then arrested; that by the acts and conduct of prosecutrix's father and brothers, Bud Wolfe, and other relations he was forced to marry the girl to avoid trouble; that immediately after the marriage (the first opportunity) he left, and almost immediately brought suit to annul the marriage, alleging duress as grounds why the marriage should be declared void. These facts and all evidence bearing thereon should be admitted in evidence on another trial.

[6] But the court did not err in excluding the judgment decreeing a divorce. That judgment would not be binding upon the state in its prosecution. It was not a party to the divorce suit, and could not be bound thereby. Greenleaf on Evidence, vol. 1, page 581, lays down the following rule:

"Upon the foregoing principles it is obvious that as a general rule a verdict and judgment in a criminal case, though admissible to establish the fact of the mere rendition of the judgment, cannot be given in evidence in a civil action to establish the facts on which it was rendered. If the defendant was convicted it might have been on evidence of the very plaintiff in the civil action; and, if he was acquitted, it may have been by collusion with the prosecutor. And beside this, and upon more general grounds, there is no mutuality. The facts are not the same, neither are the rules or decisions

of the court in proceeding the same. The defendant could not avail himself in the criminal trial of any admissions of the plaintiff in the civil action, and, on the other hand, the jury in the civil action must decide upon the mere preponderance of the evidence, whereas in a criminal conviction they must be satisfied as to a party's guilt beyond a reasonable doubt. The same principles render a judgment in a civil action inadmissible in a criminal prosecution" (citing authorities).

We do not deem it necessary to discuss more particularly all the bills in regard to this matter, as the above general expression will indicate to the trial court what testimony is admissible. The judgment of the civil court has no binding effect upon the criminal court, and should not be admitted.

In other bills appellant complains of questions propounded by the trial judge, and remarks made by him during the trial of the case. We are satisfied this will not occur on another trial, and therefore do not deem it necessary to discuss the bills presenting this matter.

The judgment is reversed, and the cause remanded.

WORD v. STATE. (No. 3781.)

(Court of Criminal Appeals of Texas. Nov. 3, 1915.)

1. CRIMINAL LAW § 589 — CONTINUANCE — GROUNDS.

Denial of continuance was not erroneous where all the witnesses were present, and accused was not deprived of any testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1315, 1319; Dec. Dig. § 589.]

2. CRIMINAL LAW § 925 — NEW TRIAL — GROUNDS—MISCONDUCT OF JURORS.

That the jurors during the trial discussed accused's conduct in walking across the courtroom in an awkward, uncouth manner during the trial, and in laughing and smiling at jurors in such a way as to call forth a discussion by the jurors, was not ground for new trial in the absence of any showing that accused was not guilty of the conduct commented on by the jurors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2238-2247, 2250; Dec. Dig. § 925.]

3. CRIMINAL LAW § 956 — NEW TRIAL — GROUNDS—MISCONDUCT OF JURORS.

That a juror, after the conviction of accused, stated to his counsel that half of the jurors said that, but for facts injected into the case as to the shooting by accused of a third person, accused would have been acquitted, unaccompanied by any affidavit of accused's counsel or of the juror, did not justify granting a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2273-2391; Dec. Dig. § 956.]

4. CRIMINAL LAW § 1111—BILL OF EXCEPTIONS—BYSTANDERS' BILL.

Where a bill of exceptions as qualified by the court and a bystander's bill are filed, the court must consider the questions raised by the bystander's bill.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2894-2896; Dec. Dig. § 1111.]

5. WITNESSES § 376 — CROSS-EXAMINATION — DIRECT EXAMINATION.

Where a state's witness testified that accused committed the crime charged, and on cross-examination accused sought to show that the witness was taking an active interest in the case, it was not reversible error for the court to permit the state on redirect examination to show that the witness was interested in the case because accused had shot the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836-839, 841, 843; Dec. Dig. § 376.]

6. CRIMINAL LAW § 1166½ — REMARKS OF PRESIDING JUDGE.

Where the court, in overruling an objection to a question asked a witness, stated that the evidence to be elicited was admissible to show motive of the witness, but on the request of accused directed the jury not to consider either the question or the answer, the remark of the court was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1166½.]

Appeal from District Court, Anderson County; John S. Prince, Judge.

Hugh Word was convicted of murder, and he appeals. Affirmed.

J. E. Rose, of Palestine, for appellant.
C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of assault to murder, and his punishment assessed at five years' confinement in the penitentiary.

[1] Appellant contends that the court should have continued the cause for the following reasons: Appellant was in jail, and had two criminal charges against him. Appellant's counsel states that in a conversation with the court and the district attorney the court had stated he would call the first-numbered case for trial, and if appellant was acquitted in that case, and would make bond in the second case, it could be continued. The court says that all that was said was:

"If appellant was not convicted in the first case, and would make bond, he would not require so strict a showing, but, if no bond was made, he would not leave him in jail untried, unless a strict showing for continuance was made."

Appellant was acquitted of the first offense on July 1st. On the 2d of July the court states: He called this case for trial in the morning. Appellant's counsel not being present, he had him called, and sent men to search for him. Not being able to locate appellant's counsel, he postponed the case until 2:30 in the afternoon. At that hour he again called the case for trial, and had the jurors take a seat in the jury box. That at this time appellant's counsel came in with a bond and asked that the case be continued. That he declined to do so unless a showing was made. All witnesses being present, and appellant not contending that he was depriv-

ed of any testimony, the court did not err in not granting a continuance.

[2] Appellant contends that the court should have granted a new trial because his counsel alleges that after the trial Mr. Ben D. Jackson, one of the jurors, stated in his presence and hearing that some of the jurors discussed the fact "that defendant would walk across the courtroom in a very awkward, uncouth manner during the progress of the trial; that he would laugh and smile at various members of the jury in such a way as to call forth a discussion of these facts." There is no allegation that appellant was not guilty of such conduct, and if he was guilty of it, and the jurors commented on it, it would present no ground for a new trial.

[3] Appellant's counsel also says that Mr. Jackson told him "that half of the jury said that, but for the facts injected into the trial relative to the shooting of Ira Swanson, defendant would have been acquitted." Appellant's counsel does not attach his affidavit that such an occurrence took place, nor does he attach the affidavit of Mr. Jackson. As presented to us, we cannot say the court erred in the premises.

[4] Appellant also has a bill in the record in which he complains Ira Swanson, a witness for the state, on redirect examination, was asked the following question: "Isn't the reason that you are interested in this case is because that Hugh Word shot you four times because you were a witness against him in this trial?" Appellant says that before he could object the witness replied, "Yes;" that appellant did then and there object and except to such question and answer, when the court remarked: "I think it admissible to show motive." The court says he made no such remark, and, as qualified by him, would certainly present no error, but appellant, while filing the bill as qualified, also filed a bystander's bill, and the witnesses testify that the court did make the remark, and prove up the bill as presented by appellant; consequently we must consider it.

[5] The witness Ira Swanson was one of the witnesses for the state who testified that appellant shot Mattie Word, his former wife. In cross-examination of the witness appellant had sought to show that the witness was taking an active interest in the prosecution, and was therefore calculated to be biased in his testimony; and under such circumstances, if the proceedings took place, as contended in the bystander's bill, it would present no reversible error.

[6] However, we will add here that, in addition to this bystander's bill, appellant, in the record, filed the stenographer's report, and in it appears the following:

"State: Isn't it because you are interested in this case is that this same negro shot you four

times after he shot Mattie Word? Witness: Ans. Yes. Defendant: We ask the court to instruct the jury not to consider either the question or the answer. Court: Yes; the jury will not consider either the question or the answer just put and answered by the witness."

It is thus seen that the question and answer were properly excluded at the time, and if the court did make the remark, and yet, when appellant's counsel requested the exclusion of the question and answer, promptly instructed the jury not to consider either, no error is shown.

After a careful consideration of each and every question presented by the record, we are of the opinion there is nothing presented that would justify a reversal of the case.

The judgment is affirmed.

MAY v. STATE. (No. 3726.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915. Rehearing Denied Nov. 24, 1915.)

1. CRIMINAL LAW §598 — CONTINUANCE — GROUNDS—DUE DILIGENCE.

In a prosecution for seduction, it was not error to refuse a continuance on the grounds of absence of witnesses, where it appeared that defendant was indicted in November, 1913, arrested in February, 1915, and trial set for May, 1915, and defendant did not attempt to subpoena the absent witness until the day before his trial, since, under such circumstances, defendant failed to show that he had exercised due diligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.]

2. CRIMINAL LAW §608 — CONTINUANCE — GROUNDS—AFFIDAVITS.

It was not error to refuse a continuance in prosecution for seduction, where defendant failed to produce any affidavits that the absent witnesses would testify as stated in his motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1350, 1364-1368; Dec. Dig. § 608.]

3. CRIMINAL LAW §956 — CONTINUANCE — DISCRETION.

Since a continuance in a criminal case is not a matter of right, but is within the sound discretion of the trial court, it was not error to refuse a continuance and to overrule a motion for new trial as soon as filed, where defendant had two days after the verdict in which he could secure the affidavits of absent witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2373-2391; Dec. Dig. § 956.]

Appeal from District Court, Callahan County; Thomas L. Blanton, Judge.

Will P. May was convicted of seduction, and he appeals. Affirmed.

Critz & Woodard, of Coleman, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted, charged with seduction, and when tried was convicted, and his punishment assessed at two years' confinement in the penitentiary.

[1] Appellant's counsel in his brief and oral argument before this court admitted that none of the bills of exception in the record as qualified by the court, present error, unless it be the one in which he excepted to the action of the court in overruling his first application for a continuance. He earnestly insists that this bill presents error, and has filed an able brief on that question alone, and if diligence was shown and an allegation that the witnesses would testify as stated, perhaps it would present error. But does the application show that diligence required under the law? Appellant admits he and Miss Effie Quillin had several acts of carnal intercourse in July and August, 1912. They both fix the first date as July 5, 1912, and that the last act was perhaps the latter part of August, 1912, when appellant left Callahan county. By the testimony of both of them it is reasonably certain that he is the father of her baby, born May 7, 1913. The grand jury of Callahan county indicted appellant November 13, 1913. The sheriff of Callahan county did not locate appellant until in February, 1915, when he was arrested in Coleman county, and gave bond for his appearance in court in Callahan county in May, 1915. While the state contends he was a fugitive from justice, appellant contends that he had never been out of the state, did not know he had been indicted until he was arrested, and was not then and had not been avoiding arrest. And it may be that his contention is correct. But it is apparent he was arrested in February, and while he says he did not then know he was indicted, and thought that only a complaint had been filed against him, the slightest diligence would have disclosed that an indictment had been returned by the grand jury and was pending against him. In fact, the bond he signed would have so informed him if he had read it. Notwithstanding he was arrested in February, he apparently made no preparation for his trial until he went to Callahan county in May, and did not have the subpoena issued for the absent witness until the evening before his case was called for trial next morning. It is true he says he was not made aware of the facts he expects to prove by the witnesses until that day, but if he had used any diligence or effort, is it not reasonable to presume that he could have ascertained such facts earlier if he had tried? At least the record does not disclose any effort on his part to learn about such testimony or witnesses.

[2] Again he does not pretend to have any personal knowledge that the witnesses would testify to the facts he states. He says some one informed him that the witnesses would so testify in a casual conversation, without giving the name of his informant. Attached to his motion for a new trial is no affidavit of the witnesses that they, or either of them,

would so testify; no affidavit of the person who told him in a casual conversation they would so testify is attached, stating they would so testify. So it is made apparent that appellant did not know they would so testify, does not state they would so testify, but states specifically he merely has been so informed, in a casual conversation, without giving the name of his informant. This is too vague and indefinite. In fact, the attendance of one of the witnesses whom he says he was informed in the casual conversation would testify that the reputation of Miss Quillin for virtue and chastity was bad was secured, and he refused and failed to so testify, thus evidencing that the information appellant received in the casual conversation was not very reliable.

[3] Appellant says the trial court overruled his motion for a new trial as soon as filed, and he had no opportunity to secure the affidavits of the witnesses. He had two whole days after verdict in which to file a motion for a new trial, and if he had taken this time, if the witnesses were in the county, he could have secured the affidavits, if they would so testify, before filing his motion. Or if he had not the means to make the trip, he could, in his motion, have set up that fact, and asked that process be issued for the witnesses, and that they be heard on the motion. Had he done this, doubtless the court would have granted such prayer, or if the court had not done so, it would have shown an effort on the part of appellant and faith in what he had been informed in the casual conversation they would testify. He did not do this, and we have no information they would so testify if a new trial was granted. Appellant does not pretend to know that they would do so, and apparently does not know the name of the person who informed him the witnesses would so testify, because he does not give it in his application for a continuance, nor in the motion for a new trial. If there was any evidence that the witnesses would so testify, there would be merit perhaps in appellant's contention, but as the record presents the question, it is too indefinite for us to hold that the trial court abused his discretion in overruling the application for continuance, and the motion for new trial based on that ground. A continuance is no longer, under our law, a matter of right, but is addressed to the sound discretion of the trial judge; and, when we are asked to review this discretion, it ought to be made apparent by the record that the witnesses would testify as alleged, or at least that appellant had good reason to believe that they would so testify. The materiality of the testimony is not questioned, for if the witnesses would so testify, the testimony would be upon a material issue in the case, but the record discloses that appellant does not know they would so testify, and is relying upon the statement of another

person whom he casually met, and the affidavit of such person is not attached to the motion.

The judgment is affirmed.

BRICE v. STATE. (No. 3784.)

(Court of Criminal Appeals of Texas. Nov. 3, 1915.)

1. CRIMINAL LAW — EVIDENCE — CONFESSIONS—CORPUS DELICTI.

While the confession of an accused may be used where the corpus delicti is established, yet it is inadmissible to establish the corpus delicti.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1225, 1226; Dec. Dig. 335.]

2. INTOXICATING LIQUORS — OFFENSES — PURSUING BUSINESS OF SELLING INTOXICANTS.

To warrant a conviction of pursuing the business of selling intoxicating liquor in local option territory, the state must prove at least two sales.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. 236.]

3. INTOXICATING LIQUORS — OFFENSES — BUSINESS OF SELLING INTOXICANTS IN LOCAL OPTION TERRITORY.

In a prosecution for pursuing the business of selling intoxicating liquors in local option territory, evidence held insufficient to warrant a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. 236.]

Appeal from District Court, Red River County; Ben H. Denton, Judge.

J. Brice was convicted of pursuing the occupation of selling intoxicating liquors in local option territory, and he appeals. Reversed and remanded.

Travis T. Thompson, of Clarksville, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of pursuing the occupation of selling intoxicating liquors in local option territory, his punishment being assessed at two years' confinement in the penitentiary.

The indictment, after alleging the pursuing of the business, set out the names of two parties to whom sales were made, to wit, Will Williams and J. T. Kilgore. Proof is reasonably certain as to the sale to Williams. Kilgore was not produced as a witness. Appellant made a confession to the district attorney after he had testified before the grand jury. The confession may be treated as indicating that he had sold whisky to J. T. Kilgore. It is rather indefinite. He also mentioned the names of two other parties who were not named in the indictment. This is the state's case outside of the fact that defendant is shown to have been connected with a shipment of whisky, by one of the witnesses; that is, that he had, on the oc-

casion when Will Williams bought the whisky, a paper box that would carry twelve bottles of whisky. It is not stated, however, that there were twelve bottles in it at the time that Williams bought this whisky. Williams testified that he did not see any other whisky there at the time he bought it. He says there was a box there, but he did not see any whisky. All that he saw was a pint of whisky that he bought of defendant for which he paid 75 cents. The sheriff testified that he recovered or came in possession of some intoxicating liquors in a pasteboard box, a twelve-quart case. This was on the 31st of May, and he found this whisky or got it at the old jail wagon yard in Clarksville, and his recollection was that there were five quarts of whisky in the box, and some old whisky glasses. This witness does not connect the defendant with that pasteboard box, nor does he undertake to do so. It may or not have belonged to appellant. The confession made to Mr. Lipscomb was to the effect that appellant got a shipment of twelve quarts of whisky on 31st of May, and disposed of all but five; that he "sold Will Williams one pint of the whisky; and let J. T. Kilgore have one pint of the whisky; and Collier Hemingway got one quart of the whisky; and Rufus Davis got one quart of the whisky; and I sold three or four other different parties one quart each of the whisky. I didn't know the parties to whom I sold."

[1-3] Now this confession does not aid the state particularly in its case, even if it was admissible testimony. The confession of a defendant may be used where corpus delicti is shown to connect the defendant or party making the confession with that corpus delicti, and it has been held that the confession may be used to aid in making out the corpus delicti, as in the Kugadt Case, 38 Tex. Cr. R. 694, 44 S. W. 989, and for other authorities see Branch's Crim. Law, § 235. It has been held that the confession alone cannot prove the crime. The corpus delicti must be proved, and the confession may be used to connect the party with it. This has been thoroughly settled in a numerous line of cases in Texas. Hill v. State, 11 Tex. App. 132, is one of the earlier cases. Confession alone is insufficient to support a conviction. See Branch's Crim. Law, § 235.

Take the confession of appellant out of the case, and there is no testimony to show that he sold whisky to anybody except Williams. The corpus delicti in this case is not shown until evidence of a sale has been shown by somebody. The same may be said as to the other parties named in the confession. They, however, are not named in the indictment; but if they had been the state could not prove the corpus delicti or crime by the confession. There must be evidence independent of the confession. Such we un-

derstand to be the unbroken line of authority in Texas. The Hill Case, *supra*, was followed in two cases reported in 40 Tex. Cr. R. (White v. State, 40 Tex. Cr. R. 370, 50 S. W. 705, and Sullivan v. State, 40 Tex. Cr. R. 639, 51 S. W. 375); also in one case in 50 Tex. Cr. R. (Dunlap v. State, 50 Tex. Cr. R. 504, 98 S. W. 845). We therefore are of opinion the state has not made out its case. The state must prove, not only the following of the business, but must prove at least two sales, and this must be done according to the rules of evidence and law, and as a prerequisite to that it must be shown that the party was following that business, and in pursuing that business made two sales; otherwise the state has not made a case.

The facts do not justify this conviction as presented by this record, and the judgment therefore will be reversed, and the cause remanded.

WELBORN v. STATE. (No. 3739.)

(Court of Criminal Appeals of Texas. Nov. 3, 1915.)

1. HOMICIDE \S 116—SELF-DEFENSE.

Where defendant shot and killed decedent when the latter attacked him, because, from his own viewpoint, he was in danger of death or serious bodily injury, he had a right to shoot until he relieved himself of the impending danger, whether other parties, friends of the decedent, had anything to do with the trouble or not, or whenever they came into the difficulty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 158-163; Dec. Dig. \S 116.]

2. HOMICIDE \S 110—SELF-DEFENSE.

Where defendant, in a prosecution for manslaughter, was down, and decedent and his friends were beating him, when a pistol was fired, and defendant was shot, he had the right of self-defense to shoot to defend himself from the attack of all.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 140-142; Dec. Dig. \S 110.]

3. HOMICIDE \S 300—TRIAL—INSTRUCTION—SELF-DEFENSE.

Defendant was convicted of manslaughter. His evidence tended to show that since he had been charged with killing decedent's father some years before there had been bad blood between him and decedent, and that, when he attended a singing school, decedent, while walking by him, struck him in the face, precipitating a fight, in which decedent's friends joined, rendering it necessary for defendant to shoot in self-defense. The state's evidence tended, on the contrary, to show that defendant struck decedent in the face and shot him before he himself was attacked. The court charged in part that, if decedent and his friends had formed a conspiracy to kill defendant, or seriously injure him, and began the difficulty, or if it reasonably appeared to defendant they were about to begin the difficulty, then defendant had the right to make the attack and kill the decedent, but that, if the decedent began the difficulty by assaulting defendant with his fist, and defendant shot him before any one else interfered he was guilty of manslaughter, while if friends, acting with decedent, attacked defendant, or, from his standpoint, it reasonably appeared to him that they were about to attack him, and in view of all the circumstances, including decedent's assault, he killed decedent, he was not guilty. Defendant

contended that such charge was erroneous, as limiting his right to defend himself against an attack of the decedent and others only if they had formed a conspiracy to injure him. He also objected that the portion of the charge relative to an assault on defendant by decedent with his fist deprived defendant of any right to defend himself against an unlawful attack upon him by decedent alone. *Held*, that such charge was erroneous as indicated.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 614, 616-620, 622-630; Dec. Dig. \S 300.]

4. HOMICIDE \S 116—SELF-DEFENSE.

It is defendant's viewpoint, and not the jury's, as they subsequently see a homicide, from which the appearance of matters, as giving defendant reasonable cause to believe that he was in danger of injury, is to be estimated.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 158-163; Dec. Dig. \S 116.]

Appeal from District Court, Houston County; John S. Prince, Judge.

Dick Welborn was convicted of manslaughter, and he appeals. Reversed, and cause remanded.

C. McClain, John I. Moore, of Crockett, and N. B. Morris, of Palestine, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was allotted four years in the penitentiary for manslaughter.

In a general way, without being prolix, the evidence shows that some 15 years or such matter before this unfortunate difficulty appellant was charged with killing the father of the deceased. For this he was acquitted, and on this trial he testified he did not kill the father of the deceased, Marshall English; that he did not even have a fight with him. The theory of the state was that, appellant having been indicted for the killing of the father of Marshall English, and because perhaps he may have been guilty of that offense, he therefore wanted to kill, and did kill, Marshall English. A Mr. Plunket was teaching a singing school in the community where the Englishs resided, and also in the community where the defendant resided. These places were something like seven miles apart. Just before the killing Plunket was in defendant's community, and invited the people there generally, including the defendant and his family, to attend the singing school in the English community on a particular day, which invitation defendant and his family accepted, and attended that meeting. It seems to have been the closing exercises of that singing school. There were several members of the English family present at the time of the homicide, but were not members of either singing school, nor had they attended either. When appellant was on his way to the singing school, where the difficulty occurred, there is evidence tending to show that one of the English boys saw appellant and his family. The singing school

went on without any trouble until some time after the dinner or noon hour. Everything was pleasant and quiet until about 4 o'clock or a little thereafter. The singing school adjourned. Marshall English and his friends and kinsfolk were in and about the school-house, mainly dressed in their working clothes. It is shown they were about the doors and windows, and the theory of the defendant was they were locating appellant, of all of which he seems to have been ignorant. After the benediction was pronounced, and while appellant was near the rostrum, Marshall English and one of his companions entered the side door, and the difficulty immediately ensued. The evidence is in conflict as to who began this difficulty. Appellant and his witnesses say that Marshall English caught appellant by the collar and began beating him in the face, crowded him back on the rostrum, threw him to the floor, got on him, and another of the English family friends came into the front door and shot appellant while the others were yet on him. The state's witnesses contend that appellant began the difficulty by striking Marshall English in the face, and that appellant shot English before anybody shot him. The contradictions and conflicts of the testimony of this case are rather peculiar. The state's theory, in addition to what has been above stated, was that appellant was standing in the house and Marshall English, and one of his friends entered and passed near where he was, and appellant struck him; that Marshall English, the deceased, then struck him, and a fight ensued between them, in which appellant pushed English back to the rostrum, and during the trouble shot him twice, once in the leg, and once in the body. Appellant's side of the case was that he was standing at the designated spot, when deceased and a friend entered, and deceased struck him, and the fight ensued, and that they pushed him back against the rostrum and onto it, and had him down and were beating him; that there were four, five, or six of the Englishes and their friends engaged in the difficulty, and Marshall English was on him. Some of the testimony goes to show that Marshall English, when shot, was standing up bending down over appellant and beating him. Appellant says in this condition that he was shot by one of them, and that he immediately got his pistol out and fired two shots rapidly. The evidence for the state controverts this, as before stated, and shows all of these people were not on him. One of the state's witnesses, however, testified that he ran up, jerked his pistol, and struck appellant over the head once or twice as hard as he could hit him, and that the pistol, by force of the jars, was discharged, and, he supposes, struck appellant. There is a great deal of testimony as to the relative size of the parties, but it may be fairly stated that deceased was a larger man and stronger and much younger than appel-

lant, the deceased being 25 to 28 years of age, and appellant about 50, and weighed 128 pounds, while deceased weighed considerably more.

Taking into consideration all these conflicts as to the relative size of the parties and the number of parties engaged in the difficulty at the time of the homicide, there are some facts that might be mentioned under the evidence still more peculiar. The clothing worn by appellant—shirt and undershirt—were introduced in evidence before the jury to show the position of the holes which corresponded with the holes in appellant's body as to where he was shot. His wife testified that she looked at him and examined him, and saw the doctor examine him. She says he was so bloody she did not recognize him at once, and did not know her husband was engaged in a difficulty until she noticed his clothing, and then she discovered the fact that it was her husband. She, with quite a lot of other witnesses, testified that the first gun fired was from the English party, and that the other shots followed from the man on the floor, who she afterwards ascertained to be her husband; that immediately upon ascertaining it was her husband she asked him what was the matter. His reply was that "Ben James and Marshall English have tried to kill me." I said, "Mercy sakes, what is the matter?" and he said, "Ben James and Marshall English have tried to kill me." Ben James is the party who struck with the pistol. She describes the wounds on appellant, and said she saw the doctor probe and examine the bullet wounds; one bullet entered his chin, went through his jaw, and came out through his lip; that it came through his mouth and scorched his lip and tongue; that his tongue was burned. The other bullet entered the left side right at the waist line, and "came out by the breast." The doctor probed for the bullet, and found that it went out that way. In further describing the wound, she said she found the hole in the shirt and in the undershirt, and the position of the holes corresponded with the holes in his body. This shirt and undershirt were introduced before the jury. She says her husband was cut across the face with a knife; that it looked like it was nearly to the bone, and across the nose there was a knife cut. When the doctor dressed the bullet wounds, he also dressed these other wounds. He had a good many bruises on him, and it is also shown there were two scalp wounds on his head. One was closed with five stitches, and the other with three stitches. All the evidence indicates that he was very bloody when he emerged from the combat. The state introduced evidence and contended that the original fight occurred only between Marshall English and the defendant, and that Ben James and the others got into it subsequently, and disclaimed using a knife, and that after James struck appellant twice with his pistol on

the head, and the pistol was discharged in this way, that he then became engaged in a contest with the son of appellant over the pistol; so it will be observed that the testimony is very wide apart as to how this transaction occurred. If appellant was shot through the jaw and the mouth, as testified to, and in the side, he must have been shot twice; yet the bulk of this testimony shows there were but three shots fired. It is seldom the case that a record comes before this court where the evidence is so variant and conflicting by eyewitnesses as shown by this record. This much of the testimony is collated in order to bring in review the court's charge, exceptions thereto, and special instructions requested.

[1-3] There is no definition of manslaughter or murder contained in the charge of the court. The court informs the jury:

"The indictment embraces both murder and manslaughter."

Then follows this charge:

"If you believe from the evidence beyond a reasonable doubt that the defendant began the difficulty with the intention of killing the deceased, he would be guilty of murder, and if you believe he began it with an intention less than to take the life of deceased, he would be guilty of manslaughter. And if you believe, beyond a reasonable doubt, that he began the difficulty, but have a doubt as to his intentions, you will give him the benefit of the doubt and convict him of manslaughter, subject to the succeeding paragraph of this charge."

Then follows the punishment for murder and manslaughter. Then he gave what he termed in the charge "succeeding paragraph":

"If the deceased and others had formed a conspiracy to kill the defendant, or inflict upon him serious bodily harm, and began the difficulty, or if it reasonably appeared to the defendant that they were about to begin the difficulty, then the defendant had the right to make the attack, and to shoot and kill the deceased."

"If you believe that the deceased began the difficulty by making an assault on the defendant with his fist, and that before any one else interfered in the difficulty (if they did interfere in the difficulty) the defendant shot and killed deceased, he would be guilty of manslaughter, but if others, acting with deceased, attacked defendant, or from their acts and conduct, taken in connection with the assault by deceased, and all other circumstances in this case, it reasonably appeared to the defendant, viewing from his standpoint, that others were about to attack him, and under such circumstances he shot and killed deceased, then you will acquit him."

Then follows a charge on dying declaration.

Appellant asked the following special charge:

"In passing upon the issue of self-defense in this case, you must view the situation from the standpoint of the defendant alone, and from no other standpoint."

This was given. Another special charge was asked, which we suppose was given, as follows:

"If you believe from the testimony that the defendant was shot, and that it was done accidentally, you are instructed that, if he believed it was purposely done, he would have the same benefit of the law of self-defense under the

circumstances that he would have if it was done purposely."

Another charge was given at request of appellant which is as follows:

"If deceased attacked the defendant, and was assaulting him so violently as to warrant in his mind a reasonable apprehension or fear of serious bodily harm, and, so fearing, he shot and killed the deceased to save himself from such serious bodily harm, then you will acquit the defendant, although you might find that no other person or persons were assaulting him at the time he fired the fatal shot."

He asked another special charge, which was refused, as follows:

"The defendant's perfect right of self-defense does not depend upon an actual conspiracy on the part of the deceased and others to inflict upon him serious bodily harm, but if he believed at the time that he was in danger of serious bodily harm from any one or more, viewing the case from his standpoint, as it appeared to him at the time, then he would have a right to anticipate such attack and act in his own defense, and, if he did so, and in the difficulty ensuing killed the deceased, or if you have a reasonable doubt thereof, then you will acquit him."

One objection to the charge at the time it was given, before being read to the jury, was to that part of the charge quoted above which is denominated in the previous portion of this opinion as the "succeeding paragraph." The objection was that it limits the defendant's right to defend himself against an attack of the deceased and others if they had formed a conspiracy to kill or inflict serious bodily harm upon him, because said charge limits the defendant's right of self-defense to an attack not by the deceased alone, but by the deceased and others, and that, too, after they had formed a conspiracy to do serious bodily harm to him or kill him, whereas under the law he would have the right to defend himself against the deceased or against the deceased and others whether they had formed a conspiracy to injure him or not, and because said charge limits his right of self-defense under the circumstances of this case. He also objected to that portion of the charge which instructed the jury, as already heretofore set out, "If you believe that the deceased began the difficulty by making an assault on the defendant with his fist, and that before any one else interfered in the difficulty," etc., he would be guilty of manslaughter, but if others, acting with deceased, attacked defendant, or from their acts and conduct, taken in connection with the assault by deceased, and all other circumstances in this case, it reasonably appeared to defendant, viewing from his standpoint, that others were about to attack him, then they would acquit. The objection urged to this charge was that it deprived defendant of any right to defend himself against an unlawful attack upon him by the deceased alone, while the evidence tended to show, and which would have been sustained as a fact, that the defendant was at the time of the difficulty over 50 years of age, and weighed about 128 pounds, whereas the deceased was

shown to have been at that time a robust, athletic young man about 28 years old, weighing about 155 to 160 pounds, and therefore able to inflict upon defendant serious bodily harm without the use of any weapons, and defendant contends that he should have the perfect right of self-defense against said deceased without being limited. The court qualifies this by stating that:

"The defendant was 49 years old, and weighed 128 pounds; that deceased was 28 years old, and weighed 150 or 160 pounds, was delicate, weak, and 'weasley,' but could walk without a stick or crutch. There was no proof that deceased was a man of superior strength to defendant."

He further qualifies it by stating that:

"The state's evidence showed that defendant and deceased were both on their feet, standing up, when the two fatal shots were fired; that defendant had been attacked by deceased and others beating him; also that still another had shot him; and that he then fired in self-defense. So there was no middle ground. Besides, this paragraph complained of was expressly modified by defendant's special charge No. 1."

There was another charge given by the court with reference to the deceased striking appellant with his fist, which is qualified by the judge in the same way. This charge informed the jury that, if the deceased began the difficulty by striking defendant with his fist, and that before any one else interfered in the difficulty the defendant shot and killed deceased, he would be guilty of manslaughter, but if others, acting with deceased, attacked defendant, or from their acts and conduct, taken in connection with the assault by deceased, and all other circumstances in the case, it reasonably appeared to the defendant, viewing it from his standpoint, that others were about to attack him, and under such circumstances he shot and killed deceased, he would not be guilty.

On account of the peculiar construction and wording of the charge given by the court, it has been deemed necessary to make a more detailed statement of these charges given and refused than would otherwise be required. It will be noticed that the first charge starts out upon the assumption that the defendant struck the deceased first; that, if defendant did it for the purpose of provoking a difficulty to kill, he would be guilty of murder; if not to kill, he would be guilty of manslaughter. There is no definition given of murder or manslaughter. So the remainder of the charge seems to be a confused statement, and not a clear enunciation of law as to the rights of the defendant if he killed the deceased Marshall English because he thought his life was in danger, or his body of serious bodily harm, independent of the acts of others. Nor is the charge clear as to the relation of the conspiracy phase of it to defendant's right. As has been heretofore noticed, it would be difficult to imagine a state of facts more confused and more in conflict than this record shows. Appellant's theory was that he was standing quietly smoking, and in this he is borne

out by much of the testimony, when deceased, Marshall English, approached him, or in passing by him struck him on the face, and some witnesses say on the neck. This brought about the difficulty. Marshall English, being somewhat stronger, more vigorous, and much younger, and having advantage of appellant, got him down on the floor and was beating him, and while in this condition there was a pistol fired, and appellant says he immediately fired two shots. If appellant killed the deceased, Marshall English, because, from his viewpoint of it, his life was in danger or his body of serious bodily injury, he had a right to shoot, and to shoot until he relieved himself of impending danger, whether the other parties had anything to do with the trouble or not, or when they came into the difficulty. But, be that as it may, he had a right to have this question of self-defense presented to the jury, from the acts and conduct and relation of himself to the deceased, and the deceased's relation to him from that standpoint. There is testimony also that enhances his views and may have impressed itself upon defendant's idea of environment that these parties were there to have trouble, and that Marshall English, the deceased, and others went in to bring it on, and the others to join in later, if necessary. If, anticipating this, he killed English before the others came into it, while he was in danger of serious bodily injury, he would have the perfect right of self-defense from this standpoint. If, as another phase of the testimony shows, while he was down, and they were beating him, a pistol fired, and he was shot, certainly he had the perfect right of self-defense from the attack of more than one. It was not definitely so charged to the jury, and his right of self-defense was limited in this respect. It is true if he killed to resist the acts of the conspirators, he would not be guilty, but defendant had a right to resist all danger of his life or serious bodily injury from the standpoint of English's attack under the circumstances of this case. He had a right to view it in the light of a conspiracy, and that Marshall English was to bring it on, and he had a right to kill him before all conspiring parties attacked him. His right of self-defense would be perfect if he was attacked by more than one of these parties under the circumstances already detailed. These matters were not submitted to the jury, as they should have been.

[4] The charge is not clear again as it might be with reference to defendant's attitude, viewed from his standpoint of the case. The keynote and controlling thought and central point in the question of self-defense is to be viewed from the standpoint of the defendant, not as the other side viewed it, but as defendant viewed it. Again, it is his viewpoint of it, and not the viewpoint of the jury as they see it subsequent to the homicide. Defendant has a right to have his

side submitted as he viewed it at the time of the transaction. He could not look at the transaction in the light of what might occur afterwards, nor could he look at it in any light of prior occurrences, unless those prior occurrences were in some way brought to his attention directly or indirectly. These are general and usually correctly stated rules. It is unnecessary to go over this case further. Enough has been said to indicate that the defendant must have the law applied to the facts of his case, and the jury must be given a true and correct criterion by which to decide his rights and his connection with these matters.

The judgment is reversed, and the cause remanded.

ARNOLD v. STATE. (No. 3669.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915. Rehearing Denied Nov. 17, 1915.)

1. WITNESSES \Leftrightarrow 337—ACCUSED AS WITNESS—IMPEACHMENT—PREVIOUS CHARGES—EVIDENCE.

In a prosecution for swindling, in which defendant testified on her own behalf, it was proper on cross-examination to question accused as to previous charges of swindling against her.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1113, 1129-1132, 1140-1142, 1146-1148; Dec. Dig. \Leftrightarrow 337.]

2. CRIMINAL LAW \Leftrightarrow 372—SWINDLING—SIMILAR TRANSACTIONS—EVIDENCE.

Where, in a prosecution against the operator of an employment agency for swindling, accused swore that she did not intend to swindle the prosecuting witness in the transaction with him, or any other persons with whom she had contracts to secure employment, the state could prove similar transactions with other parties about the same time which tended to show the intent of accused and her system of operating.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. \Leftrightarrow 372.]

3. CRIMINAL LAW \Leftrightarrow 447—SWINDLING—CONTRACT—MERGE—EVIDENCE.

The written contract whereby accused undertook to secure employment for the prosecuting witness on certain terms did not merge accused's representations thereunder so as to prevent the state from going behind the contract and showing the true facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1029-1031; Dec. Dig. \Leftrightarrow 447.]

4. FALSE PRETENSES \Leftrightarrow 49—EVIDENCE—SUFFICIENCY.

In a prosecution for swindling against the operator of an employment agency, evidence held sufficient to support a conviction.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. \Leftrightarrow 49.]

Appeal from Tarrant County Court; Jesse M. Brown, Judge.

Mrs. Pete Arnold was convicted of swindling, and she appeals. Affirmed.

Mays & Mays and John L. Poulter, both of Ft. Worth, for appellant. C. O. McDonald, Asst. Atty Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of swindling J. J. Brown, and her punishment assessed at a fine of \$300 and six months in jail.

We will give a summary of what the evidence, though contradictory in some respects, was amply sufficient to establish: On April 20, 1915, and before and after that, she was engaged in running an employment agency in Ft. Worth, and so advertised in the paper. Said Brown was a young man engaged in running dairies and feeding cattle, and was at the time feeding cattle at Corsicana. He saw her advertisement, and called and talked to her over long-distance phone, and told her his qualifications and experience and the position he wanted. She told him she had the very position he wanted waiting for him; that it was as manager of a large farm and dairy. They then agreed that he should go to Ft. Worth and see her about it the next day, which he did. She then repeated her representations to him, and again told him the job was waiting for him, and that the place was managing the farm and dairy where they were milking about 65 dairy cows and had about 1,500 acres planted in wheat; that the position would pay him about \$80 per month salary, and he would be furnished a house free. He asked her the name of the party and the location. She refused to divulge this to him until he should pay her \$10 in advance and sign one of her printed contracts. He told her that he could then pay her but \$5; that he had to have a little money left; and that he would pay her the other \$5 when he got the position. He then paid her \$5, signed one of her printed contracts, and asked her again who the person was who was going to employ him at the salary and terms and for the purpose she had represented. She then told him it was Mr. R. E. Smith at Sherman. She then showed him a letter from said Smith to her, but she had torn off the place and date of the letter. It had been written nearly a year before. At her instance he then read it, and saw from it that Mr. Smith had no such place as she had represented; she insisting that he had. He then declined to go to Sherman and see Smith without she should further communicate with him over the phone and know that he had the position for him that she represented he had. She phoned Smith and had a talk with him over the long-distance phone. In effect, Smith told her that he had no such position. Brown, after waiting a sufficient time for her to so communicate with Smith, went to see her again, and she told him that she had talked to Smith, and, in substance, Smith told her that he had such position, and for him to come on. He immediately went to see Smith at Sherman. Smith told him, and swore on this trial, that he had no dairy, and never had run a dairy; that he at that time milked only 6 or 7 cows for his own use, and that

was a greater number than he had ever milked before; that he wanted no one to manage his farm; he managed it himself, and declined to employ Brown for any such position as she had represented to him Smith then had for him. Brown was then out of money, and had to go to work there to raise sufficient funds to return to Ft. Worth, which he did, working for Smith at \$1.75 a day sawing cord wood with a bunch of negroes. He had to support himself out of the \$1.75 a day. He worked six days, got his money from Smith, and returned to Ft. Worth and demanded his money back, telling her what he had found out and done with Smith. She refused to repay him his money. He then prosecuted her first for the theft of the money. This court held that it did not amount to theft, but the offense might be swindling. 176 S. W. 159. Thereupon she was prosecuted in this case. The testimony authorized the jury to believe, and by their verdict they, in effect, did believe, that all of her said representations to Brown in order to get his money were false and known by her and not by him, to be so at the time and that he relied upon them, and was thereby induced to pay her his money, which she refused to refund.

[1] She testified on the trial. On cross-examination, for the purpose of impeaching her, the court permitted the state to ask her, and she answered, that she had theretofore been charged with swindling in 10 or 15 cases. Swindling is certainly an offense showing moral turpitude. This evidence was admissible, as has uniformly been held by this court in a large number of cases. Mr. Branch, in his Criminal Law (section 868), so states the rules to be, and collates a considerable number of cases to that effect.

[2] She swore that she did not intend to swindle Brown in the transaction she had with him, and that she did not intend to swindle any other person with whom she had made like contracts under substantially the same kind of representations she had made to Brown. Therefore the question of her intent in this transaction and her system in like transactions was material. The court therefore did not err in permitting the state to prove over her objections several other like transactions she had with different parties about the same time she had this transaction with Brown; for such testimony clearly tended to show what her intent was and the system she used in such transactions. This has been so uniformly decided in this state—and the text-books are all to the same effect—that it seems useless to again cite the authorities, but see Branch's Criminal Law, § 338, where he collates a large number of cases.

[3] The only other question appellant presents is her claim that the evidence is insufficient to sustain the verdict. Her contention and that of her attorneys on the trial

and in the lower court was, in substance, that the printed contract which she had Brown to sign at the time he paid her his money, in effect, merged all of her representations therein, and that the effect of the contract was that she did not represent to Brown that Smith would employ him to do the work and at the salary she had stated to him, but that it authorized her, within 30 days if Smith did not give him that position, to get him some other employment of a different or the same kind. We do not so understand the contract, nor that the state nor Brown would be conclusively bound thereby, and not permitted to show the true facts of the transaction. She herself, on cross-examination, testified that she wrote in the body of said contract, and herself signed it, thus: "It is agreed and understood that in the event this position is not accepted the money is returned."

And she testified that that was intended to vary the 30 days stipulation contained in the printed form, and that she meant to return Brown his money if he did not accept the position. Taking the printed signed contract and all the testimony together, it amply shows that she made the said representations in effect as Brown had testified she made them, and got his money on the faith that he would get the position from Smith she told him was waiting for him at the salary she represented, and a house free, and that, if he did not get that identical contract which she said Smith would make with him, he was then, and not in some other contingency, to get his money back. It is certain that he did not get the position; that Smith had no such position at all, nor at the salary she represented he would get.

[4] Her attorney who represented her in this court, but who did not in the court below, now contends that the evidence is insufficient to sustain the verdict on the additional ground, not made in the court below, and for the first time made in this court, to the effect that Brown did not testify he believed her said representations to be true, and that he relied upon them in parting with the title to his money when he paid it to her. It is true that Brown, in his testimony, did not use that specific language, but, taking his testimony as a whole and his acts, there can be no question, and the jury was clearly authorized to believe, that Brown did believe her said false representations and relied upon them, and paid her his money, based solely on his reliance upon her said representations, which the jury was authorized to believe from the testimony were false. After a careful study of the evidence, we think that it was amply sufficient for the jury to believe therefrom all the essential facts to authorize her conviction. The court so required the jury to believe before they could convict her.

The judgment will be affirmed.

GRAGARA v. STATE. (No. 3795.)

(Court of Criminal Appeals of Texas. Nov. 3, 1915.)

CRIMINAL LAW §1090—QUESTIONS REVIEWABLE—SUFFICIENCY OF EVIDENCE—STATEMENT OF FACTS—BILL OF EXCEPTIONS.

The sufficiency of the evidence cannot be reviewed in the absence of a statement of facts or bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. §1090.]

Appeal from Ellis County Court; W. M. Tidwell, Judge.

Gragara, a Mexican, was convicted of gaming, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of gaming, his punishment being assessed at a fine of \$10.

This case is before us without a statement of facts or bill of exceptions. The allegation that the evidence is not sufficient, therefore, cannot be reviewed.

The judgment is affirmed.

BESENTA v. STATE. (No. 3793.)

(Court of Criminal Appeals of Texas. Nov. 3, 1915.)

CRIMINAL LAW §1124—PRESENTATION FOR REVIEW—SUFFICIENCY OF EVIDENCE.

Where there was no bill of exceptions or statement of facts, and the motion for new trial, based on insufficiency of the evidence to support the conviction, was not signed by defendant or his attorney, and there was no verification by the trial judge of the testimony set out in the motion as being that adduced on the trial, nothing was presented for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2939, 2946-2948; Dec. Dig. §1124.]

Appeal from Ellis County Court; W. M. Tidwell, Judge.

Besenta, a Mexican, was convicted of gaming, and appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of gaming, his punishment being assessed at a fine of \$10.

There is no bill of exceptions or statement of facts in the record, therefore the case will be disposed of without reference to those matters. The motion for new trial is based on the insufficiency of the evidence to support the conviction, and there is also set out in the motion for new trial some questions and answers of the witness. But there is no verification of this testimony by the trial judge as being the facts adduced upon the trial, and in fact the motion for new trial is

not signed by the defendant or his attorneys. As this matter is presented, there is nothing for this court to review, and the judgment will be affirmed.

AUGUSTINE v. STATE. (No. 3794.)

(Court of Criminal Appeals of Texas. Nov. 3, 1915.)

CRIMINAL LAW §1097—APPEAL AND ERROR—RECORD ON APPEAL—REVIEW OF EVIDENCE.

The contention of appellant that evidence fails to support the conviction cannot be reviewed in the absence of a statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2862, 2864, 2926, 2934, 2938, 2989, 2941, 2942, 2947; Dec. Dig. §1097.]

Appeal from Ellis County Court; W. M. Tidwell, Judge.

Augustine, a Mexican, was convicted of gaming, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of gaming, his punishment being assessed at a fine of \$10.

The record is before us without bills of exception or statement of facts. The contention of appellant that the evidence fails to support the conviction cannot be reviewed in the absence of the statement of facts.

The judgment therefore will be affirmed.

RIDGEWAY v. STATE. (No. 3822.)

(Court of Criminal Appeals of Texas. Nov. 10, 1915.)

1. CRIMINAL LAW §1092, 1099—APPEAL—BILLS OF EXCEPTION AND STATEMENT OF FACTS—TIME FOR FILING.

A bill of exceptions and a statement of facts, filed more than 20 days after the adjournment of court, could not be considered, as they must be filed within 20 days, or some reason shown why this was not done which would relieve appellant of negligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2866-2880, 2919; Dec. Dig. §1092, 1099.]

2. CRIMINAL LAW §1090—APPEAL—RECORD—MATTERS PRESENTED FOR REVIEW.

Where no bill of exceptions or statement of facts was filed within 20 days after the adjournment of court, an allegation in the motion for a new trial as to the insufficiency of the evidence could not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825, 2827, 2927, 2928, 2948, 3204; Dec. Dig. §1090.]

Appeal from Tarrant County Court; Jesse M. Brown, Judge.

Tom Ridgeway was convicted of unlawfully selling intoxicating liquors and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of unlawfully selling intoxicating liquors, his punishment being assessed at a fine of \$100 and two months' imprisonment in the county jail.

[1, 2] Court adjourned on September 5th. The only bill of exception in the record was filed on September 29th, as was the statement of facts. These matters cannot be considered. They must be filed within 20 days, or some reason shown why it was not done which would relieve the appellant of negligence. The allegation in the motion for new trial of the insufficiency of the evidence, therefore, cannot be considered.

The judgment will be affirmed.

RICHARDSON v. STATE. (No. 3820.)
(Court of Criminal Appeals of Texas. Nov. 10, 1915.)

CRIMINAL LAW §1134 — EXCEPTIONS — QUESTIONS PRESENTED FOR REVIEW.

Where no exceptions were reserved to the introduction of any testimony, nor to the charge of the court as given, and no special charge was requested, the only question presented for review was the sufficiency of the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986-2998, 3066, 3067-3071; Dec. Dig. §1134.]

Appeal from District Court, Trinity County.

Brit Richardson was convicted of selling intoxicating liquor in prohibition territory, and he appeals. Affirmed.

J. A. Platt, Dist. Atty. of Groveton, and C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of selling intoxicating liquor in prohibition territory, and his punishment assessed at one year's confinement in the state penitentiary.

No exceptions were reserved to the introduction of any testimony, nor to the charge of the court as given. No special charge was requested. So the only question presented for review is the sufficiency of the testimony. Tom Kirkwood testified he secured a bottle of whisky from appellant and paid him a dollar for it.

The judgment is affirmed.

GRISHAM v. STATE. (No. 3818.)
(Court of Criminal Appeals of Texas. Nov. 10, 1915.)

1. INTOXICATING LIQUORS §238 — UNLAWFUL SALE—QUESTION FOR JURY.

In a prosecution for unlawfully selling intoxicating liquor in a prohibition county, the positive testimony of the state's witness that defendant sold him intoxicating liquor as alleged in the indictment, denied by defendant, made the offense a question for the jury.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 324-330; Dec. Dig. §238.]

2. CRIMINAL LAW §1092 — EXCEPTIONS — VERIFICATION.

A so-called "Appellant's Exceptions to the Charge of the Court," not verified by the trial judge, or shown to have been presented to him for his action before the trial was concluded, cannot be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2919; Dec. Dig. §1092.]

Appeal from District Court, Trinity County; S. W. Dean, Judge.

L. M. Grisham was convicted for unlawfully selling intoxicating liquor in a prohibition county, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for unlawfully selling intoxicating liquor in a prohibition county, a felony, and his punishment assessed at the lowest prescribed by law.

[1] He contends that the evidence is insufficient to sustain the verdict. The state's witness testified positively that the appellant sold him intoxicating liquor at the time and place alleged in the indictment. He denied this. That was a question for the jury. We cannot disturb the verdict.

[2] There appears in the record what is termed "Appellant's Exceptions to the Charge of the Court." However, it is in no way verified by the trial judge, and it is not shown anywhere or in any way that it was presented to the trial judge for his action, or that it was ever called to his attention at any time before the trial was concluded. Hence it cannot be considered. *Ross v. State*, 170 S. W. 305.

The judgment is affirmed.

LAWSON v. STATE. (No. 3813.)
(Court of Criminal Appeals of Texas. Nov. 10, 1915.)

1. CRIMINAL LAW §1102 — STATEMENT OF FACTS—TIME FOR FILING.

A statement of facts, filed more than 20 days after the adjournment of the court, will be stricken on motion.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §1102.]

2. INDICTMENT AND INFORMATION §137 — MOTION TO QUASH—GROUNDS.

An indictment for knowingly permitting his house to be used for purposes of prostitution would not be quashed because defendant's name did not immediately follow the words "upon their oaths in said court present that, * * *" where the indictment as a whole clearly alleged that defendant committed acts which under the statute would make him guilty of the offense, or on the ground that it did not allege more than that the premises were in the county, as it was not necessary to allege particularly where they were situated.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. §137.]

Appeal from Childress County Court; Frank W. Freeman, Judge.

A. D. Lawson was convicted for knowingly permitting his house to be used for purpose of prostitution, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for knowingly permitting his house to be used for purposes of prostitution, and assessed the punishment prescribed by the statute.

[1] There is in the record what purports to be a statement of facts, but it was filed much more than 20 days after the adjournment of court. The Assistant Attorney General's motion to strike it out on that ground is therefore sustained.

[2] The only question which we can review in the absence of a statement of facts is his motion to quash the indictment. His first ground to quash is that appellant's name does not appear in the indictment where it should, claiming that it should immediately follow these words in the indictment: "Upon their oaths in said court present that. * * * There is nothing in this, for the indictment as a whole clearly alleges that the appellant, A. D. Lawson, with suitable allegations, in conformity with the statute, did commit the acts which would show that he is guilty of the offense. His second ground is that the indictment does not allege particularly where the house was located in the county where the offense was alleged to have been committed. This was unnecessary. It alleged that the house was situated in said Childress county, which was all that was necessary.

The judgment is affirmed.

JERNIGAN v. STATE. (No. 3819.)

(Court of Criminal Appeals of Texas. Nov. 10, 1915.)

1. CRIMINAL LAW §531—EVIDENCE—CONFESSIONS—AUTHENTICATION.

Where a written confession was made to a district attorney by one accused of rape, the district attorney was competent to testify that the confession was voluntarily made, that it was reduced to writing, signed by the accused, that he had been warned that he need not make any confession, and that if he did it would be used as evidence against him, as required by Code Cr. Proc. 1911, art. 810.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1212-1217; Dec. Dig. § 531.]

2. CRIMINAL LAW §448—EVIDENCE—CONFESSIONS.

It was not error to allow a city detective to testify that the persons who had signed a confession by defendant as witnesses did not hold any official position in the city or county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. § 448.]

3. RAPE §51—EVIDENCE—IDENTITY OF DEFENDANT.

In a prosecution for rape, evidence held sufficient to sustain a finding that the defendant was the person that committed the crime.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-77; Dec. Dig. § 51.]

Appeal from District Court, Trinity County; S. W. Dean, Judge.

Sam Jernigan was convicted of rape, and he appeals. Affirmed.

J. A. Platt, Dist. Atty., of Groveton, and C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of rape on a girl under 15 years of age, and his punishment assessed at death.

[1] There are but three bills of exception in the record, all relating to the introduction of a purported confession of defendant, and the evidence offered to prove that it was voluntarily made, signed, and witnessed as provided by law. The confession on its face alleges:

"I, Sam Jernigan, after being duly warned by J. A. Platt, district attorney, Twelfth judicial district of Texas, as follows, (1) that I do not have to make any statement at all, and (2) that any statement here made by me may be used in evidence against me upon the trial for the offense concerning which this statement is made, and being so warned by the said J. A. Platt, as aforesaid, do here make to the said J. A. Platt the following voluntary statement."

Then follows the confession, and it is signed by appellant, he making his mark, and was witnessed by C. Ansberer and Leon M. Siler. The defendant objected to the introduction of the confession, that defendant signed same by his mark, if at all, and that neither of the subscribing witnesses were called to testify how and under what circumstances the purported confession was signed; that it had not been properly shown that the subscribing witnesses were not peace officers. When these objections were made, Hon. J. A. Platt, district attorney, testified:

"I was in Houston about the 28th of June, 1915. While in Houston I saw and conferred with the defendant, Sam Jernigan. I made a written statement at the request of Sam Jernigan. On that occasion I signed Sam Jernigan's name to a statement at his request; I signed the name, and he touched the pencil and made the mark. I remember others being there. C. Ansberer was there; he represented that to be his name, and Leon M. Siler. They witnessed the signature. I asked them particularly in the presence of the defendant if they held any official position, and they said they did not. The defendant was there present. I saw them sign that instrument (indicating paper handed him by counsel). That is the name I signed at his request; he told me he couldn't write his name, and I signed his name, and he made his mark. When I started to leave the jail, Jernigan asked me when he would have his trial; something about when his trial would be. After writing this statement I read it to him and warned him that he didn't have to make any statement, and that if he did make it it would be used against him in evidence. It was read to him twice, and he was warned that he didn't

have to make it. It was written down just as he told it. He made no objection to it. I asked him if he had anything to say, and he said yes, he wanted to tell how the thing happened, to tell the truth about it, and I told him he didn't have to make any statement, and that the statement might be used against him on trial, concerning the offense with which he was charged, and he went ahead and told me, and I got paper and told him to tell it slowly, and I wrote it down as he told it, and when he got through I read the whole thing over."

Appellant objected to Mr. Platt being permitted to make this proof, his contention apparently being that only the subscribing witnesses could be called to make such proof. The court did not err in overruling the objections made. If appellant desired Messrs. Ansberer and Siler as witnesses, he could have secured process for them. He does not allege nor contend that if present they would testify to any other state of facts than as testified to by Mr. Platt.

[2] The state also called C. W. McPhaill as a witness, and he testified:

"He was working for the city of Houston as city detective in the police department. That he was in Houston on the 28th of June, 1915. That he knew Leon M. Siler and C. Ansberer, and that they, Leon M. Siler and C. Ansberer, did not hold any official position in Houston or Harris county, and that he saw them, the said Siler and the said Ansberer, sign as witnesses the purported statement or confession of the defendant, Sam Jernigan."

One of the three bills contends that the court erred in permitting the testimony of Mr. McPhaill to be introduced; another, that there was error in admitting the testimony of the district attorney; and, the third, that there was error in admitting the confession. As before stated, these are the bills in the record, and they and neither of them present error. When appellant objected to the introduction of the confession in evidence, it then became necessary for the state to make proof of its execution by defendant, and that the provisions of article 810 of the Code of Criminal Procedure had been complied with, that is, that it was voluntarily made, that it was reduced to writing, and signed by him, and that he had been warned by the person to whom the confession was made that he did not have to make any statement, and that it would be used in evidence against him. Mr. Platt was the person to whom the confession was made, the person who reduced it to writing, and who knew better whether or not the warning had been given, as he had given the warning. It seems to us Mr. Platt was the proper person to make this proof. And as the statement was signed by mark, the law required that it be witnessed by some person other than a peace officer; therefore, in order to meet the objection made, it was necessary to make the proof sworn to by Mr. McPhaill, that neither of the subscribing witnesses were peace officers. There is other testimony in the record, both as to the fact that the subscribing witnesses were not officers and that the statement was a voluntary

one, and was signed by appellant; he making his mark.

[3] This disposes of all questions in the record other than the one that the evidence is of that doubtful character and we should not permit the death penalty to be inflicted. There is and can be no question that the little girl was assaulted and penetrated. Appellant does not seek to dispute that fact. It is proven by the little girl, her mother, and two physicians who examined her person; but appellant does insist that the evidence does not unerringly point to him as the person who committed the crime. If we should consider his confession, with the other evidence, this would be shown also beyond question. But appellant insists that the confession was obtained under such circumstances that we should give but little, if any, weight thereto, and that, as many of the statements in the confession are shown to be false, it bears the impress that it was manufactured by appellant and he was induced to do so by one Buddy Townes, who had an incentive to so do; that Buddy Townes, in event he got a confession from defendant, would have two criminal cases pending against him for violating the local option law dismissed. But independent of this confession, we think the evidence unerringly points to appellant as the person who committed the crime. The little girl testified:

"My name is Rosa Vondra. I am 14 years old. I was 14 years old the 8th of March, this year. I live on the farm, about five miles from Groveton. My father's name is Joseph Vondra. About two months ago, about the 27th of May, I was living at Kopiechek's. I worked in the field with my father on that day, about three miles from the house where my father lived. I quit working in the field that day about 1 o'clock. When I quit working that day, I went and cut some weeds and went home. Nobody went home with me. I left my father and mother in the field. I took a sack of weeds with me. I went just a piece of the way near the railroad track in going home. I just saw the train before I got home. I did not meet anybody walking. I didn't meet any negro. I didn't see any negro in the woods before I got home. When I was going I didn't see anybody until I got to that little creek, away from the railroad. The negro asked where I lived, and I said nothing. He asked me to come to him. That was about a mile from the railroad. The negro had a gallon bucket in his hand. He was dressed in blue overalls, blue shirt, and raggedy black hat. When he asked me to come to him, I did not do it; I ran—ran towards my folks. I ran towards the field where my folks were. That was close to Piney creek. When I ran the negro ran after me and caught me. I would know that negro if I were to see him. I see him now. (Witness points out defendant.) This is the man here that ran after me. He caught me and led me to the woods. I sat down and refused, and he got me by the leg and turned me over and got on me, rolled on top of me. He put his private parts in my private parts. I hollered. He tried to stop me from hollering. He held my mouth with his hand. He stayed on top of me two or three minutes. Somebody hollered in the woods near by, and that frightened him, and he got up then. Then I got up and ran towards the field where my mother and father were. I went back to my mother and father where they were

at work in the field. I told them what had happened. I first told my mother, and my mother went to my father and told him, and he quit his work and ran towards the negro settlement there. Q. Did the negro, before he left you, ask you if you were going to tell anybody? A. I would tell my mother and father. I was going to tell my father. This happened about two months ago. The negro tore my clothes. I tried to keep him from pulling me into the woods. I was catching hold of saplings and trees, and he dragged me. He had a regular syrup bucket, and there wasn't any lettering on it. This happened in Trinity county, state of Texas, about eight miles from Groveton. When he dragged me, I was skinned on the back and back of my ear. He bruised my lips by holding his hand over it. I didn't see the negro the next day or the next two days after that. I haven't saw him before or after. This is the negro (indicating defendant). I am quite sure it is him."

On cross-examination she was asked if on the day after the occurrence she had not failed to identify appellant. She testified:

"I told Mr. Shupak that the clothes on that man they had there wasn't the clothes the man had on that made the assault on me. He didn't look like him, except in the face, he didn't look as large, but, after I come to think about it, it come to my mind that he was the nigger."

The appellant called Shupak as a witness, and he testified that they carried appellant out to where the little girl was stopping, and he called for her, and he says, when she first saw him she said, "That looks like him," and he told her to come closer and look good, and she did so, and said it looked like him in the face, but he did not have on clothes like the one who assaulted her; she said it was not the clothes, but identified the hat as the one worn by the person who assaulted her. It was a black ragged hat. She said the person who assaulted her looked bigger and taller, and said she would not be sure whether he was the person or not. Others present can only testify to what Shupak told them, because the conversation was carried on between Shupak and Rosa in the Polish language. This is the extent it was sought to break down her positive identification on the trial, and, if this was all the testimony, it might be said to render the identification a little uncertain. But it will be noticed that the little girl testified to the assault taking place near the railroad and Piney creek, and fixes the time shortly after the train had passed. Joe White testified he was a brakeman on this train, and saw a girl at the point testified to by Rosa; that appellant was on the train at this time, and he saw him get off the train about a quarter of a mile this side of Piney creek and go back in the direction he saw the little girl; that appellant said he was going to pick some berries. Ed Williams testified he was on the train, saw appellant on the train, and saw him get off the train; that he had blue overalls, a shirt, and black hat on; it was a ragged looking hat; that appellant got off the train about a quarter of a mile this side of Piney creek;

that he had a bucket, and said he was going to pick a few berries. Other witnesses also so testified, and place appellant and the little girl at and near the point where the rape occurred, and no other person is seen there or near there. G. W. McGraw says he was on Piney creek fishing the day the little girl was assaulted; that he saw appellant in Piney creek bottom that day; that he heard a scream, and soon thereafter he saw the negro in the bottom, and saw him turn to the left and jump the creek; that when he heard the scream he hollered back. The little girl testified that when some one was heard the negro got off of her and ran. Thus by all the testimony, other than her own and appellant's confession, the little girl is shown to be at this point and was ravished. Appellant is the only negro the evidence places at or near this place; a scream is heard, and he is seen running away, coming from the direction where the crime was committed.

There is no testimony that he was at any other or different place, and if the little girl had not identified appellant positively on the trial, and no confession was introduced, but she had described the man as she did describe him on this and all other occasions, with the other evidence in the case, it would amply support the verdict.

The judgment is affirmed.

BROD v. STATE. (No. 3772.)

(Court of Criminal Appeals of Texas. Nov. 10, 1915.)

1. CRIMINAL LAW §368—EVIDENCE—ADMISSIBILITY—OTHER ACTS.

Evidence that defendant's father, shortly after the shooting by accused, violently cursed and abused another person who had been engaged in the fight was improperly admitted as part of the *res gestæ*; it being immaterial upon defendant's conduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 812, 814, 815, 821; Dec. Dig. §368.]

2. CRIMINAL LAW §1171—TRIAL—REMARKS OF ATTORNEYS—PREJUDICIAL ERRORS.

While after a change of venue taken by the state in a criminal trial it is proper for the defendant's attorney to comment on the fact that a change was taken, the statement of the state's attorney that "the reason why the same was changed was that Waller county had a history, and that was they would turn murderers loose over there," is improper, and the judge's refusal to direct the jury to disregard it was error prejudicial to defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. §1171.]

3. HOMICIDE §122—DEFENSES—DEFENSE OF ANOTHER.

Where defendant, accused of murder, shot the deceased who was attacking defendant's father, he was guilty of no offense, if it reasonably appeared to him when he shot that the life of his father was in danger, or that he was in danger of suffering serious bodily injury, and the criterion is not what the circumstances ac-

tually were, but what they would have appeared to be to a reasonably prudent man.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 177-181; Dec. Dig. § 122.]

Appeal from District Court, Austin County; Frank S. Roberts, Judge.

Jake Brod was convicted of murder, and he appeals. Reversed and remanded.

A. G. Lipscomb, of Hempstead, J. E. Edmundson, of Bellville, Mathis, Teague & Embrey, of Brenham, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of murder, and his punishment assessed at 15 years' confinement in the state penitentiary.

It appears there had been a game of baseball in the afternoon; that the shooting took place at night. The state's contention is that appellant had become dissatisfied with the management of the baseball team, and had sought to break it up. Deceased, Gus Ueckert, was also a member of the team, and ill will existed between Ueckert and appellant, growing out of this matter. After the game of ball, a dance was had that night on a platform adjacent to a beer garden, and appellant and deceased were both at this dance, and the state's evidence is that, while deceased, Ed Ueckert, and Roman Michalski were drinking soda water, appellant approached them and said, "You want to fight, you G—d d—d bastard?" when deceased replied, "Jake, I don't want to have anything to do with you," when, with a knife in his hand, he approached deceased and said, "You G—d d—d s—n of a b—h." Ed Ueckert here interfered and carried appellant to his father, Anton Brod (who was constable of the precinct), and asked him to make appellant behave. Appellant's father said something to his son about behaving, but almost immediately went to where deceased was standing, caught him in the collar and said, "I am tired of you calling my boy s—ns of b—hes; I didn't raise no s—n of a b—h, G—d d—n you." Deceased replied, "Mr. Brod, don't hit me." Anton Brod responded, "I will, G—d d—n you," pulling his pistol. As he pulled his pistol, Ed Ueckert grabbed his arm, and Anton Brod and Ed Ueckert went down, Ed Ueckert falling on his face, but having the hand with the pistol under him, Anton Brod being at his side and over him. Michalski and Gus Ueckert caught hold of Anton Brod, as they say, to pull him off and prevent him shooting. Appellant Jake Brod rushed up and cut Gus Ueckert in the shoulder with a knife, retreating after he had done so. Gus Ueckert grabbed a soda water bottle and threw it at Jake Brod, when Jake Brod drew a pistol and shot him, inflicting a fatal wound.

The defendant's contention is that deces-

ed had been writing letters to a young lady in the community and receiving letters from her, the letters to deceased being sent to appellant for delivery. Deceased's wife hearing of those letters, deceased accused appellant of informing his wife, and he gives this as a reason for their ill will. The defendant's contention is that no words passed between him and deceased on the night of the shooting, and that between 11 and 12 o'clock, his father, Anton Brod, came to where he was standing and said, "Come on, Jake, let's go home," when Gus Ueckert, deceased, remarked, "You'd better take the s—n of a b—h home, else I will kill him." Then Anton Brod turned and said to deceased, "You can kill hell," when deceased picked up a beer glass and drew it back as if to strike, when Anton Brod caught deceased's hand with one of his hands and pulled his pistol with the other. As he pulled his pistol, Ed Ueckert grabbed the hand with the pistol in it, and Anton Brod and Ed Ueckert went down, Ed Ueckert having the hand with the pistol under him; that Gus Ueckert then jumped on Anton Brod and struck him, when appellant rushed up and cut Gus Ueckert. Gus Ueckert grabbed a bottle and threw it at appellant, when, as appellant contends, Gus Ueckert drew a knife, got on his father, Anton Brod, and began cutting at his father, when he, appellant, shot. As he shot, all parties parted, and Gus Ueckert, deceased, went to his father-in-law's house, some hundred yards distant. Thus, it is seen the evidence is in sharp conflict, both as to the origin of the fatal difficulty and the events immediately preceding the shooting. There are a number of bills of exception in the record, but we do not deem it necessary to discuss but three of them, as the others present no error.

[1] The first bill we will mention is the one wherein it is shown that shortly after the shooting of Gus Ueckert by Jake Brod and after the parties fighting had all been separated, the state was permitted to show that Anton Brod, father of appellant, cursed and very violently abused Roman Michalski. This evidence seems to have been admitted on the ground that it occurred so soon after the difficulty in which appellant shot Gus Ueckert that it was res gestæ of that transaction. If it was appellant doing the cursing and committing the acts towards Michalski, we would agree with the trial court, but Anton Brod was not on trial, and certainly appellant cannot be held responsible for the acts of his father towards a third person after the difficulty in which he did the shooting was over. The acts and conduct of appellant might throw light on his previous acts, but the acts and conduct of his father could not do so. We are of the opinion that the court should have sustained the objection to the acts and conduct of ap-

pellant's father toward Roman Michalski after the shooting was over.

[2] In another bill, it is shown that Mr. Mathis, attorney for defendant, had commented on the fact that the record disclosed that the state had had the venue of this case changed from Waller to Austin county, and remarked that this was not fair to defendant; that he should have been tried in Waller county, where both appellant and deceased had been raised. As the record had been introduced showing the change of venue to have been made, appellant's counsel could comment on that evidence, and state's counsel could also reply to such argument and comment on any fact in evidence, but state's counsel should not have been permitted to go outside of the record, and say "that the reason why the same was changed was that Waller county had a history, and that was they would turn murderers loose over there." There was no evidence in the record upon which to base such statement. Again, state's counsel said, in commenting on the testimony of Anton Brod, "That old man Brod went over to Richmond to help get a murderer out." Anton Brod testified to material facts for appellant, and, if his testimony was true, it would tend to show that appellant killed deceased to save his, Anton Brod's, life. Upon objection being made, the court instructed the jury not to consider the last remark, but refused to instruct the jury not to consider the remark about the history of Waller county, stating they turned murderers loose over there. Counsel for the state may always comment on the testimony and draw legitimate deductions therefrom, but in their zeal they should not get outside the record and inject new and prejudicial matter into the case.

[3] The only other bill we deem it necessary to discuss is the one complaining of the charge of the court in instructing the jury:

"The resistance which the person about to be injured may make to prevent the commission of the offense must be proportioned to the injury about to be inflicted. It must be only such as is necessary to repel the aggressor. If the person about to be injured uses a greater amount of force to resist such injury than is necessary to repel the aggressor and protect his own person, he is himself guilty of an illegal act, according to the nature and degree of force which he has used, but in all cases the matter is to be viewed from the defendant's standpoint. Any person, other than the party about to be injured, may also, by the use of necessary means, prevent the commission of the offense, and the same rules which regulate the conduct of the person to be injured in repelling the aggression are also applicable to the conduct of him who interferes in behalf of such person. He may use a degree of force proportionate to the injury about to be inflicted, and no greater."

It is contended that this is too much limitation to place upon appellant's right of self-defense. It is the law of this state that one who seeks to justify his act on the

ground that he committed the act in defense of another (in this instance in defense of his father) can use no greater force than seems to him necessary to accomplish that purpose. If Anton Brod was in no danger of losing his life or suffering serious bodily injury, appellant would have no right to kill in his defense. He would only have the right to use such force as was necessary to repel the aggressive act, or acts. According to the state's evidence, Anton Brod was in no danger of death or suffering serious bodily injury. Ed Ueckert grabbed the hand in which Anton Brod had the pistol to keep him from shooting his brother; and the acts and conduct of Gus Ueckert and the others were done to keep Anton Brod from injuring Ed Ueckert after he had gotten him down, thus authorizing a finding by the jury that Anton Brod was in no danger at the time the fatal shot was fired, and from the verdict they evidently so found. While this is the law, yet it is also the law that a jury must view the circumstances as it appeared to appellant at the time. Not that they must accept his version, but they must take all the evidence and pass on the question of how it then, at the time of the difficulty, would appear to a reasonable person situated as was appellant. If from all the facts and circumstances it reasonably appeared to appellant that deceased was on his father, cutting at him with a knife, thereby endangering the life of his father, he would be justified in slaying to save the life of his father. The charge as given herein, we think, is too restrictive, and should be so drawn on another trial as to present clearly that, if it reasonably appeared to defendant at the time he shot that the life of his father was in danger, or he was in danger of suffering serious bodily injury, he would be guilty of no offense. And this question should not be passed on as it appeared to the jury from the evidence, but as the jury believed it appeared to defendant at the time he acted.

The case is reversed, and the cause remanded.

GREEN v. STATE. (No. 3737.)

(Court of Criminal Appeals of Texas. Nov. 10, 1915.)

1. CRIMINAL LAW \S 1002, 1102—APPEAL—STATEMENT OF FACTS AND BILLS OF EXCEPTION—TIME FOR FILING.

Where the term at which a criminal trial occurred adjourned on May 15th, a statement of facts filed July 29th, and bills of exception filed the next day, would be stricken and not considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2803, 2829, 2834-2861, 2919; Dec. Dig. \S 1002, 1102.]

2. CRIMINAL LAW \S 27—FELONIES AND MISDEMEANORS—INTOXICATING LIQUORS.

Under Acts 31st Leg. c. 35, providing that if any person shall sell any intoxicating liquor in any territory in which the sale of intoxicating

liquors "has been prohibited" he shall be punished by confinement for not less than one nor more than three years, and Pen. Code 1911, art. 597, providing that if any person shall sell any intoxicating liquor in any county, etc., in which the sale of intoxicating liquor "has been prohibited," he shall be punished by fine and imprisonment for not less than 20 nor more than 60 days, and if any person shall sell any intoxicating liquor in any county, etc., in which the sale of intoxicating liquor "shall hereafter be prohibited," he shall be punished by imprisonment in the penitentiary for not less than one nor more than three years, it is a misdemeanor only to sell intoxicating liquors in territory where prohibition had been adopted prior to the act of 1909, and a felony to make such a sale in territory where prohibition was subsequently adopted, and there is no conflict between the two clauses of article 597.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 29-31; Dec. Dig. ¶27.]

Appeal from Matagorda County Court; Thomas H. Lewis, Special Judge.

J. H. Green was convicted of making a sale of intoxicating liquors in prohibition territory, and he appeals. Affirmed.

See, also, 155 S. W. 210.

J. W. Conger, of Bay City, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for making a sale of intoxicating liquor after prohibition was in force in Matagorda county, and assessed the lowest punishment prescribed by law for a misdemeanor.

[1] The term of court at which this trial occurred adjourned on May 15, 1915. The statement of facts was not filed until July 29, following, and the bills of exceptions the next day. Hence the Assistant Attorney General's motion to strike all these out and not consider them must be sustained. Without these, the only question raised which we can consider is to the jurisdiction of the county court.

[2] This prosecution was begun by complaint and information in the county court. The information alleges that the prohibition election in said county was ordered by the commissioners' court on March 16, 1907; that the election for prohibition carried; and thereupon the commissioners' court passed an order declaring the result and prohibiting the sale of intoxicating liquors in said county; that such order was published for four successive weeks as required by law; and that this offense was committed on October 4, 1912.

Prior to the Acts of 1909, p. 356, it was a misdemeanor only to sell intoxicating liquors in prohibition territory. Said act of 1909 made it a felony to sell in such territory. The revisers in 1911, in the first clause of article 597, P. O., which was enacted and adopted by the Legislature of that year, provided that, if any person shall sell intoxicating liquors in prohibition territory "in which

the sale of intoxicating liquor has been prohibited under the laws of this state," he shall be guilty of a misdemeanor, punishable by fine of not less than \$25 nor more than \$100, and by imprisonment in the county jail for not less than 20 nor more than 60 days; and, in the second clause of said article, made it a felony for any person to sell in prohibition territory "in which the sale of intoxicating liquors shall hereafter be prohibited under the laws of this state."

It has been the uniform holding of this court in many cases, since the said act of 1909 was passed and the Revised Statutes adopted, that, as stated in said article 597, it was a misdemeanor only to make an illegal sale of intoxicating liquors in prohibition territory where prohibition had been adopted prior to the act of 1909, and a felony where adopted since the act of 1909, and that there is no conflict between the clauses of article 597; the first making it a misdemeanor and the latter a felony. So that, in this case, appellant's contention that the two clauses of the act conflict, and in effect therefore that neither, or only the felony clause, is in force, and also his contention that the county court had no jurisdiction, cannot be sustained. *Lewis v. State*, 58 Tex. Cr. R. 351, 127 S. W. 808, 21 Ann. Cas. 656; *Mealer v. State*, 66 Tex. Cr. R. 140, 145 S. W. 353; *Nobles v. State*, 71 Tex. Cr. R. 123, 158 S. W. 1133; and other cases there cited.

The judgment is therefore affirmed.

MAYS v. STATE. (No. 3809.)

(Court of Criminal Appeals of Texas. Nov. 10, 1915.)

CRIMINAL LAW ¶945 — GROUNDS — NEWLY DISCOVERED EVIDENCE.

A new trial, after conviction of assault to rape a child under 15 years of age, will not be granted on the ground of newly discovered testimony of a physician, who had examined the child within 48 hours of the time of the alleged assault, and found no bruises about the child's person, for the assault may have occurred without any injury to the child.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. ¶945.]

Appeal from Criminal District Court, Dallas County; W. L. Crawford, Jr., Judge.

Willie Mays was convicted of crime, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of assault to rape, his punishment being assessed at five years' confinement in the penitentiary.

There is nothing in the record that requires revision. There is neither a statement of facts nor bill of exceptions forwarded to this court. There is an affidavit of

newly discovered testimony, but it is very indefinite and hardly tangible from any viewpoint, and especially so in the absence of the evidence. It shows that Dr. Gilbert made such affidavit in effect that he examined the alleged injured girl, who was under 15 years of age, within 48 hours of the time of the alleged assault, and found no bruises or anything that indicated rape about her private parts. Dr. Gilbert testified, on the trial and it is so manifested by the motion for new trial; but, even if he had not, the jury only having convicted appellant of assault to rape, the fact there was no bruises about her person would be of very small value. The assault may have occurred without ever having injured her private parts.

As the record is presented, the judgment will be affirmed, and it is, accordingly, so ordered.

COHEN v. STATE (No. 3715.)

(Court of Criminal Appeals of Texas. Nov. 10, 1915.)

GAME — PROSECUTION — INSTRUCTIONS.

In a prosecution under Act March 13, 1911 (Acts 32d Leg. c. 60) § 5, for having in his possession for the purpose of sale and for offering to sell the hide of a wild deer killed in the state, where the evidence raised the issue as to whether defendant first told the game warden that the hide was for sale, but that he was not then in possession of it, but it was in possession of his employer, and that he had no authority to sell it, and, after learning from his employer that it could not be sold, so informed the officers seeking to buy it, the refusal to instruct that, if the jury so found, they should acquit, was reversible error; and the court should have instructed conversely for the state that, if defendant was in possession of the hide with authority to sell it, and offered it for sale, even though a mere employee of another, he would be guilty.

[Ed. Note.—For other cases, see Game, Cent. Dig. § 9; Dec. Dig. ¶ 9.]

Appeal from Bexar County Court; Nelson Lytle, Judge.

William Cohen was convicted of having in his possession for the purpose of sale and for offering to sell a hide of a wild deer killed in the state, and he appeals. Reversed and remanded.

Davies & Davies, of San Antonio, for appellant. C. C. McDonald, Asst. Atty. Gen. for the State.

PRENDERGAST, P. J. Under section 5 of the act approved March 13, 1911, appellant was convicted for having in his possession for the purpose of sale and for offering to sell one deer hide of a wild deer killed in the state.

There are but two questions necessary to pass upon in the disposition of this case: First, the appellant claims that the evidence is insufficient to sustain the conviction. We have carefully read the statement of facts, and cannot so hold.

His second contention is that the court erred in refusing to give, among others, his special charge to the effect that, if the jury believed from the evidence that upon inquiry made of him he first answered to the deputy game warden that the deer's hide was for sale, but that at said time he was not in possession of it, but it was in possession of A. Cohen & Co., and that he had no authority to sell said hide, and after learning from the manager of said firm that it could not be sold, so told the officers seeking to buy it, or, if they have a reasonable doubt as to his guilt under this phase of the case, to acquit him. Without reciting it, the evidence pertinently raised this issue, and we think the court committed reversible error in failing and refusing to give in substance, said charge. On another trial, if the testimony substantially raises this issue as it did in the former trial, the court should not only give the said charge substantially as asked by appellant, but should also in behalf of the state give the converse of the proposition; that is, that if appellant was in possession of the hide, and had authority to sell it, and offered it for sale, even though he was a clerk or mere employé of A. Cohen & Co., then he would be guilty under the law. We do not intend to give the verbiage of the charge, but merely the issue to be submitted.

For the error pointed out, the judgment is reversed, and the cause remanded.

Ex parte BOGLE. (No. 3749.)

(Court of Criminal Appeals of Texas. Nov. 3, 1915.)

1. MUNICIPAL CORPORATIONS — STREETS — OPERATION OF AUTOMOBILES — JITNEY — POWER TO REGULATE.

Under Austin city charter (Sp. Acts 31st Leg. c. 2), providing that the mayor and councilmen shall have all the legislative, executive, and judicial powers granted, that the council may adopt ordinances not inconsistent with the Constitution and statutes, and shall have exclusive control over streets, and power to regulate the use of same, and to regulate the speed and handling of automobiles, the city could enact and enforce such reasonable ordinances as it deemed necessary and proper to regulate the handling of automobiles, including jitneys, and the use of streets by a person owning and operating the same in the carriage of passengers for hire.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. ¶ 703.]

2. CONSTITUTIONAL LAW — CLASS LEGISLATION — ORDINANCES — USE OF STREETS — REGULATION OF JITNEYS.

An ordinance regulating the operation of jitneys on the streets and requiring a license and a bond as a condition precedent thereto, was not objectionable as class legislation in violation of Const. art. 1, § 3, and Const. U. S. Amend. 14, where it applied to all jitneys alike, though it did not apply to the street car system and other automobiles and vehicles carrying passengers for hire; jitneys being a class

within themselves distinct from such other modes of conveyance for hire.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 625-677; Dec. Dig. §§ 207, 208.]

3. MUNICIPAL CORPORATIONS — 703 — STREETS — JITNEY ORDINANCE — VALIDITY — CREATION OF LIABILITY.

A provision of an ordinance requiring, as a prerequisite to a license to operate a jitney, that the owner file with the city an indemnity bond for \$5,000, conditioned that the licensee should pay any judgment rendered against him to the extent of \$2,500 for injury to, or death of, any person, or injury to the property of another, and to the extent of \$5,000 for like injuries in one accident to more than one person, and further conditioned to hold the city harmless from all claims resulting to it from the granting of such license, was not objectionable as an attempt to create on behalf of strangers to the licensee and licensor a liability against the licensee or his bondsmen.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1500-1513; Dec. Dig. § 703.]

4. MUNICIPAL CORPORATIONS — 121 — ORDINANCES — VALIDITY — RIGHT TO OBJECT.

Where an ordinance prescribed a license fee of \$50 per annum for each jitney holding five or less, and of \$75 for a seating capacity of not over seven, but more than five, and of \$100 for a seating capacity of more than seven, the owner of a jitney who came within the \$50 class only could not question the validity of the provisions for \$75 and \$100 license fees.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 257; Dec. Dig. § 121.]

5. LICENSES — 7 — ORDINANCE — VALIDITY — POLICE REGULATION — TAX FOR REVENUE.

Where it appeared that the salaries of extra policemen and other expenses necessitated by the operation of jitneys would proximately equal the amount expected from the license fees of \$50 per annum on each vehicle with a seating capacity of five or less, including the driver, the ordinance prescribing such fee was not objectionable as being a tax for revenue for city purposes, instead of a police regulation.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.]

6. LICENSES — 7 — ORDINANCES — VALIDITY.

That an ordinance requiring procurement of a license as a condition to the right to operate a jitney gave the city authorities discretionary power to grant or refuse a license did not render it void.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.]

7. MUNICIPAL CORPORATIONS — 121 — ORDINANCES — RIGHT TO OBJECT.

Where a jitney owner had not attempted to procure a license and been refused, he could not object that the ordinance requiring licenses was invalid because it clothed the city with arbitrary power to grant or refuse a license, though all the fees were paid and all the requirements of the ordinance complied with.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 257; Dec. Dig. § 121.]

8. MUNICIPAL CORPORATIONS — 121 — EVIDENCE — BURDEN OF PROOF — UNREASONABLENESS OF ORDINANCE.

Where a jitney owner charged with violating an ordinance by running a jitney without a license complains in habeas corpus by him that requirements of the ordinance that he pay a license fee and give bond amount to a prohibi-

tion, the burden is on him to establish his contention.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 257; Dec. Dig. § 121.]

Davidson, J., dissenting.

M. Bogle was arrested for operating a jitney without the license required by ordinance of the city of Austin, and brings habeas corpus. Relator remanded to custody.

E. T. Moore, of Austin, for appellant. E. C. Gaines, of Austin, Special Counsel, J. Boul-din Rector, City Atty., and H. B. Barnhart, Asst. City Atty., both of Austin, and C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. In vacation Mr. Bogle applied to one of the judges of this court for a writ of habeas corpus, alleging that he was illegally restrained of his liberty by the chief of police of the city of Austin under a capias issued by the corporation court on a complaint filed therein August 21, 1915, charging him with that day operating a jitney on one of the public streets of the city without having a license in violation of the ordinance making it an offense to do so, and seeking his discharge from said claimed illegal arrest and detention. The writ was granted and the cause set for hearing before this court in term time. The relator, Bogle, contends that said ordinance is unconstitutional, invalid, and void on various grounds.

The attacked ordinance was enacted July 6, 1915, and on its face clearly appears to be regulatory only in all of its provisions and as a whole. Long before its enactment the city had in force another permit ordinance requiring every person running any automobile on its public streets to apply to and get from its clerk a permit to do so, and requiring the payment of a fee of 50 cents therefor, and that the number of his machine be properly placed thereon. Mr. Bogle had complied with that ordinance. The city also had another drivers' ordinance, in effect, requiring every person who engaged in the business of carrying passengers for hire in any automobile within its limits, in addition to said permit, to get a driver's license from it, and, when granted, to pay the city tax collector a fee of \$2 therefor. Mr. Bogle had also complied with that ordinance.

It is agreed herein that about 1,800 persons had taken out said permits, and that 95 of these had taken out said \$2 driver's license, but that no person had applied for license under said jitney ordinance, and that Mr. Bogle had in no way complied therewith, and had no license thereunder.

It is also agreed that there was "a further class of vehicles" permitted to operate in carrying persons in the city under its ordinance designated as "any hack, * * * omnibus, * * * or other vehicle of any

name whatever," carrying persons for hire, and that all such "have designated stands and run only on special calls, and are not held out as running over any special route, and they charge a higher fare than jitneys"; that all these are required to pay only said \$2 license fee, and no bond is required of them; that all automobiles permitted to operate in the city, whether private cars, service cars having designated stands, or jitneys, are subject to the same traffic ordinances, except such special provisions as are in said jitney ordinance relating to jitneys alone; that Mr. Bogle, on the date charged in the complaint against him, operated a five-passenger Ford automobile in the city as a jitney running on a route having definite termini of less than 35 blocks, which automobile operated by him would clearly be a jitney, as defined in section 1 of the attacked ordinance. This ordinance makes it an offense to thus operate a jitney without license, and it was for that only Mr. Bogle was arrested and held in custody by the chief of police.

It is further agreed that there was a street car system operating in the city as a carrier of passengers under a franchise; that it carries passengers and gives transfers anywhere on its lines for five cents fare. It is not required to take out license nor give bond. It is required and pays the city \$1 per mile occupation tax, and the same amount to the county, and double that to the state. Its franchise and the city ordinances require it to pave its tracks and one foot additional on each side thereof wherever the city paves, and to maintain the same space on all other streets where its tracks are laid. It has spent alone for paving in the city over \$300,000, and its annual paving is about \$30,000. It pays the city \$4,900 ad valorem tax, and one-half that sum to the state and county annually. Its gross receipts annual tax to the state is \$1,955, and its federal income tax is \$611 annually. Its total annual tax for the space of each passenger is \$58.76.

[1] The charter of the city of Austin was granted by the Legislature, approved February 3, 1909, and by a provision therein the courts are required to take judicial knowledge thereof. Special Laws of 1909, pp. 8-45. It provides that the mayor and four councilmen shall be known and designated as the city council, and have all legislative, executive, and judicial functions or powers granted. Among other provisions of the charter and powers given the city council are these:

Article XI, section 1:

"The city council shall be vested with the power and charged with the duty of adopting all law and ordinances, not inconsistent with the Constitution and laws of the state of Texas, touching every object, matter and subject within the purview of the local self-government, conferred by this act upon the citizens of the city of Austin."

Article XIV, section 38:

"* * * To make and regulate stands for vehicles at said depots and other public places."

Article XV, section 1:

"The city council shall have power, subject to the restrictions herein contained, to make all rules, regulations and ordinances which may be necessary and proper for carrying into effect the powers specified herein."

Article XV, section 14:

"* * * The council may enact any ordinance not in conflict with the penal laws of the state."

Article XIII, section 1:

"The city council shall have exclusive control over and regulation of all streets, alleys, sidewalks and highways and the public squares within the corporate limits of the city, and shall have power: * * * [Subdivision h.] To regulate the use of the same. * * *"

Article XIV:

"The city council shall have power by ordinance: [Section 10.] To license and regulate hacks, carriage, omnibusses, wagons and drays, and to fix the rate to be charged for the carriage of persons and for the wagonage, cartage and drayage of property. * * * [Section 32.] To regulate the speed and handling of automobiles."

Under these powers and authority, we think unquestionably the city had the power and authority to enact and enforce any and all reasonable ordinances which it deemed necessary and proper to regulate the handling of automobiles and the use of the streets by persons owning or operating the same in the carriage of passengers for hire. A jitney is an automobile, both in fact and so agreed herein, and as specially defined by section 1 of said ordinance; in fact, as we understand, appellant concedes that the city council had power and authority to pass all reasonable ordinances regulating the jitney and the operation thereof on the streets of the city.

[2] However, the first ground of his attack on said jitney ordinance is substantially this: That section 1 of said ordinance, when considered in connection with other ordinances and the testimony, violates section 3, art. 1, of our state Constitution and the fourteenth amendment of the Constitution of the United States, in that it discriminates between the rights of the same class, and places a greater burden upon one than another of the same class, and that whether the amount charged be a tax or license fee.

In the recent case of *Ex parte Sullivan*, 178 S. W. 537, we discussed an ordinance of the city of Ft. Worth, Tex., of which the ordinance attacked herein is substantially and practically the same, and therein held, as we do in this case that the said ordinance violates neither our state Constitution nor the Constitution of the United States in this particular. What we said in the *Sullivan Case* on that subject specially applies to this case. We think there can be no question but that the jitney, as defined in the ordinance herein and as operated by Mr. Bogle, is a class within itself, separate and distinct from both the street car system and other automobiles or vehicles which have stands as described above. In addition to the *Sullivan Case* and authorities therein cited, we cite *Ex parte Cardinal (Cal.)* 150 Pac. 348. By the ordi-

nance all jitneys are treated exactly alike, and neither within that class is treated in any way whatever different from another.

[3] He next attacks sections 9, 10, and 11 of said jitney ordinance, requiring a bond, claiming that it is beyond the power of the city, and its charter confers no right, either express or implied, to create a cause of action in behalf of individuals strangers to the licensee or licensor or to provide a remedy for such, or to insure or indemnify the city for damage or loss, unless the same is of such a nature as to render the city liable either by statutory or common law; and by the terms of the ordinance and conditions of the required bond it affirmatively appears that the damage or loss sought to be guarded against is not of this character. These sections of the ordinance, in effect, as a prerequisite for a license to operate a jitney, require that for each jitney the owner, etc., shall procure and file with the city an indemnity bond or policy of insurance in the sum of \$5,000, conditioned that the licensee shall pay any judgment of court finally rendered against him, etc., to the extent of \$2,500 on account of injuries to or death of any person or injury to the property of another and to the extent of \$5,000 for like injuries occurring in one accident to more than one person caused by the negligence of such licensee, etc., and further conditioned to hold the city harmless from any and all claims, etc., resulting to it from the granting of such license. This bond can be made by either a surety company authorized to do business in this state or by personal security. Neither these sections nor the ordinance as a whole, as we understand it, in any way creates, or attempts to create, in behalf of any person, any liability against the licensee or his bondsmen, but it merely provides as one of the reasonable regulations of the licensee that he shall provide by such bond or indemnity a means to satisfy the loss to such one as may be damaged by him finally rendered by a court. It in no way prescribes any contingency under which the licensee should be liable to any person for any negligence whatever committed by him or other act by him. The city would have no right to create that kind of cause of action, and, as stated, it does not attempt to do so.

It is agreed herein that the city of San Antonio, Tex., had an ordinance regulating jitneys, wherein it required as a prerequisite to a license that the jitney owner should execute a bond in the sum of \$10,000, with the conditions thereof somewhat like the conditions of the bond of the ordinance herein attacked, and that also the city of Ft. Worth, Tex., had a like ordinance requiring a bond in the sum of \$2,500, with somewhat of the same conditions; that in the city of San Antonio, under the ordinance of that city, 91 such bonds as there required had been given, and under the ordinance of the city of Ft. Worth 89 bonds as there required had been given.

In the Sullivan Case, supra, we held that the bond required therein was a proper regulation. We likewise hold in this case that the bond required herein is a reasonable regulation, not void nor unconstitutional on any ground, and is a proper regulation, as shown in this case is the city of Austin. In addition to the authorities cited on this point in the Sullivan Case, we now cite case *Ex parte Bell*, 24 Tex. App. 428, 6 S. W. 197; *Greene v. San Antonio* (Civ. App.) 178 S. W. 6; *Ex parte Cardinal*, supra.

In this connection, and others as well, it was further agreed herein: That prior to the passage of the jitney ordinance attacked there were about 60 jitneys running in the city. Some of them had inexperienced or reckless drivers, and few of them had any financial responsibility, except some owned the Ford car operated. These jitneys traversed the most traveled streets of the city, and largely confined their traffic to the paved or best graded or graveled streets, and practically paralleled all the street railway lines, and in going their usual route all, or about all, of them traversed certain mentioned streets, which are the principal streets of the city and in the most congested centers of ordinary traffic, and tended to greatly congest the traffic of said streets. That during the 60 days prior to the passage of said ordinance there were a number of accidents due to the jitneys. That the city council, in view of the traffic conditions brought about by the advent of the jitney and of the accidents due to their presence and their menace to the general safety of the public, deemed that there was an imperative and urgent necessity for the passage of said jitney ordinance.

It is further agreed herein that the jitney traffic in the city is a business done, carried on, and operated solely upon the public streets and thoroughfares of the city, and is largely confined to the paved streets and best graded and graveled streets, and that the jitney is a new and hazardous kind of passenger traffic, and the danger to individual accident and injury is greater, and that the number of accidents in proportion to the number of passengers carried and injuries has, in fact, been greater in this line of passenger traffic than in any other commonly used.

It was further agreed that, by reason of the new and hazardous nature of the jitney service, very few surety or indemnity companies would undertake such security until the class, character, and nature of the service have been reduced to a system (that it was not meant thereby that thereafter either of said bonds could or could not be given under said jitney ordinance), and that a personal bond could ordinarily be given only by a careful driver known to his sureties to be temperate, cautious, and reliable; that the said bonds given in the cities of San Antonio and Ft. Worth were made by an indemnity company. It was further agreed that application was made in behalf of the Austin jit-

neys to certain named indemnity companies without success, and that a certain other company would write a policy on autos carrying passengers for hire, but would not write a policy under the ordinance attacked.

[4, 5] The next ground of attack is of section 7 of said ordinance, which prescribes a license fee of \$50 per annum for each jitney with a seating capacity of five or less, including the driver, and of \$75 for a seating capacity of not more than seven, but more than five, including the driver, and of \$100 for a seating capacity of more than seven persons, including the driver, claiming that these fees are not license fees, but an evasion of the law, and, in fact, a tax for revenue for city purposes, and not as a police regulation.

So far as the relator is concerned, he is in no position to attack said section of the ordinance for the amount of the latter two fees, because it is conclusively shown that he comes within the \$50 class only, and we do not pass upon those features of that section prescribing the \$75 and \$100 amount of license fees. On this point, in addition to the agreed facts above recited, is this further agreement: That the carrying out of said jitney ordinance will require the printing of blanks and stationery for licenses, applications, bonds, and such other matters as are named in the ordinance, and will require more clerical labor, all at an expense to the city that cannot now be estimated, and that the policing of the ordinance will require two, or possibly three, extra policemen at a salary of \$90 each per month, including a motorcycle man and cost of the motorcycle, all at an additional expense of probably \$2,500 a year, if the same number of jitanies were in operation, and that in fixing the amount of said license fees the council did not expect the sum realized therefrom to more than pay the expenses of policing and enforcing said ordinance, and did not expect to or contemplate the realizing of any revenue to the city over and above the additional expense caused by the proper enforcement of said ordinance. We think that this demonstrates that the said \$50 license fee was, in truth and in fact, a license fee only, and not a tax to provide an extra revenue, and that this section of the ordinance is unquestionably valid. *Ex parte Sullivan*, supra, and authorities there cited.

[6, 7] In the next attack on the ordinance he claims that, as a whole, it is unreasonable, and clothes the city with arbitrary power to grant or refuse a license though the fees are paid, and all the requirements thereof complied with by an applicant for a license. This question was also discussed and passed upon in the *Sullivan Case*, supra. We see no necessity of further discussing it here. The attacked ordinance herein is in no essential particular different from the Ft. Worth ordinance passed upon in the *Sullivan Case*. The relator is not in a position to attack the

ordinance on that ground, anyway; for it is conclusively shown that he has in no way attempted to procure a license and been refused on any ground. However, we might say that, if even he was in a position to attack the ordinance on this ground, we see nothing in it but a reasonable and proper regulation, and we see nothing in it which would authorize or justify this court to hold the ordinance, or any provision of it, void on that ground.

[8] His next attack on the ordinance is his claim that the difficulty of complying with its requirements practically amounts to a prohibition, and that the amount of the fees required to be complied with before the bond can be given and the terms and amount of the bond are requirements which cannot be complied with. The relator's contention on this point cannot be sustained. The whole agreed facts indicate that, if he is a proper person to operate a jitney under said ordinance, he may reasonably comply therewith, and that its provisions do not amount to a prohibition. The burden is on him to show what he claims, and not on the state or city to show otherwise. In the agreed facts as a whole, we think it is shown that he can reasonably comply therewith, and hence the ordinance is not void on this ground.

His last contention is that, the arbitrary power preceding the issuance of license and the power reserved by the city to cancel it and throw him out of business at any time discourages the investment necessary to go into business, and tends to, and does, prevent competition and results in building up a monopoly in behalf of the street car company. We think it unnecessary to discuss this general attack of the ordinance. We see nothing in it that would sustain the relator's contention. On the contrary, we see from it only the proper and reasonable regulation of the business and the proper requisites of persons only who should be authorized by the city to operate jitanies on its streets. It may be that some persons would experience some difficulty in complying with the ordinance, but no more so than any other like hazardous and dangerous business.

We have carefully investigated this ordinance and the relator's attack of it and the questions raised by him, and reviewed the *Sullivan Case*, supra, and the authorities therein cited, and have reached the conclusion that there is nothing in the ordinance herein attacked that would in any way legally permit or authorize this court to hold it invalid. On the contrary, it is our opinion that the said ordinance, in the particular attacked wherein relator is in position to attack it, is valid and constitutional, under the agreed statement of facts on file.

It is therefore ordered that the relator be remanded to the custody of the city marshal.

DAVIDSON, J. I cannot concur. I wrote fairly fully in the *Sullivan Case* my views of disagreement. I may write in this case later.

MEMORANDUM DECISIONS

BENITO v. STATE. (No. 3800.) (Court of Criminal Appeals of Texas. Nov. 3, 1915.) Appeal from Ellis County Court; W. M. Tidwell, Judge. Benito, a Mexican, was convicted of gaming, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of gaming, and his punishment assessed at a fine of \$10. Neither a statement of facts nor any bills of exception accompany the record. The information charges the offense of which appellant was convicted. No ground is stated in the motion for a new trial we can review in the absence of the testimony. The judgment is affirmed.

CASE v. STATE. (No. 3597.) (Court of Criminal Appeals of Texas. June 16, 1915. Rehearing Denied Oct. 13, 1915.) Appeal from District Court, Rains County; William Pierson, Judge. Buck Case was convicted of rape, and he appeals. Affirmed. W. W. Berzett, of Emory, and Campbell & Mansell, of Alba, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of rape, and assessed the lowest punishment. There is no bill of exceptions nor statement of facts. In the absence of these there is no question which can be reviewed. The judgment is affirmed.

GOODMAN v. STATE. (No. 3688.) (Court of Criminal Appeals of Texas. Oct. 13, 1915.) Appeal from Criminal District Court, Dallas County; W. L. Crawford, Jr., Judge. Bertha Goodman was convicted of robbery, and she appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a conviction for robbery, with 25 years in the penitentiary assessed as her punishment. There is neither a bill of exceptions nor a statement of facts. Nothing is raised which can be reviewed in the absence of these. The judgment is therefore affirmed.

JOHN v. STATE. (No. 3797.) (Court of Criminal Appeals of Texas. Nov. 3, 1915.) Appeal from Ellis County Court; W. M. Tidwell, Judge. John, a Mexican, was convicted of gaming, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. The appellant in this case was fined \$10 for gaming, the lowest penalty prescribed by law. There is neither a statement of facts nor a bill of exceptions in this case. No question is raised which can be reviewed in the absence of these. The judgment therefore is affirmed.

MICKEY v. STATE. (No. 3807.) (Court of Criminal Appeals of Texas. Nov. 10, 1915.) Appeal from District Court, Bexar County; W. S. Anderson, Judge. Richard Mickey was convicted of arson, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of arson, and his punishment assessed at 5 years in the penitentiary. There is no statement of facts and no bill of exceptions. In the absence of these nothing is presented which we can review. The judgment is affirmed.

MIKE v. STATE. (No. 3796.) (Court of Criminal Appeals of Texas. Nov. 3, 1915.) Appeal from Ellis County Court; W. M. Tidwell, Judge. Mike, a Mexican, was convicted of gaming, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. The appellant in this case was fined \$10 for gaming, the lowest penalty prescribed by law. There is neither a statement of facts nor a bill of exceptions in this case. No question is raised which can be reviewed in the absence of these. The judgment therefore is affirmed.

PELATA v. STATE. (No. 3798.) (Court of Criminal Appeals of Texas. Nov. 3, 1915.) Appeal from Ellis County Court; W. M. Tidwell, Judge. Pelata, a Mexican, was convicted of gaming, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of gaming, and his punishment assessed at a fine of \$10. Neither a statement of facts nor any bills of exception accompany the record. The information charges the offense of which appellant was convicted. No ground is stated in the motion for a new trial we can review in the absence of the testimony. The judgment is affirmed.

RODREGUEZ v. STATE. (No. 3801.) (Court of Criminal Appeals of Texas. Nov. 3, 1915.) Appeal from Ellis County Court; W. M. Tidwell, Judge. Jose Rodriguez was convicted of gaming, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of gaming, and his punishment assessed at a fine of \$10. No statement of facts or bill of exceptions accompany the record. The information charges the offense of which appellant was convicted. No ground is stated in the motion for a new trial we can review in the absence of any testimony. The judgment is affirmed.

SEGUIN v. STATE. (No. 3694.) (Court of Criminal Appeals of Texas. Oct. 13, 1915.) Appeal from Bexar County Court; Nelson Lytle, Judge. Mariano Seguin was convicted of unlawfully carrying a pistol, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. From a conviction for unlawfully carrying a pistol, with the lowest penalty assessed, this appeal is prosecuted. There is no statement of facts or bill of exceptions, and nothing is raised in the record which we can review. The judgment is therefore affirmed.

SLOAN v. STATE. (No. 3678.) (Court of Criminal Appeals of Texas. Oct. 13, 1915.) Appeal from Johnson County Court; B. Jay Jackson, Judge. Henry Sloan was convicted of making a sale of intoxicating liquors in prohibition territory, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of making a sale of intoxicating liquors in prohibition territory. The record contains neither a statement of facts nor any bills of excep-

tions; consequently there is nothing to review, the indictment charging an offense. Affirmed.

STRANGE v. STATE. (No. 3706.) (Court of Criminal Appeals of Texas. Oct. 20, 1915.) Appeal from McLennan County Court; Geo. N. Denton, Judge. Sheb Strange was convicted of aggravated assault, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of an aggravated assault, and fined \$75. There is no statement of facts in the record, and nothing is presented which can be reviewed in the absence of this. The judgment is therefore affirmed.

TOLLIVER v. STATE. (No. 3671.) (Court of Criminal Appeals of Texas. Oct. 13, 1915.) Appeal from Criminal District Court, Dallas County; W. L. Crawford, Jr., Judge.

Jim Tolliver was convicted of a public offense, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. The record before us contains neither a statement of facts nor any bill of exceptions. The information charges an offense against the laws of this state, and there is no question presented we can review. Affirmed.

TREUBINE v. STATE. (No. 3799.) (Court of Criminal Appeals of Texas. Nov. 3, 1915.) Appeal from Ellis County Court; W. M. Tidwell, Judge. Joe Treubine was convicted of gaming, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of gaming, and his punishment assessed at a fine of \$10. Neither a statement of facts nor any bills of exception accompany the record. The information charges the offense of which appellant was convicted. No ground is stated in the motion for a new trial we can review in the absence of the testimony. The judgment is affirmed.

WILLIS v. STATE. (No. 3702.) (Court of Criminal Appeals of Texas. Oct. 20, 1915.) Appeal from District Court, El Paso County; W. D. Howe, Special Judge. C. E. Willis was convicted of burglary, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of burglary, and assessed the lowest punishment. There is no statement of facts, nor any bills of exceptions. Nothing is presented which can be reviewed by this court. The judgment is therefore affirmed.

CHICAGO, R. I. & P. R. CO. v. JONES. (Supreme Court of Arkansas. Sept. 21, 1914.) Appeal from Circuit Court, Prairie County, Southern District; Eugene Lankford, Judge.

PER CURIAM. Appeal dismissed on appellant's motion.

HURST v. STATE. (Supreme Court of Arkansas. Oct. 5, 1914.) Appeal from Circuit Court, Pulaski County, First Division; Robert J. Lea, Judge.

PER CURIAM. Appeal dismissed, on appellant's motion.

KIGER v. STATE. (Supreme Court of Arkansas. Sept. 28, 1914.) Appeal from Circuit Court, Sebastian County, Greenwood District; Daniel Hon, Judge.

PER CURIAM. Appeal dismissed on appellee's motion for failure of appellant to comply with the condition prescribed by the statute in misdemeanor cases.

RALPH v. STATE. (Supreme Court of Arkansas, Sept. 28, 1914.) Appeal from Circuit Court, Sebastian County, Greenwood District; Daniel Hon, Judge.

PER CURIAM. Appeal dismissed on appellee's motion for failure of appellant to comply with the condition prescribed by the statute in misdemeanor cases.

ST. LOUIS SOUTHWESTERN RY. CO. v. HEEREN. (Supreme Court of Arkansas, Sept. 28, 1914.) Appeal from Circuit Court, Calhoun County; Charles W. Smith, Judge.

PER CURIAM. Settled, and appeal dismissed on appellant's motion.

ST. LOUIS SOUTHWESTERN RY. CO. v. TRUBY. (Supreme Court of Arkansas. Sept. 28, 1914.) Appeal from Circuit Court, Columbia County; Charles W. Smith, Judge.

PER CURIAM. Settled, and appeal dismissed on appellant's motion.

OGLESBY v. FT. SMITH DISTRICT OF SEBASTIAN COUNTY. (No. 38.)

(Supreme Court of Arkansas. Dec. 6, 1915.)

Dissenting opinion.

For majority opinion, see 179 S. W. 178.

McCULLOCH, C. J. (dissenting). Two of the justices who have voted to affirm this case declare the law to be that the county court has the power to employ counsel, in addition to the prosecuting attorney, to conduct litigation in which the county is interested. I agree unqualifiedly with that conclusion, and so does Mr. Justice WOOD. That makes four of the judges who are of the opinion that the county court possesses that power. The authorities cited in appellant's brief sustain that view. Those authorities relate generally to municipal corporations, but the principle is the same that where a county or municipality has authority to direct litigation in which it is interested it may employ special counsel, and the fact that an official attorney has been provided by law does not curtail that power. Our statute (Kirby's Digest, § 1493) expressly provides that the county court shall defend cases appealed to the circuit or Supreme Court, and that all expenses incurred by reason of such defense shall be paid by the county. It is therefore necessarily implied that county courts shall provide the means for conducting litigation in which it is interested, and that includes the employment of attorneys.

Two of the judges say that, while the county court has the power to employ counsel, it cannot exercise that power and enter into a contract of employment with another attorney without first obtaining the consent of the prosecuting attorney, or at least until after he has been consulted. If there is any authority at all for employing additional counsel to represent the county in its litigation, it is to be exercised by the county court. Certainly there is no authority conferred by statutes on the prosecuting attorney to exercise that power or to hinder its exercise by the county court. If the county court possesses the power at all, it may exercise it in disregard of the wishes of the prosecuting attorney and without consulting him. Any other view of the matter necessarily places the power in the prosecuting attorney, and not the

county court. The very fact, however, that the county court contracts for the services of an attorney, presupposes that the court has determined the necessity and propriety therefor; and, even if the prosecuting attorney may object to the contract, it is too late to do so after it has been entered into. The prosecuting attorney might, like any other citizen, appeal from the order of the county court entering into such a contract; but he cannot defeat the contract or abrogate it merely by manifesting his disapproval.

Again it is said by the two judges, whose views I am now discussing, that the evidence is sufficient to warrant the conclusion that appellant was acting for the county judge personally, and not for the county court. Where is that evidence found? The contract is evidenced by an order of the county court which was duly entered of record, and pursuant to that contract appellant performed the services contemplated in the employment. There is no evidence whatever that Judge Harp personally employed appellant to do anything at all, and there is no suggestion anywhere in the record of any fraud or collusion between the two. Judge Harp was very earnestly in favor of building a new courthouse. Whether he was right or wrong about that, as a matter of policy or propriety, it is plain that what he did was openly done and

was done as a public official representing the county, and not as an individual. As an individual he made no contract with appellant, but acting for the county he made a contract in the most solemn form. I cannot see that the issues of a political campaign, which resulted in Judge Harp's defeat for re-election as a county judge, have anything whatever to do with this case. It might be different if there was any charge here of fraud and collusion between Judge Harp and appellant to defraud the county by making a contract for the latter to perform services for the county judge as an individual and impose the payment upon the county. But such is not the state of this case. The most that can be said of it is that Judge Harp made a mistake as a matter of policy in pushing the movement to build a new courthouse.

It is treating too lightly the solemn contract of the parties to set aside the appellant's contract with the county on any such grounds as that which has been mentioned as sustaining the decision of the circuit court. I am of the opinion, therefore, that the undisputed evidence in this case shows that appellant's contract with the county court was valid, and that he performed the services and is entitled to the compensation specified in the contract. Mr. Justice WOOD agrees with me in this conclusion.

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⇨282 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 1612, 1991, and district court rule 71a (145 S. W. vii), motion for new trial *held* unnecessary in case tried without a jury, where conclusions of fact and law are filed and exception taken.—Wilkerson v. Stasney & Holub, 179 S. W. 669.

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⚡500 (Ky.) Where the bill of exceptions fails to show the order complained of limiting the number of witnesses, the question cannot be reviewed.—*Deitchman v. Bowles*, 179 S. W. 249.

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⚡569 (Tex.Civ.App.) Under the statute, appellant, without consent of appellee, may without the reporter's transcript prepare a statement of facts on appeal, and have it approved by the judge.—*J. B. Farthing Lumber Co. v. Illig*, 179 S. W. 1092.

⚡569 (Tex.Civ.App.) Bills of exceptions taken to the exclusion of evidence could not be considered on appeal, where they were not signed by the presiding judge.—*Hall v. Ray*, 179 S. W. 1135.

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⚡671 (Ky.) Where the record does not contain the evidence, the only questions are whether the pleadings and proceedings are sufficient to support the judgment.—*Graves' Committee v. Lyons*, 179 S. W. 413.

⚡671 (Ky.) Where there is no bill of evidence in the record, the court can only determine whether the pleadings support the judgment.—*Vasa Co. v. Ohio Valley Banking & Trust Co.*, 179 S. W. 1045.

⚡671 (Mo.App.) Where the abstract of the record proper failed to show the filing and overruling of a motion for a new trial, only the record proper could be considered, so that consideration of matters of exception was precluded on appeal, and such rule was not changed by *Kansas City Court of Appeals* rule 26 (169 S. W. xv).—*Fleming v. Meals*, 179 S. W. 743.

⚡680 (Tex.Civ.App.) Error in overruling special demurrer cannot be considered where record fails to show any demurrer presented or acted upon or exceptions taken.—*Allen v. Reed*, 179 S. W. 544.

⚡685 (Ky.) To show that defendant, in an equitable action involving a legal issue as to which defendant was entitled to a jury trial, was prejudiced by denial of a jury trial as to such issue, the evidence must be shown by the record.—*Scott v. Kirtley*, 179 S. W. 825.

⚡688 (Ky.) Civ. Code Prac. § 840, subsec. 2, and section 343, held not to require affidavits as to improper argument in the presence of the court and about which there was no dispute and to which the court certified in a bill of exceptions.—*Carter Coal Co. v. Hill*, 179 S. W. 2.

⚡688 (Tex.Civ.App.) Statement of defendant's counsel in his argument that plaintiff was a liar cannot be said to be error in the absence of a statement of facts.—*Pulkrabek v. Griffith & Griffith*, 179 S. W. 282.

⚡699 (Tex.Civ.App.) Where defendants gave three separate notes, two of which were renewal notes, and the court could not determine from the general verdict upon which note

it was based, whether the failure to give charges with reference to the rights of plaintiff under each note was error could not be determined.—*First State Bank of Amarillo v. Cooper*, 179 S. W. 295.

⚡708 (Ky.) Where exceptions to confirmation of a judicial sale are heard on evidence, the matter will not be reviewed on an appeal, where the evidence is not in the record.—*Graves' Committee v. Lyons*, 179 S. W. 413.

XI. ASSIGNMENT OF ERRORS.

⚡724 (Tex.Civ.App.) The court on appeal will not consider an assignment of errors which is multifarious, indefinite, and not properly supported by a statement.—*McConnon & Co. v. McCormick*, 179 S. W. 275.

⚡724 (Tex.Civ.App.) Under Rev. St. 1911, art. 1612, assignments of error sufficient to direct the appellate court's attention to the errors complained of were sufficient.—*Bonner Oil Co. v. Gaines*, 179 S. W. 686.

⚡730 (Tex.Civ.App.) Where an assignment of error fails to give the substance of the requested charge on the refusal of which it is based, and the statement fails in any way to identify it, the court will regard it as waived.—*Pecos & N. T. Ry. Co. v. Winkler*, 179 S. W. 691.

⚡731 (Tex.Civ.App.) Any assignment of error without support in the court's conclusions of facts, and which fails to challenge the correctness of such conclusions, presents no error.—*Fowler v. Carlisle*, 179 S. W. 528.

⚡736 (Tex.Civ.App.) The court on appeal will not consider an assignment of error which is multifarious, indefinite, and not properly supported by a statement.—*McConnon & Co. v. McCormick*, 179 S. W. 275.

⚡742 (Tex.Civ.App.) The court on appeal will not consider an assignment of error which is multifarious, indefinite, and not properly supported by a statement.—*McConnon & Co. v. McCormick*, 179 S. W. 275.

⚡742 (Tex.Civ.App.) Mere recital in motion for new trial that court overruled demurrer held not sufficient to present error under rule 31 (142 S. W. xiii), requiring a brief statement subjoined to the proposition in explanation thereof.—*Allen v. Reed*, 179 S. W. 544.

Assignment of error on failing to submit issue to jury cannot be considered, in the absence of a proposition, upon a statement that issue was raised by pleadings and was material.—*Id.*

Assignment of error attacking judgment as permitting defendant to retain property of plaintiff and that plaintiff was entitled to judgment on the verdict under the pleadings and declaring all other issues immaterial to defeat plaintiff's action is not a proposition presenting error for review.—*Id.*

⚡742 (Tex.Civ.App.) An assignment of error complaining of the admission of evidence could not be considered, where it was not followed by a statement showing that the court erred.—*Hall v. Ray*, 179 S. W. 1135.

An assignment of error under which no proposition is submitted will not be considered, where it does not sufficiently disclose the point insisted on to be a proposition within itself.—*Id.*

An assignment of error will not be considered where the statement subjoined thereto is wholly insufficient to support same and enable the Supreme Court to determine without an examination of the record whether error was committed.—*Id.*

⚡743 (Tex.Civ.App.) Plaintiff's contention that defendant admitted, and that the undisputed evidence showed, that he was entitled to an item not allowed by the verdict, could not be considered, where the page or pages of the voluminous statement of facts containing such admission and evidence was not given.—*Hall v. Ray*, 179 S. W. 1135.

⇨747 (Tex.) Where plaintiff did not on defendant's appeal assign as error the denial of complete relief, the question will not be reviewed.—*Owosso Carriage & Sleigh Co. v. McIntosh & Warren*, 179 S. W. 257.

⇨748 (Tex.Civ.App.) Assignments of error not in conformity to the Courts of Civil Appeals rules for briefing and submitting cases will not be considered on appeal.—*Allen v. Reed*, 179 S. W. 544.

XII. BRIEFS.

⇨758 (Tex.Civ.App.) Under the rules for briefing, Rev. St. 1911, art. 1612, as amended by Acts 33d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612), making grounds assigned in a motion for new trial assignments of error, the assignments in the brief must be true copies of such grounds, and not reconstructions thereof.—*J. B. Farthing Lumber Co. v. Illig*, 179 S. W. 1092.

Where assignments of error are grounds assigned in a motion for new trial, they, as given in the brief, must, as required by Rule 25 (142 S. W. xii), refer to the portion of the motion in which they are complained of.—Id.

⇨766 (Ark.) Where a brief fails to abstract the complaint sufficiently to show whether a demurrer was properly sustained, under Supreme Court rule 9, the case will be affirmed.—*Ussery v. Ussery*, 179 S. W. 996.

⇨767 (Tex.Civ.App.) Brief of defendant abusing the trial court and opposing counsel, and a motion by plaintiff to strike it containing abusive language in reference to opposing counsel, stricken from the files on the court's own motion.—*Mossop v. Zapp*, 179 S. W. 685.

⇨770 (Tex.Civ.App.) Under court rule 40 (142 S. W. xiv) an appellant's brief may be accepted as a proper presentation of the case, without examination of the record, where appellee files no brief.—*Occident Fire Ins. Co. v. Linn*, 179 S. W. 523.

⇨773 (Ky.) Failure of appellant to file brief 20 days before date set for hearing on appeal, as required by rule 3 (154 S. W. vii), does not warrant dismissal, where cause was not properly docketed because appellee had never been summoned.—*Doherty v. First Nat. Bank*, 179 S. W. 602.

⇨773 (Mo.App.) Under Rev. St. 1909, §§ 2047-2049, and Courts of Appeals Rules 15, 18 (169 S. W. xxi, xxii), the court may not affirm the judgment for failure of appellant to serve and file briefs in time, but may only dismiss the appeal.—*Arkansas Valley Trust Co. v. Corbin*, 179 S. W. 484.

⇨773 (Tex.Civ.App.) Where appellants failed to file briefs within the time provided in a stipulation, and no error in law was apparent on the record, judgment *held* to be affirmed.—*Richardson v. Peden Iron & Steel Co.*, 179 S. W. 544.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

⇨781 (Tex.Civ.App.) Where the controversy between the parties has been settled pending appeal, the appeal will be dismissed.—*A. A. Fielder Lumber Co. v. Gamble*, 179 S. W. 522.

⇨784 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 2064, appellant, whose notice of appeal was not given before the last day of the term, and who filed no appeal bond, did not perfect his appeal so as to give the Court of Civil Appeals jurisdiction, and it will be dismissed.—*Elkins v. Houlihan*, 179 S. W. 894.

XV. HEARING AND REHEARING.

⇨833 (Tex.Civ.App.) Where appellee's motion for rehearing contains much abusive and vituperative language referring to appellant, it will be dismissed with leave to file another.—*Pye v. Cardwell*, 179 S. W. 683.

⇨835 (Tex.Civ.App.) Objections to instructions, not contained in appellants' brief, but attempted to be set up in a motion for rehearing, *held* waived.—*Levy v. Dunken Realty Co.*, 179 S. W. 679.

XVI. REVIEW.

(A) Scope and Extent in General.

⇨837 (Ky.) Where inadmissible testimony was unobjected to, it must be allowed to stand for what it is worth, on appeal, as part of the evidence of the party whom it favors.—*Hatfield's Adm'r v. Hatfield*, 179 S. W. 832.

Under Civ. Code Prac. § 589, appellee's incompetent testimony on former trial embodied in deposition, to which no exception was pressed below, could not be disregarded on appeal; any error in its admission having been waived.—Id.

⇨842 (Tex.Civ.App.) An erroneous construction of the law applicable to the facts found is error apparent on the face of the record.—*Carroll v. Evansville Brewing Ass'n*, 179 S. W. 1099.

⇨846 (Mo.App.) In an action tried to the court, the erroneous admission of evidence will be disregarded, unless it appears to have affected the decision.—*Pickel v. Pickel*, 179 S. W. 949.

⇨866 (Ark.) Where each side requested a directed verdict, and neither requested any other instruction, the court on appeal must treat the cause as before them on the question of the sufficiency of the evidence to sustain the verdict.—*Swift v. First Nat. Bank of Lewisville*, 179 S. W. 810.

(C) Parties Entitled to Allege Error.

⇨877 (Ky.) In an action to recover balance advanced on a timber contract, cross-defendants could not complain of instructions having no bearing on the verdict from which they appealed.—*Ramey v. Ironton Lumber Co.*, 179 S. W. 207.

⇨880 (Tex.Civ.App.) In action against corporation on its notes, and against its president as surety thereon, where the surety sought no relief against the corporation, he could not question the validity of the default judgment against it because the record showed no service on it.—*Bonner Oil Co. v. Gaines*, 179 S. W. 686.

⇨882 (Ky.) Where one party demurs to the petition for want of a necessary party, he is estopped from afterwards alleging error in bringing in such party, as the error, if any, is invited.—*Carrick v. Garth*, 179 S. W. 609.

⇨882 (Tex.) Defendant cannot complain of submission as ground of recovery of act of negligence, though not the proximate cause of injury, where its own requested charges submitted the same issue.—*Paris & G. N. R. Co. v. Flanders*, 179 S. W. 263.

(D) Amendments, Additional Proofs, and Trial of Cause Anew.

⇨895 (Ark.) Case tried in chancery without objection *held* to come before the Supreme Court for trial de novo with a presumption in favor of the chancellor's finding of fact, unless against the preponderance of the evidence.—*Mays v. Blair*, 179 S. W. 331.

(E) Presumptions.

⇨907 (Ark.) In the absence of a bill of exceptions, it will be presumed that the court's finding, in an action to set aside a judgment, that the attorney who confessed it was authorized to do so, was sustained by evidence.—*Smith v. Minter*, 179 S. W. 341.

⇨907 (Ky.) In the absence of a transcript of the evidence, it will be presumed that the evidence supported the judgment.—*Pacific Mut. Life Ins. Co. v. Taylor*, 179 S. W. 199.

⇨907 (Tex.Civ.App.) Where the record of a case does not show whether the stock law pro-

hibiting horses and other animals from running at large was in force, the court on appeal will presume that it was not in force.—*Missouri, K. & T. Ry. Co. of Texas v. Lovell*, 179 S. W. 1111.

—909 (Ky.) Where the evidence is not in the record, it will be presumed in an action on an insurance policy that the premiums were paid; judgment going for plaintiff.—*Pacific Mut. Life Ins. Co. v. Taylor*, 179 S. W. 199.

—922 (Ky.) Where the facts disclosed in a motion to quash the panel were not established other than by the motion, they cannot be assumed to be true, and the denial cannot be reviewed.—*Trosper Coal Co. v. Rader*, 179 S. W. 1023.

—927 (Ark.) In determining the correctness of directed verdict, view of evidence most favorable to party against whom it is directed *held* to be taken.—*Barrentine v. Henry Wrape Co.*, 179 S. W. 328.

—927 (Ark.) In reviewing the direction of a verdict for defendant, the evidence for plaintiff must be given its highest probative force.—*Cook v. St. Louis, I. M. & S. Ry. Co.*, 179 S. W. 501.

—927 (Tex.Civ.App.) Where there are both valid and invalid grounds for dismissal, it will be presumed on appeal that the dismissal was upon valid grounds only.—*H. J. Murrell & Co. v. Edwards*, 179 S. W. 532.

—928 (Tex.Civ.App.) In the absence of any information enabling it to determine error in the refusal to charge, the presumption must be in support of the judgment.—*First State Bank of Amarillo v. Cooper*, 179 S. W. 295.

—930 (Tex.Civ.App.) In an action for delay in the shipment of live stock an assignment of error that the verdict was insufficient in failing to find weight and market value, or what the cattle sold for, will be overruled, under *Vernon's Sayles' Ann. Civ. St. 1914, art. 1985*, where the issue was not requested and the market value was sufficiently proven.—*Quannah, A. & P. Ry. Co. v. Collier*, 179 S. W. 96.

—931 (Tex.Civ.App.) When a special answer does not find all the facts necessary to form the basis of a judgment, but does answer all the questions submitted, the court is presumed to have found the omitted facts necessary to support the judgment.—*International & G. N. Ry. Co. v. Berthea*, 179 S. W. 1087.

—933 (Ky.) New trial *held* not to be assumed to have been granted for inadequacy of the damages contrary to Civ. Code Prac. § 341.—*Gnau v. Ackerman*, 179 S. W. 217.

—934 (Tex.Civ.App.) Under Rev. St. 1911, § 1985, as to presuming finding by court to support judgment, assumption that court erred in decreeing foreclosure of lien because jury made made no finding on that issue *held* to be overruled.—*King v. Collins*, 179 S. W. 899.

—934 (Tex.Civ.App.) On appeal from district court of T. county, to which sequestration suit had been taken by certiorari, *held* that, in the absence of the writ of certiorari from the record, it would be presumed to support the judgment, that claimant residing in D. county had admitted that the property was in defendant's possession when levied on.—*Josey v. Masters*, 179 S. W. 1134.

—936 (Mo.App.) An award of a lump sum for attorney's fees must, where there were numerous items, be presumed to have been only for those services for which compensation could be awarded.—*Pickel v. Pickel*, 179 S. W. 949.

(F) Discretion of Lower Court.

—959 (Mo.App.) The allowance of amendments to pleadings is a matter not entirely within the discretion of the trial court; its action being reviewable in case of abuse.—*Jennings v. National American*, 179 S. W. 789.

—969 (Ky.) Trial together of action for libel against newspaper and action against reporter thereon involving same issues *held* within discretion of court, and not to be disturbed on appeal, except for abuse.—*Reid v. Nichols*, 179 S. W. 440.

—977 (Ky.) The discretion of the trial court in granting a new trial will not be interfered with unless it appears to have been abused, or unless it appears that the court transcended its authority under the Code.—*Gnau v. Ackerman*, 179 S. W. 217.

—977 (Mo.App.) Trial court's discretion to grant new trial should not be interfered with by appellate court, unless that discretion has been clearly abused; but where no verdict in favor of the party to whom the new trial is granted could be allowed to stand, the order granting the new trial will be reversed.—*Powell v. Batchelor*, 179 S. W. 751.

—982 (Ky.) The action of lower court in setting aside verdict as excessive will not be reviewed on appeal, in the absence of abuse of discretion by the trial court.—*Beall v. Louisville Home Telephone Co.*, 179 S. W. 251.

(G) Questions of Fact, Verdicts, and Findings.

—1001 (Mo.App.) Jury's finding on ample evidence that railroad rail, which struck plaintiff, was turned by another employé as directed, and not thrown at the foreman for the purpose of assaulting him, *held* to be respected.—*Hellriegel v. Dunham*, 179 S. W. 763.

—1001 (Tex.Civ.App.) Where the evidence is sufficient to raise the issue, the finding of the jury that assured was in good standing at the time of his death is conclusive on appeal.—*Knights of the Maccabees of the World v. Parsons*, 179 S. W. 78.

—1001 (Tex.Civ.App.) Where the verdict is not supported by the evidence, the case will be reversed.—*Blair & Hughes Co. v. Watkins & Kelley*, 179 S. W. 530.

—1002 (Ark.) Where a judgment was for a less sum than the only testimony as to the damages, *held*, that it would not be disturbed on the ground that it was contrary to the uncontradicted evidence; the credibility of the witness being involved.—*Hall v. Gage*, 179 S. W. 508.

—1002 (Ky.) Where evidence was conflicting, verdict for plaintiff not flagrantly against the evidence is conclusive.—*Shelby v. Grabble*, 179 S. W. 1.

—1002 (Mo.App.) Conflict between plaintiff's statement of the facts and his affirmative answers to carefully-worded questions on cross-examination *held* a matter for the jury.—*Hellriegel v. Dunham*, 179 S. W. 763.

—1002 (Tex.Civ.App.) In an action on life insurance policies, the finding of assured's death *held* conclusive on the appellate court where the evidence is conflicting.—*Knights of the Maccabees of the World v. Parsons*, 179 S. W. 78.

—1002 (Tex.Civ.App.) A verdict fully supported by the evidence, though conflicting, will not be reversed.—*Hughes v. Colbert*, 179 S. W. 443; *Same v. Butler*, Id.

—1003 (Ky.) Verdict *held* not to be set aside, unless clearly and palpably against the weight of the evidence.—*Hodge Tobacco Co. v. Whaley*, 179 S. W. 840.

—1004 (Ky.) Damages for personal injuries *held* to be left to the judgment and discretion of the jury, which will not be interfered with unless unreasonable or influenced by passion or prejudice.—*Gnau v. Ackerman*, 179 S. W. 217.

⇒1009. A chancellor's findings of fact will not be disturbed on appeal, unless against the clear preponderance of the evidence.

—(Ark.) Beatrice Creamery Co. v. Garner, 179 S. W. 160; Vaughan v. Chicago, R. I. & P. Ry. Co., Id. 165; Louis Werner Sawmill Co. v. Sessoms, Id. 185; Barker v. Lack, Id. 493;

(Ky.) Gambill v. Grigsby, 179 S. W. 822.

⇒1009 (Ky.) In an action to set aside a conveyance, the evidence being conflicting, the chancellor's finding of the grantor's mental capacity must be accepted on appeal.—Meece v. Colyer, 179 S. W. 579.

⇒1009 (Ky.) Where the evidence is conflicting and the mind left in doubt, and it is not reasonably certain that the chancellor has erred, the appellate court will affirm his decision.—Cole v. Collins, 179 S. W. 607.

⇒1009 (Ky.) Where the evidence is conflicting, and on the whole case the court on appeal cannot determine with reasonable certainty that the chancellor erred, his finding will not be disturbed.—Gover v. Williams, 179 S. W. 1047.

⇒1010 (Tex.Civ.App.) Where an issue of fact was not requested to be submitted to the jury, but was determined by the court, the Court of Civil Appeals could only inspect the evidence to ascertain whether the finding was supported thereby.—Harper v. Stewart, 179 S. W. 277.

⇒1010 (Tex.Civ.App.) The question for an appellate court is not whether findings of the trial court complained of are supported by a preponderance of the evidence, but whether or not there is any evidence to support them.—International Fire Insurance Co. v. Black, 179 S. W. 534.

⇒1015 (Ark.) Where there is a substantial conflict in the evidence, the action of the trial court, in granting new trial because the verdict is against the weight of the evidence, is not reviewable.—Johnson v. Mantooth, 179 S. W. 175.

(H) Harmless Error.

⇒1027 (Tex.Civ.App.) Admission of testimony of witness that he did not know or hear of plaintiff's ownership of the land in controversy, if error *held* harmless, where it appeared that the same verdict and judgment would have been rendered had the evidence been excluded.—Hall v. Ray, 179 S. W. 1135.

⇒1033 (Ky.) Where defendants were entitled to the whole of timber on land, plaintiffs cannot complain that the judgment awarded them only a one-half interest.—Wilson v. Marsee, 179 S. W. 410.

⇒1033 (Mo.App.) In an action for breach of marriage promise, where defendant's answer admitted plaintiff's legal capacity to marry, an instruction submitting that question to the jury was harmless as to defendant, casting an unnecessary burden on plaintiff.—Chapman v. Brown, 179 S. W. 774.

⇒1040 (Tex.Civ.App.) In an action on note, error, if any, in overruling exception to answer, *held* harmless, where the subsequent pleadings raised such issue and the case was tried thereon.—First State Bank of Amarillo v. Cooper, 179 S. W. 295.

⇒1040 (Tex.Civ.App.) Defendant cannot complain of court's refusal to rule on a general demurrer, unless it is well taken.—City of Brownsville v. Tumlinson, 179 S. W. 1107.

⇒1041 (Ky.) Defendant *held* not prejudiced by filing of amended petition after impaneling of jury; it merely making more definite some of the allegations of the original petition.—Hodge Tobacco Co. v. Whaley, 179 S. W. 840.

⇒1041 (Tex.Civ.App.) Refusal to permit defendant to withdraw its announcement of ready, to file a supplemental answer, *held* harmless, where the answer was actually an amendment, and the court permitted the filing of a trial

amendment.—City of Brownsville v. Tumlinson, 179 S. W. 1107.

⇒1046 (Tex.Civ.App.) Under rule 81 for district and county courts (142 S. W. xx), including the provision of Rev. St. art. 1953, *held*, on the pleadings in an action on a note, that the granting to defendants of the right to open and close was reversible error.—First State Bank of Amarillo v. Cooper, 179 S. W. 295.

⇒1046 (Tex.Civ.App.) Error in permitting defendant to open and conclude the argument was material and necessitated a reversal.—J. W. Carter Music Co. v. Bailey, 179 S. W. 547.

⇒1050 (Mo.App.) In an action for injuries received by one who fell on a defective sidewalk, the erroneous admission of evidence of the condition of the walk subsequent to the action *held* prejudicial.—Morgan v. City of Kirksville, 179 S. W. 755.

⇒1050 (Tex.Civ.App.) Erroneous admission of hearsay evidence could not be said to be harmless, though there was other competent evidence, where there was no statement of facts.—Pulkrabek v. Griffith & Griffith, 179 S. W. 282.

⇒1050 (Tex.Civ.App.) It is harmless error to admit testimony that witness did not hear of a train's not running on Sunday, over the objection of the defendant that the evidence is immaterial.—Missouri, K. & T. Ry. Co. of Texas v. Dale Bros. Land & Cattle Co., 179 S. W. 935.

⇒1050 (Tex.Civ.App.) The admission of testimony as to whether a railroad track was fenced at a point other than the place of the accident is harmless, in an action for the killing of cattle.—Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co., 179 S. W. 1104.

⇒1050 (Tex.Civ.App.) Though testimony of president of bank suing on note as to extent of his powers might be objectionable, *held*, that the inquiry as to his powers was not apparently material.—Bolt v. State Savings Bank of Manchester, Iowa, 179 S. W. 1119.

⇒1050 (Tex.Civ.App.) Admission of testimony over objection that it was a conclusion *held* harmless, where the witness had already given substantially the same testimony without objection.—Hall v. Ray, 179 S. W. 1135.

Admission of defendant's testimony that prior to the date of the general partnership the existence of which was in controversy he and plaintiff had made a number of land trades together and divided the profits on same, if error, was harmless, where plaintiff had testified to similar transactions.—Id.

⇒1051 (Tex.Civ.App.) Admission of opinion evidence given after positive showing upon the same question, although error, is harmless.—Pecos & N. T. Ry. Co. v. Winkler, 179 S. W. 691.

⇒1052 (Tex.Civ.App.) In a proceeding for the appointment of a receiver, the admission of secondary evidence as to the contents of the books of defendant was cured by the production of the books in court.—Hart-Parr Co. v. Alvin-Japanese Nursery Co., 179 S. W. 697.

⇒1058 (Ky.) The exclusion of evidence which was supplied by the testimony of later witnesses is harmless, though erroneous.—Roberts v. Sandy Valley & Elkhorn Ry. Co., 179 S. W. 228.

⇒1060 (Tex.Civ.App.) Argument of plaintiff's counsel based on defendant's failure to have present as witnesses the engineer and fireman of train causing the injury *held* not to require a reversal.—St. Louis Southwestern Ry. Co. of Texas v. Aston, 179 S. W. 1128.

⇒1062 (Ark.) Error in directing verdict against plaintiff, who sued for wrongful attachment, was harmless, where plaintiff, who bought in other attached property with her own, profited in the transaction.—Webb v. Van Vleet-Mansfield Drug Co., 179 S. W. 357.

⇨1062 (Tex.Civ.App.) Submitting special issue of whether parties were defendants' agents, the controversy being as to their authority, *held* immaterial; another issue having been submitted as to their authority.—King v. Collins, 179 S. W. 899.

⇨1064 (Ky.) In a servant's action for injury, error in an instruction as to assumption of risk from a defective appliance *held* harmless, where plaintiff testified that he knew of the alleged defect.—Phillips v. Corbin & Fannin, 179 S. W. 586.

⇨1064 (Tex.Civ.App.) It must appear that an erroneous charge calculated to mislead the jury did not have that effect, or the judgment will be reversed.—Wichita Valley Ry. Co. v. Somerville, 179 S. W. 671.

Erroneous instruction as to defendant's right to prevail under five-year statute of limitations *held* not immaterial under rule 62a (149 S. W. x), unless she was entitled to a peremptory instruction under the ten-year statute.—Id.

⇨1066 (Ky.) Under Civ. Code Prac. §§ 134, 333, 756, in mining trip brakeman's action for injuries through negligence of motorman, his superior servant, charge erroneously authorizing recovery for mere ordinary negligence *held* not prejudicial where gross negligence was shown.—Consolidated Coal Co. v. Baldrige, 179 S. W. 18.

⇨1066 (Tex.Civ.App.) That petition was based on quantum meruit, and charge authorized recovery of balance due under contract, *held* not to require reversal, where there was no question of the reasonable value of the work and material.—King v. Collins, 179 S. W. 899.

⇨1067 (Tex.Civ.App.) Where the court erroneously denied a motion to strike incompetent evidence, the refusal of a charge to disregard such evidence was material error.—Occident Fire Ins. Co. v. Linn, 179 S. W. 523.

⇨1068 (Tex.Civ.App.) Refusal of an instruction that an agreement was not binding was harmless, it being clear that the jury did not consider the agreement.—Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin, 179 S. W. 541.

⇨1068 (Tex.Civ.App.) In trespass to try title, refusal of instruction to find against one defendant under certain circumstances *held* immaterial, because jury, by finding for the other defendant, found against such defendant.—Wichita Valley Ry. Co. v. Somerville, 179 S. W. 671.

⇨1068 (Tex.Civ.App.) Error in refusing a requested instruction was harmless, where the verdict shows that the jury found adversely to the one requesting the instruction.—Pecos & N. T. Ry. Co. v. Winkler, 179 S. W. 691.

⇨1070 (Ky.) In an action for setting fire by sparks from a locomotive, failure of the jury to say whether the company owning the road or the company operating a train thereon started the fire was not prejudicial, where the first company was liable for the negligence of the latter.—Louisville & N. R. Co. v. Feeney, 179 S. W. 826.

(K) Subsequent Appeals.

⇨1099 (Ky.) In action in equity for use of a judgment creditor against father of judgment debtor, to whom he had fraudulently turned over several jacks, language of Court of Appeals on former appeal *held* not conclusive as to the number of jacks living when the suit was commenced.—Commonwealth v. Filiatreau, 179 S. W. 20.

⇨1099 (Ky.) Where the evidence on new trial after appeal is substantially the same as on the first trial, the court will not review a verdict directed in accordance with opinion on first appeal.—Swann's Adm'x v. Cincinnati, N. O. & T. P. Ry. Co., 179 S. W. 391.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(B) Affirmance.

⇨1140 (Tex.Civ.App.) Where a verdict allows an excessive amount for medical attendance, the error may be cured by plaintiff's filing a remittitur so as to conform the amount to that supported by the evidence.—Pecos & N. T. Ry. Co. v. Winkler, 179 S. W. 691.

⇨1144 (Mo.App.) Judgment, in action to disaffirm contract, entered into in infancy, open in that it provided for the appointment of a receiver if money award was not paid, would be remanded, so that court below might adjust it to meet the situation as changed by the appeal.—Moser v. Renner, 179 S. W. 970.

(D) Reversal.

⇨1170 (Ky.) In view of Civ. Code Prac. § 134, prohibiting reversal for harmless errors, a judgment which is a correct decision will not be disturbed because based on an erroneous reason.—Commonwealth v. McCauley's Ex'r, 179 S. W. 411.

⇨1170 (Ky.) In view of Civ. Code Prac. §§ 135, 335, 756, the error in an instruction allowing recovery for ordinary negligence, where the charge was gross negligence, *held* harmless.—Chesapeake & O. Ry. Co. v. Shamblen, 179 S. W. 837.

⇨1170 (Tex.Civ.App.) In an action for destruction of plaintiff's house by fire from defendant's locomotive, admission of a conductor's report not shown to be correct *held* harmless error, under rule 62 for the Court of Civil Appeals (149 S. W. x).—Moose v. Missouri, K. & T. Ry. Co. of Texas, 179 S. W. 75.

⇨1177 (Tex.Civ.App.) Where amended petition shows an amount beyond the jurisdiction of the trial court, but the record does not show the amount originally sued for, the cause will be remanded, instead of dismissing it.—San Antonio & A. P. Ry. Co. v. Schaeffer, 179 S. W. 540.

⇨1180 (Mo.App.) Appellant, appealing without giving a stay bond, may, on reversal of the judgment, recover back money he has been compelled to pay on judgment pending appeal.—Arkansas Valley Trust Co. v. Corbin, 179 S. W. 484.

(F) Mandate and Proceedings in Lower Court.

⇨1195 (Tex.Civ.App.) The answers to questions propounded by the Court of Civil Appeals to the Supreme Court are conclusive upon the Court of Civil Appeals.—Masterson v. Harris, 179 S. W. 284.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

⇨1230 (Mo.App.) An appellant who fails to perfect his appeal, or who asks its dismissal, violates his appeal bond.—Arkansas Valley Trust Co. v. Corbin, 179 S. W. 484.

APPELLATE COURTS.

See Courts, ⇨207.

APPLIANCES.

See Master and Servant, ⇨101-129.

APPOINTMENT.

See Executors and Administrators, ⇨11.

APPORTIONMENT.

See Eminent Domain, ⇨157.

APPRAISEMENT.

See Taxation, ⇨895.

ARGUMENT OF COUNSEL.

See Criminal Law, ¶720-730; Trial, ¶112, 125.

ARREST.

See False Imprisonment; Ne Exeat.

ARSON.

See Criminal Law, ¶371, 424; Indictment and Information, ¶110; Judgment, ¶559.

¶25 (Tex.Cr.App.) It is not error in a prosecution for arson to exclude copies of deeds tending to show title of the burned property in another than the person named in the indictment, where it is not claimed that possession or claim of possession by another can be shown.—*Tinker v. State*, 179 S. W. 572.

¶30 (Tex.Cr.App.) The title of burned property is never in issue in a prosecution for arson and may be shown by oral evidence.—*Tinker v. State*, 179 S. W. 572.

¶37 (Ark.) Evidence held sufficient to sustain a conviction.—*Shuffield v. State*, 179 S. W. 660.

ASSAULT AND BATTERY.

See Criminal Law, ¶200, 419, 420, 422; Homicide, ¶89, 95, 257; Indictment and Information, ¶122.

II. CRIMINAL RESPONSIBILITY.**(B) Prosecution and Punishment.**

¶91 (Tex.Cr.App.) Substantial proof only of the means used in an assault is sufficient to support the charge.—*Chisom v. State*, 179 S. W. 103.

¶91 (Tex.Cr.App.) Evidence held to warrant a conviction of assault.—*Dickie v. State*, 179 S. W. 566.

¶92 (Tex.Cr.App.) On trial for aggravated assault, evidence as to whether defendant was a principal in the offense or an innocent bystander held to support a verdict of guilty.—*Southall v. State*, 179 S. W. 872.

Evidence held sufficient to show a premeditated plan to waylay an assaulted party, and that he was waylaid and a fight forced at a point selected by defendant and his companions.—*Id.*

¶97 (Tex.Cr.App.) On trial for assault, held, that verdict assessing fine of \$25 should have specified whether accused was convicted of simple assault or aggravated assault.—*Dieter v. State*, 179 S. W. 557.

ASSESSMENT.

See Damages, ¶208; Drains, ¶82; Municipal Corporations, ¶406-567; Taxation, ¶362½, 387.

ASSIGNMENT OF ERRORS.

See Appeal and Error, ¶724-748; Criminal Law, ¶1129.

ASSIGNMENTS.

See Fraudulent Conveyances; Vendor and Purchaser, ¶261.

I. REQUISITES AND VALIDITY.**(A) Property, Estates, and Rights Assignable.**

¶18 (Ark.) Contract between company successors and assigns, and a consumer, successors, and assigns, for the furnishing of electricity, held not rendered nonassignable by stipulation that it was nontransferable.—*Leader Co. v. Little Rock Ry. & Electric Co.*, 179 S. W. 358.

¶19 (Ark.) Contract to furnish electricity to certain premises held not to create personal obligations rendering the contract nonassignable.—*Leader Co. v. Little Rock Ry. & Electric Co.*, 179 S. W. 358.

III. RIGHTS AND LIABILITIES OF PARTIES.

¶100 (Tex.Civ.App.) An order to pay from funds collected by the drawee is subject to the prior debt of the drawer to the drawee and to the drawee's equities against the drawer.—*H. J. Murrell & Co. v. Edwards*, 179 S. W. 582.

ASSOCIATIONS.

See Beneficial Associations; Building and Loan Associations; Insurance, ¶687-825.

ASSUMPSIT, ACTION OF.

See Money Received.

ASSUMPTION OF RISK.

See Master and Servant, ¶203-224.

ATTACHMENT.

See Execution; Garnishment; Homestead; Pleading, ¶34.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

¶191 (Ky.) The bond executed under Civ. Code Prac. § 214, is only an obligation to produce the property; the lien of the attachment and the power of the court over the property continuing as if the attachment were still in force.—*Hudson Engineering Co. v. Shaw*, 179 S. W. 1083.

X. LIABILITIES ON BONDS OR UNDERTAKINGS.

¶337 (Ky.) Although, after defendant surety company gave bond, under Civ. Code Prac. § 221, to release attached property, the plaintiff amended his petition to recover a greater sum, the surety company is not discharged from all liability, but is liable in the amount originally sued for.—*Hudson Engineering Co. v. Shaw*, 179 S. W. 1083.

¶338 (Ky.) Where defendant surety company gave its bond under Civ. Code Prac. § 221, to release attached property in an action to recover \$880, and plaintiff thereafter amended to recover \$8,500, defendant is not liable for final judgment for more than the \$880.—*Hudson Engineering Co. v. Shaw*, 179 S. W. 1083.

¶343 (Ark.) Consolidation of attachments for rent held to preclude recovery on more than one of the attachment bonds, the consolidated action being alone left.—*Davidson v. Mayhue*, 179 S. W. 371.

XI. WRONGFUL ATTACHMENT.

¶365 (Ark.) An attaching creditor cannot be held liable for wrongful acts of the sheriff not shown to have been done at his direction.—*Webb v. Van Fleet-Mansfield Drug Co.*, 179 S. W. 357.

¶366 (Ark.) Under Kirby's Dig. § 381, the damages for wrongful attachment must be determined in the action wherein the attachment was dissolved.—*Davidson v. Mayhue*, 179 S. W. 371.

ATTESTATION.

See Wills, ¶115-123.

ATTORNEY AND CLIENT.

See Affidavits, ¶5; Appeal and Error, ¶424, 936; Counties, ¶114; Criminal Law, ¶720-730, 1171; Malicious Prosecution, ¶21; New Trial, ¶29, 49; Trial, ¶112, 125; Witnesses, ¶198.

I. THE OFFICE OF ATTORNEY.

(C) Suspension and Disbarment.

¶49 (Ark.) In a contempt proceeding, *held* that, under Kirby's Dig. §§ 450-468, an attorney could not be disbarred.—*Dickerson v. State*, 179 S. W. 324.

¶56 (Ark.) An attorney, charged with contempt, cannot be said not to have objected to judgment of disbarment; it appearing he was not notified that disbarment would be sought.—*Dickerson v. State*, 179 S. W. 324.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

¶133 (Ky.) As a general rule, an attorney cannot recover fees for his services from one who has not employed him or authorized his employment, although the services may have been beneficial to such person.—*O'Doherty & Yonts v. Bickel*, 179 S. W. 848.

Attorneys representing certain stockholders in a suit to recover on a contract for the sale of stock, *held* not entitled to recover compensation as against other stockholders who had been benefited by their services.—*Id.*

Attorneys for certain stockholders *held* not entitled to compensation under Ky. St. § 489, as against other stockholders not employing them, although their services in suing upon the contract for the sale of stock had benefited such other stockholders.—*Id.*

¶150 (Ark.) An attorney *held* entitled only to the percentage of amount paid his client in compromise without his consent, as fixed by his contingent fee contract.—*St. Louis, I. M. & S. Ry. Co. v. Freeman*, 179 S. W. 648.

(B) Lien.

¶172 (Ark.) Kirby's Dig. § 4457, giving a right of action to attorneys against litigants for reasonable fee, where client compromises, *held* repealed by Act May 31, 1909 (Laws 1909, p. 892), creating lien upon cause of action.—*St. Louis, I. M. & S. Ry. Co. v. Freeman*, 179 S. W. 648.

¶189 (Ark.) Parties to litigation have right to compromise without consent and over objection of attorneys.—*St. Louis, I. M. & S. Ry. Co. v. Freeman*, 179 S. W. 648.

ATTRACTIVE NUISANCE.

See Evidence, ¶5; Municipal Corporations, ¶762.

AUTOMOBILES.

See Carriers, ¶2, 4; Constitutional Law, ¶208; Damages, ¶113, 188; Homicide, ¶68; Licenses, ¶7; Master and Servant, ¶301, 302, 333; Municipal Corporations, ¶121, 703-706.

AVOIDANCE.

See Infants, ¶58.

BAIL.

II. IN CRIMINAL PROSECUTIONS.

¶42 (Tex.Cr.App.) Under Const. art. 1, § 11, all prisoners are to be admitted to bail, save when the proof is evident not only that accused is guilty, but that the jury will, if they prop-

erly enforce the law, probably assess capital punishment.—*Ex parte Sapp*, 179 S. W. 109.

¶52 (Tex.Cr.App.) Judgment fixing bail at amount claimed to be in excess of defendant's ability to give bail *held* not to be set aside, in the absence of any attempt and failure to give bail in the amount fixed.—*Ex parte Neyland*, 179 S. W. 715.

¶65 (Tex.Cr.App.) Failure to set forth punishment assessed in recognizance in criminal case *held* to require dismissal of appeal.—*Dorris v. State*, 179 S. W. 718.

¶66 (Tex.Cr.App.) A recognizance which recites no specific offense and does not comply with the statute requiring that the punishment itself must be stated is insufficient.—*Robertson v. State*, 179 S. W. 106.

BAILMENT.

¶12 (Tenn.) A bailee for the accommodation of the bailor is answerable only for his gross negligence or bad faith, the degree of care being measured, however, with reference to the nature of the article bailed.—*Ridenour v. Woodward*, 179 S. W. 148.

A traveling salesman to whom funds were entrusted to deposit in a neighboring bank *held* not guilty of a conversion in depositing the money in an iron safe in the custody of another when he arrived after banking hours.—*Id.*

BALLOTS.

See Elections, ¶299.

BANKS AND BANKING.

III. FUNCTIONS AND DEALINGS.

(A) Banking Franchises and Powers, and Their Exercise in General.

¶94 (Tex.Civ.App.) While a bank ordinarily may not own a railroad, it may sell and dispose of its capital stock held by it as executor.—*Continental Trust Co. v. Brown*, 179 S. W. 939.

(C) Deposits.

¶123 (Ky.) A bank having the custody of stock certificates is liable for failure to deliver within a reasonable time after demand.—*Ohio Valley Banking & Trust Co. v. Wathen's Ex'rs*, 179 S. W. 230.

¶134 (Ky.) Bank lending funds to subcontractor *held* to have legal right to appropriate or enforce payment from deposit by contractor in such bank to subcontractor's account.—*Citizens' Trust & Guaranty Co. v. Farmers' Bank of Estill County*, 179 S. W. 29.

¶154 (Ark.) Evidence in an action by a depositor against a bank to recover the amount deposited, which the bank turned over to a third person, *held* sufficient to support a directed verdict for the defendant.—*Swift v. First Nat. Bank of Lewisville*, 179 S. W. 810.

Evidence of transaction between person to whom bank paid funds of a depositor and the vice president of the bank, involving the funds paid, *held* properly excluded as immaterial.—*Id.*

(D) Collections.

¶156 (Ark.) Bank in collecting draft *held* to have acted as drawer's agent, and, drawer being guilty of fraud, drawee could recover the amount paid from the bank.—*Oklahoma State Bank v. Bank of Central Arkansas*, 179 S. W. 509.

¶165 (Ark.) Party induced to pay draft to bank by fraud *held* entitled to recover payment notwithstanding cashier's attempted appropriation of the funds in payment of a note after receiving notice of the fraud.—*Oklahoma State Bank v. Bank of Central Arkansas*, 179 S. W. 509.

(H) Actions.

↯226 (Ky.) Petition, in action against a bank by a customer, based on bank's refusal to give a correct statement of account, whereby he suffered a loss, *held* not to state a cause of action.—*Vasa Co. v. Ohio Valley Banking & Trust Co.*, 179 S. W. 1045.

IV. NATIONAL BANKS.

↯262 (Tex.Civ.App.) The cashier of a national bank has power to transfer notes and bills receivable, payable to the bank, without special authority from the directors.—*Memphis Cotton Oil Co. v. Gist*, 179 S. W. 1000.

BAR.

See Judgment, ↯540.

BASTARDS.**I. ILLEGITIMACY IN GENERAL.**

↯3 (Tenn.) The presumption of the legitimacy of a child born during wedlock is indulged, though antenuptial conception is made to appear.—*Jackson v. Thornton*, 179 S. W. 384.

The presumption of the legitimacy of a child born during wedlock is weakened, and may be overcome by a less weight of evidence where antenuptial conception is shown.—*Id.*

Presumption of legitimacy *held* overcome only by clear, strong, and convincing testimony, and not by a mere preponderance, or by neighborhood rumor and suspicion, though antenuptial conception is shown.—*Id.*

BATTERY.

See Assault and Battery.

BENEFICIAL ASSOCIATIONS.

See Building and Loan Associations; Insurance, ↯687-825.

↯4 (Tex.Civ.App.) A colored order, known as the Free and Accepted Masons, *held* not entitled to enjoin a rival order from the use of the name of the Ancient Free & Accepted Masons, Colored.—*Free and Accepted Masons of the State of Texas v. Ancient Free and Accepted Masons, Colored*, 179 S. W. 265.

BEST AND SECONDARY EVIDENCE.

See Criminal Law, ↯398-404; Evidence, ↯158.

BETTING.

See Gaming.

BEVERAGE.

See Food, ↯25.

BIAS.

See Jury, ↯97; Witnesses, ↯369, 376.

BIGAMY.

See Criminal Law, ↯597.

↯1 (Tex.Cr.App.) One who marries another under the honest belief that he has been divorced from his first wife is not guilty of bigamy.—*Chapman v. State*, 179 S. W. 570.

BILL OF LADING.

See Carriers, ↯58, 83.

BILL OF PARTICULARS.

See Indictment and Information, ↯121.

BILLS AND NOTES.

See Alteration of Instruments, ↯25; Appeal and Error, ↯80; Chattel Mortgages, ↯241; Embezzlement, ↯6; Evidence, ↯423, 434, 441, 471, 472; Indemnity, ↯6; Novation, ↯4; Principal and Surety, ↯27, 115, 156; Trial, ↯25, 191, 194, 199, 251, 252; Usury, ↯32.

I. REQUISITES AND VALIDITY.**(D) Acceptance.**

↯68 (Tex.Civ.App.) The drawee of an order *held* not to have accepted the order by the words, "the order shall have our attention" at an uncertain time.—*H. J. Murrell & Co. v. Edwards*, 179 S. W. 532.

(F) Validity.

↯103 (Tex.Civ.App.) Cashier's misrepresentation to maker of note to bank as to its amount that he was also a party and would stand between her and all danger *held* sufficient ground for a cancellation.—*Lockney State Bank v. Dameron*, 179 S. W. 552.

↯114 (Ky.) Defendant, in action on notes, cannot counterclaim for amount of notes he has paid innocent purchasers, when notes were all given in consideration of a fraudulent contract, to the fraud of which he did not object until three months after learning of it.—*American Mfg. Co. v. Crittenden Record-Press*, 179 S. W. 456.

II. CONSTRUCTION AND OPERATION.

↯129 (Tex.Civ.App.) Bringing of suit on notes containing stipulations that failure to pay one when due should mature the other at holder's election, one being past due when suit was instituted, *held* sufficient to show holder's election to declare second note due.—*Stewart v. Thomas*, 179 S. W. 888.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.**(D) Bona Fide Purchasers.**

↯378 (Tex.Civ.App.) Change in personality, number, or relation of parties to instrument, without consent of the opposite party, *held* to avoid it, even in the hands of an innocent purchaser.—*Bolt v. State Savings Bank of Manchester, Iowa*, 179 S. W. 1119.

VI. PRESENTMENT, DEMAND, NOTICE AND PROTEST.

↯400 (Mo.App.) Where plaintiff bank located in Missouri received a check on a bank in Iowa and presented it through the ordinary channels of business, and protested it when payment was refused, there was no failure of due diligence.—*First Nat. Bank of Grant City v. Korn*, 179 S. W. 721.

↯410 (Mo.App.) Under Rev. St. 1909, § 6329, certificate of protest verified on day of trial in justice court *held* sufficient in trial de novo in circuit court seven months later.—*First Nat. Bank of Grant City v. Korn*, 179 S. W. 721.

↯414 (Mo.App.) Under Rev. St. 1909, § 10125, it was not necessary that drawer of check who had notified drawee bank not to pay it be notified of its protest.—*First Nat. Bank of Grant City v. Korn*, 179 S. W. 721.

↯421 (Mo.App.) The requirement as to notice of the protest of a check is met by putting it into the proper post office in due time, properly directed.—*First Nat. Bank of Grant City v. Korn*, 179 S. W. 721.

VII. PAYMENT AND DISCHARGE.

↯430 (Tex.Civ.App.) Where either of two renewal notes constituted a novation, the note for which the renewals were given was no longer a binding obligation.—*First State Bank of Amarillo v. Cooper*, 179 S. W. 295.

VIII. ACTIONS.

⚡493 (Ky.) In the absence of proof to the contrary, there is a presumption that a paid check was executed for valuable consideration.—*Hatfield's Adm'r v. Hatfield*, 179 S. W. 832.

⚡499 (Tex.Civ.App.) In an action on a note, defendants, whose pleadings raised the issue that plaintiff had failed to account for certain collateral, and sought relief to the extent of the value thereof, had the burden of showing the value of the securities not accounted for.—*First State Bank of Amarillo v. Cooper*, 179 S. W. 295.

⚡511 (Tex.Civ.App.) In an action on a note, with an allegation of an agreement that certain collateral should be divided between the note and another, evidence of a defendant's objection at the time of making such agreement to any switching of the collateral to protect the other note was admissible.—*First State Bank of Amarillo v. Cooper*, 179 S. W. 295.

⚡518 (Ky.) In an administrator's action on a note found among decedent's papers, evidence held sufficient to authorize chancellor's judgment that a payment by the decedent to the maker of the note, his grandson, was supported by consideration other than the note.—*Hatfield's Adm'r v. Hatfield*, 179 S. W. 832.

⚡537 (Mo.App.) Whether facts constitute due diligence in the presentation of a check to the drawee bank is a question of law for the court.—*First Nat. Bank of Grant City v. Korn*, 179 S. W. 721.

⚡537 (Mo.App.) What is valuable consideration for the release by the payee of a note of his rights thereunder is a question of law.—*Lumpkin v. Strange*, 179 S. W. 742.

⚡537 (Tex.Civ.App.) Whether either of two renewal notes constituted a novation was a question for the jury.—*First State Bank of Amarillo v. Cooper*, 179 S. W. 295.

⚡537 (Tex.Civ.App.) In suit on a note which was in evidence and its execution admitted by defendant, a claimed accommodation surety, peremptory instruction for plaintiff held proper.—*Banks v. Mixon*, 179 S. W. 690.

BONA FIDE PURCHASERS.

See Alteration of Instruments, ⚡20; Bills and Notes, ⚡378; Vendor and Purchaser, ⚡228-239.

BONDS.

See Appeal and Error, ⚡1230; Attachment, ⚡191-343; Bail; Mechanics' Liens, ⚡313; Municipal Corporations, ⚡918; Sequestration, ⚡20.

BOOKS OF ACCOUNT.

See Evidence, ⚡354.

BOUNDARIES.

I. DESCRIPTION.

⚡3 (Ark.) Where the descriptions of the boundaries of a tract are uncertain and conflicting, distances yield to courses and courses to monuments.—*Paschal v. Swepston*, 179 S. W. 339.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

⚡37 (Tex.Civ.App.) In an action involving boundary, evidence held to show that the plat, as made, was result of a mistake, and that it was not intended to include in the addition in which plaintiff bought property other unplatted property not belonging to plaintiff's grantor.—*Lockwood Inv. Co. v. Geiselman*, 179 S. W. 549.

⚡46 (Ky.) Where, on claim of B. that there was a shortage in the lot which he and R.

had partitioned, R., while erecting a boundary fence, agreed to remove it if a shortage be established, he thereby waived no rights, there having been no shortage, but B. having allowed another to encroach on his part.—*Boone v. Robinson*, 179 S. W. 452.

⚡55 (Ky.) Two lot owners in the center of a block which contained a surplus of 18 inches held bound by the descriptions in their deeds, and not entitled in an action between them alone to have their corners shifted so as to apportion their share of the surplus.—*Elam v. Hickman*, 179 S. W. 17.

BREACH OF MARRIAGE PROMISE.

See Trial, ⚡192.

⚡13 (Mo.App.) After breach of a promise of marriage a subsequent offer hedged around with conditions is no defense.—*Chapman v. Brown*, 179 S. W. 774.

⚡20 (Mo.App.) An action for breach of marriage promise being founded on contract, it will be presumed that the complaining party possessed legal capacity to enter into such relation, and hence defendant has the burden of proving plaintiff's incapacity.—*Chapman v. Brown*, 179 S. W. 774.

⚡29 (Mo.App.) After breach of a promise of marriage a subsequent offer hedged around with conditions cannot be considered in mitigation of damages.—*Chapman v. Brown*, 179 S. W. 774.

BRIDGES.

See Counties, ⚡165; Waters and Water Courses, ⚡171.

BRIEFS.

See Appeal and Error, ⚡758-773.

BROKERS.

See Evidence, ⚡317; Pleading, ⚡129; Trial, ⚡329.

IV. COMPENSATION AND LIEN.

⚡53 (Mo.App.) Real estate firm which aided in final consummation of lease by another firm to some extent held not entitled to a commission from the owner.—*Mason v. James M. Carpenter Realty Co.*, 179 S. W. 945.

⚡61 (Tex.Civ.App.) Brokers' knowledge of incumbrances which prevented consummation of contract held not to defeat right to commissions, where defendants entered into a contract binding themselves to remove such incumbrances.—*Levy v. Dunken Realty Co.*, 179 S. W. 679.

V. ACTIONS FOR COMPENSATION.

⚡82 (Tex.Civ.App.) In broker's action for commissions, complaint held to allege ability and willingness of party to make exchange of lands, and not merely ability and willingness to make the exchange or pay the stipulated damages.—*Levy v. Dunken Realty Co.*, 179 S. W. 679.

Allegation that person procured by brokers was ready, able, and willing to carry out contract of exchange held equivalent to allegation that he had title to the land he contracted to exchange.—*Id.*

⚡88 (Mo.App.) In an action by real estate brokers for a commission, whether they or another firm was the efficient cause in effecting defendant's lease to a third party held for the jury.—*Mason v. James M. Carpenter Realty Co.*, 179 S. W. 945.

VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

⚡94 (Tenn.) A landowner who makes a sale through a duly authorized broker is bound by

the broker's statements as to the quantity of the land.—*Caughron v. Stinespring*, 179 S. W. 152.

BUILDING AND LOAN ASSOCIATIONS.

§3 (Ky.) Amendments of articles of incorporation, increasing capital stock of a building association and authorizing an increase of corporation's indebtedness, did not render it a new corporation to subject its stock to an organization tax.—*Avery Bldg. Ass'n v. Commonwealth*, 179 S. W. 39.

An amendment of the charter of a building association organized in 1888, before the enactment of Ky. St. § 4225, upon the original capitalization of which no organization tax had been imposed, *held* to create a new corporation, subjecting the original capital to such a tax.—*Id.*

§4 (Ky.) The "Home and Savings Fund Company," an existing corporation, which changed its name merely by adding the words "Building Association," to comply with Ky. St. § 856, did not thereby become a new corporation.—*Avery Bldg. Ass'n v. Commonwealth*, 179 S. W. 39.

BUILDING CONTRACTS.

See Damages, §78.

BULK SALES.

See Constitutional Law, §87, 240; Fraudulent Conveyances, §3, 229, 314.

BURDEN OF PROOF.

See Criminal Law, §330.

BURGLARY.

See Criminal Law, §200, 404, 511, 517.

II. PROSECUTION AND PUNISHMENT.

§41 (Ky.) On a trial for breaking into a railroad depot with intent to steal, the mere breaking and the taking of goods from the depot proves the motive actuating the commission of the crime.—*Richardson v. Commonwealth*, 179 S. W. 458.

On a trial for breaking into a railroad depot with intent to steal, evidence *held* sufficient to support a conviction.—*Id.*

BYSTANDERS.

See Criminal Law, §1111.

CANCELLATION OF INSTRUMENTS.

See Vendor and Purchaser, §110, 112.

II. PROCEEDINGS AND RELIEF.

§47 (Tex.Civ.App.) Testimony of woman seeking cancellation of note to bank for fraud *held* open to a construction rendering her agreement with the cashier of the bank not fraudulent as to the bank so as to defeat relief.—*Lockney State Bank v. Damron*, 179 S. W. 552.

CANVASS.

See Elections, §260.

CARRIERS.

See Action, §4; Evidence, §366; False Imprisonment, §15, 24; Judgment, §597; Trial, §352.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) In General.

§2 (Tenn.) Acts 1915, c. 60, regulating jitneys *held* constitutional.—*City of Memphis v. State*, 179 S. W. 631.

§4 (Tenn.) A jitney being self-propelled, not a street car, operating between certain points at a certain fare, approximately five cents, and so *held* out, advertised, or announced, is a common carrier.—*City of Memphis v. State*, 179 S. W. 631.

§13 (Tex.Civ.App.) It is contemplated by Rev. St. 1911, art. 6670, that the Railroad Commission shall establish rules against unjust discrimination against freight destined to a connecting carrier.—*Consumers' Lignite Co. v. Houston & T. C. R. Co.*, 179 S. W. 306.

Under rule 2 of the Railroad Commission, *held*, that a carrier was not excused, by reason of local custom to observe the following Monday, from duly transporting freight on Monday, because Sunday, as March 2d, was a legal holiday.—*Id.*

Reply by chairman of Railroad Commission to an inquiry by railroad company as to whether the following Monday would be recognized as free time, when Sunday was also a legal holiday, *held* not to show a rule of the Commission to that effect.—*Id.*

§20 (Tex.Civ.App.) Where a railroad company unreasonably delays a shipment destined to a connecting carrier, the shipper's remedy is under subdivision 2, and not subdivision 1, of Rev. St. 1911, art. 6670.—*Consumers' Lignite Co. v. Houston & T. C. R. Co.*, 179 S. W. 306.

(B) Interstate and International Transportation.

§32 (Tex.Civ.App.) An agreement of the agent of a carrier to reimburse the plaintiff for damages suffered by injury to goods in shipment is not an agreement for a rebate, sufficient to make it discriminatory within the interstate commerce law.—*Missouri, K. & T. Ry. Co. of Texas v. A. E. Want & Co.*, 179 S. W. 903.

II. CARRIAGE OF GOODS.

(A) Delivery to Carrier.

§39 (Ark.) Where an unprecedented rush of business occurs, the carrier is not bound to accept goods until the emergency has been removed.—*St. Louis, I. M. & S. R. Co. v. Laser Grain Co.*, 179 S. W. 189.

§45 (Mo.App.) A shipper was not entitled to a mandatory injunction requiring an express company to deliver liquor shipments C. O. D., since it was compelling the express company to contract against its will in a matter having nothing to do with its duty as a common carrier.—*Danciger v. American Express Co.*, 179 S. W. 797.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

§53 (Ark.) A bill of lading is the symbol of the property described therein, and its delivery by the consignor to a bank with draft attached is equivalent to a delivery of the property so far as they are concerned.—*Vehicle Supply Co. v. McInturf*, 179 S. W. 999.

Defendant, wrongfully receiving goods and converting them to its own use, by applying the proceeds to a debt due from the consignor, did not stand in the position of a third person acquiring rights without notice as against a bank to whom consignor had indorsed bill of lading with draft attached.—*Id.*

§69 (Tex.Civ.App.) Evidence, in an action for damages for deterioration of goods shipped, *held* to warrant submission of the issue whether defendant's agent, who assumed to compromise a claim, had been held out to shippers and consignees as having authority to do so.—*Mis-*

souri, K. & T. Ry. Co. of Texas v. A. E. Want & Co., 179 S. W. 903.

(D) Transportation and Delivery by Carrier.

⚡83 (Mo.App.) Irregular delivery by carrier to one authorized to receive shipment *held* not to render carrier liable for loss of goods converted by such person, though it failed to exact the usual written authority.—Parker-Gordon Cigar Co. v. Chicago, R. I. & P. Ry. Co., 179 S. W. 785.

⚡90 (Mo.App.) A shipment of liquor by an express company "C. O. D." means that the purchase price of the liquor shall be collected by the company from the consignee upon delivery.—Danciger v. American Express Co., 179 S. W. 797.

An express company is not required by its common law duty to receive, transport, and deliver packages C. O. D., as the duty of making such delivery arises solely by private contract.—Id.

Express company compelled to receive C. O. D. shipments of liquor which by subsequent law could not be made without license tax, penalties, etc., *held* thereby excused from delivery C. O. D.—Id.

An express company under mandatory injunction to make C. O. D. deliveries of liquor which were subsequently declared unlawful without license tax, etc., was not bound to trust to the preliminary order or to the shipper's bond or solvency to indemnify it from loss by reason of delivery in violation of the law.—Id.

A shipper of intoxicating liquors, C. O. D. by an express company compelled to make such delivery under temporary injunction from a United States Circuit Court acquired no vested rights under the order, as the right to have the express company collect was a right arising solely through private contract.—Id.

⚡91 (Mo.App.) Express company refusing to deliver shipments of intoxicating liquors to consignees in another state because of laws of such state *held* bound to return packages to shipper and for failure to do so liable for conversion.—Danciger v. American Express Co., 179 S. W. 806.

⚡92 (Mo.App.) Where consignee of goods arriving at defendant's station at C. on August 21st and 22d did not live at C., the reasonable time allowed for their removal before liability as carrier ceased had not elapsed when they were seized by a federal officer on August 22d and 23d.—Danciger v. Atchison, T. & S. F. Ry. Co., 179 S. W. 800.

A carrier is excused from liability for failure to deliver goods which are taken from its possession by process of law, without fraud or collusion on its part, by an officer acting under apparently valid authority, and where it gives notice thereof to the consignor.—Id.

Carrier's required notice to consignor that goods had been taken from its possession under process of law *held* satisfied by notice given shortly after they were taken, when, under the circumstances, no notice could possibly have enabled the consignor to protect his interests.—Id.

Where officer of United States Indian Service had authority to take intoxicating liquors from the possession of defendant carrier while awaiting delivery, defendant would not be liable, even though the officer had no authority to thereafter destroy them.—Id.

Where Indian officer had apparent authority to take liquor from carrier's possession as about to be introduced into the Indian territory, the carrier, as against the consignor, was not bound to construe the law, nor foresee a subsequent ruling that the officer could not act outside the territory.—Id.

Agent of carrier *held* not required to resist Indian officer's taking of liquors on suspicion

that they were about to be introduced into Indian territory.—Id.

(F) Loss of or Injury to Goods.

⚡133 (Ark.) In an action for injury to a shipment of goods, evidence of their market value at their place of destination *held* admissible.—St. Louis, I. M. & S. R. Co. v. Laser Grain Co., 179 S. W. 189.

⚡136 (Ark.) In an action for damages for a carrier's failure to supply refrigerator cars for the shipment of fruits, the question of its negligence *held*, under the evidence, for the jury.—St. Louis, I. M. & S. R. Co. v. Laser Grain Co., 179 S. W. 189.

(G) Carrier as Warehouseman.

⚡140 (Mo.App.) When a shipment arrives on time, and the carrier places the goods in warehouse to await delivery, its liability as carrier ceases after a reasonable time for their removal, although no notice is given to the consignee, and its liability thereafter is that of a warehouseman only.—Danciger v. Atchison, T. & S. F. Ry. Co., 179 S. W. 800.

(H) Limitation of Liability.

⚡159 (Ark.) A provision in a bill of lading requiring shipper to make claims in writing within a specified time as a condition precedent to recovering for injuries to the property transported is valid.—St. Louis, I. M. & S. R. Co. v. Laser Grain Co., 179 S. W. 189.

Where a carrier made no objection on the ground that shipper had not properly presented its claim in accordance with bill of lading, but proceeded with negotiations, it waived the right to object to the manner of presentation.—Id.

⚡160 (Ark.) A stipulation in a bill of lading, limiting the time in which suit shall be brought, is valid.—Kansas City Southern Ry. Co. v. Bull, 179 S. W. 172.

⚡163 (Ark.) Where the carrier set up the shipper's noncompliance with requirement of bill of lading that complaint be made in a specified time, the shipper has the burden of proving compliance.—St. Louis, I. M. & S. R. Co. v. Laser Grain Co., 179 S. W. 189.

III. CARRIAGE OF LIVE STOCK.

⚡205 (Mo.App.) The duty of a carrier of live stock begins when the stock is delivered into its receiving pens for shipment.—Hardesty v. Atchison, T. & S. F. Ry. Co., 179 S. W. 725.

⚡213 (Tex.Civ.App.) Carrier *held* not liable for delay in transportation of cattle, due to burning of bridge without its fault, and instruction that burning, though unavoidable, would be no defense, was erroneous.—Ft. Worth & D. C. Ry. Co. v. Morgan, 179 S. W. 901.

⚡215 (Mo.App.) It was the duty of a carrier of live stock to keep its receiving pens in a reasonably safe condition to hold cattle offered for shipment until loading, considering the ordinary habits of cattle in such situation.—Hardesty v. Atchison, T. & S. F. Ry. Co., 179 S. W. 725.

⚡215 (Tex.Civ.App.) A carrier receiving cattle for transportation *held* liable for injuries caused by placing them in pens without shelter, too small to accommodate them properly.—Andrews v. McGill, 179 S. W. 1087.

⚡218 (Ark.) Stipulations in an interstate stock shipping contract as to notice of damage and time for bringing suit *held* not avoided because the shipper was not given an unrestricted contract, where he had the choice of shipping under such contract.—St. Louis Southwestern Ry. Co. v. I. W. Haynie & Co., 179 S. W. 170.

Stipulations in an interstate stock shipping contract as to notice of claim of damage and time for bringing suit *held* not invalid as not

being based upon consideration additional to that in the contract of shipment.—*Id.*

☞218 (Ark.) Railroad holding live stock for freight charges *held* to hold as a carrier, and therefore entitled to the protection of a stipulation in bill of lading limiting the time of bringing actions.—*Kansas City Southern Ry. Co. v. Bull*, 179 S. W. 172.

☞218 (Ark.) Provision of contract, requiring shipper of stock to give written notice of injuries to nearest station agent or other agent of carrier, may be waived by the company.—*St. Louis, I. M. & S. Ry. Co. v. Nunley*, 179 S. W. 369.

☞218 (Ark.) Shipper of jack under stipulation that he should notify railroad of injury in transit within a day after delivery was excused from giving such notice where the injuries did not become evident until more than a day had elapsed.—*Eoff & Snapp v. Scullin*, 179 S. W. 663.

Stipulation between common carrier and shipper of live stock, setting a time within which the shipper must give notice of injury to the stock as a condition to recovery, *held* unenforceable as unreasonable, where the notice period expired before the injury became evident.—*Id.*

Special stipulation between carrier of jack and shipper that carrier should be informed of injuries within a day after delivery, unenforceable because the injuries did not become evident within that time, did not require the shipper to give notice within a reasonable time after discovering the injuries.—*Id.*

☞219 (Tex.Civ.App.) A connecting carrier negligently handling cattle received from the initial carrier *held* liable, though the initial carrier negligently delayed delivery.—*Andrews v. McGill*, 179 S. W. 1087.

☞228 (Ark.) In an action for injuries to live stock, evidence *held* to warrant finding that written notice of injury was waived.—*St. Louis, I. M. & S. Ry. Co. v. Nunley*, 179 S. W. 369.

Evidence of injuries *held* sufficient to support verdict.—*Id.*

☞228 (Tex.Civ.App.) Evidence, in an action for damages for negligent delay in transportation of live stock, *held* sufficient to sustain a verdict for the plaintiff.—*Missouri, K. & T. Ry. Co. of Texas v. Dale Bros. Land & Cattle Co.*, 179 S. W. 935.

☞230 (Ark.) Where an action for injuries to live stock was tried on the theory that they occurred after the shipment reached the point of destination and the shipper left the car, a charge that the burden of proving all the facts of the injury was upon the shipper was properly refused.—*St. Louis, I. M. & S. Ry. Co. v. Nunley*, 179 S. W. 369.

☞230 (Ark.) In an action against a railroad and receivers of another, whether the receivers' employees were negligent in handling a car containing a jack after it reached their road *held* for the jury, under the evidence.—*Eoff & Snapp v. Scullin*, 179 S. W. 663.

☞230 (Mo.App.) In an action for damage to cattle from their escape from defendant railroad's receiving pens, issues of whether the cattle were normal or wild, and whether the defendant road's pens were reasonably secure, *held* for the jury under the evidence.—*Hardesty v. Atchison, T. & S. F. Ry. Co.*, 179 S. W. 725.

☞230 (Tex.Civ.App.) In an action for delay in the shipment of live stock, refusal of an instruction for defendant, if a connecting carrier failed to run a special train, *held* not error, where no such duty rested on the carrier.—*Quannah, A. & P. Ry. Co. v. Collier*, 179 S. W. 96.

☞230 (Tex.Civ.App.) In view of answer and supplemental petition, *held* that, in an action for damages to shipment, it was not error to define negligence, though original petition was

based on breach of contract.—*Ft. Worth & D. C. Ry. Co. v. Morgan*, 179 S. W. 901.

In action for delay in transportation of cattle, instructions submitting issue as to special contract concerning time of shipment *held* at least misleading under the evidence.—*Id.*

Instruction as to measure of damages for delay in transportation of cattle *held* erroneous, as authorizing double recovery for the decline in price.—*Id.*

IV. CARRIAGE OF PASSENGERS.

(A) Relation Between Carrier and Passenger.

☞247 (Ky.) One who attempts to board a moving train is not a passenger, though he may have purchased a ticket entitling him to passage thereon.—*Kentucky Highlands R. Co. v. Creal*, 179 S. W. 417.

(D) Personal Injuries.

☞280 (Ark.) As to a person on a station platform waiting for a train a railroad company is bound to exercise ordinary care to avoid inflicting injury, and may assume that the person will not be negligent.—*Cook v. St. Louis, I. M. & S. Ry. Co.*, 179 S. W. 501.

If an engineer of a train approaching a station, on the platform between the tracks of which persons are standing, fails to keep a lookout, the railway company is liable for his negligence under the lookout law.—*Id.*

☞284 (Ky.) A carrier of female passengers impliedly stipulates that he will protect them against general obscenity and immodest conduct.—*Louisville & N. R. Co. v. Bell*, 179 S. W. 400.

In view of Ky. St. §§ 806, 1342b, it is the duty of those in charge of a train to either remove a drunken negro who is profane and obscene, or have her arrested.—*Id.*

☞287 (Ky.) Where defendant's engineer did all that could have been done to prevent injury to plaintiff after he was discovered attempting to board a moving train, there was no actionable negligence.—*Kentucky Highlands R. Co. v. Creal*, 179 S. W. 417.

☞303 (Mo.App.) Rule that conductor may start steam train after stopping reasonable time at stations for passengers to board and alight on assumption that passengers are safe *held* not applicable to street cars.—*Paul v. Metropolitan St. Ry. Co.*, 179 S. W. 787.

Conductor of street car in city, under duty to exercise highest degree of care, must know before starting car that no passenger is in position of danger.—*Id.*

☞304 (Tex.Civ.App.) One assisting passengers to board a train in the interest of the company and with its knowledge does so by implied invitation, and the train must be held long enough to allow him to render such services and leave the train.—*Ft. Worth & D. C. Ry. Co. v. Allen*, 179 S. W. 62.

In the absence of knowledge that one enters its train merely to assist passengers and then alight, the carrier may assume such person to be a passenger, and may start its train after giving him reasonable time to get aboard.—*Id.*

Where a person, entering a train to assist passengers, answers the brakeman's question as to destination by saying "they" are going to H. the brakeman is not thereby charged with knowledge of his intention.—*Id.*

Where one enters a train only to assist passengers on board, and then to get off there being no custom to hold trains for that purpose and no knowledge by the railroad that he is so upon the train, failure to hold the train a reasonable time for him to alight is not negligence.—*Id.*

Where a person assisting a passenger alights from a moving train getting under way from a station, without hesitation or request to stop, the carrier owes no duty to stop the train nor to prevent his alighting until it can be stopped.—*Id.*

—316 (Tex.Civ.App.) The custom of a railroad company to allow persons to enter its trains to assist passengers excuses plaintiff, in jumping from the train after it started, from showing notice to the company of his intent to alight.—*Ft. Worth & D. C. Ry. Co. v. Allen*, 179 S. W. 62.

—317 (Ky.) In an action for damages for annoyance by a drunken passenger, evidence of conduct after notice to the conductor is admissible.—*Louisville & N. R. Co. v. Bell*, 179 S. W. 400.

—318 (Tex.Civ.App.) In passenger's action for injuries in derailment, evidence held to sustain a finding that defendant was negligent in failing to maintain a safe rail.—*International & G. N. Ry. Co. v. Berthea*, 179 S. W. 1087.

—319 (Ky.) Where a passenger is disturbed by the drunkenness of another passenger, she is entitled to such damages as would fairly compensate her for the humiliation, mortification, annoyance, and mental anguish.—*Louisville & N. R. Co. v. Bell*, 179 S. W. 400.

An award of \$500, in favor of colored women who were passengers on defendant's train, who were annoyed by a drunken, profane and obscene negro, held not excessive.—*Id.*

—320 (Tex.Civ.App.) In action for injuries in derailment, evidence held not to show, as a matter of law, that the breakage in the first rail struck by the train was the proximate cause of the derailment.—*International & G. N. Ry. Co. v. Berthea*, 179 S. W. 1087.

—321 (Mo.App.) In action by passenger for injuries while alighting at regular stopping place, received through starting of street car, an instruction omitting element of conductor's knowledge of plaintiff's alighting or ascertainment thereof by reasonable care held good.—*Paul v. Metropolitan St. Ry. Co.*, 179 S. W. 787.

—321 (Mo.App.) In a passenger's action for injury, held, that an instruction was not objectionable because not requiring a finding that defendant's conductor knew that plaintiff was alighting, when such fact was conceded by the evidence.—*Clark v. Dunham*, 179 S. W. 795.

In an action for injury while alighting from street car, where the facts hypothesized in an instruction constituted negligence in law, it was not necessary for recovery to require a finding that conductor's act in suddenly starting car, with knowledge of plaintiff's position, was negligence.—*Id.*

—322 (Tex.Civ.App.) In a passenger's action for injuries by derailment, a finding that a defect, in that one of two broken rails which first gave way, could not have been discovered by the highest care, held not to require a judgment for defendant.—*International & G. N. Ry. Co. v. Berthea*, 179 S. W. 1087.

Finding in passenger's action for injuries by derailment that a hidden defect in the first rail giving way was not discoverable by the highest care held not in conflict with another finding that defendant had not used a high degree of care to have the rails in a reasonably safe condition.—*Id.*

(E) Contributory Negligence of Person Injured.

—327 (Ark.) A person on a station platform waiting for a train is bound to exercise ordinary care to avoid receiving injury, and may assume that the railroad company will not be negligent.—*Cook v. St. Louis, I. M. & S. Ry. Co.*, 179 S. W. 501.

A person injured while standing on a station platform in a narrow space between tracks cannot set up the invited use of the space, where it would be apparent to a reasonably prudent man exercising due care that it was dangerous.—*Id.*

Although it was necessary in order to board

a train, that fact will not justify plaintiff's negligent presence in a place of danger, although, had he not been there, he would have missed his train.—*Id.*

—336 (Tex.Civ.App.) Statement by brakeman to person alighting from moving train to "jump with the train" held not to be an invitation or command so to do.—*Ft. Worth & D. C. Ry. Co. v. Allen*, 179 S. W. 62.

Where a person was alighting from a moving train, the act of the brakeman in making room for him on the step held not an invitation to alight.—*Id.*

—347 (Ark.) Whether a space between moving trains was so dangerous as to charge plaintiff, injured therein, with contributory negligence, held a question for the jury.—*Cook v. St. Louis, I. M. & S. Ry. Co.*, 179 S. W. 501.

Whether plaintiff, standing in a space of 3½ feet between moving trains for the purpose of boarding one train, was negligent in failing to stand in the exact center of the space, held a question for the jury.—*Id.*

—347 (Ky.) In an action against a railroad for death of a passenger, evidence as to defendant's negligence after its servants had discovered decedent's position of peril held insufficient to take the case to the jury.—*Louisville & N. R. Co. v. Stokes' Adm'x*, 179 S. W. 47.

—347 (Tex.Civ.App.) Stepping from the platform of a railroad train in the daytime, where the distance to the ground was about three feet without a footstool, held not contributory negligence as a matter of law.—*Aransas Harbor Terminal Ry. v. Sims*, 179 S. W. 895.

(F) Ejection of Passengers and Intruders.

—352 (Ky.) A railroad responsible for the appointment of a special police officer could not regard him as a de facto officer after his office was vacated by failure to take the oath, etc., since it was bound to know that he was an officer de jure before he was given employment on its trains.—*Cincinnati, N. O. & T. P. Ry. Co. v. Cundiff*, 179 S. W. 615.

In view of Ky. St. § 3755, railroad held responsible for acts of special railway police officer whose office had been vacated for failure to take oath, etc.—*Id.*

—374 (Ky.) Railroad employé summoned by special railway police officer without authority thereto to aid in ejecting and arresting a passenger held liable as a trespasser.—*Cincinnati, N. O. & T. P. Ry. Co. v. Cundiff*, 179 S. W. 615.

—381 (Ky.) In an action against a carrier and its special police officer for wrongful ejection, where the evidence justified compensatory damages only, evidence as to the officer's motive in making the arrest was inadmissible.—*Cincinnati, N. O. & T. P. Ry. Co. v. Cundiff*, 179 S. W. 615.

—382 (Ky.) Where defendant carrier's special police officer and another employé used no unnecessary force or any insulting language, etc., in ejecting and arresting a passenger, punitive damages were not recoverable.—*Cincinnati, N. O. & T. P. Ry. Co. v. Cundiff*, 179 S. W. 615.

Verdict of \$4,000 for passenger's wrongful ejection and arrest without excessive force or brutal treatment held excessive.—*Id.*

CATTLE.

See Animals.

CAUSE OF ACTION.

See Action.

CERTIFICATE.

See Appeal and Error, —641; Corporations, —95; Elections, —156; Levees, —34.

CHANCERY.

See Equity.

CHANGE OF VENUE.

See Criminal Law, ¶119-137.

CHARACTER.

See Criminal Law, ¶376-380; Homicide, ¶163; Witnesses, ¶337, 345.

CHARGE.

To jury, see Criminal Law, ¶775-844; Trial, ¶191-296.

CHARITIES.

See Taxation, ¶241.

CHATTEL MORTGAGES.

See Evidence, ¶231.

IV. RIGHTS AND LIABILITIES OF PARTIES.

¶172 (Mo.App.) In replevin for furniture claimed under a chattel mortgage executed to secure the purchase price, *held*, that whether plaintiff had accepted a subsequent note and mortgage in payment and release of the original mortgage was for the jury.—*Western Auction & Storage Co. v. Shore*, 179 S. W. 769.

VIII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

¶241 (Mo.App.) The taking of a new note as absolute payment of one secured by a chattel mortgage extinguishes the lien thereof, which is a mere incident to the note.—*Western Auction & Storage Co. v. Shore*, 179 S. W. 769.

CHAUFFEURS.

See Master and Servant, ¶301, 302.

CHILDREN.

See Adoption; Bastards; Guardian and Ward; Infants; Negligence, ¶96; Parent and Child.

CHOSE IN ACTION.

See Assignments.

CIRCUMSTANTIAL EVIDENCE.

See Homicide, ¶234.

CITIES.

See Municipal Corporations.

CITIZENS.

See Constitutional Law, ¶206, 207; Railroads, ¶9.

¶2 (Ark.) The word "citizen" will not be construed to include a corporation, unless meaning of statute seems to require it.—*St. Louis & S. F. R. Co. v. State*, 179 S. W. 842.

CIVIL RIGHTS.

See Constitutional Law, ¶83-88.

CLAIMS.

See Corporations, ¶565; Executors and Administrators, ¶206-227; Receivers, ¶155.

CLASS LEGISLATION.

See Constitutional Law, ¶208.

C. O. D.

See Carriers, ¶45.

COLLATERAL ATTACK.

See Counties, ¶57; Guardian and Ward, ¶107.

COLLATERAL UNDERTAKINGS.

See Evidence, ¶441, 442; Frauds, Statute of, ¶23; Guaranty.

COLLECTION.

See Banks and Banking, ¶156, 165.

COLLEGES AND UNIVERSITIES.

See Taxation, ¶242.

COLOR OF TITLE.

See Adverse Possession.

COMBINATIONS.

See Monopolies.

COMITY.

See Courts, ¶511.

COMMERCE.**I. POWER TO REGULATE IN GENERAL.**

¶8 (Ark.) Under the state statutes allowing recovery for mental anguish in actions for negligent failure to receive, transmit, or deliver a telegraphic message, no recovery can be had where the message is interstate in character, and therefore subject to federal Interstate Commerce Law.—*Western Union Telegraph Co. v. Stewart*, 179 S. W. 813.

¶8 (Ky.) No state regulation of the shipment of intoxicating liquors is valid unless the shipments to which it applies are intended for use in violation of the state law, and thus specifically within the Webb-Kenyon Act.—*Commonwealth v. White*, 179 S. W. 469.

Ky. St. 1915, § 2569b, subsec. 3, cannot make it unlawful to refuse to give information regarding interstate shipments of liquor intended for a lawful use, since the Mann-Elkins Act prohibits the giving of such information.—*Id.*

¶8 (Tenn.) The federal Employers' Liability Act in the cases to which it applies is necessarily supreme.—*Howard v. Nashville, O. & St. L. Ry. Co.*, 179 S. W. 380.

II. SUBJECTS OF REGULATION.

¶27 (Mo. App.) Where a railroad company accepts a car billed from a point without the state and transports it to a point on its line for delivery to the consignee, the shipment constitutes interstate commerce, although the car was billed only to the point of connection with defendant's line.—*Trowbridge v. Kansas City & W. B. Ry. Co.*, 179 S. W. 777.

Return of an empty car billed from a point outside the state, after unloading at a point on defendant's line, *held* to be interstate commerce within the federal Employers' Liability Act.—*Id.*

¶40 (Ky.) Sale of machinery by foreign corporation through traveling salesmen *held* interstate transaction, despite measurements of proposed location taken by agent.—*Louisville Trust Co. v. Bayer Steam Soot Blower Co.*, 179 S. W. 1034.

¶40 (Mo.App.) Missouri corporation, selling goods to one denominated its sales agent in South Carolina, title vesting in the agent, the business conducted by him being his own, was engaged in interstate commerce, and need not comply with South Carolina law as to foreign

corporations.—*Watkins v. Donnell*, 179 S. W. 980.

III. MEANS AND METHODS OF REGULATION.

§80 (Ky.) Ky. St. § 571, requiring foreign corporation to maintain agent for process, *held* inoperative as to interstate commerce transactions.—*Louisville Trust Co. v. Bayer Steam Soot Blower Co.*, 179 S. W. 1034.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION AND COMMISSIONERS.

See Carriers, §13.

COMMISSIONS.

See Brokers, §53-88; Master and Servant, §70, 79.

COMMON LAW.

See Marriage, §13; Statutes, §239.

COMMON SCHOOLS.

See Schools and School Districts.

COMMUNITY PROPERTY.

See Husband and Wife, §257.

COMPARATIVE NEGLIGENCE.

See Negligence, §101.

COMPENSATION.

See Brokers, §53-88; Eminent Domain, §75; Judges, §22; Officers, §100, 101.

COMPENSATORY DAMAGES.

See Damages, §23-69.

COMPETENCY.

See Criminal Law, §396; Evidence, §155; Jury, §97-103; Witnesses, §37-219, 414.

COMPLAINT.

See Pleading.

COMPROMISE AND SETTLEMENT.

See Appeal and Error, §781; Attorney and Client, §150; Payment.

§6 (Tex.Civ.App.) Agreement by claimant of property levied on under execution to pay the judgments by delivery of the property levied on, at an agreed price, *held* not without consideration.—*Grisham v. Ward*, 179 S. W. 893.

CONCLUSION.

See Pleading, §8, 9.

CONCLUSIVENESS.

See Criminal Law, §1159; Evidence, §265, 383; Judgment, §822.

CONDEMNATION.

See Eminent Domain.

CONDITIONS.

See Deeds, §145-165.

CONFESSION.

See Criminal Law, §517-535.

CONFIRMATION.

See Judicial Sales, §31.

CONFLICT.

See Courts, §247.

CONFLICTING DECISIONS.

See Courts, §231.

CONFLICT OF LAWS.

See Corporations, §216; Courts, §487, 511; Death, §8; Wills, §70.

CONNECTING CARRIERS.

See Carriers, §219.

CONSENT.

See Courts, §24, 25; Criminal Law, §854.

CONSIDERATION.

See Bills and Notes, §493, 518; Compromise and Settlement; Fraudulent Conveyances, §300; Principal and Surety, §35, 108.

CONSOLIDATION.

See Action, §57.

CONSPIRACY.

See Criminal Law, §422-427; Evidence, §253, 260.

II. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

§48 (Ark.) Evidence *held* to make question for jury as to conspiracy between defendant and H. to attack deceased if he did not make a satisfactory explanation regarding alleged defamatory remarks.—*Johnson v. State*, 179 S. W. 361.

§48 (Ky.) Evidence *held* sufficient to justify submission of the issue of conspiracy between defendants, accused of murder.—*Wilson v. Commonwealth*, 179 S. W. 237.

CONSTABLES.

See Sheriffs and Constables.

CONSTITUTIONAL LAW.

For validity of statutes relating to particular subjects, see also the various specific topics. Amendment of statutes, see Statutes, §141. Enactment of statutes in general, see Statutes, §814-64.

Partial invalidity of statute, see Statutes, §64.

Subjects and titles of statutes, see Statutes, §105-123.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§30 (Ky.) Const. § 198, authorizing the General Assembly to enact laws to prevent combinations to depreciate or enhance the cost of any article above or below its real value, is not violative of the federal Constitution, since it is not self-executing.—*Gay v. Brent*, 179 S. W. 1051.

§46 (Tenn.) The Supreme Court, although the cause can be decided upon other grounds, will determine a constitutional question made in good faith and relied on; a constitutional question removing the cause from the jurisdiction of the Court of Civil Appeals, under Acts 1907, c. 82.—*Memphis St. Ry. Co. v. Rapid Transit Co.*, 179 S. W. 635.

☞48 (Ky.) The courts will not declare an act unconstitutional unless it is plainly so, and, in case of doubt, will resolve the doubt in favor of its validity.—*Dwiggins Wire Fence Co. v. Patterson*, 179 S. W. 224.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

☞60 (Ark.) Whether a statute is invalid as delegating legislative authority depends upon whether the power to make the law is delegated or whether authority as to its execution is delegated.—*Nall v. Kelley*, 179 S. W. 486.

☞63 (Ark.) A special statute creating a road improvement district giving the improvement board power to appoint a board of assessment held not invalid as constituting a delegation of legislative authority.—*Nall v. Kelley*, 179 S. W. 486.

☞63 (Tex.Civ.App.) An ordinance of a city attempting to except bawdyhouses from the operation of a general statute is void, since the Legislature cannot delegate its power to except a class from the operation of a general statute.—*Coman v. Baker*, 179 S. W. 937.

(B) Judicial Powers and Functions.

☞68 (Tenn.) Whether nonresident merchants should be allowed to compete for local trade by employing solicitors without paying a merchant's license fee is a political question for the Legislature, with which the courts have no concern.—*Lowenthal v. Underdown*, 179 S. W. 129.

V. PERSONAL, CIVIL, AND POLITICAL RIGHTS.

☞83 (Mo.App.) A judgment for alimony is a debt barring imprisonment for nonpayment thereof.—*Francis v. Francis*, 179 S. W. 975.

☞83 (Tenn.) The issuance of a writ of ne exeat under Shannon's Code, § 6246, against a nonresident, held not an imprisonment for debt, contrary to Const. art. 1, § 18.—*Caughron v. Stinespring*, 179 S. W. 162.

☞87 (Ky.) The state has power to regulate the acquisition, enjoyment, and disposition of property and to prevent fraud, and police regulations are not invalid because they may incidentally affect a constitutional right.—*Dwiggins Wire Fence Co. v. Patterson*, 179 S. W. 224.

The Sales in Bulk Act §§ 1-4, enacted to prevent fraudulent sales and to protect a merchant's creditors, is not invalid as an unreasonable interference with the right of property.—Id.

☞88 (Tex.Civ.App.) Provision of ordinance requiring licensed motor bus to run at least six hours a day, and making it unlawful to operate it on any route not designated by its license certificate, held not in derogation of the right to pursue any lawful occupation.—*Booth v. City of Dallas*, 179 S. W. 301.

VI. VESTED RIGHTS.

☞102 (Ark.) Justices of the peace held to have no vested right to fees and emoluments of their office, and Laws 1915, p. 340, establishing municipal courts, is not void as impairing vested rights.—*State v. Woodruff*, 179 S. W. 813.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

☞206 (Ky.) Ky. St. §§ 4226, 4230a, imposing a tax on premiums collected by life companies, and authorizing the collection of the tax after such a company has voluntarily ceased to do business in the state, are not in violation of the fourteenth amendment to the federal Constitution.—*Washington Life Ins. Co. v. Commonwealth*, 179 S. W. 591.

☞207 (Tex.Cr.App.) An ordinance regulating the use of jitneys held not class legislation in violation of Const. U. S. Amend. 14, though it did not apply to the street car system and other automobiles or vehicles carrying passengers for hire.—*Ex parte Bogle*, 179 S. W. 1193.

☞208 (Tenn.) Acts 1915, c. 60, regulating jitneys as common carriers, is not violative of constitutional rights, as creating an arbitrary classification between jitneys and privately owned automobiles.—*City of Memphis v. State*, 179 S. W. 631.

Acts 1915, c. 60, is not violative of the Constitution, as making an arbitrary classification between jitney busses and street railway cars, since the jitney runs upon no track, and is less substantial and more dangerous than the street car.—Id.

Act 1915, c. 60, is not violative of the Constitution, in making an arbitrary classification between jitneys and taxicabs; the conditions of operation being so different as to afford a valid basis for classification of either.—Id.

Under the constitutional provisions prohibiting class legislation, it is not sufficient, to invalidate a statute, merely to show points of similarity in the thing classified and thing excluded; but it must be shown that the classification is unreasonable and impracticable.—Id.

☞208 (Tex.Cr.App.) An ordinance regulating the use of jitneys held not class legislation, in violation of Const. art. 1, § 3, though it did not apply to the street car system and other automobiles or vehicles carrying passengers for hire.—*Ex parte Bogle*, 179 S. W. 1193.

☞208 (Tex.Civ.App.) The Legislature may classify persons or subjects for taxation or regulation which right includes the right to exempt; the test being whether it operates equally and uniformly upon all persons in the class.—*Booth v. City of Dallas*, 179 S. W. 301.

X. EQUAL PROTECTION OF LAWS.

☞211 (Tenn.) Under Const. U. S. Amend. 14, and Const. Tenn. art. 1, § 8, and article 11, § 8, the same rules will be applied to classifications as to the classifications made in legislative enactments, so that the basis for a classification must be natural, and not arbitrary or capricious.—*City of Memphis v. State*, 179 S. W. 631.

☞229 (Ky.) Ky. St. §§ 4226, 4230a, imposing a tax on premiums collected by life companies and authorizing the collection of the tax after such a company has voluntarily ceased to do business in the state, are not in violation of the fourteenth amendment to the federal Constitution.—*Washington Life Ins. Co. v. Commonwealth*, 179 S. W. 591.

☞240 (Ky.) The Bulk Sales Act, §§ 1-4, applying only to merchants, held not discriminatory within the fourteenth amendment to the federal Constitution or any provision of the Kentucky Constitution.—*Dwiggins Wire Fence Co. v. Patterson*, 179 S. W. 224.

☞240 (Ky.) Ky. St. §§ 3915-3921, prohibiting combines or pools to regulate or fix prices of any kind of commodity, held not unconstitutional as being discriminatory.—*Gay v. Brent*, 179 S. W. 1051.

☞241 (Tenn.) Acts 1915, c. 60, regulating jitneys as common carriers, is not violative of constitutional rights, as creating an arbitrary classification between jitneys and privately owned automobiles.—*City of Memphis v. State*, 179 S. W. 631.

Acts 1915, c. 60, is not violative of the Constitution, as making an arbitrary classification between jitney busses and street railway cars, since the jitney runs upon no track, and is less substantial and more dangerous than the street car.—Id.

Acts 1915, c. 60, is not violative of the Constitution, in making an arbitrary classification between jitneys and taxicabs; the conditions of

operation being so different as to afford a valid basis for classification of either.—Id.

XL DUE PROCESS OF LAW.

↪283 (Ky.) Ky. St. §§ 4226, 4230a, imposing a tax on premiums collected by life companies, and authorizing the collection of the tax after such a company has voluntarily ceased to do business in the state, are not in violation of the fourteenth amendment to the federal Constitution.—*Washington Life Ins. Co. v. Commonwealth*, 179 S. W. 591.

↪290 (Ky.) Ky. St. § 3643, providing for local assessments for street improvements, *held* not to deprive one of property without due process of law.—*Vogt v. City of Oakdale*, 179 S. W. 1037.

↪296 (Ky.) Ky. St. § 3941a, authorizing combination to pool crops of wheat and tobacco *held* void, as violating the fourteenth amendment of the federal Constitution, notwithstanding it is construed in connection with Const. § 198, and Ky. St. §§ 3915-3921.—*Gay v. Brent*, 179 S. W. 1051.

CONSTRUCTION.

See Contracts, ↪147, 169; Deeds, ↪100, 101, 143; Indemnity, ↪6; Insurance, ↪146; Pleading, ↪34; Statutes, ↪181-241; Trial, ↪296, 343, 385; Wills, ↪439-692.

CONSTRUCTIVE TRUSTS.

See Trusts, ↪110.

CONTEMPT.

See Attorney and Client, ↪49; Habeas Corpus, ↪86.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

↪52 (Ark.) An attorney's contempt in attempting to deceive the court by a false waiver of service, being one committed within the presence of the court, the written charge made upon the record, of which the attorney was notified and given an opportunity to answer, is sufficient.—*Dickerson v. State*, 179 S. W. 324.

CONTEST.

See Elections, ↪269-299.

CONTINUANCE.

See Criminal Law, ↪589-608, 1151.

↪26 (Tex.Civ.App.) Denial of continuance *held* not error, where no diligence to procure the absent witnesses was shown, though the adverse party did not comply, until the case was called for trial, with an order requiring a bond for costs.—*Etheridge v. Campbell*, 179 S. W. 1144.

↪30 (Tex.Civ.App.) Where defendants in a foreclosure suit were not surprised or misled by a trial amendment correcting a misdescription of the note as to date and amount, it was not error to refuse to permit them to withdraw their announcement of ready for trial and grant a continuance.—*Memphis Cotton Oil Co. v. Gist*, 179 S. W. 1090.

CONTRACTS.

See Adoption; Alteration of Instruments; Assignments; Bailment; Bills and Notes; Boundaries, ↪46; Breach of Marriage Promise; Cancellation of Instruments; Chattel Mortgages; Compromise and Settlement; Contribution; Corporations, ↪447-482, 657; Counties, ↪114; Covenants; Customs and Usages; Damages, ↪23, 175; Deeds; Evidence, ↪397-462; Fixtures; Frauds, Stat-

ute of; Guaranty; Husband and Wife, ↪87; Indemnity; Infants, ↪57, 58; Insurance, ↪74; Joint Ventures; Landlord and Tenant; Limitation of Actions, ↪46; Mechanics' Liens; Money Received; Mortgages; Municipal Corporations, ↪226-247, 352-366, 446; Novation; Partnership; Patents, ↪211; Payment; Reformation of Instruments; Sales; Subscriptions; United States, ↪74; Usury; Vendor and Purchaser.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

↪10 (Ark.) A contract providing that one party shall pay purchase money for real estate as it matures by the terms of the contract, and that the other party shall execute deeds for the land at a rate stipulated in the contract, is not void for want of mutuality.—*Federal Realty Co. v. Evans*, 179 S. W. 344.

↪10 (Tex.Civ.App.) Warranty executed by seller without knowledge and consent of buyers *held* to have no binding effect.—*Bolt v. State Savings Bank of Manchester, Iowa*, 179 S. W. 1119.

(B) Validity of Assent.

↪94 (Tex.Civ.App.) Defendant's statement to plaintiff upon assignment of contract *held* merely the expression of an opinion on a question of law upon which plaintiff did not rely, and plaintiff could not rescind his contract with defendant.—*Kinchen v. Austin*, 179 S. W. 924.

(F) Legality of Object and of Consideration.

↪108 (Ky.) An advertising popularity contest, based on deceitful methods in counting votes, making nominations, etc., is fraudulent, and a contract based thereon is against public policy.—*American Mfg. Co. v. Crittenden Record-Press*, 179 S. W. 456.

↪116 (Ky.) Executory contract to suppress competition in the purchase and sale of bluegrass seed, *held* unenforceable as being in restraint of trade, unaffected by Const. § 193, or Ky. St. §§ 3915-3921.—*Gay v. Brent*, 179 S. W. 1051.

↪128 (Tex.Civ.App.) An agreement by a creditor who had charged the debtor with crime to receive the amount of the debt and stop prosecution would be illegal and void.—*Western Union Telegraph Co. v. Smith*, 179 S. W. 548.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

↪147 (Mo.App.) A contract must be construed as a whole, regarding its general tenure and purpose, and giving rational effect, if possible, to all of its provisions.—*Watkins v. Donnell*, 179 S. W. 980.

↪169 (Mo.App.) A contract is to be read in the light of the surrounding circumstances, in order, if necessary, to more perfectly reach the understanding and intention of the parties.—*Lemuire v. Strassberger Conservatories of Music Co.*, 179 S. W. 959.

V. PERFORMANCE OR BREACH.

↪278 (Ark.) Where defendant entered into contract with plaintiff imposing obligations upon plaintiff and conferring certain rights, he cannot insist upon the enforcement of his rights without performing his obligations.—*Federal Realty Co. v. Evans*, 179 S. W. 344.

↪303 (Ark.) Provision in a contract reviving a previous contract, and providing that the bondsmen thereunder shall be sufficient without the furnishing of any new or additional bond,

held to justify refusal of defendant to perform upon withdrawal of plaintiff's bondsmen.—*J. R. Watkins Medical Co. v. Haynes*, 179 S. W. 349.

⚡317 (Mo.App.) Forfeitures are not favored, and are to be avoided, rather than created by construction.—*Stout v. Missouri Fidelity & Casualty Co.*, 179 S. W. 993.

⚡319 (Mo.App.) Correspondence school which failed to furnish defendant instruction papers in a course of electrical engineering, as contracted, could not recover payment for the course.—*International Text-Book Co. v. Schwickrath*, 179 S. W. 723.

VI. ACTIONS FOR BREACH.

⚡328 (Mo.App.) In action for damages for breach of written contract concerning the assets and business management of a corporation, entitling plaintiff to purchase defendant's interest, defendant, after breach, could not defend on the ground that plaintiff would not have found a purchaser.—*Powell v. Batchelor*, 179 S. W. 751.

⚡332 (Tex.Civ.App.) In absence of exception, petition in action by contractor held to authorize charge and verdict either upon quantum meruit or for balance of contract price.—*King v. Collins*, 179 S. W. 899.

⚡349 (Mo.App.) In action for breach of contract concerning the assets and management of a corporation, held, in view of the contract's release of plaintiff from liability for representations to defendant, that evidence thereof was inadmissible.—*Powell v. Batchelor*, 179 S. W. 751.

CONTRADICTION.

See Appeal and Error, ⚡667; Witnesses, ⚡405.

CONTRIBUTION.

See Tenancy in Common, ⚡29.

⚡5 (Ky.) Where a telephone lineman was electrocuted through the negligence of the telephone company and a light company, no contribution can be enforced between the wrongdoers; their negligence being concurrent.—*Cumberland Telephone & Telegraph Co. v. Mayfield Water & Light Co.*, 179 S. W. 388.

CONTRIBUTORY NEGLIGENCE.

See Negligence, ⚡68, 83, 122, 141.

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Assignments; Chattel Mortgages; Corporations, ⚡437; Deeds; Mortgages.

CORPORATIONS.

See Banks and Banking; Beneficial Associations; Building and Loan Associations, ⚡4; Carriers; Citizens, ⚡2; Commerce, ⚡40, 80; Electricity; Evidence, ⚡352, 459; Executors and Administrators, ⚡164, 167; Gas; Injunction, ⚡64-67; Insurance; Limitation of Actions, ⚡121; Mines and Minerals, ⚡103; Municipal Corporations; Railroads; Street Railroads; Taxation, ⚡113, 160, 387; Telegraphs and Telephones.

I. INCORPORATION AND ORGANIZATION.

⚡13 (Tenn.) Rev. St. Me. 1903, c. 47, § 6, merely limits the right of corporations of Maine to do business in states whose laws also permit their operation, and is not void as creating a corporation in one state for operation wholly within another.—*Sullivan v. Farnsworth*, 179 S. W. 317.

II. CORPORATE EXISTENCE AND FRANCHISE.

⚡34 (Ky.) Person executing obligation to corporation held not entitled to deny corporate existence.—*Yellow Chief Coal Co.'s Trustee v. Johnson*, 179 S. W. 599; Same v. Preston, Id. 602.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(C) Issue of Certificates.

⚡95 (Ky.) A provision on the face of a certificate of preferred stock that it bore interest at the rate of 7 per cent. did not require its construction as a certificate of indebtedness rather than of stock.—*Smith v. Southern Foundry Co.*, 179 S. W. 205.

(D) Transfer of Shares.

⚡143 (Tex.Civ.App.) The transfer of the capital stock of a railroad does not operate ipso facto as a transfer of the physical properties thereof.—*Continental Trust Co. v. Brown*, 179 S. W. 939.

(E) Interest, Dividends, and New Stock.

⚡152 (Ky.) Dividends are payable from the profits and surplus funds of a corporation as the directors, in the exercise of a sound discretion, declare, with which discretion the courts will not interfere except for the directors' bad faith or willful abuse.—*Smith v. Southern Foundry Co.*, 179 S. W. 205.

⚡156 (Ky.) Where directors declare a dividend, or where the company has earned profits and the directors wrongfully refuse to declare a dividend, a preferred stockholder occupies the position of a corporate creditor to the extent of the accumulated profits due him.—*Smith v. Southern Foundry Co.*, 179 S. W. 205.

V. MEMBERS AND STOCKHOLDERS.

(A) Rights and Liabilities as to Corporation.

⚡170 (Ky.) The charter and the recitals of a preferred stock certificate must be construed with the statutory law to determine whether the holder was a creditor or a stockholder.—*Smith v. Southern Foundry Co.*, 179 S. W. 205.

Holder of a certificate of preferred stock which on its face carried interest in the way of dividends at the rate of 7 per cent., with a provision for progressive redemption, held a stockholder, and not a creditor, of the corporation.—Id.

⚡178 (Ky.) Except as to preference in dividends and distribution of assets, when authorized by statute, the holders of common and preferred stock have the same rights and are under the same liabilities.—*Smith v. Southern Foundry Co.*, 179 S. W. 205.

(D) Liability for Corporate Debts and Acts.

⚡216 (Tenn.) So far as not penal, courts of Tennessee will enforce laws of another state creating a liability on the part of a single stockholder for the unpaid balance of his stock, although Tennessee laws require that all holders of unpaid stock shall be made parties.—*Sullivan v. Farnsworth*, 179 S. W. 317.

⚡228 (Tenn.) Holder of corporation stock is liable for interest on unpaid balance from day he receives stock, although he is not liable for interest on any amount in excess of unpaid balance, since such liability is penal.—*Sullivan v. Farnsworth*, 179 S. W. 317.

⚡243 (Tenn.) One who receipts for, accepts, and holds stock certificates is liable for the unpaid balance thereon, although he never formally subscribed for the stock.—*Sullivan v. Farnsworth*, 179 S. W. 317.

Actual taking of shares of stock will support an action under a statute giving an action for

recovering the unpaid balance on the stock only in case of "subscription to or agreement for" the stock.—Id.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

⚡374 (Ark.) Powers essential to those expressly granted are necessarily implied.—Gregg v. Little Rock Chamber of Commerce, 179 S. W. 658.

⚡388 (Ky.) Person executing obligation to corporation *held* not entitled to deny corporate power to contract, unless contract be expressly forbidden by law.—Yellow Chief Coal Co.'s Trustee v. Johnson, 179 S. W. 599.

(B) Representation of Corporation by Officers and Agents.

⚡425 (Tex.Civ.App.) When officers of a corporation make a contract for it, which inures to its benefit, and the results are enjoyed by it, it is estopped to deny the officers' authority to make the contract.—Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin, 179 S. W. 541.

⚡426 (Tex.Civ.App.) After rights of attorneys to compensation for services performed for a corporation have accrued, it cannot avoid liability by placing the matter of disbursing funds and employing attorneys in the hands of a finance committee.—Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin, 179 S. W. 541.

⚡432 (Tex.Civ.App.) Authority of a corporation's president to employ an attorney can be presumed where its directors thereafter meet and confer with the attorney on legal matters.—Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin, 179 S. W. 541.

(C) Property and Conveyances.

⚡437 (Ky.) Conveyance to corporation *held* valid as between the parties, though made before organization of the corporation was complete.—Yellow Chief Coal Co.'s Trustee v. Johnson, 179 S. W. 599; Same v. Preston, Id. 602.

(D) Contracts and Indebtedness.

⚡447 (Ark.) The power of a corporation to contract is restricted to the purposes for which it is created.—Gregg v. Little Rock Chamber of Commerce, 179 S. W. 658.

Little Rock Chamber of Commerce, incorporated under Kirby's Dig., §§ 937-943, in view of the provisions of its constitution and by-laws, *held* not to exceed its powers by aiding navigation of river to Memphis, with a view to lowering freight rates.—Id.

⚡480½ (Mo.App.) Where a corporate bond secured by a mortgage aptly incorporated the provision of the mortgage regarding acceleration of the maturity of the debt at the trustee's election for default in the payment of interest, etc., a purchaser of such bond took with notice of the provisions of the mortgage duly recorded.—Brinsmade v. Johnson, 179 S. W. 967.

⚡482 (Mo.App.) Promissory note or bond secured by deed of trust containing provisions authorizing foreclosure for default in payment of interest, making no reference to the deed to incorporate such provision, does not mature the bond, but only the indebtedness for foreclosure; but it is otherwise where the bond incorporates the mortgage provision.—Brinsmade v. Johnson, 179 S. W. 967.

VIII. INSOLVENCY AND RECEIVERS.

⚡553 (Tex.Civ.App.) That the managers of a corporation notified its creditors that the corporation would become insolvent if they should

foreclose *held* not to constitute collusion for the purpose of covering up the debts of the corporation by the appointment of a receiver.—Hart-Parr Co. v. Alvin-Japanese Nursery Co., 179 S. W. 697.

⚡553 (Tex.Civ.App.) The mere fact that a corporation is insolvent is not sufficient ground for the appointment of a receiver therefor, without a showing of some equity in favor of complainants.—Continental Trust Co. v. Brown, 179 S. W. 939.

The fact that the creditor of a corporation attempts to assert an unjust debt and to charge usury does not justify the appointment of a receiver.—Id.

⚡557 (Tex.Civ.App.) Petition for appointment of receiver *held* to state a cause of action under Vernon's Sayles' Ann. Civ. St. 1914, art. 2128, authorizing such appointment where defendant corporation is in imminent danger of insolvency.—Hart-Parr Co. v. Alvin-Japanese Nursery Co., 179 S. W. 697.

In proceedings for the appointment of a receiver for a corporation, on the verge of insolvency, petition *held* not to show that certain creditors were attempting to hinder the collection of debts of others.—Id.

⚡565 (Mo.App.) Claim against receiver of manufacturing corporation by sales agent for breach of his contract of employment *held* sufficient.—Watkins v. Donnell, 179 S. W. 980.

⚡566 (Ky.) Person conveying land to corporation for mortgage bonds *held* not entitled to priority over creditors and other bondholders because more bonds were issued than were necessary to pay for land.—Yellow Chief Coal Co.'s Trustee v. Johnson, 179 S. W. 599; Same v. Preston, Id. 602.

XII. FOREIGN CORPORATIONS.

⚡642 (Mo.App.) Conduct of sales agency in South Carolina for a Missouri manufacturing corporation by an agent as such was unlawful for him, unless the Missouri corporation complied with South Carolina law relating to foreign corporations doing business.—Watkins v. Donnell, 179 S. W. 980.

Missouri company could appoint agent in Missouri for transaction of its business in South Carolina without complying with that state's laws relative to the doing of business by foreign corporations.—Id.

⚡657 (Mo.App.) Where a Missouri corporation appointed a South Carolina sales agent, the company's subsequent failure to comply with the laws of that state regulating the doing of business by foreign corporations did not render the contract of appointment void ab initio.—Watkins v. Donnell, 179 S. W. 980.

Missouri corporation, which, after appointing South Carolina sales agent, failed to comply with that state's laws relative to doing business by foreign corporations, thus rendering the agent's contract impossible of performance, became liable for breach.—Id.

⚡657 (Tex.Civ.App.) A foreign corporation can incur liability on a contract of employment of an attorney made in the state, before it obtains a permit to do business in the state.—Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin, 179 S. W. 541.

CORPUS DELICTI.

See Criminal Law, ⚡535; Homicide, ⚡228.

CORROBORATION.

See Criminal Law, ⚡510, 511, 534, 535; Witnesses, ⚡414.

COSTS.

See Guardian and Ward, ¶162; Partnership, ¶346.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

¶32 (Tex.Civ.App.) Where defendant recovered both in respect to the general partnership set up by plaintiff and the special partnership set up by himself, he was entitled to recover all costs, though plaintiff recovered some items in controversy in the accounting.—Hall v. Ray, 179 S. W. 1135.

¶42 (Mo.App.) Under the statute, offer of judgment in an action for breach of a contract for services in an amount equal to that recovered stopped the running of costs against defendant from the time of the offer.—Lemaire v. Strassberger Conservatories of Music Co., 179 S. W. 959.

COTENANCY.

See Tenancy in Common.

COUNTIES.

See Eminent Domain, ¶75; Judges, ¶22; Municipal Corporations; Officers, ¶100.

II. GOVERNMENT AND OFFICERS.

(C) County Board.

¶57 (Ky.) The order of a county's fiscal court fixing salary and compensation of officers cannot be collaterally attacked.—Hurt v. Morgan County, 179 S. W. 255.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(B) Contracts.

¶114 (Ark.) Claim of attorneys, under order of county judge appointing them special counsel for county to defend suits to restrain erection of new courthouse, held to be dismissed. (Affirmed by divided court.)—Oglesby v. Ft. Smith District of Sebastian County, 179 S. W. 1199.

(C) County Expenses and Charges and Statutory Liabilities.

¶139 (Ark.) Under Kirby's Dig. §§ 990, 7183, held, that county was not liable to sheriff and circuit clerk for mileage service, fees, etc., in prosecutions in name of state against railroad for the penalty imposed by Acts 1911, p. 11.—Chicot County v. Matthews, 179 S. W. 1002.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

¶165 (Ark.) Where the county court has made an appropriation, though not a sufficiently large one to discharge all expenditures for bridge purposes, warrants issued for bridge purposes are not void.—Watkins v. Finger, 179 S. W. 653.

¶190 (Tenn.) Act 1915, providing salary for judge of the juvenile court held not invalid for violating Const. art. 2, § 29, limiting levy of taxes to county purposes.—State v. Brown, 179 S. W. 321.

¶196 (Ark.) After county warrants have been accepted by the treasurer, held that under Kirby's Dig. §§ 1165, 1169, taxpayers cannot secure cancellation; it appearing that the warrants were only voidable in part.—Watkins v. Finger, 179 S. W. 653.

COUNTY BOARDS.

See Counties, ¶57, 114.

COUNTY COURTS.

See Courts, ¶184, 185.

COURTS.

See Appeal and Error, ¶185, 493; Constitutional Law, ¶102; Contempt; Corporations, ¶216; Criminal Law, ¶84, 87; Divorce, ¶62; Equity, ¶39; Executors and Administrators, ¶11; Infants, ¶18; Injunction, ¶164; Judges; Judgment, ¶17; Justices of the Peace; Removal of Causes; Statutes, ¶8½, 64.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

¶7 (Tenn.) Right of action for wrongful death held transitory, and, with certain exceptions, ordinarily enforceable wherever defendant may be found.—Howard v. Nashville, C. & St. L. Ry. Co., 179 S. W. 380.

¶24 (Tex.Civ.App.) Jurisdiction of the subject-matter cannot be conferred by the consent of parties.—Josey v. Masters, 179 S. W. 1134.

¶25 (Tex.Civ.App.) Where the court has jurisdiction of the subject-matter, the parties may by consent confer jurisdiction over their persons.—Josey v. Masters, 179 S. W. 1134.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(C) Rules of Court and Conduct of Business.

¶78 (Tex.Cr.App.) The Constitution and laws authorize the Supreme Court to adopt rules for the government of all the courts of the state, and such rules govern when not in conflict with statute.—Vinson v. State, 179 S. W. 574.

(D) Rules of Decision, Adjudications, Opinions, and Records.

¶116 (Ark.) A court may amend its record nunc pro tunc at a subsequent term upon clear oral testimony alone.—Bottoms v. Borah, 179 S. W. 996.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

¶184 (Ark.) A county court could only make a valid order in term time at the county seat, so that no order could be made at another point in the county where the court was not legally in session.—Bottoms v. Borah, 179 S. W. 996.

¶185 (Ark.) Under Acts 1901, p. 143, dividing a county into two judicial districts, in one of which was located the county seat, where the county court was held, appeals from the county court lie only to the circuit court of the district in which the county seat is situated.—Chicago Mill & Lumber Co. v. Drainage Dist. No. 16, 179 S. W. 998.

¶189 (Ky.) That judgment in a police court on a note of over \$50 was obtained without written petition, the proper practice under Civ. Code Prac. § 705, does not render it void, so as to authorize enjoining its collection.—Ross v. Ross, 179 S. W. 454.

Judgment in a police court on a note of over \$50 is not void, so as to authorize enjoining its collection because rendered less than ten days after service of summons.—Id.

VI. COURTS OF APPELLATE JURISDICTION.

(A) Grounds of Jurisdiction in General.

¶207 (Tex.Civ.App.) Under Const. art. 5, § 6, and Vernon's Sayles' Ann. Civ. St. 1914, art. 1592, the Court of Civil Appeals has power to issue a writ of prohibition to protect its jurisdiction.—Cattlemens Trust Co. of Ft. Worth v. Willis, 179 S. W. 1115.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1591, a judgment of affirmance, with damages for delay, held a judgment of the Court of Civil Appeals, and not of the district court;

hence prohibition to preclude the judgment being enjoined will issue.—Id.

Where it was sought to enjoin, in a district court outside of the supreme judicial district, a judgment affirmed by the Court of Civil Appeals, *held*, the Court of Civil Appeals had power to issue prohibition against the district judge and the defendant.—Id.

In view of Const. art. 5, § 6, the Court of Civil Appeals of one district may issue a writ of prohibition against a district court of another district and parties residing in another district to prevent interference with its judgment.—Id.

(B) Courts of Particular States.

⚡223 (Ky.) The Court of Appeals has no jurisdiction to reverse a judgment granting divorce.—Hester v. Hester, 179 S. W. 451.

⚡231 (Mo.App.) A former decision of the Springfield Court of Appeals, contrary to the holding of the Kansas City Court of Appeals, on the authority of an Indian agent to act outside of the Indian country, required that the latter case be certified to the Supreme Court for final adjudication.—Danciger v. Atchison, T. & S. F. Ry. Co., 179 S. W. 800.

⚡231 (Mo.App.) A suit to appoint a receiver to take over the assets of a corporation, amounting to \$60,000, so as to secure payment of plaintiff's claim, *held* to involve a right involving a sum in excess of the jurisdiction of the Court of Appeals.—Walker v. Ozark Cooperation & Lumber Co. of New Jersey, 179 S. W. 948.

⚡231 (Mo.App.) Court of Appeals *held* without jurisdiction on appeal to determine the constitutionality of Rev. St. 1909, §§ 8315, 8320, so that the case would be transferred to the Supreme Court for final determination.—State v. Wild, 179 S. W. 964.

⚡247 (Tex.) Rev. St. 1911, art. 1623, requires that the certificate of a question of law, and the record in a case in which the decision conflicts with a prior decision, be made only when the decision is in direct conflict with a prior decision, and the test is whether one would overrule the other if in the same court.—Coultrass v. City of San Antonio, 179 S. W. 515.

Decisions of a Court of Civil Appeals, denying a discharged policeman recovery of salary subsequently accruing, *held* not in conflict with other cases, so as to require certification to the Supreme Court.—Id.

⚡247 (Tex.Civ.App.) The Court of Civil Appeals will not certify a case to the Supreme Court, where that court has jurisdiction to grant a writ of error.—National Live Stock Ins. Co. v. Gomillion, 179 S. W. 671.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

⚡487 (Mo.App.) Where the sum involved appears to be in excess of its jurisdiction, the Court of Appeals should on its own motion transfer the cause to the Supreme Court.—Walker v. Ozark Cooperation & Lumber Co. of New Jersey, 179 S. W. 948.

(C) Courts of Different States or Countries.

⚡511 (Tex.Civ.App.) The laws of another state will be given that construction and effect which is given them by the courts of final resort in the state where they were enacted.—American Express Co. v. North Ft. Worth Undertaking Co., 179 S. W. 908.

COVENANTS.

See Deeds, ⚡145; Estoppel, ⚡38.

III. PERFORMANCE OR BREACH.

⚡101 (Mo.App.) A covenantor whose title has failed, though there has been no judgment in ejectment against him, may recover of the covenantor for breach by showing a surrender to a paramount title.—Eaker v. Harvey, 179 S. W. 985.

Grantee suing for damages for breach of warranty of title against whom judgment in ejectment had been obtained, voidable for omission to describe the property, and a writ of restitution, *held* to have surrendered to a paramount title, especially in view of Rev. St. 1909, § 2082.—Id.

IV. ACTIONS FOR BREACH.

⚡121 (Mo.App.) A judgment in ejectment against the terre tenant when the covenantor in the deed is made party to the suit is to be received in evidence as concluding the question of paramount title.—Eaker v. Harvey, 179 S. W. 985.

COVERTURE.

See Husband and Wife.

CREDIBILITY.

See Evidence, ⚡588; Witnesses, ⚡311-396.

CRIMINAL LAW.

See Arson, ⚡30; Assault and Battery, ⚡91-97; Bail; Bigamy; Burglary; Conspiracy; Contempt; Counties, ⚡139; Disorderly House; Embezzlement; False Pretenses; Fences; Forgery; Fornication; Game; Habeas Corpus, ⚡118; Homicide, ⚡234; Husband and Wife, ⚡302, 313; Incest; Indictment and Information, ⚡137; Injunction, ⚡105; Intoxicating Liquors, ⚡139-238; Judgment, ⚡559; Larceny; Libel and Slander, ⚡144-156; Physicians and Surgeons, ⚡6; Prostitution; Rape; Records, ⚡17; Robbery; Statutes, ⚡118; Vagrancy; Weapons; Witnesses.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

⚡27 (Tex.Cr.App.) Under Acts 81st Leg. c. 35, and Pen. Code 1911, art. 597, sale of liquors in territory where prohibition was adopted prior to the act of 1909 *held* a misdemeanor, but in territory where prohibition was subsequently adopted a felony.—Green v. State, 179 S. W. 1191.

⚡36 (Ark.) The rule that one in *pari delicto* with defendant cannot recover for acts of the defendant does not apply to criminal actions, and the fact that the prosecuting witness was also a party to the crime will not prevent conviction of the defendant.—Lawson v. State, 179 S. W. 818.

III. PARTIES TO OFFENSES.

⚡59 (Tex.Cr.App.) Mere presence, without participation in the commission of an offense, will not constitute one a principal, but presence, with other circumstances, may be sufficient to show that such person was a principal.—Taylor v. State, 179 S. W. 113.

IV. JURISDICTION.

⚡84 (Ark.) Under Const. art. 7, § 40, the Legislature may abolish the jurisdiction of justices of the peace in misdemeanor cases.—State v. Woodruff, 179 S. W. 813.

Laws 1915, p. 340, § 10, giving municipal courts thereby created jurisdiction over misde-

means exclusive of justices of the peace, *held* not invalid under Const. art. 7, § 43, authorizing such courts with "jurisdiction concurrent with justices of the peace."—*Id.*

Under Const. art. 7, § 43, *held*, that the Legislature may vest jurisdiction in municipal courts beyond the geographical limits of the municipalities.—*Id.*

§87 (Ark.) Justices of the peace *held* to have no vested right to fees and emoluments of their office, and Laws 1915, p. 340, establishing municipal courts, is not void as impairing vested rights.—*State v. Woodruff*, 179 S. W. 813.

V. VENUE.

(B) Change of Venue.

§119 (Ark.) One convicted of crime securing trial of sanity issue on writ of error coram nobis after sentence *held* entitled to change of venue as in other cases.—*Dewein v. State*, 179 S. W. 346.

§121 (Ark.) Where supporting witnesses to affidavit for change of venue in criminal case are qualified under Kirby's Dig. § 2318, the court has no discretion, and must grant the change.—*Dewein v. State*, 179 S. W. 346.

§134 (Ark.) Evidence *held* to support finding that supporting witnesses to an affidavit for change of venue were not credible for want of knowledge.—*Dewein v. State*, 179 S. W. 346.

§134 (Tex.Cr.App.) It is not error to allow time to file a contest to defendant's motion for a change of venue, nor to extend the time for verification when the contest is not at first sworn to.—*Thompson v. State*, 179 S. W. 561.

A change of venue was properly denied where only one of defendant's witnesses swore he could not get a fair trial, while all the witnesses for the state, resisting the change, swore that he could.—*Id.*

§135 (Ark.) For sole purpose of ascertaining their credibility, the court may examine supporting witnesses to affidavit for change of venue as to their means of knowledge and the probability of petitioner having fair trial.—*Dewein v. State*, 179 S. W. 346.

§137 (Ark.) Statement of court on motion for change of venue that supporting witnesses to affidavit were reputable citizens, etc., *held* not finding that they were "credible," within Kirby's Dig. § 2318.—*Dewein v. State*, 179 S. W. 346.

Credibility of supporting witnesses to affidavit for change of venue is a question largely within the discretion of the trial court.—*Id.*

VI. LIMITATION OF PROSECUTIONS.

§147 (Tex.Cr.App.) In prosecution for violating the prohibition law, there could be a conviction only for an offense committed within two years prior to the filing of the indictment.—*Sloan v. State*, 179 S. W. 111.

VII. FORMER JEOPARDY.

§170 (Tex.Cr.App.) Where an information in a former complaint charged an impossible date, a conviction could not be had under it, so that an acquittal thereunder was not available as a plea of former acquittal.—*Spicer v. State*, 179 S. W. 712.

§185 (Ark.) Trial under defective indictment resulting in discharge of jury for failure to agree, under Kirby's Dig. § 2396, *held* not to bar a new trial under a valid indictment.—*Carmen v. State*, 179 S. W. 183.

§193½ (Tex.Cr.App.) Where defendant tried for murder was acquitted by a conviction of manslaughter, the issue of murder could not be submitted in another trial, though the court, in submitting manslaughter, might charge as to what constituted murder.—*Vollintine v. State*, 179 S. W. 108.

§200 (Tex.Cr.App.) Acquittal on a charge of carrying "knucks" is immaterial, on the charge of having committed an assault with

"knucks" at the same time; the question of unlawful carrying not being in issue.—*Chisom v. State*, 179 S. W. 103.

§200 (Tex.Cr.App.) Under Pen. Code 1911, arts. 1317, 1318, theft committed in the same transaction as a burglary is separate from the burglary, and accused may be convicted of both.—*Park v. State*, 179 S. W. 1152.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

§206 (Ark.) Under Const. art. 7, §§ 40, 43, Laws 1915, p. 340, *held* not unconstitutional because of provision vesting municipal courts with jurisdiction to sit as examining courts.—*State v. Woodruff*, 179 S. W. 813.

§260 (Tex.Cr.App.) A judgment of conviction in justice court *held* a final judgment, warranting appeal to and trial de novo in the county court.—*Golson v. State*, 179 S. W. 560.

X. EVIDENCE.

(A) Judicial Notice, Presumptions, and Burden of Proof.

§330 (Tex.Cr.App.) Burden of proof *held* sometimes on defendant, but usually with reference to special matters, like nonage and insanity, and never until the state has overcome the presumption of innocence and reasonable doubt.—*Hawkins v. State*, 179 S. W. 448.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§368 (Tex.Cr.App.) On a trial for assault with intent to murder, evidence that, while defendant and another were assaulting the prosecuting witness, a third person told them not to do it, was admissible as *res gestæ*.—*Freeman v. State*, 179 S. W. 1157.

§368 (Tex.Cr.App.) Evidence of acts of defendant's father immediately after the shooting by defendant, *held* improperly admitted as part of the *res gestæ*.—*Brod v. State*, 179 S. W. 1189.

(C) Other Offenses, and Character of Accused.

§369 (Ark.) In prosecution for robbery, where defendant set up an alibi, evidence as to his presence and participation in other robberies at the same time and locality *held* admissible.—*Nash v. State*, 179 S. W. 159.

Guilt of one crime cannot be proved as a circumstance from which to infer guilt of another, where not offered to show motive, intent, or design.—*Id.*

§369 (Ark.) Evidence of the commission of one offense is not admissible to establish the guilt of defendant, charged with an entirely independent crime.—*Miller v. State*, 179 S. W. 1001.

§369 (Ky.) Evidence of different offenses, though ordinarily incompetent, *held* admissible to establish identity, guilty knowledge, intent, or motive, or where they cannot be separated, or were perpetrated to conceal the crime on trial.—*Richardson v. Commonwealth*, 179 S. W. 458.

§371 (Ark.) Where a sheriff and his deputy had searched two persons, and were both threatened by them, on a charge of burning the barn of the sheriff the following night evidence was admissible that the deputy's fence and corn-tops were burned the same night.—*Shuffield v. State*, 179 S. W. 650.

§371 (Ky.) In a prosecution for embezzlement, where defendant relies upon the absence of intent fraudulently to convert, or claims that his act was the result of oversight, accident, or mistake, evidence of other acts of embezzlement is admissible to show guilty knowledge.—*Commonwealth v. Brand*, 179 S. W. 844.

In prosecution for crime, the commission by defendant of other criminal acts of the same nature cannot be considered as substantive tes-

timony of defendant's guilt, but only as indicating motive and intent.—*Id.*

↪372 (Tex.Cr.App.) In a prosecution for swindling, *held* proper to prove other similar transactions had about the same time.—*Arnold v. State*, 179 S. W. 1183.

↪374 (Ark.) On a criminal prosecution, other offenses, tending to show the intent or motive, cannot be established by hearsay.—*Shuffield v. State*, 179 S. W. 650.

↪376 (Ark.) The prosecution cannot introduce evidence of the bad character of accused as a circumstance from which the jury might infer guilt, until the accused has introduced evidence of his good character.—*Shuffield v. State*, 179 S. W. 650.

↪378 (Ark.) Proof of pleading guilty to stealing chickens is not admissible to rebut evidence of the good character of one accused of arson.—*Shuffield v. State*, 179 S. W. 650.

↪380 (Tex.Cr.App.) Where accused put his good character as a peaceable citizen in issue, testimony that it had been reported some 30 years before that he killed a man in another state and was a member of a gang of outlaws is too remote to be considered.—*Taylor v. State*, 179 S. W. 118.

(D) Materiality and Competency in General.

↪396 (Mo.) In a prosecution for embezzlement by a bank cashier, where evidence had been admitted showing a general shortage in the assets of the bank, testimony by accused tending to explain the shortage was improperly excluded.—*State v. Wilcox*, 179 S. W. 479.

↪396 (Tex.Cr.App.) In prosecution for keeping house for prostitution, where defendant testified that, upon arrest for vagrancy, she had been mistreated and induced to plead guilty through misrepresentations, etc., it was proper in rebuttal to permit police officers to explain the whole matter.—*Jackson v. State*, 179 S. W. 711.

(E) Best and Secondary and Demonstrative Evidence.

↪398 (Tex.Cr.App.) Witness, having lost a letter to her, could testify to its contents.—*McDonald v. State*, 179 S. W. 880.

↪400 (Tex.Cr.App.) Parol evidence of the contents of a circular was properly rejected, where the circular itself could be put in evidence.—*Hyroop v. State*, 179 S. W. 878.

↪404 (Ark.) Stolen knife *held* not sufficiently identified to warrant its admission in evidence in a prosecution for burglary.—*Oliver v. State*, 179 S. W. 366.

(F) Admissions, Declarations, and Hearsay.

↪406 (Tex.Cr.App.) Statements of defendant and of another party, made while the police officer was making an investigation, *held* not inadmissible as made while defendant was under arrest.—*Rice v. State*, 179 S. W. 876.

↪406 (Tex.Cr.App.) On defendant's admission that a circular was one used by him in advertising his business as a masseur, the circular was properly admitted in evidence to show the purpose for which he held himself out.—*Hyroop v. State*, 179 S. W. 878.

↪406 (Tex.Cr.App.) Testimony of officer as to searching deceased's rooms for money, and defendant's statements *held* admissible, even though defendant was under arrest: the money having been found by reason of her statements.—*Hand v. State*, 179 S. W. 1155.

↪407 (Ky.) Statement made by one to another jointly accused with him of murder, charging him with firing the shot, *held* competent against person so accused, where the circumstances were such that he would naturally have

denied the charge, if false.—*Wilson v. Commonwealth*, 179 S. W. 237.

↪413 (Tex.Cr.App.) Refusing to allow defendant in seduction to show his prior statements that he was to marry another than prosecutrix *held* not error, where they were not communicated to prosecutrix.—*McDonald v. State*, 179 S. W. 880.

↪418 (Tex.Cr.App.) Remark to assaulted party before the assault and his reply *held* admissible, where it appeared that defendant was near enough that the assaulted party heard a remark by him or one of his companions.—*Southall v. State*, 179 S. W. 872.

↪419, 420 (Tex.Cr.App.) On trial for assault, accused's testimony that he made the assault because he was told by his wife and others that the prosecuting witness had raped her *held* erroneously excluded; the hearsay rule not applying.—*Dieter v. State*, 179 S. W. 557.

↪419, 420 (Tex.Cr.App.) Assaulted party *held* improperly permitted to testify that his assailant beat him with a fence rail; his knowledge having been acquired from G., who found the rail with blood on it.—*Southall v. State*, 179 S. W. 872.

(G) Acts and Declarations of Conspirators and Codefendants.

↪422 (Tex.Cr.App.) On trial for assault, remark of one of four boys who were together that they would get the prosecuting witness *held* admissible against one of them.—*Southall v. State*, 179 S. W. 872.

↪423 (Ark.) Where the evidence made a question for the jury as to a conspiracy between defendant and H., evidence of H.'s possession of a pistol *held* competent either on direct or cross examination.—*Johnson v. State*, 179 S. W. 361.

↪423 (Tex.Cr.App.) On trial of defendant as principal in assault committed by W., evidence as to remark by W. regarding his intention to whip the prosecuting witness, just prior to the assault, *held* admissible.—*Southall v. State*, 179 S. W. 872.

If defendant was principal in assault by W., evidence as to what W. did to the assaulted party after he ran away, pursued by W., *held* admissible.—*Id.*

↪424 (Ark.) Statement of one jointly indicted for arson with defendant *held* erroneously admitted because any conspiracy had been consummated when it was made.—*Counts v. State*, 179 S. W. 662.

↪424 (Ky.) Letter by one defendant, written after commission of crime and threatening to kill the jailer, *held* not admissible upon joint trial.—*Wilson v. Commonwealth*, 179 S. W. 237.

↪427 (Tex.Cr.App.) That defendant and other companions of W. followed him and party assaulted by him, and remarked that W. ought to beat such person's head off, *held* to strongly tend to show that defendant was a principal.—*Southall v. State*, 179 S. W. 872.

(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

↪447 (Tex.Cr.App.) Written employment contract *held* not to merge previous representations of accused so as to prevent their proof by state in prosecution for swindling.—*Arnold v. State*, 179 S. W. 1183.

(I) Opinion Evidence.

↪448 (Ky.) In prosecution of sheriff for embezzlement, evidence of a county attorney that he had in the exercise of his official functions determined that the tax which defendant was accused of embezzling had never been certified to him for collection was inadmissible as opinion.—*Commonwealth v. Brand*, 179 S. W. 844.

§448 (Tex.Cr.App.) It was not error to allow a city detective to testify that the persons who had signed confession by defendant as witnesses did not hold any official position in the city or county.—*Jernigan v. State*, 179 S. W. 1187.

§452 (Ark.) Opinion of nonexpert witness on sanity held only admissible upon showing association with subject, opportunity for observation, and statement of facts upon which opinion is based.—*Dewein v. State*, 179 S. W. 346.

§476 (Tex.Cr.App.) Opinion evidence by a doctor, who qualified as an expert witness, as to the cause of the injuries inflicted, held properly admitted.—*Chisom v. State*, 179 S. W. 103.

§478 (Tex.Cr.App.) Chemist who analysed deceased's stomach held competent to express an opinion as to how much strychnine sulphate would cause a man's death.—*Hand v. State*, 179 S. W. 1155.

(J) Testimony of Accomplices and Codefendants.

§507 (Ky.) Person assisting in removing stolen goods from place of concealment held not an accomplice to the offense of breaking into a railroad depot from which such goods were stolen.—*Richardson v. Commonwealth*, 179 S. W. 458.

§507 (Tex.Cr.App.) Under Pen. Code 1911, art. 498, a female solicited to illicit sexual intercourse, who consents without persuasion, is not an accomplice of the solicitor making requisite corroboration of her testimony for conviction thereon.—*Denman v. State*, 179 S. W. 120.

§507 (Tex.Cr.App.) Sheriff and person employed by him to detect bootleggers, and who, pursuant thereto, purchased whisky from defendant, held not accomplices in view of Pen. Code 1911, art. 602.—*Bagley v. State*, 179 S. W. 1167.

§508 (Tex.Cr.App.) Where a theft is established, a conviction may be had on accomplice testimony on proof of facts and circumstances tending to connect accused with the offense.—*Edwards v. State*, 179 S. W. 1163.

§508 (Tex.Cr.App.) Under Code Cr. Proc. 1911, arts. 791, 792, making codefendants incompetent witnesses for each other, accused may not complain that the state proved that a witness called by him was indicted for the same offense.—*Fondren v. State*, 179 S. W. 1170.

§510 (Ky.) Statement made by one to another jointly indicted for murder with him, charging latter with firing the shot, and testified to by third person, who overheard same, held not accomplice testimony, within Cr. Code Prac. § 241, requiring corroboration.—*Wilson v. Commonwealth*, 179 S. W. 237.

§511 (Ark.) Unexplained possession of a portion of property recently stolen may be considered in corroboration of testimony of accomplices in a prosecution for grand larceny, although the value of the property so found does not exceed \$10.—*White v. State*, 179 S. W. 160.

§511 (Ark.) Evidence in corroboration of an accomplice to a burglary held insufficient, under Kirby's Dig. § 2384.—*Ernest v. State*, 179 S. W. 174.

§511 (Tex.Cr.App.) In a prosecution for cattle theft, evidence of corroboration held sufficient to connect defendant with the offense and to justify conviction on an accomplice's testimony.—*Edwards v. State*, 179 S. W. 1163.

(K) Confessions.

§517 (Ky.) Where accused confessed to a witness the commission of two breakings, for one of which he was being tried, the entire confession held provable to establish his identity.—*Richardson v. Commonwealth*, 179 S. W. 458.

§531 (Tex.Cr.App.) A district attorney to whom a confession of crime was made held

competent to testify that it was made voluntarily after warning in accordance with Code Cr. Proc. 1911, art. 810.—*Jernigan v. State*, 179 S. W. 1187.

§534 (Ky.) Where accused confessed to a witness the commission of two breakings, the finding of goods stolen at each time held provable, as corroborative.—*Richardson v. Commonwealth*, 179 S. W. 458.

§535 (Tex.Cr.App.) While the confession of an accused may be used where the corpus delicti is established, yet it is inadmissible to establish the corpus delicti.—*Brice v. State*, 179 S. W. 1178.

(M) Weight and Sufficiency.

§561 (Ky.) In order to convict, the jury must have no reasonable doubt of defendant's guilt.—*Commonwealth v. Brand*, 179 S. W. 844.

§570 (Ark.) Evidence on the issue of sanity held sufficient to support verdict of sanity.—*Dewein v. State*, 179 S. W. 346.

XI. TIME OF TRIAL AND CONTINUANCE.

§577 (Tex.Cr.App.) Defendant's failure to insist on a ruling on his plea of former acquittal and his motion to postpone and his announcement of immediate readiness for trial held a waiver of his right to the two days allowed to prepare for trial.—*Spicer v. State*, 179 S. W. 712.

§586 (Ark.) The trial court has a large discretion in granting or refusing continuances.—*Carmen v. State*, 179 S. W. 183.

§589 (Tex.Cr.App.) Denial of continuance was not erroneous, where accused was not deprived of any testimony.—*Word v. State*, 179 S. W. 1175.

§595 (Tex.Cr.App.) In a criminal prosecution, it was not error to refuse a continuance, where the affidavit of the absent witness stated that he had seen the prosecuting witness intoxicated at about the time of the offense; the fact of the witness' intoxication not rendering him incompetent.—*Fletcher v. State*, 179 S. W. 879.

§595 (Tex.Cr.App.) Denial of continuance because of absence of witnesses who would have testified to defendant's whereabouts at a different time than the times when sales of liquor were claimed to have been made held not error.—*Bagley v. State*, 179 S. W. 1167.

§595 (Tex.Cr.App.) In a prosecution for abandonment after seduction and marriage, testimony of a witness to the chastity of prosecutrix held material, so that absence of the witness could be ground for continuance.—*Coleman v. State*, 179 S. W. 1172.

§596 (Ark.) The denial of a continuance on the ground of an absent witness whose testimony would be merely cumulative is not an abuse of discretion.—*Owens v. State*, 179 S. W. 1014.

§596 (Tex.Cr.App.) The rule against cumulative evidence does not apply to a first application for a continuance, nor is it applied with strictness where the witnesses present are nearly related to accused.—*Chapman v. State*, 179 S. W. 570.

§596 (Tex.Cr.App.) A continuance sought to secure a witness whose testimony can only be available to impeach a state's witness should be denied.—*Galvan v. State*, 179 S. W. 875.

§597 (Tex.Cr.App.) In a prosecution for bigamy, held, that accused's first application for a continuance on account of absent witnesses should have been granted, as he could have procured evidence which would have showed he believed he was divorced.—*Chapman v. State*, 179 S. W. 570.

§598 (Mo.App.) Refusal to grant a continuance to enable defendant to obtain a witness

held error where there was not sufficient time in which to obtain the witness without continuance.—State v. Flick, 179 S. W. 768.

⚖️598 (Tex.Cr.App.) In prosecution for unlawfully carrying a pistol, held, that there was no error in refusing a continuance on the ground of surprise; no diligence being shown.—Grant v. State, 179 S. W. 871.

⚖️598 (Tex.Cr.App.) Denial for want of diligence of a continuance sought for absence of witness who would give material testimony, held error.—Coleman v. State, 179 S. W. 1172.

⚖️598 (Tex.Cr.App.) A defendant indicted for seduction in November, 1913, whose trial was set for May, 1915, held not to have exercised such diligence in obtaining the presence of a witness as to make it error to refuse a continuance.—May v. State, 179 S. W. 1176.

⚖️608 (Ark.) Where the showing on a motion for postponement did not clearly disclose the whereabouts of the absent witness, or establish that his attendance could be procured later, the denial was not an abuse of discretion.—Owens v. State, 179 S. W. 1014.

⚖️608 (Tex.Cr.App.) It was not error to refuse a continuance in a prosecution for seduction, where defendant failed to produce any affidavits that the absent witnesses would testify as stated in his motion.—May v. State, 179 S. W. 1176.

XII. TRIAL.

(A) Preliminary Proceedings.

⚖️622 (Tex.Cr.App.) Application for severance in order that codefendant, who was an important witness, might be first tried, held erroneously denied.—Dieter v. State, 179 S. W. 557.

(B) Course and Conduct of Trial in General.

⚖️636 (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 646, absence of defendant, who was locked in jail, while counsel was arguing motion for instructed verdict, held to require a reversal.—Brooks v. State, 179 S. W. 447.

(C) Reception of Evidence.

⚖️673 (Ky.) Where evidence of a different breaking was admitted, held, that court should have admonished jury that it could be considered only on the questions of motive and identity.—Richardson v. Commonwealth, 179 S. W. 458.

⚖️673 (Ky.) In prosecution of sheriff for embezzling a collected tax, the court, on admission of evidence of the clerk of the county court that defendant failed to report collections, should admonish the jury that such evidence was only to show intent.—Commonwealth v. Brand, 179 S. W. 844.

⚖️676 (Ark.) The court did not abuse its discretion in limiting cumulative testimony, by excluding the testimony of 10 witnesses upon certain facts, where there was nothing to show that their testimony was of special value or weight, and 9 witnesses had already testified upon the same facts.—Sheppard v. State, 179 S. W. 168.

⚖️676 (Tex.Cr.App.) Where a given fact is sufficiently shown by a number of witnesses, it is not error to exclude testimony of another witness which is merely cumulative.—Tinker v. State, 179 S. W. 572.

⚖️678 (Ky.) Commonwealth held to have elected to try accused for one of two breakings, where its first witness testified as to accused's possession of property stolen at the time of such breaking.—Richardson v. Commonwealth, 179 S. W. 458.

⚖️683 (Tex.Cr.App.) In rebuttal of testimony of witness, who claimed that he, and not accused, assaulted the prosecuting witness, testimony of prosecuting witness as to how he was

dressed and that he had a lantern held permissible.—Vinson v. State, 179 S. W. 574.

(D) Arguments and Conduct of Counsel.

⚖️720 (Ark.) Prosecuting attorney's statement that, no doubt, defendant was given a check by his father and advised that other crimes would be more healthful for him after committing a homicide, held justified by the evidence.—Yancey v. State, 179 S. W. 352.

⚖️720 (Ark.) Where accused and another who were traced from the place of the killing to the drug store, where they were found the next morning, asserted that they spent the night together, argument by the prosecutor that such other person participated in the crime is warranted.—Owens v. State, 179 S. W. 1014.

⚖️720 (Tex.Cr.App.) Prosecuting attorneys in their argument should confine themselves to legitimate deductions from the facts as they apply to the law of the case.—Hawkins v. State, 179 S. W. 448.

⚖️722 (Ark.) In prosecution for grand larceny, district attorney's closing argument, imputing a criminal intent to defendant in over insuring his house, and tending to counteract proof of his good character, held reversible error.—Miller v. State, 179 S. W. 1001.

⚖️724 (Tenn.) Statements of the prosecuting attorney that if one ran over and killed a child of his he would shoot him, held improper.—Lauterbach v. State, 179 S. W. 180.

⚖️728 (Ark.) That the prosecuting attorney made statements as to proof he would adduce, but on trial was unable to furnish it, is not ground for reversal, where the statements were in good faith, and accused requested no instructions that the jury should not consider such statements.—Owens v. State, 179 S. W. 1014.

⚖️730 (Mo.) That counsel expressly advised the jury not to read the instructions, but to return a verdict forthwith, was cured by the direction of the court that the jury pay no attention thereto.—State v. Wilcox, 179 S. W. 479.

⚖️730 (Tex.Cr.App.) Where defendant had not put his character in issue, remark of county attorney, that he did not know whether defendant had been previously charged with an offense, presented no error where objection was sustained with an instruction not to consider it.—Rice v. State, 179 S. W. 876.

⚖️730 (Tex.Cr.App.) Action of state's attorney, in asking accused if he had not been convicted of crime, held not reversible, where the court sustained an objection to the question and directed the jury not to consider it.—Park v. State, 179 S. W. 1152.

(E) Province of Court and Jury in General.

⚖️737 (Tex.Cr.App.) Under the evidence and defendant's admission at the time stolen property was taken from his person, held, that there was no question of venue in the case.—Whitfield v. State, 179 S. W. 558.

⚖️741 (Ark.) Whether form of insanity is such as to preclude discovery by a nonexpert held question of fact for the jury on the issue of defendant's sanity at the trial for the crime.—Dewein v. State, 179 S. W. 346.

⚖️762 (Tex.Cr.App.) An instruction that appellant "stands charged by indictment with the offense of the murder of S. G., alleged to have been committed by him," does not suggest to the jury the opinion of the court that the defendant was guilty.—Munoz v. State, 179 S. W. 566.

⚖️763, 764 (Ark.) A charge that accused's alleged confession should be received with caution is on the weight of the evidence, and he cannot complain of a modification, where the jury were informed that conviction could not

be had on the unsupported confession.—Owens v. State, 179 S. W. 1014.

(G) Necessity, Requisites, and Sufficiency of Instructions.

—775 (Tex.Cr.App.) Charge on alibi instructing jury to acquit upon reasonable doubt of presence of defendant at time and place of offense *held good*.—McAninch v. State, 179 S. W. 719.

—778 (Ark.) On a trial for homicide, it was not error to charge in the language of Kirby's Dig. § 1765, relative to the burden of proving mitigating circumstances.—Johnson v. State, 179 S. W. 361.

—778 (Tex.Cr.App.) Instruction that burden of proof is on state *held* usually sufficient, unless some peculiarity requires the further instruction that the burden never shifts to defendant.—Hawkins v. State, 179 S. W. 448.

—780 (Tex.Cr.App.) The fact that officers went to one charged with practicing medicine unlawfully and procured him to treat them does not make them his accomplices so as to require a charge on accomplices' testimony.—Hyroop v. State, 179 S. W. 878.

—780 (Tex.Cr.App.) If testimony suggested that the state's witnesses were accomplices, *held*, that the court should have charged the provisions of Code Cr. Proc. 1911, art. 801, as to the corroboration of accomplices.—Bagley v. State, 179 S. W. 1167.

—782 (Ark.) In prosecution for assault with intent to kill, *held* not error to refuse to instruct that, where the facts were susceptible of two interpretations, that of innocence must prevail.—Deshazo v. State, 179 S. W. 1012.

—792 (Tex.Cr.App.) Instruction in prosecution for cattle theft *held* sufficient on the distinction between principal and accomplice, and the necessity of acquittal if accused was the latter.—McAninch v. State, 179 S. W. 719.

—801 (Tex.Cr.App.) Reading charge before argument *held* not mandatory in misdemeanor cases.—Robison v. State, 179 S. W. 1157.

—814 (Ark.) In a prosecution for assault with intent to rape, refusal to give instructions distinguishing between acts of preparation and acts constituting the beginning of the attempt to commit rape *held* properly refused, where not required by the issues.—Tyra v. State, 179 S. W. 187.

—814 (Tex.Cr.App.) Where there were two counts charging cattle theft, one charging ownership in husband, and one in wife, charge on question of theft of cow as property of husband *held good*.—McAninch v. State, 179 S. W. 719.

—822 (Tex.Cr.App.) Objection that charge in prosecution for carrying pistol was contradictory cannot prevail, when charge, as a whole, was clear and could not mislead jury.—Davis v. State, 179 S. W. 702.

(H) Requests for Instructions.

—829 (Ark.) In prosecution for assault with intent to kill, instruction that indictment raised no presumption of guilt *held* properly refused, in view of other instructions given.—Deshazo v. State, 179 S. W. 1012.

In prosecution for assault with intent to kill, *held* not error to refuse to instruct as to reasonable doubt, where the law on such subject was covered by instructions given.—Id.

In prosecution for assault with intent to kill, it was not error to refuse to instruct that words of threatening character might reduce the crime to aggravated assault, or justify an aggravated assault in view of other instructions given.—Id.

—829 (Tex.Cr.App.) On a trial for theft, a requested instruction as to defendant's possession of the stolen property and his explanation *held* sufficiently presented by instructions given.—Whitfield v. State, 179 S. W. 558.

—829 (Tex.Cr.App.) Where in a prosecution for murder the court's charge embraced every

proper question of self-defense, instructions on the same question requested by the defendant were properly refused.—Thompson v. State, 179 S. W. 561.

—829 (Tex.Cr.App.) Where a charge requested by accused and covering the issue is given, other special charges requested by accused on same issue are properly refused.—Davis v. State, 179 S. W. 702.

—829 (Tex.Cr.App.) In prosecution for larceny, *held*, in view of the charge as to defendant's explanation of his possession of the property, that it was unnecessary to give requested special charges on that issue.—Rice v. State, 179 S. W. 870.

—829 (Tex.Cr.App.) The refusal of requested charges covered by those given is not error.—Edwards v. State, 179 S. W. 1163.

—829 (Tex.Cr.App.) Where the court gave a proper charge on an issue, it was not necessary to give a special requested charge thereon.—Durley v. State, 179 S. W. 1170.

—834 (Ark.) The court is not bound to give instructions exactly in the requested words, if the instruction given is correct and complete.—Sheppard v. State, 179 S. W. 168.

—834 (Ark.) A requested charge that accused's alleged confession should be received with caution being on the weight of evidence, defendant cannot complain of a modification, charging that conviction could not be had on the unsupported confession.—Owens v. State, 179 S. W. 1014.

(I) Objections to Instructions or Refusal Thereof, and Exceptions.

—844 (Tex.Cr.App.) Objection to a charge that it did not directly submit the issues raised by the evidence, and did not instruct on certain subjects, *held* not to point out specific errors, as required by statute.—McDonald v. State, 179 S. W. 880.

(J) Custody, Conduct, and Deliberations of Jury.

—854 (Tenn.) In a capital case, it constitutes reversible error to permit the jury to go at large pending the trial, though accused consents, this depriving him of his constitutional guaranties of fair and impartial trial by jury.—Lee v. State, 179 S. W. 145.

—854 (Tenn.) Notwithstanding accused's consent to separation of the jury, a conviction of felony cannot be upheld under Const. art. 1, § 9.—Long v. State, 179 S. W. 315.

—866 (Tex.Cr.App.) Conduct of jury in prosecution for theft, in determining term of imprisonment by totaling the amount desired by all and dividing by their number, the result not being followed ultimately, but a different term of imprisonment being agreed upon, *held* to present no error.—Luna v. State, 179 S. W. 1152.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

—922 (Tex.Cr.App.) Where defendant failed to except to the charge in a misdemeanor trial he could not raise objection on motion for new trial.—Robison v. State, 179 S. W. 1157.

—925 (Tex.Cr.App.) That jurors during the trial made comments on accused's conduct at the time *held* not ground for new trial, in the absence of any showing that accused was not guilty of such conduct.—Word v. State, 179 S. W. 1175.

—928 (Tex.Cr.App.) Statement of juror, before vote was taken, that he knew prosecuting witness would not swear another man into the penitentiary, *held* not to justify new trial.—Wilburton v. State, 179 S. W. 1169.

—938 (Tex.Cr.App.) In a prosecution for seduction motion for new trial for newly discovered evidence, *held* improperly overruled.—Long v. State, 179 S. W. 564.

—945 (Tex.Cr.App.) New trial, after conviction of assault to rane a child under 15 years, will not be granted for newly discovered testimony of a physician that he found no bruises on the child.—Mays v. State, 179 S. W. 1192.

—949 (Tex.Cr.App.) A motion for new trial in a prosecution for selling intoxicating liquors held properly overruled as too vague and indefinite.—Alvarez v. State, 179 S. W. 714.

—954 (Tex.Cr.App.) In a motion for a new trial, appellant should specifically point out the reasons for a new trial, so as to give the court a chance to correct its own errors, if any.—Jackson v. State, 179 S. W. 711.

—956 (Tex.Cr.App.) A new trial sought on the ground of newly discovered evidence held properly refused, accused not making a sufficient showing of diligence.—Ellis v. State, 179 S. W. 1163.

—956 (Tex.Cr.App.) That a juror stated that accused would have been acquitted but for facts injected into the case as to his shooting of a third person, unaccompanied by any affidavit, held not ground for new trial.—Word v. State, 179 S. W. 1175.

—956 (Tex.Cr.App.) Where defendant had two days after verdict in which to secure the affidavits of absent witnesses on motion for new trial, it was not an abuse of discretion to refuse the continuance, where such affidavits were not produced.—May v. State, 179 S. W. 1176.

—957 (Tex.Cr.App.) A conviction cannot be impeached by affidavits of the jury.—Chapman v. State, 179 S. W. 570.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

—982 (Tex.Cr.App.) The state on cross-examination of accused filing plea for suspension of sentence may show that he had been arrested for various crimes.—Backus v. State, 179 S. W. 1166.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

—1023 (Tex.Cr.App.) Pronouncement of sentence by the judge in vacation is not authorized, so that sentence so pronounced is not a final judgment on which an appeal may be rested.—Dodd v. State, 179 S. W. 564.

—1024 (Ky.) The commonwealth can appeal in criminal cases under Cr. Code Prac. § 337, only from decisions of the court adverse to it.—Commonwealth v. Brand, 179 S. W. 844.

—1026 (Ky.) Defendant has an appeal under Cr. Code Prac. §§ 335, 337, from final judgment of conviction, but he cannot appeal before judgment and afterwards also, or prosecute a cross-appeal upon an appeal by the commonwealth.—Commonwealth v. Brand, 179 S. W. 844.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

—1028 (Tex.Cr.App.) The court of criminal appeals can pass only upon such questions as are properly raised in the trial court.—Davis v. State, 179 S. W. 702.

—1038 (Tex.Cr.App.) Statutory provision as to objections to charge and failure to charge held one the Legislature had a right to enact, and one which the courts can neither ignore nor emasculate.—Vinson v. State, 179 S. W. 574.

Under Code Cr. Proc. art. 743, defendant, in the absence of objection or request for special charge, cannot complain of court's failure to charge as to contention not made at the trial.—Id.

—1038 (Tex.Cr.App.) Error in refusing charges held not shown, where transcript did not show exception to charge and request for sub-

mission of special charges before the charge was read.—Taylor v. State, 179 S. W. 1161.

—1043 (Ark.) Where erroneous instruction as to disregarding testimony of witness testifying falsely to any material fact was part of a long instruction, and was not specifically called to the attention of the trial judge, held, that there was no error.—Johnson v. State, 179 S. W. 361.

—1051 (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 938, the court on appeal will not consider question of venue not raised in the case and no bill of exception taken thereto.—Park v. State, 179 S. W. 1152.

—1054 (Tex.Cr.App.) The court on appeal cannot review the admission of evidence, alleged as grounds for a new trial, to which no exceptions were preserved on the trial below.—Munoz v. State, 179 S. W. 566.

—1056 (Tex.Cr.App.) Where no exceptions were reserved to the court's charge when submitted to defendant's counsel for inspection, the refusal of special charges requested by defendant was proper.—Galvan v. State, 179 S. W. 875.

—1064 (Tex.Cr.App.) All alleged errors must be contained in the motion for a new trial or in the bills of exceptions filed in the trial court, especially in view of rule 101a for district and county courts (159 S. W. xi).—Vinson v. State, 179 S. W. 574.

A ground in a motion for a new trial, alleging that the court erred in its charge to the jury, but not attempting to point out any error, is too general to receive consideration.—Id.

(C) Proceedings for Transfer of Cause, and Effect Thereof.

—1069 (Tex.Cr.App.) No appeal can be taken in criminal cases until sentence is pronounced, since sentence is the final judgment.—Dodd v. State, 179 S. W. 564.

—1069 (Tex.Cr.App.) An appeal does not lie until sentence has been pronounced.—Wilburton v. State, 179 S. W. 1169.

(D) Record and Proceedings Not in Record.

—1090 (Tex.Cr.App.) Where there is neither a statement of facts nor any bill of exceptions, nothing is presented which the Court of Criminal Appeals can review.—Calvert v. State, 179 S. W. 98.

—1090 (Tex.Cr.App.) Where there is neither statement of facts nor bill of exceptions, and the only ground of motion for new trial was that the verdict was contrary to the law and evidence, the ruling thereon cannot be reviewed.—Lockhart v. State, 179 S. W. 556.

—1090 (Tex.Cr.App.) Where the record on appeal contains neither statement of facts nor bills of exceptions, the ruling on a motion for new trial is not reviewable on appeal.—Lawson v. State, 179 S. W. 557.

—1090 (Tex.Cr.App.) Complaints in the motion for new trial of rulings on evidence, as to which no bills of exceptions appear in the record, cannot be considered on appeal.—Rea v. State, 179 S. W. 706.

—1090 (Tex.Cr.App.) The impropriety of overruling a motion for continuance cannot be reviewed without a bill of exceptions.—Smith v. State, 179 S. W. 1165.

—1090 (Tex.Cr.App.) Sufficiency of evidence cannot be reviewed in absence of statement of facts or bill of exceptions.—Gragara v. State, 179 S. W. 1185.

—1090 (Tex.Cr.App.) Insufficiency of the evidence, asserted as ground for a new trial, held not reviewable, in the absence of a bill of exceptions or statement of facts.—Ridgeway v. State, 179 S. W. 1185.

⇒1091 (Tex.Cr.App.) A bill of exceptions showing merely the substance of evidence objected to, but failing to show when the objections were made or what the other evidence on the subject was, is insufficient under White's Ann. Code Cr. Proc. §§ 857, 1123.—Tinker v. State, 179 S. W. 572.

A bill of exceptions to the conduct of a prosecuting attorney which states only appellant's conclusions, and not facts, does not show reversible error.—Id.

⇒1091 (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 938, a bill of exceptions complaining of refusal to direct acquittal on ground that venue had not been proven presents no question.—Fondren v. State, 179 S. W. 1170.

⇒1092 (Ark.) Where accused failed to file his bill of exceptions within the time granted therefor, no question on the admission of evidence or the instructions is presented on appeal.—Riley v. State, 179 S. W. 661.

⇒1092 (Tex.Cr.App.) Where the bills of exceptions were filed after adjournment of court without an order for that purpose, such papers will not be considered.—Van Dyke v. State, 179 S. W. 111.

Code Cr. Proc. 1911, art. 845, does not authorize statement of facts and bills of exceptions to be filed after adjournment of court, whether there was an order entered to that effect or not.—Id.

Where an order of the trial court authorizing the filing of bills of exceptions after adjournment was not carried forward into the minutes of the court, it does not authorize filing after adjournment.—Id.

⇒1092 (Tex.Cr.App.) Bills of exceptions, approved and filed about 75 days after the term of court at which accused was tried had adjourned, cannot be considered.—Martin v. State, 179 S. W. 121.

⇒1092 (Tex.Cr.App.) Bills of exceptions, filed after adjournment, without an order entered for the purpose, will not be considered.—Luna v. State, 179 S. W. 1152.

⇒1092 (Tex.Cr.App.) Allowance of bill of exceptions to remarks by county attorney not excepted to or called to the court's attention until the motion for a new trial, and denied by the county attorney to have been made, held properly refused.—Taylor v. State, 179 S. W. 1161.

⇒1092 (Tex.Cr.App.) Bills of exception cannot be considered where the trial court refused expressly to approve them.—Backus v. State, 179 S. W. 1166.

⇒1092 (Tex.Cr.App.) Court on appeal from county court cannot consider bills of exception filed after adjournment of the term, in absence of order allowing filing thereof.—Williams v. State, 179 S. W. 1167.

⇒1092 (Tex.Cr.App.) Bill of exceptions, filed more than 20 days after adjournment of court, held not to be considered.—Ridgeway v. State, 179 S. W. 1185.

⇒1092 (Tex.Cr.App.) A so-called "Appellant's Exceptions to the Charge of the Court," not verified by the trial judge, or shown to have been presented to him for his action before the trial was concluded, cannot be considered.—Grisham v. State, 179 S. W. 1186.

⇒1092 (Tex.Cr.App.) Where term of court adjourned on May 15th, bills of exceptions filed July 29th and 30th held to be stricken and not considered.—Green v. State, 179 S. W. 1191.

⇒1097 (Tex.Cr.App.) Without statement of facts, the grounds of a motion for new trial relating to the insufficiency of the evidence, to the improper conduct of counsel, and to the erroneous admission of evidence, cannot be reviewed.—Dixon v. State, 179 S. W. 561.

⇒1097 (Tex.Cr.App.) Error in refusing special charges in criminal case held not reviewable, in absence of a statement of facts.—Dorris v. State, 179 S. W. 718.

⇒1097 (Tex.Cr.App.) The sufficiency of the evidence to sustain a conviction cannot be considered without a statement of facts.—Smith v. State, 179 S. W. 1165.

⇒1097 (Tex.Cr.App.) The contention of appellant that evidence fails to support the conviction cannot be reviewed in the absence of a statement of facts.—Augustine v. State, 179 S. W. 1185.

⇒1098 (Tex.Cr.App.) Statement of facts, made up of questions and answers, held not to be considered.—Hawkins v. State, 179 S. W. 448.

⇒1099 (Tex.Cr.App.) After conviction for a misdemeanor, a statement of facts not filed until 81 days after adjournment of the county court will be stricken.—Celo v. State, 179 S. W. 99.

⇒1099 (Tex.Cr.App.) Where the statement of facts was filed after adjournment of court without an order for that purpose, such papers will not be considered.—Van Dyke v. State, 179 S. W. 111.

Code Cr. Proc. 1911, art. 845, does not authorize statements of fact to be filed after adjournment of court, whether there was an order entered to that effect or not.—Id.

Where an order of the trial court authorizing the filing of statement of facts after adjournment was not carried forward into the minutes of the court, it does not authorize filing after adjournment.—Id.

⇒1099 (Tex.Cr.App.) Statement of facts, approved and filed about 75 days after the term of court at which accused was tried had adjourned, cannot be considered.—Martin v. State, 179 S. W. 121.

⇒1099 (Tex.Cr.App.) Where the statement of facts fails to show its presentment or approval below, it cannot be considered.—Dorris v. State, 179 S. W. 718.

⇒1099 (Tex.Cr.App.) Statement of facts, filed after adjournment, without an order entered for the purpose, will not be considered.—Luna v. State, 179 S. W. 1152.

⇒1099 (Tex.Cr.App.) Alleged newly discovered evidence and misconduct of jury and county attorney as to which evidence was heard on motion for new trial held not reviewable without a statement of facts filed during term time.—Taylor v. State, 179 S. W. 1161.

⇒1099 (Tex.Cr.App.) Court on appeal from county court cannot consider statement of facts filed after adjournment of the term, in absence of order allowing filing thereof.—Williams v. State, 179 S. W. 1167.

⇒1099 (Tex.Cr.App.) Statement of facts filed within 90 days after sentence pronounced at term subsequent to that at which accused was convicted held filed in time.—Wilburton v. State, 179 S. W. 1169.

⇒1099 (Tex.Cr.App.) Statement of facts, filed more than 20 days after adjournment of court, held not to be considered.—Ridgeway v. State, 179 S. W. 1185.

⇒1102 (Tex.Cr.App.) Where there was no order in the record authorizing a statement of facts to be filed after adjournment of county court, a purported statement of facts must be stricken.—McGee v. State, 179 S. W. 1165.

⇒1102 (Tex.Cr.App.) A statement of facts filed more than 20 days after the adjournment of the court will be stricken on motion.—Lawson v. State, 179 S. W. 1186.

⇒1102 (Tex.Cr.App.) Where term of court adjourned on May 15th, statement of facts filed July 29th held to be stricken.—Green v. State, 179 S. W. 1191.

⇒1111 (Tex.Cr.App.) Where a bill of exceptions as qualified by the court and a bystander's bill are filed, the court must consider the questions raised by bystander's bill.—Word v. State, 179 S. W. 1175.

⇒1114 (Tex.Cr.App.) In absence of bills of exception, complaints as to charge, and requests for special charges, the only question on appeal from a conviction of crime was the sufficiency of the evidence.—*Looper v. State*, 179 S. W. 110.

⇒1114 (Tex.Cr.App.) Where the record on appeal contains no statement of facts, bill of exceptions, or motion for new trial, no question is presented which can be reviewed.—*Garsa v. State*, 179 S. W. 566.

⇒1119 (Tex.Cr.App.) Prosecuting attorney's allusion to the negro race in harsh and bitter terms held not to require a reversal, in the absence of a proper statement of facts.—*Hawkins v. State*, 179 S. W. 448.

⇒1119 (Tex.Cr.App.) A bill of exceptions, complaining of a remark of the state's attorney, held not to present reversible error.—*Park v. State*, 179 S. W. 1152.

⇒1120 (Tex.Cr.App.) Where the record fails to include questions which the court rules call for opinions of witnesses, and to which ruling the defendant excepts, the ruling must be taken as correct, and no question is presented for review.—*Rea v. State*, 179 S. W. 706.

⇒1120 (Tex.Cr.App.) A bill of exceptions, complaining of the refusal to strike out the testimony of a witness, held not to present reversible error, where the testimony of the witness was not shown.—*Park v. State*, 179 S. W. 1152.

⇒1121 (Tex.Cr.App.) The court, on appeal from a conviction of violating the local option law, in the absence of evidence on the point cannot consider whether the option election was invalid.—*Van Dyke v. State*, 179 S. W. 111.

⇒1121 (Tex.Cr.App.) Defendant's bill of exceptions to the denial of a directed acquittal on the ground that venue was not shown, presents no question for review, where the bill does not contain the evidence on that point.—*Thompson v. State*, 179 S. W. 561.

⇒1124 (Tex.Cr.App.) Where there was no bill of exceptions or statement of facts or verification of the testimony set out in motion for new trial based on insufficiency of the evidence, held that nothing was presented for review.—*Besenta v. State*, 179 S. W. 1185.

⇒1128 (Tex.Cr.App.) Court on appeal cannot consider an ex parte affidavit as to disqualification of a juror for bias, made after the term at which the verdict was rendered, but is confined to matters which are a part of the record in the trial court.—*Rea v. State*, 179 S. W. 706.

⇒1128 (Tex.Cr.App.) Affidavit of juror, that jury had considered the fact that defendant did not testify, which was not attached to nor made a portion of nor an exhibit to the motion for new trial, cannot be considered.—*Ornelas v. State*, 179 S. W. 717.

(E) Assignment of Errors and Briefs.

⇒1129 (Tex.Cr.App.) Assignments of error filed in vacation have no place in a transcript in a criminal case, as the motion for a new trial alone will be looked to.—*Vinson v. State*, 179 S. W. 574.

⇒1129 (Tex.Cr.App.) Assignments of error, filed after the term at which appellant was tried has adjourned, have no place in the record.—*Jackson v. State*, 179 S. W. 711.

(F) Dismissal, Hearing, and Rehearing.

⇒1131 (Tex.Cr.App.) Where, since conviction and pending appeal, accused escaped from custody, the appeal will be dismissed.—*Acosta v. State*, 179 S. W. 870.

⇒1133 (Tex.Cr.App.) A motion for rehearing, based upon statements that appellant was deprived of a statement of facts and bill of exceptions through the fault of the trial judge,

will be denied where the statement is in no way verified.—*Robertson v. State*, 179 S. W. 108.

(G) Review.

⇒1134 (Tex.Cr.App.) Where the only question properly presented by the motion for new trial was the alleged insufficiency of the evidence and the only bill of exceptions was to the overruling of the motion, the sole question for review is the insufficiency of the evidence.—*Grubbs v. State*, 179 S. W. 718.

⇒1134 (Tex.Cr.App.) Where no exceptions were reserved to the introduction of any testimony, nor to the charge, and no special charge was requested, the only question presented for review was the sufficiency of the testimony.—*Richardson v. State*, 179 S. W. 1186.

⇒1137 (Tex.Cr.App.) Where the court, on defendant's request, charges that his failure to testify shall not be taken as a circumstance against him, defendant cannot show error therein.—*Munoz v. State*, 179 S. W. 566.

⇒1144 (Tex.Cr.App.) Where the record omits evidence on the question of qualification of jurors, the ruling on a motion to discharge the jury for want of qualifications must be presumed correct.—*Thompson v. State*, 179 S. W. 561.

⇒1148 (Ark.) In absence of proof of prejudice, refusal of trial court to grant defendant's motion, under section 2350, Kirby's Dig., to discharge sheriff and the venire summoned by him for prejudice, was not an abuse of discretion.—*Oliver v. State*, 179 S. W. 366.

⇒1151 (Ark.) The trial court has a large discretion in granting or refusing continuances, and, unless there has been a manifest abuse of its discretion in the denial of a continuance, its action will not be reversed.—*Carmen v. State*, 179 S. W. 183.

⇒1156 (Tex.Cr.App.) Denial of a new trial on the ground of newly discovered evidence will not be disturbed, unless it appears that the trial court abused its discretion, to defendant's prejudice.—*McDonald v. State*, 179 S. W. 880.

⇒1159 (Ark.) In testing the sufficiency of evidence on appeal to uphold the verdict, the only necessity is that there be some substantial evidence upon which to base it.—*McLaughlin v. Benson*, 179 S. W. 326.

⇒1159 (Tex.Cr.App.) A conviction will not be reversed solely on the ground of the insufficiency of the evidence, if the state's evidence is worthy of credit, and if true supports the verdict.—*Mitchell v. State*, 179 S. W. 116.

⇒1159 (Tex.Cr.App.) Where there is a conflict in the evidence which sustains the verdict, the court on appeal will not set the verdict aside.—*Tinker v. State*, 179 S. W. 572.

⇒1159 (Tex.Cr.App.) Where a direct conflict in the testimony has been decided adversely to the accused, the judgment will not ordinarily be reversed.—*Grant v. State*, 179 S. W. 871.

⇒1159 (Tex.Cr.App.) Where evidence was sufficient to sustain the verdict, whether defendant or the witnesses for the state were to be believed was a matter for the jury and the trial court alone.—*Taylor v. State*, 179 S. W. 1161.

⇒1159 (Tex.Cr.App.) A conviction on conflicting testimony and sustained by testimony will not be disturbed.—*Wilburton v. State*, 179 S. W. 1169.

⇒1163 (Ark.) Admission of question on cross-examination of one jointly indicted with accused as to whether his brother had not been charged with killing and burning a woman held presumptively prejudicial.—*Counts v. State*, 179 S. W. 862.

⇒1166 (Tex.Cr.App.) The denial of a continuance because of the absence of witnesses whose presence was secured presents no error.—*Galvan v. State*, 179 S. W. 875.

⌚1166½ (Tex.Cr.App.) Remark of the court in ruling on evidence *held* not reversible error, where the court, at the request of accused, directed the jury not to consider the question or answer.—Word v. State, 179 S. W. 1175.

⌚1169 (Tex.Cr.App.) Although it is error to admit oral evidence that a certain person insured burned property, and at the same time exclude the policy of insurance, in showing ownership, the error is harmless, where other evidence showed ownership.—Tinker v. State, 179 S. W. 572.

⌚1169 (Tex.Cr.App.) Defendant's exception to a ruling admitting evidence in his favor cannot be considered on appeal.—Rea v. State, 179 S. W. 706.

⌚1169 (Tex.Cr.App.) Admission of testimony based on what witness was told by G. *held* not reversible error, where G. testified to the same facts without contradiction.—Southall v. State, 179 S. W. 872.

⌚1169 (Tex.Cr.App.) Admission of evidence of propositions of defendant in seduction to witness was harmless, where it was stricken out, and the jury instructed to disregard it; the jury having assessed the lowest punishment.—McDonald v. State, 179 S. W. 880.

Where proper objection was not made till after witness had testified to part of the contents of a letter, and was then sustained, there was no error; the court having previously instructed that, under such circumstances, testimony should not be considered.—Id.

Erroneous admission of testimony is not ground for reversal; the same fact having been testified to by another, without objection.—Id.

⌚1170 (Tex.Cr.App.) Where, on trial for cattle theft, a state's witness confessed that he was a thief and had aided in the theft, exclusion of testimony on cross-examination of his attempt to get a third person to aid in stealing cattle *held* not prejudicial, where he had also testified to such fact on the direct.—Durley v. State, 179 S. W. 1170.

⌚1170½ (Tex.Cr.App.) That the court permitted the state to disqualify accused's witness under Code Cr. Proc. 1911, arts. 791, 792, on the erroneous theory that the inquiry affected the credibility of the witness and not because he was indicted for the same offense, *held* not prejudicial.—Fondren v. State, 179 S. W. 1170.

⌚1171 (Tex.Cr.App.) Remarks of counsel for state in prosecution for murder *held* improper, and the judge's refusal to warn the jury against them prejudicial error.—Brod v. State, 179 S. W. 1189.

⌚1172 (Tex.Cr.App.) Where all the evidence showed that the sale, violating the prohibition law, was within less than two years prior to the return of the indictment, the court's error in authorizing a conviction for a sale before the two years was harmless.—Sloan v. State, 179 S. W. 111.

(H) Determination and Disposition of Cause.

⌚1184 (Tex.Cr.App.) Where, contrary to the Indeterminate Sentence Law, accused was sentenced to a definite term of imprisonment, the judgment will be reformed so as to comply with the law, and affirmed.—Dixon v. State, 179 S. W. 561.

⌚1186 (Tenn.) Under Pub. Acts 1911, c. 32, where in spite of error the judgment is sustained by the evidence, and it appears that the error is harmless, no new trial will be granted.—Lauterbach v. State, 179 S. W. 130.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

⌚1213 (Ky.) Act March 17, 1904 (Laws 1904, c. 29, Ky. St. § 1201c), prescribing imprisonment in the penitentiary for poultry theft, *held* not in violation of Const. § 17, prohibiting cruel punishments.—Fry v. Commonwealth, 179 S. W. 604.

CROPS.

See Constitutional Law, ⌚240, 296; Criminal Law, ⌚1026.

CROSS-EXAMINATION.

See Witnesses, ⌚269-280, 330.

CRUEL AND UNUSUAL PUNISHMENT.

See Criminal Law, ⌚1213.

CRUELTY.

See Divorce, ⌚130.

CURTESY.

⌚12 (Ark.) Where defendants bought plaintiff's estate by the curtesy, without investigating whether taxes were paid, and there were no misrepresentations they would not be relieved of payment, on the ground the estate was forfeited for nonpayment of taxes under Kirby's Dig. § 7132.—Ward v. Ward, 179 S. W. 495.

CUSTOMS AND USAGES.

See Master and Servant, ⌚118.

⌚4 (Tex.Civ.App.) Custom or usage to enlarge scope of agent's authority must exist long enough to become generally known so as to warrant presumption of silent inclusion by principal.—Holmes v. Tyner, 179 S. W. 887.

DAMAGES.

See Appeal and Error, ⌚1004; Breach of Marriage Promise, ⌚29; Carriers, ⌚319, 382; Death, ⌚91-99; False Imprisonment, ⌚35, 36; Landlord and Tenant, ⌚129; Libel and Slander, ⌚120; Malicious Prosecution, ⌚68; Master and Servant, ⌚41; Municipal Corporations, ⌚385-404; Negligence, ⌚101; New Trial, ⌚75, 76; Telegraphs and Telephones, ⌚68.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

⌚23 (Tex.Civ.App.) Salary of vaudeville troupe as element of damage for breach of contract to furnish electricity for theater building *held* not within contemplation of parties; it being understood that the business to be conducted was that of a moving picture show.—City of Brownsville v. Tumlinson, 179 S. W. 1107.

Damages not within the contemplation of parties *held* not recoverable, though defendant's representative had notice of the facts giving rise to such damages before the breach of the contract.—Id.

⌚24 (Mo.App.) In action for personal injury, *held*, that the jury might take into account such future pain of body and mind, if any, as in all reasonable probability plaintiff would suffer as a direct result of his injury.—Clark v. Dunham, 179 S. W. 795.

⌚32 (Ky.) Future suffering *held* element of damages in personal injury case regardless whether permanent impairment of earning power was pleaded or proved.—Moses v. Proctor Coal Co., 179 S. W. 1043.

⌚40 (Mo.App.) In an action for damages for the termination of an insurance agency, expected profits may be recovered, where there is actual data upon which a reasonable estimate thereof may be based.—United States Fidelity & Guaranty Co. v. Ridge, 179 S. W. 791.

(B) Aggravation, Mitigation, and Reduction of Loss.

⌚62 (Ark.) Plaintiffs' action for injury to a supply pool is not defeated by failure to restore it before selling the property.—Ross &

Ross v. St. Louis, I. M. & S. Ry. Co., 179 S. W. 353.

(C) Interest, Costs, and Expenses of Litigation.

—69 (Tex.Civ.App.) In an action in tort, interest is a part of the damages.—San Antonio & A. P. Ry. Co. v. Schaeffer, 179 S. W. 540.

IV. LIQUIDATED DAMAGES AND PENALTIES.

—78 (Tex.Civ.App.) A provision of a building contract that \$5 should be forfeited for each day's delay, held to be a stipulation for liquidated damages rather than for a penalty.—Gillespie v. Williams, 179 S. W. 1101.

VI. MEASURE OF DAMAGES.

(B) Injuries to Property.

—108 (Ark.) The measure of damages for injury to the pool supplying plaintiff's cotton gin with water held the cost of restoration and the value of the lost use, not the depreciation in market value.—Ross v. St. Louis, I. M. & S. Ry. Co., 179 S. W. 353.

—113 (Ky.) In an action for injuries to an automobile, an instruction that the measure of damages was the difference in value before and after the injury held erroneous as not being based on the market value.—Cincinnati, N. O. & T. P. Ry. Co. v. Sweeney, 179 S. W. 214.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

—130 (Mo.App.) In a truck driver's action against a city for personal injuries, verdict for \$2,000 held not excessive.—Morrill v. Kansas City, 179 S. W. 759.

—131 (Ky.) An award of \$2,000 in favor of an employé in a coal mine held excessive for injuries caused by shock of a low-voltage wire.—Imperial Jellico Coal Co. v. Neff, 179 S. W. 829.

—132 (Ky.) Verdict of \$10,000 for injuries to boy between two and three years old crippling him and totally destroying and disfiguring one hand and arm held not excessive.—Gnau v. Ackerman, 179 S. W. 217.

—132 (Ky.) Personal injuries held to warrant verdict of \$7,250.—Beall v. Louisville Home Telephone Co., 179 S. W. 251.

—132 (Ky.) An award of \$9,500 in favor of a brakeman 22 years of age, who earned \$105 per month, for injuries destroying use of his leg, held not excessive.—Cincinnati, N. O. & T. P. Ry. Co. v. Nolan, 179 S. W. 1046.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) Pleading.

—159 (Mo.App.) Under petition in action for personal injury, alleging loss from inability to perform duties of his "employment," plaintiff could show the receipts from his practice of dentistry.—Clark v. Dunham, 179 S. W. 795.

(B) Evidence.

—175 (Mo.App.) In action for damages for breach of contract concerning the assets and management of a corporation, entitling plaintiff to purchase defendant's share, evidence as to the probability of finding a purchaser, etc., held admissible on the question of damages.—Powell v. Batchelor, 179 S. W. 751.

—176 (Tex.Civ.App.) In action for breach of contract to furnish electric current for plaintiff's theater building, plaintiff, in testifying to his loss of profits, was not bound to estimate his loss for each night separately.—City of Brownsville v. Tumlinson, 179 S. W. 1107.

—188 (Ky.) In an action for injuries to an automobile at a railroad crossing, it was not error to fix the maximum amount which might be recovered at the greatest, which any evidence conducted to show was the difference between the market value of the machine immediately before and immediately after the injury.—Cincinnati, N. O. & T. P. Ry. Co. v. Sweeney, 179 S. W. 214.

(C) Proceedings for Assessment.

—208 (Tex.) In an action by a city fireman against a railway company for injuries due to an explosion, the issue of damages for lost time held properly submitted to the jury under conflicting evidence.—Houston Belt & Terminal Ry. Co. v. Johansen, 179 S. W. 853.

DEATH.

See Courts, —7; Executors and Administrators, —11; Limitation of Actions, —124; Statutes, —231; Trial, —256; Wills, —775.

I. EVIDENCE OF DEATH AND OF SURVIVORSHIP.

—5 (Tex.Civ.App.) Where a husband and wife, making mutual wills, were frozen to death in the same snowstorm, with no evidence as to which died first, there was no presumption as to survivorship or simultaneous death.—Fitzgerald v. Ayres, 179 S. W. 289.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

—8 (Tenn.) A right of action for wrongful death is governed by the laws of the state where the injury occurred.—Sharp v. Cincinnati, N. O. & T. P. Ry. Co., 179 S. W. 375.

—10 (Tenn.) The right of action for wrongful death given by Shannon's Code, § 4025 et seq., is that which the deceased would have had, and the recovery is in right of the deceased.—Sharp v. Cincinnati, N. O. & T. P. Ry. Co., 179 S. W. 375.

—31 (Ky.) Under Ky. St. § 4, giving widow and minor child of person killed by malicious use of firearms, etc., an action for damages, the widow's remarriage pending the suit did not affect her right of recovery, or that of the children.—Archer v. Bowling, 179 S. W. 15.

(C) Parties and Process.

—43 (Ky.) Under Const. § 241, and Ky. St. § 6, an action may be brought jointly against both the employer and his servant whose negligence caused the death of deceased servant.—Carter Coal Co. v. Prichard's Adm'r, 179 S. W. 10:8.

—44 (Ky.) Under Ky. St. § 4, infant children of one killed by malicious use of firearms, etc., held entitled to join as parties plaintiff in a suit originally brought by the widow alone.—Archer v. Bowling, 179 S. W. 15.

(B) Damages, Forfeiture, or Fine.

—91 (Ky.) Under civil action for damages for malicious killing brought under Ky. St. § 4, the widow's remarriage pending suit did not diminish the damages which she and her minor children, as joint plaintiffs, might recover.—Archer v. Bowling, 179 S. W. 15.

—95 (Ky.) Under Ky. St. § 6, measure of damages for killing by malicious use of firearms, etc., held a sum reasonably compensating the widow and children for loss of deceased's earning power, together with punitive damages, divided one half to the widow and the other half to the children.—Archer v. Bowling, 179 S. W. 15.

—99 (Mo.App.) In action for death of plaintiff's two year old daughter, verdict, exclusive

of the \$2,000 penalty, for \$5,420, could not be declared excessive.—*Albert v. St. Louis Electric Terminal Ry. Co.*, 179 S. W. 955.

DEBTOR AND CREDITOR.

See Fraudulent Conveyances.

DECLARATIONS.

See Criminal Law, ¶413, 418, 422-427.

DEEDS.

See Covenants; Estoppel, ¶21, 38; Evidence, ¶185, 419; Husband and Wife, ¶14; Logs and Logging, ¶3; Mortgages; Perpetuities; Trial, ¶253.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

¶6 (Ark.) Instrument, though containing a granting clause, *held*, when considered as a whole, an executory contract, and not a deed.—*Mays v. Blair*, 179 S. W. 331.

¶17 (Ky.) The fact that the grantor conveying land in consideration that the grantee should care for him during his lifetime lived only 68 days thereafter did not render the consideration inadequate; the test being whether the conveyance was fair and reasonable when made.—*Meece v. Colyer*, 179 S. W. 579.

(B) Form and Contents of Instruments.

¶38 (Ark.) Description of land in deed as "part" of a quarter section *held* insufficient, "part" not, as claimed, referring to the grantors' interest, but to the area.—*Mays v. Blair*, 179 S. W. 331.

(D) Delivery.

¶66 (Tex.Civ.App.) Whether a deed was delivered, *held* for the jury.—*McLemore v. Bickertstaff*, 179 S. W. 536.

(E) Validity.

¶70 (Ky.) Where option to purchase land payable in corporate bonds provided for repurchase of the bonds by the corporation, its inability to repurchase *held* not a badge of fraud, nor ground for canceling the deed.—*Yellow Chief Coal Co.'s Trustee v. Johnson*, 179 S. W. 599; *Same v. Preston*, *Id.* 602.

III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

¶100 (Ky.) Where the meaning of an expression in a deed is not clear, evidence of the surrounding circumstances is admissible.—*Wilson v. Marsee*, 179 S. W. 410.

¶101 (Ky.) Where the meaning of a deed is not clear, evidence of the subsequent acts of the parties construing the deed is admissible.—*Wilson v. Marsee*, 179 S. W. 410.

(C) Estates and Interests Created.

¶124 (Ky.) Deed *held* to vest fee-simple title in grantees.—*Chappell v. Frick Co.*, 179 S. W. 203.

¶129 (Ky.) A deed conveying without limitation in the granting clause certain property not to be subject to the debts of the grantees or the control of their husbands, the property upon the death of both to go to the children of one, *held* to convey a life estate merely.—*Taylor v. Dedman*, 179 S. W. 216.

(D) Exceptions and Reservations.

¶143 (Ky.) Where a grantor deeded land to another, reserving a life estate and power to revoke, the fee, upon her death without revocation, passed to the grantee regardless of her will.—*Commonwealth v. McCauley's Ex'r*, 179 S. W. 411.

(E) Conditions and Restrictions.

¶145 (Tex.Civ.App.) An agreement in a deed whereby vendees were to raise sugar cane and sell it to the vendor *held* a condition, and not a covenant.—*Imperial Sugar Co. v. Cabell*, 179 S. W. 83.

¶147 (Tex.Civ.App.) A deed providing that title should pass to the vendee only upon condition of full performance of the contract is not ineffectual because partly based upon a sale of personal property.—*Imperial Sugar Co. v. Cabell*, 179 S. W. 83.

¶165 (Tex.Civ.App.) Where a deed retained a lien and declared it did not become absolute until full performance by vendee, the vendor *held* entitled to possession under unimpaired title, where the vendees repudiated the conditions.—*Imperial Sugar Co. v. Cabell*, 179 S. W. 83.

IV. PLEADING AND EVIDENCE.

¶194 (Ark.) Plaintiff, in an action to set aside a deed to a railroad, had the burden of showing that it had been wrongfully delivered; delivery to an agent and the recording of the deed raising a presumption of delivery.—*Vaughan v. Chicago, R. I. & P. Ry. Co.*, 179 S. W. 165.

¶196 (Ky.) Where a conveyance is voluntary and without consideration or upon an inadequate consideration, and where there is a relation of trust and confidence between the parties, the burden is upon the grantee to prove that the grantor acted freely and understandingly.—*Meece v. Colyer*, 179 S. W. 579.

The mere fact that the grantor and the grantee were uncle and nephew does not establish such a confidential relation as would give rise to the presumption of fraud.—*Id.*

¶208 (Ark.) Evidence *held* to sustain a finding that a deed had been delivered, and that the title had vested in the grantee.—*Vaughan v. Chicago, R. I. & P. Ry. Co.*, 179 S. W. 165.

¶211 (Ky.) In a proceeding to set aside a deed, etc., based on a conspiracy between a real estate agent and vendee, *held*, that there was sufficient evidence, outside of the acts and declarations of the vendee, to sustain a judgment in favor of the vendor.—*Cole v. Collins*, 179 S. W. 607.

DE FACTO OFFICERS.

See Officers, ¶43.

DEFAMATION.

See Libel and Slander.

DEFAULT.

See Judgment, ¶138.

DELEGATION OF POWER.

See Constitutional Law, ¶60, 63.

DELINQUENT CHILDREN.

See Infants, ¶12, 18.

DELIVERY.

See Carriers, ¶39, 45, 83-92, 140; Deeds, ¶68, 194, 208.

DEMAND.

See Trover and Conversion, ¶9.

DEMONSTRATIVE EVIDENCE.

See Criminal Law, ¶404.

DEMURRER.

See Indictment and Information, ¶147; Pleading, ¶193-216.

DEPARTURE.

See Pleading, ¶180.

DEPOSITS.

See Banks and Banking, ¶123-154.

DESCENT AND DISTRIBUTION.

See Curtesy; Executors and Administrators; Taxation, ¶860-895; Wills.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.**(B) Surviving Husband or Wife.**

¶52 (Tenn.) Under Laws 1913, c. 28, removing disabilities of coverture of married women, a wife's personal property, undisposed of by her, passes, *jure mariti*, to her husband.—*Baker v. Dew*, 179 S. W. 645.

DESCRIPTION

See Boundaries, ¶3; Deeds, ¶88; Embezzlement, ¶28; Forgery, ¶28; Frauds, Statute of, ¶110; Names.

DESERTION.

See Parent and Child, ¶17.

DIRECTING VERDICT.

See Appeal and Error, ¶927; Trial, ¶168.

DISBARMENT.

See Attorney and Client, ¶49-56.

DISCHARGE.

See Guaranty, ¶57, 87; Principal and Surety, ¶104-115.

DISCOVERED PERIL

See Negligence, ¶83; Railroads, ¶376, 390; Street Railroads, ¶103.

DISCRETION OF COURT.

See Appeal and Error, ¶959-982; Criminal Law, ¶121, 586, 1148-1156; Divorce, ¶223; Pleading, ¶236, 261.

DISCRIMINATION.

See Carriers, ¶13, 32; Constitutional Law, ¶211.

DISMISSAL AND NONSUIT.

See Appeal and Error, ¶627, 778, 781, 784; Criminal Law, ¶1131; Judgment, ¶570; Limitation of Actions, ¶130; Removal of Causes, ¶39.

DISORDERLY HOUSE.

See Constitutional Law, ¶63; Criminal Law, ¶396; Nuisance, ¶65, 72.

¶9 (Tex.Cr.App.) Married woman living with her husband, who herself leased the premises and paid the rent, might be convicted of unlawfully keeping the house for prostitution.—*Jackson v. State*, 179 S. W. 711.

¶12 (Tex.Cr.App.) That information for unlawfully keeping a house for prostitution alleged defendant to be a tenant, and not a lessee, was no ground for quashing, since "tenant" was synonymous with "lessee".—*Jackson v. State*, 179 S. W. 711.

¶17 (Tex.Cr.App.) Evidence in a prosecution for unlawfully keeping and being concerned in keeping a bawdyhouse held sufficient to support a conviction.—*Thompson v. State*, 179 S. W. 98.

DISSOLUTION.

See Injunction, ¶163; Partnership, ¶296.

DISTRICTS.

See Municipal Corporations, ¶266, 747.

DITCHES.

See Drains.

DIVIDENDS.

See Corporations, ¶152, 156.

DIVORCE.

See Constitutional Law, ¶83; Courts, ¶223; Witnesses, ¶60.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.**(A) Jurisdiction, Venue, and Limitations.**

¶62 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4632, prescribing the period of inhabitancy in the state and residence in the county, jurisdictional to the maintenance of an action for divorce, a temporary absence during the six months next preceding filing of the petition would not affect right to maintain the action.—*Fox v. Fox*, 179 S. W. 833.

(D) Evidence.

¶124 (Tex.Civ.App.) Evidence in wife's action for divorce and for the recovery of her separate property held to show that she had been a bona fide inhabitant of the state for one year, and a resident of the county for six months next preceding the filing of the petition, within the jurisdictional requirement of Vernon's Sayles' Ann. Civ. St. 1914, art. 4632.—*Fox v. Fox*, 179 S. W. 833.

¶130 (Ky.) Evidence in a husband's action for divorce for the wife's abandonment, with counterclaim for divorce on the ground of cruel and inhuman treatment, etc., and for alimony, held not to establish husband's cruel treatment so as to entitle wife to alimony.—*Rice v. Rice*, 179 S. W. 200.

(F) Judgment or Decree.

¶152 (Ky.) The entry of a divorce judgment on the order book of the court is indispensable to establish the fact that a divorce has been granted.—*Robinson v. Robinson*, 179 S. W. 436.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

¶221 (Mo.App.) An order allowing or denying suit money to enable wife to prosecute an appeal from an adverse judgment in a divorce suit is entirely independent from the issues in the divorce suit, and the right thereto is in no way dependent on the right to divorce.—*Hall v. Hall*, 179 S. W. 738.

¶223 (Mo.App.) Where the lower court which denied a wife divorce awarded her temporary alimony pending appeal, that order showed that she was also entitled to suit money; it appearing that she was destitute, so the denial of suit money was an abuse of discretion.—*Hall v. Hall*, 179 S. W. 738.

¶224 (Mo.App.) Where a wife is destitute, she is entitled to suit money to prosecute an appeal from judgment denying her divorce.—*Hall v. Hall*, 179 S. W. 738.

¶236 (Mo.App.) Under Rev. St. 1909, § 2375, agreement of parties to commute arrears of alimony and to change amount of alimony held enforceable, in absence of fraud or imposition.—*Francis v. Francis*, 179 S. W. 975.

¶240 (Ky.) A wife given a divorce on the ground of abandonment and cruel treatment and awarded the custody of small children held entitled, in addition to an allowance for their

support, to alimony in the sum of \$150 per year.—*Goff v. Goff*, 179 S. W. 828.

⚡241 (Mo.App.) Under Rev. St. 1909, § 2376, whether an award of alimony to the wife shall be in gross or a periodical allowance depends on the husband's financial ability.—*Wright v. Wright*, 179 S. W. 950.

An award of alimony in monthly installments of \$100, instead of a gross sum of \$7,500, *held* not an abuse of the discretion vested in the court by Rev. St. 1909, § 2376, where it appeared that the defendant husband was earning \$340 per month.—*Id.*

⚡249 (Ky.) Notwithstanding Ky. St. § 2121, and Civ. Code Prac. § 425, did not authorize it, the court granting a divorce to the wife might order her to pay the amount expended by the husband in permanent improvements upon her property.—*Sandusky v. Sandusky*, 179 S. W. 415.

A husband who, under agreement with his wife for repayment out of rents, expended money in permanent improvements upon her property, *held* entitled to recover in her suit for divorce the amount so spent.—*Id.*

⚡285 (Mo.App.) An appeal from an order denying suit money in a divorce case will be considered, though the bill of exceptions in the principal case was not in the record and the printed abstract had not been prepared, for that is the principal purpose for which suit money is necessary.—*Hall v. Hall*, 179 S. W. 738.

⚡286 (Ky.) Where, in a wife's action for divorce, evidence on issue of money wrongfully withheld by husband is doubtful, the finding of chancellor will not be disturbed.—*Hester v. Hester*, 179 S. W. 451.

DOCKETS.

See Trial, ⚡11.

DOCTORS.

See Physicians and Surgeons.

DOCUMENTARY EVIDENCE.

See Criminal Law, ⚡447.

DOMICILE.

See Divorce, ⚡62; Venue, ⚡22.

DOUBLE TAXATION.

See Municipal Corporations, ⚡407.

DOWER.

See Curtesy; Eminent Domain, ⚡157; Taxation, ⚡806, 889.

DRAFTS.

See Embezzlement, ⚡6.

DRAINS.

I. ESTABLISHMENT AND MAINTENANCE.

⚡14 (Ark.) Jurisdictional notice not conforming to map and report describing proposed drainage district, and not enabling owner to know whether his land was to be included, *held* to invalidate all subsequent proceedings.—*Paschal v. Swepston*, 179 S. W. 339.

II. ASSESSMENTS AND SPECIAL TAXES.

⚡82 (Ark.) On evidence in a proceeding for the amendment of former orders relating to assessments, *held*, that court could not say that the trial court erred in refusing to treat it as establishing with sufficient certainty the fact that the orders had been made as claimed by

the petitioners.—*Bottoms v. Borah*, 179 S. W. 996.

DRAMSHOPS.

See Intoxicating Liquors.

DRINK.

See Food, ⚡25.

DRUNKENNESS.

See Carriers, ⚡284.

DUE PROCESS OF LAW.

See Constitutional Law, ⚡283-296.

DUPLICITY.

See Indictment and Information, ⚡125.

EASEMENTS.

I. CREATION, EXISTENCE, AND TERMINATION.

⚡17 (Ky.) A conveyance of a warehouse with appurtenances will not carry with it the right to use a private way over the grantor's land which at that time was not needed for plaintiff's full enjoyment of the premises.—*Kentucky Distilleries & Warehouse Co. v. Warwick Co.*, 179 S. W. 611.

⚡18 (Ky.) Where, on conveyance of a warehouse surrounded on three sides by the grantor's land, a way over railroad tracks furnished access to the entire premises, plaintiff, having changed the construction of the premises, cannot claim as a way of necessity a passway to the rear portion of the warehouse.—*Kentucky Distilleries & Warehouse Co. v. Warwick Co.*, 179 S. W. 611.

Where plaintiff used way across railroad tracks, it cannot claim a way of necessity over defendant's land which surrounded its property on three sides on the ground that the way across the tracks might be revoked.—*Id.*

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

⚡61 (Ky.) In a suit to enjoin obstruction of a way, evidence *held* to show that the prior use of the way had only been permissive and that it was not open to the public or a way of necessity.—*Kentucky Distilleries & Warehouse Co. v. Warwick Co.*, 179 S. W. 611.

EJECTION.

See Carriers, ⚡352-382.

EJECTMENT.

See Pleading, ⚡8.

III. PLEADING AND EVIDENCE.

⚡86 (Ky.) Plaintiffs in ejectment *held* not entitled to recover without showing that defendants were occupying land within the exterior lines of the patent under which they claimed, and without an exclusion.—*Tussey v. Hale*, 179 S. W. 390.

IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

⚡122 (Mo.App.) A judgment in an action of ejectment omitting any description of the premises would not sustain an order of restitution for the lot involved or for any lot, though it was not void and might have been amended.—*Eaker v. Harvey*, 179 S. W. 985.

ELECTION.

See Pleading, ⚡369; Wills, ⚡702.

ELECTIONS.

See Municipal Corporations, ¶918.

VI. NOMINATIONS AND PRIMARY ELECTIONS.

¶146 (Ky.) Under the Primary Act, a nominee may create a vacancy by withdrawal even though he agrees to accept the nomination.—Elswick v. Ratliff, 179 S. W. 11.

A nominee *held* not entitled to withdraw his resignation delivered to the county clerk after it was accepted by the party authorities and another selected.—*Id.*

¶156 (Ky.) Under Ky. St. 1915, § 1550, subsec. 26, nomination certificate of Republican candidate for representative filed with secretary of state October 4th *held* filed too late; the election being November 2d.—Dobbs v. Crecelius, 179 S. W. 12.

Ky. St. 1915, § 1550, subsec. 26, is mandatory in character, and noncompliance deprives a nominee of the right to have his name printed on the official ballot.—*Id.*

IX. COUNT OF VOTES, RETURNS, AND CANVASS.

¶260 (Ky.) Election commissioners cannot canvass questioned ballots unaccompanied by statement of whether and how counted, as required by Ky. St. § 1482.—Graham v. Treadway, 179 S. W. 1029.

X. CONTESTS.

¶269 (Tenn.) The Chancery Court has no jurisdiction of a bill brought to contest the election of the one receiving the highest number of votes, on the ground of his ineligibility, or to declare the election void.—Hogan v. Hamilton County, 179 S. W. 128.

¶280 (Ky.) Under Primary Election Law, § 23, and Civ. Code Prac. § 625, failure to give notice of contest until nine days after the award of certificate of nomination *held* a jurisdictional defect, so that the contest would be dismissed.—Edge v. Allen, 179 S. W. 212.

¶299 (Ky.) Questioned ballots unaccompanied by statement of whether and how counted, required by Ky. St. § 1482, will be counted by the court in election contest.—Graham v. Treadway, 179 S. W. 1029.

ELECTRICITY.

See Contribution, ¶5; Municipal Corporations, ¶682.

¶4 (Ky.) A void ordinance granting to an electric light and power company a franchise *held* to give the company a license to use the streets, and a reasonable time within which to remove its property.—City of Princeton v. Princeton Electric Light & Power Co., 179 S. W. 1074.

A city need not allow the use of its streets by a public service corporation without a franchise, merely because it has entered into obligations with citizens which it cannot perform without a franchise.—*Id.*

¶11 (Ky.) One furnishing to a city electric light and power under a franchise void under Const. § 164, may not enforce collection therefor.—City of Princeton v. Princeton Electric Light & Power Co., 179 S. W. 1074.

A city, paying for light furnished by an electric light company operating under a void franchise *held* not entitled to recover the sums paid.—*Id.*

ELIGIBILITY.

See Officers, ¶19, 35.

EMBEZZLEMENT.

See Criminal Law, ¶371, 396, 448, 673; Indictment and Information, ¶202.

¶6 (Mo.) Under Rev. St. 1909, §§ 4550, 4551, a draft is not subject to embezzlement prior to delivery.—State v. Wilcox, 179 S. W. 482, 493.

¶9 (Ky.) Certification to sheriff for collection of franchise tax due county from corporation *held* necessary condition precedent to his embezzlement thereof.—Commonwealth v. Brand, 179 S. W. 844.

¶11 (Mo.) Conversion is any using or dealing with the property of another which impliedly or by its terms excludes the owner's dominion; the word "imply" meaning it is "virtually involved or included; involved in substance; inferential, tacitly conceded—the correlative of express or expressed."—State v. Wilcox, 179 S. W. 479.

¶23 (Mo.) In a prosecution for embezzlement by a bank cashier, an instruction that the fact that the proceeds of the check whereby the embezzlement was consummated went to another did not constitute a defense was not erroneous.—State v. Wilcox, 179 S. W. 479.

¶28 (Ky.) An indictment *held* to charge conversion not of a note, or horse, but of money, the proceeds of sale of a horse, giving in a descriptive way its source.—Commonwealth v. Holliday, 179 S. W. 235.

¶38 (Ky.) In a prosecution of a sheriff for embezzling a county tax, testimony of the clerk of the county court during defendants' term of office that the latter had failed to report collections as required by Ky. St. § 4147, was admissible.—Commonwealth v. Brand, 179 S. W. 844.

Testimony as to a receipt given the sheriff by his deputy, as to the handwriting of the receipt, who had given it, and ill feeling between the deputy and the defendant growing out of the receipt, was inadmissible.—*Id.*

Pleadings of the sheriff's sureties' suit to recover sums they were required to pay for his defalcations in office were irrelevant.—*Id.*

The prosecution may prove that a demand has been made by the proper person for the payment by defendant of the money he is accused of embezzling.—*Id.*

Evidence that defendant had arranged with his deputy to take the former sheriff's books and collect unpaid taxes, etc., *held* inadmissible.—*Id.*

¶39 (Ky.) In prosecution of sheriff for embezzlement, defendant's testimony that upon demand by the county for the tax he was accused of embezzling, but which he did not know he had not accounted for, he was financially unable to turn it over, *held* admissible.—Commonwealth v. Brand, 179 S. W. 844.

In prosecution of sheriff for embezzlement of a tax which he claimed he had no memory of receiving, evidence that at the time of the receipt defendant suffered from his nerves and could not look after his office was admissible.—*Id.*

¶39 (Mo.) In a prosecution for embezzlement by a bank cashier evidence of shortages in the bank's assets other than those resulting from the transaction counted on was admissible upon the question of fraudulent intent.—State v. Wilcox, 179 S. W. 479.

EMBLEMENTS.

See Life Estates, ¶25.

EMINENT DOMAIN.

See Railroads, ¶113.

II. COMPENSATION.

(A) Necessity and Sufficiency in General.

¶75 (Ark.) Const. art. 12, § 9, prohibiting appropriation of property until full compensation is made in money or secured, *held* not to apply to exercise of power of eminent domain by the

Bank of Plainview v. McWhorter, 179 S. W. 1147.

☞318 (Tex.Civ.App.) In an action for wood sold f. o. b. cars at A., in the absence of evidence as to the correctness of the statement in freight bills of the railroad as to the number of cords of wood on arrival at H., the exclusion of such bills was proper.—McLaughlin v. Terrell Bros., 179 S. W. 932.

In an action for the price of wood, in which defendant claimed shortage, a copy of the American Railway Equipment Register, with testimony to its general use, was admissible as to the capacity of freight cars.—Id.

A railway equipment register as to the dimensions of cars being admissible, it was proper to admit a memorandum, condensing the information desired, from the book.—Id.

☞323 (Ark.) A witness may testify as to the market value of fruits at a given time; his information being based on market reports.—St. Louis, I. M. & S. R. Co. v. Laser Grain Co., 179 S. W. 189.

X. DOCUMENTARY EVIDENCE.

(C) Private Writings and Publications.

☞352 (Mo.App.) In a switchman's action for injuries while coupling cars under the Federal Employers' Liability Act, railroad records as to the movement of the car *held* admissible, where their identity and correctness had been properly attested.—Trowbridge v. Kansas City & W. B. Ry. Co., 179 S. W. 777.

☞354 (Tex.Civ.App.) In an action for the price of lumber sold, plaintiff's daybook, or journal, containing the first permanent entry of sales items taken from slips made out by yardmen, *held* admissible as a book of original entry.—Scruggs v. E. L. Woodley Lumber Co., 179 S. W. 897.

Books of account are not admissible under the rule admitting accounts kept by the parties, where they do not contain items and charges made in the regular course of business.—Id.

In action for price of lumber, addition to name of party charged of the word "residence" *held* not such an alteration as to render plaintiff's account book inadmissible.—Id.

☞359 (Tex.Civ.App.) Explanation of evidence of physician attending plaintiff switchman, injured while in the employ of the defendant, by X-ray photographs of plaintiff's anatomy after injury, is admissible, if preliminary evidence has established the correctness of the photographs.—Pecos & N. T. Ry. Co. v. Winkler, 179 S. W. 691.

(D) Production, Authentication, and Effect.

☞366 (Tex.Civ.App.) In an action for damages for negligent transportation of stock, it is not error to exclude government reports of tests of shrinkage of stock in transportation, where there is nothing to show that they are accurate, authentic, or that the tests embraced therein were made under similar conditions.—Missouri, K. & T. Ry. Co. of Texas v. Dale Bros. Land & Cattle Co., 179 S. W. 935.

☞368 (Ky.) Refusal to order production of books of bank after cashier had testified without objection from a memorandum concerning a deposit in the bank *held* not error.—Shelby v. Grabbie, 179 S. W. 1.

☞383 (Tex.Civ.App.) A pamphlet or other document, purporting to have been used by the government or under the authority of some department of the government, has, *prima facie*, no more weight as evidence, nor greater authenticity or verity, than documents issued by other authority.—Missouri, K. & T. Ry. Co. of Texas v. Dale Bros. Land & Cattle Co., 179 S. W. 935.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

☞397 (Ky.) Prior negotiations and agreements are merged by the execution of a written contract deliberately covering the subject-matter, and, in the absence of fraud or mistake, parol or extrinsic evidence is not admissible to vary or contradict its terms.—Citizens' Trust & Guaranty Co. v. Farmers' Bank of Estill County, 179 S. W. 29.

The written contract which will merge prior agreements and render inadmissible parol evidence varying its terms need not be in any particular form, contained in one paper, or signed by both parties.—Id.

☞400 (Tex.Civ.App.) A seller may by written contract limit his warranty of the article sold, and, in the absence of fraud, accident, or mistake, parol evidence is not admissible to vary or contradict this contract.—Bolt v. State Savings Bank of Manchester, Iowa, 179 S. W. 1119.

☞419 (Tenn.) In a suit to recover for a deficiency in a parcel of land, the price per acre may be shown by parol, though not stated in the deed; the real contract between the parties governing.—Caughron v. Stinespring, 179 S. W. 152.

☞419 (Tex.Civ.App.) Parol evidence of the real consideration of a written contract is admissible, although it contradicts the consideration named in the contract.—Blair & Hughes Co. v. Watkins & Kelley, 179 S. W. 530.

☞423 (Mo.App.) Under Rev. St. 1909, § 10033, the legal effect of a blank indorsement cannot be changed by parol evidence.—First Nat. Bank of Grant City v. Korn, 179 S. W. 721.

(B) Invalidating Written Instrument.

☞433 (Tex.Civ.App.) Where transfer of partner's interest in business was not intended to cover only part of the transaction, and omission of a transfer of claims resulted from mistake, *held* that such transfer could not be shown by parol.—City of Brownsville v. Tumlinson, 179 S. W. 1107.

☞434 (Ark.) Where the defendant alleges fraud and misrepresentations in the procurement of a contract, parol evidence is admissible to show the deceit, although it varies the written contract.—Barker v. Lack, 179 S. W. 493.

☞434 (Tex.Civ.App.) Where fraud is alleged in the answer to an action on a note with respect to the plaintiff's representation as to the application of collateral, parol evidence of the agreement was admissible.—First State Bank of Amarillo v. Cooper, 179 S. W. 295.

☞434 (Tex.Civ.App.) Parol evidence of fraudulent representations inducing an order for goods *held* admissible, although the order stipulates that all its conditions appear upon its face.—Blair & Hughes Co. v. Watkins & Kelley, 179 S. W. 530.

☞434 (Tex.Civ.App.) Purchaser sued for purchase price, in support of plea of failure of consideration, *held* entitled to show by parol material misrepresentations.—Bolt v. State Savings Bank of Manchester, Iowa, 179 S. W. 1119.

(C) Separate or Subsequent Oral Agreement.

☞441 (Ark.) A note absolute on its face cannot be varied by parol agreement, that satisfaction should be sought out of mortgaged property.—Smith v. McLaughlin, 179 S. W. 496.

☞441 (Ky.) In action to recover purchase price of goods sold, answer setting up collateral parol agreement *held* bad for failure to allege its omission through fraud or mistake from purchase contract.—Louisville Trust Co. v. Bayer Steam Soot Blower Co., 179 S. W. 1034.

⚡441 (Tex.Civ.App.) The terms of a promissory note are conclusive of the contract, and cannot be changed by parol evidence of an understanding that it was never to be paid.—Lockney State Bank v. Damron, 179 S. W. 552.

⚡441 (Tex. Civ. App.) Written warranty of horse, executed as part of contract of sale, held to exclude any warranty not therein contained, as well as evidence of fraudulent representations.—Bolt v. State Savings Bank of Manchester, Iowa, 179 S. W. 1119.

⚡442 (Tex. Civ. App.) Evidence held insufficient to show that written transfer of partner's interest in business purported to express only a part of the transaction so as to authorize parol proof of a transfer of the claim sued on.—City of Brownsville v. Tumlinson, 179 S. W. 1107.

(D) Construction or Application of Language of Written Instrument.

⚡459 (Ky.) Where contract was in the name of a company, it might be shown by parol who the members of the alleged company were and whom it was intended to bind.—Geary v. Taylor, 179 S. W. 426.

⚡462 (Mo.App.) Manufacturing company's advertisement for agent, and correspondence leading up to contract with resident of South Carolina, could be considered to resolve ambiguity in the contract as to whether it appointed a sales agent or provided for the sale of goods.—Watkins v. Donnell, 179 S. W. 980.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

⚡471 (Tex.Civ.App.) In an action on a note, where one of the issues of fact and law was whether one M. was a principal or a surety, his statement that he was a surety involved a legal conclusion.—First State Bank of Amarillo v. Cooper, 179 S. W. 295.

⚡471 (Tex.Civ.App.) Admission of portion of answer of witness, which, taken alone, appeared to be opinion as to meaning of a third person's statements, but which, in view of the entire answer, merely stated what such third person had said, was proper.—Postal Telegraph Cable Co. of Texas v. De Krekko, 179 S. W. 525.

⚡471 (Tex.Civ.App.) A question inquiring of defendant whether he had any agreement with plaintiff whatever, or gave him any right to the property in controversy, was not objectionable as calling for a conclusion.—Hall v. Ray, 179 S. W. 1135.

⚡472 (Tex.Civ.App.) In an action on a note, where one of the issues of fact and law was whether one M. was a principal or a surety, his statement that he was a surety invaded the province of the jury.—First State Bank of Amarillo v. Cooper, 179 S. W. 295.

⚡474 (Tex.Civ.App.) Plaintiff who testified to his familiarity with conditions and knowledge of the market value held competent to testify as to the market value of his property, though he became confused on cross-examination as to difference between market and actual value.—Houston Belt & Terminal Ry. Co. v. Vogel, 179 S. W. 268.

(B) Subjects of Expert Testimony.

⚡506 (Mo.App.) In an action against street railroad for personal injury from a collision, offer of the facts which an expert medical witness had discovered on his examination, and his admissible opinions as an expert, held not objectionable as invading the province of the jury.—Michaels v. Harvey, 179 S. W. 735.

(D) Examination of Experts.

⚡553 (Mo.App.) In an action for injuries to an occupant of a wagon in a collision at a street crossing, it was not error to predicate

questions as to the distance in which a car could be stopped upon the assumption that the rails were dry, when there was indirect evidence thereof.—Ingino v. Metropolitan St. Ry. Co., 179 S. W. 771.

(F) Effect of Opinion Evidence.

⚡568 (Tex.Civ.App.) A jury are not concluded by opinion evidence, but may apply their own experience and knowledge in solving the question.—Houston Belt & Terminal Ry. Co. v. Vogel, 179 S. W. 268.

XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

⚡577 (Ky.) It is error to permit a transcript of evidence at a former trial to be read where there is nothing to show that the witness whose testimony is read could not be produced.—Liverpool & London & Globe Ins. Co. v. Wright, 179 S. W. 49.

⚡580 (Ark.) In action to quiet title, as against defendant's claim under a decree of divorce from her husband, under whose conveyance plaintiffs claimed, testimony in divorce suit held inadmissible.—West v. West, 179 S. W. 1017.

XIV. WEIGHT AND SUFFICIENCY.

⚡588 (Mo.App.) In an action for injuries to person struck by street car, plaintiff held not entitled to recover on testimony that car was not in sight when he looked, when the testimony could not be true.—Guffey v. Harvey, 179 S. W. 729.

⚡589 (Tex.Civ.App.) In an action between partners for an accounting, the court could refuse credence to defendant's statement, totally uncorroborated, that he made a disbursement.—Navarro v. Lamana, 179 S. W. 922.

EXAMINATION.

See Evidence, ⚡553; Witnesses, ⚡255-286.

EXCEPTIONS.

See Appeal and Error, ⚡272, 501; Criminal Law, ⚡844, 922; Pleading, ⚡228; Trial, ⚡366.

EXCEPTIONS, BILL OF.

See Appeal and Error, ⚡548-553, 569; Criminal Law, ⚡1090-1092.

EXCESSIVE DAMAGES.

See Damages, ⚡130-132.

EXCLUSIVE FRANCHISES.

See Municipal Corporations, ⚡682.

EXCUSABLE HOMICIDE.

See Homicide, ⚡110-122.

EXECUTION.

See Attachment; Courts, ⚡189; Fraudulent Conveyances, ⚡241; Garnishment; Homestead; Judicial Sales; Justices of the Peace, ⚡135; Sheriffs and Constables, ⚡106.

I. NATURE, AND ESSENTIALS IN GENERAL.

⚡12 (Mo.App.) Where the judgment on which an execution rests is annulled, the execution falls.—Francis v. Francis, 179 S. W. 975.

II. PROPERTY SUBJECT TO EXECUTION.

⚡33 (Tex.) A vested remainder is subject to execution against the remaindermen.—Caples v. Ward, 179 S. W. 856.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

⚡172 (Tex.Civ.App.) In a suit to restrain a sale under execution, evidence *held* to justify a temporary injunction and refusal to dissolve it.—Whitaker v. Hill, 179 S. W. 539.

VI. CLAIMS BY THIRD PERSONS.

⚡184 (Tex.Civ.App.) Amendment of claimant's oath, setting up claim to property levied on under execution to include allegation that he was also acting for his minor brother, *held* properly permitted.—Grisham v. Ward, 179 S. W. 893.

⚡201 (Tex.Civ.App.) On trial of claim to property levied on under execution, agreement by claimants to pay the judgments by the delivery of such property *held* enforceable.—Grisham v. Ward, 179 S. W. 893.

EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Wills; Witnesses, ⚡188.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

⚡11 (Tenn.) Under Shannon's Code, § 3935, an administrator of a nonresident may be appointed in a county in which there are no assets except a cause of action for wrongful death in that county.—Sharp v. Cincinnati, N. O. & T. P. Ry. Co., 179 S. W. 375.

"Estate," as used in Shannon's Code, § 3935, subd. 4, as to appointment of administrator where any suit is to be brought or defended in which the estate is interested, defined.—Id.

⚡11 (Tenn.) Administrator to sue for wrongful death of nonresident killed in another state *held* appointable wherever defendant may be found in the state.—Howard v. Nashville, C. & St. L. Ry. Co., 179 S. W. 880.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(C) Personal Property.

⚡164 (Ky.) Failure to deliver stock certificate within 10 days after executor's sale did not release purchaser from liability on bid; time not being of the essence of the contract of sale.—Ohio Valley Banking & Trust Co. v. Wathen's Ex'rs, 179 S. W. 230.

Executor *held* to have reasonable time after sale to deliver stock certificates.—Id.

⚡167 (Ky.) The purchaser of stock at an executor's sale has the right to demand the identical shares purchased.—Ohio Valley Banking & Trust Co. v. Wathen's Ex'rs, 179 S. W. 230.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) Liabilities of Estate.

⚡206 (Mo.App.) Where a grandfather agreed that his grandson who was supporting and nursing him, should be paid from his estate on his death, the grandson was entitled to compensation though unable to receive it in the form expected.—Biggerstaff v. Riley, 179 S. W. 744.

⚡221 (Mo.App.) In an action against a decedent's estate by his grandson for services in working his farm and nursing him, evidence *held* sufficient to support finding that the parties had an express understanding that the services should be compensated.—Biggerstaff v. Riley, 179 S. W. 744.

(B) Presentation and Allowance.

⚡227 (Mo.App.) Demand filed in probate court embodying claim for services about decedent's farm, nursing, and for board and provisions furnished, unattacked by motion before trial as too indefinite and uncertain, the point

first being raised by objection to evidence, *held* sufficient.—Biggerstaff v. Riley, 179 S. W. 744.

EXEMPTIONS.

See Homestead; Taxation, ⚡241, 242.

EXHUMATION.

See Insurance, ⚡549.

EXPERT TESTIMONY.

See Evidence, ⚡506, 553.

EXPLOSIVES.

See Master and Servant, ⚡107, 190, 265.

⚡8 (Tex.) A member of a city fire department, injured by one of a series of explosions constituting a continuing negligent act on defendant's part, *held* not negligent in entering upon the premises.—Houston Belt & Terminal Ry. Co. v. Johansen, 179 S. W. 853.

FACTORS.

See Brokers.

FALSE IMPRISONMENT.

See Malicious Prosecution.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

⚡15 (Ky.) A railroad responsible for the appointment of a special police officer could not regard him as a de facto officer after his office was vacated by failure to take the oath, etc., since it was bound to know that he was an officer de jure before he was given employment on its trains.—Cincinnati, N. O. & T. P. Ry. Co. v. Cundiff, 179 S. W. 615.

Railroad employé summoned by special railway police officer without authority and assisting in ejecting and arresting a passenger *held* liable as a trespasser.—Id.

In view of Ky. St. § 3755, railroad *held* responsible for acts of special police officer whose office had been vacated for failure to take oath, etc.—Id.

(B) Actions.

⚡24 (Ky.) In an action against a carrier and its special police officer for wrongful arrest, where the evidence justified compensatory damages only, evidence as to the officer's motive in making the arrest was inadmissible.—Cincinnati, N. O. & T. P. Ry. Co. v. Cundiff, 179 S. W. 615.

⚡35 (Ky.) Where defendant carrier's special police officer and another employé used no unnecessary force or any insulting language, etc., in ejecting and arresting a passenger, punitive damages were not recoverable.—Cincinnati, N. O. & T. P. Ry. Co. v. Cundiff, 179 S. W. 615.

⚡36 (Ky.) Verdict of \$4,000 for passenger's wrongful ejection and arrest without excessive force or brutal treatment *held* excessive.—Cincinnati, N. O. & T. P. Ry. Co. v. Cundiff, 179 S. W. 615.

FALSE PRETENSES.

See Criminal Law, ⚡372.

⚡7 (Ark.) To make out the offense of obtaining money by false pretenses, the pretense must be of a past event or of a present fact, and not a future promise.—Lawson v. State, 179 S. W. 818.

Where defendant falsely represented himself to be a revenue officer, that it was his power and duty to arrest witness, but that he would end the matter on payment to him of \$300, which was given him he was guilty of obtaining money by false pretenses.—Id.

⚡38 (Ark.) Variance between indictment for false pretenses and evidence *held fatal*.—Lawson v. State, 179 S. W. 818.

⚡49 (Tex.Cr.App.) In a prosecution for swindling against the operator of an employment agency, evidence *held* sufficient to support a conviction.—Arnold v. State, 179 S. W. 1183.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Commerce, ⚡8, 27; Limitation of Actions, ⚡130; Master and Servant, ⚡270; Negligence, ⚡101; Pleading, ⚡369.

FEES.

See Attorney and Client, ⚡133-189.

FEE SIMPLE.

See Deeds, ⚡124.

FELLOW SERVANTS.

See Master and Servant, ⚡177-202, 216.

FELONY.

See Criminal Law, ⚡27.

FENCES.

⚡28 (Tex.Cr.App.) Offer of accused in prosecution for pulling down fence to show prosecuting witness' possession to be that of agent for owner, who authorized accused to destroy fence, *held* improperly excluded.—Hughitt v. State, 179 S. W. 703.

FILING.

See Appeal and Error, ⚡627, 770, 773.

FINAL JUDGMENT.

See Appeal and Error, ⚡76-80.

FINDINGS.

See Appeal and Error, ⚡931, 1009-1015.

FIRE INSURANCE.

See Insurance.

FIRES.

See Railroads, ⚡460-484.

FISH.

⚡9 (Tenn.) Acts 1897, c. 57, is impliedly repealed by Acts 1907, c. 489, forbidding killing of fish with dynamite, so that conviction under the former cannot be sustained.—Bivens v. State, 179 S. W. 384.

FIXTURES.

⚡4 (Ark.) It will be presumed that the owner of land attaching chattels thereto intends that they shall become a part of the realty, and his intention is the test as to whether they are irremovable fixtures.—W. B. Thompson & Co. v. Lewis, 179 S. W. 343.

⚡21 (Tex.Civ.App.) Stationary engine, bolted to concrete bed prepared therefor and attached by its shaft to the building, *held* a fixture, title to which passed to the purchaser.—Phillips v. Newsome, 179 S. W. 1123.

Purchaser of real estate with mortgaged fixture *held* not bound with notice of chattel mortgage record.—Id.

⚡27 (Tex.Civ.App.) Contract between mortgagor and mortgagee of personal property that same shall not become fixture upon attachment to realty *held* valid between parties.—Phillips v. Newsome, 179 S. W. 1123.

⚡33 (Ark.) The leasehold estate of defendant who attaches fixtures to the land merges in the fee he afterwards acquires by purchase, so that fixtures attached prior to purchase are thereafter irremovable.—W. B. Thompson & Co. v. Lewis, 179 S. W. 343.

⚡35 (Ark.) Evidence *held* sufficient to show intention of owner that trade fixtures attached to the land should become a part of the realty.—W. B. Thompson & Co. v. Lewis, 179 S. W. 343.

FLOWAGE.

See Waters and Water Courses, ⚡171.

FOOD.

See Statutes, ⚡20, 110½.

⚡25 (Tenn.) The duty of one who prepares and markets in bottles or sealed packages foods, drugs, or beverages to exercise ordinary care that nothing unwholesome or injurious is contained therein is based upon negligence.—Crigger v. Coca-Cola Bottling Co., 179 S. W. 155.

One who prepares and puts on the market in bottles or sealed packages foods or beverages is liable for breach of a duty to the public in the preparation thereof, regardless of the privacy of contract to any one injured.—Id.

In an action for damages for illness caused by swallowing a decomposed mouse in a bottle of coca-cola purchased from a local dealer to whom it had been sold by a bottling company, evidence *held* to sustain a finding that the bottling company was not at fault.—Id.

FORCIBLE ENTRY AND DETAINER.

See Landlord and Tenant, ⚡291.

FORECLOSURE.

See Mortgages, ⚡356-559.

FOREIGN CORPORATIONS.

See Corporations, ⚡642, 657.

FOREIGN JUDGMENTS.

See Judgment, ⚡822, 944.

FORFEITURES.

See Contracts, ⚡317; Insurance, ⚡310-349, 744.

FORGERY.

⚡12 (Ark.) Where a forged order for an express package, not addressed to any particular person, was yet addressed to "Express Agt.," directing him to "let the bearer have my package," its uttering was forgery.—Stith v. State, 179 S. W. 178.

⚡28 (Tex.Cr.App.) An indictment for forgery need not state in the purport clause the names to the instrument forged.—Bethany v. State, 179 S. W. 1166.

⚡29 (Ark.) Indictment for forgery, not alleging any person, firm, or corporation to whom a forged order for an express package was passed, *held* bad upon demurrer.—Stith v. State, 179 S. W. 178.

⚡34 (Tex.Cr.App.) Variance between the purport clause in indictment for forgery and instrument forged *held* fatal.—Bethany v. State, 179 S. W. 1166.

FORMER JEOPARDY.

See Criminal Law, ⚡170-200.

FORNICATION.

See Incest.

☞9 (Tex.Cr.App.) In a prosecution for fornication, evidence held insufficient to show accused's common-law marriage to the woman.—*Nye v. State*, 179 S. W. 100.

FRANCHISES.

See Electricity; Injunction, ☞64-67; Mines and Minerals, ☞105; Telegraphs and Telephones, ☞7.

FRAUD.

See Bills and Notes, ☞103; Contracts, ☞94; Deeds, ☞70, 196, 211; Evidence, ☞434; False Pretenses; Frauds, Statute of; Fraudulent Conveyances; Husband and Wife, ☞6; Insurance, ☞256; Pleading, ☞9; Sales, ☞38, 251; Vendor and Purchaser, ☞33.

II. ACTIONS.

(C) Evidence.

☞50 (Ky.) The general rule is that one who charges fraud has the burden of making out his case.—*Meece v. Colyer*, 179 S. W. 579.

FRAUDS, STATUTE OF.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCAR-RIAGE OF ANOTHER.

☞23 (Tex.Civ.App.) Promise by person, desiring services of a prisoner, to pay plaintiff any sums for which he might become liable if he would sign such person's bail bond, held an original promise, not within the statute of frauds.—*Gonzales v. Garcia*, 179 S. W. 932.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

☞69 (Tex.Civ.App.) Under Rev. St. 1911, art. 1103, title to lots of incorporator, orally agreed to be transferred to company in return for stock, which was issued to him, such lots not being mentioned in the charter or the affidavit thereto, did not pass to the company.—*McGough v. Finley*, 179 S. W. 918.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

☞110 (Ky.) Where a vendor who owned a large tract entered into a written contract to sell a farm of 210 acres, parol evidence was inadmissible to show what part was to be sold; hence the contract was unenforceable under the statute of frauds.—*Roberts v. Bennett*, 179 S. W. 605.

IX. OPERATION AND EFFECT OF STATUTE.

☞119 (Tex.Civ.App.) Where defendant released its lien upon plaintiff's property, relying upon his oral promise to give substitute security, that plaintiff claimed other land acquired as homestead as against a trust deed subsequently executed under the agreement held to take the case out of the statute of frauds, since to apply the statute would permit the perpetration of a fraud.—*Pipkin v. Bank of Miami*, 179 S. W. 914.

☞129 (Ky.) Where a contract for the reconveyance of land was oral, a subsequent tender of a deed by the grantee was not enough to take the case out of the statute of frauds.—*Todd v. Finley*, 179 S. W. 455.

☞143 (Mo.App.) Under the statute of frauds (Rev. St. 1909, § 2783), an oral contract for the sale of land is not absolutely void, and if the vendor is able and willing to fulfill his agreement, the vendee cannot, on the ground of invalidity of the contract, recover money paid on

the contract.—*Chamberlain v. Ft. Smith Lumber Co.*, 179 S. W. 740.

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

☞158 (Ky.) It will be presumed that a contract within the statute of frauds, as one to reconvey land, was oral, unless the pleader alleges it was in writing.—*Todd v. Finley*, 179 S. W. 455.

FRAUDULENT CONVEYANCES.

I. TRANSFERS AND TRANSACTIONS INVALID.

(A) Grounds of Invalidity in General.

☞3 (Ky.) The Sales in Bulk Act, §§ 1-4, enacted to prevent fraudulent sales and to protect a merchant's creditors, held valid.—*Dwiggins Wire Fence Co. v. Patterson*, 179 S. W. 224.

☞3 (Tex.) The Bulk Sales Law held a valid exercise of the police power, and not to unreasonably deprive the owners of merchandise of their control over it and right to contract as to it.—*Owosso Carriage & Sleigh Co. v. McIntosh & Warren*, 179 S. W. 257.

(I) Retention of Possession or Apparent Title by Grantor.

☞132 (Ark.) Though a husband continued in possession after sale of a stock of drugs to his wife, it cannot be held presumptively fraudulent for that reason, where the drugs were in the wife's building, and she objected to the levy of an attachment by the husband's creditors.—*Webb v. Van Vleet-Mansfield Drug Co.*, 179 S. W. 357.

☞137 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 3968, grass seed raised by wife on her separate real estate held not a gift to her by her husband as against his creditors where actual possession was not given to the wife.—*First Nat. Bank of Plainview v. McWhorter*, 179 S. W. 1147.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(A) Persons Entitled to Assert Invalidity.

☞206 (Ky.) Within Ky. St. § 1907, declaring one's transfer of property without consideration void as to his then existing liabilities, liability for price under a contract for purchase of goods previously made is then existing, even as to goods subsequently received.—*Sterk v. Redman*, 179 S. W. 577.

☞208 (Ky.) Under Ky. St. 1915, § 1906, declaring that every gift, conveyance, or transfer of land made with intent to delay, hinder, or defraud creditors shall be void, a conveyance made with intent to hinder subsequent creditors is void and may be set aside.—*Williamson v. Morris*, 179 S. W. 45.

(B) Remedies on Ground of Nullity of Transfer.

☞229 (Tex.) Under Bulk Sales Law, § 1, a purchaser who did not comply with the statute is a trustee for the seller's creditors, and they may reach the debt by garnishment, though the goods have been sold and the proceeds disposed of.—*Owosso Carriage & Sleigh Co. v. McIntosh & Warren*, 179 S. W. 257.

(C) Right of Action to Set Aside Transfer, and Defenses.

☞241 (Ky.) Under Ky. St. 1915, § 1907a, it is unnecessary that execution against the debtor who transferred the property be returned unsatisfied, or that an attachment be attempted.—*Williamson v. Morris*, 179 S. W. 45.

(G) Evidence.

☞271 (Ky.) In action in equity to subject property to judgment, defendant, who had re-

ceived two jacks from the judgment debtor, had the burden of showing that one of them had died before the commencement of the action.—*Commonwealth v. Filiatreau*, 179 S. W. 20.

⚡295 (Ky.) Evidence in an action in equity by a judgment creditor to reach several jacks belonging to the judgment debtor and fraudulently turned over to the defendant *held* insufficient to show that two of the jacks had died before the commencement of the action.—*Commonwealth v. Filiatreau*, 179 S. W. 20.

⚡295 (Tex.Civ.App.) Evidence *held* sufficient to justify jury's finding that the conveyance of the premises to defendant was fraudulent as to the grantor's creditors.—*McGough v. Finley*, 179 S. W. 918.

⚡299 (Ky.) Evidence *held* to show that a conveyance by a husband of his land to his wife was in fraud of creditors.—*Williamson v. Morris*, 179 S. W. 45.

⚡300 (Ark.) In a creditors' suit to uncover a parcel of realty in the hands of the judgment debtor's wife, evidence *held* sufficient to show that the land which the debtor conveyed was originally purchased with the wife's money.—*Scott v. McCraw, Perkins & Webber Co.*, 179 S. W. 329.

Evidence *held* to support the chancellor's finding that the conveyance was voluntary, and to put the property beyond plaintiff's reach.—*Id.*

The statement of a wife, asserting her insolvent husband's conveyance to her in preference to other creditors was in payment of a prior loan made without written evidence of an agreement to repay, should be corroborated by other evidence.—*Id.*

(J) Judgment or Decree and Execution.

⚡313 (Ark.) Action of the court in a creditors' suit to uncover realty, in decreeing its sale to satisfy the judgment, *held* proper.—*Scott v. McCraw, Perkins & Webber Co.*, 179 S. W. 329.

Where, in a judgment creditor's suit to uncover realty, the order of sale gave the debtor only five days to pay the judgment, such decree allowed an unreasonably short time.—*Id.*

⚡314 (Ky.) A purchaser who had not complied with the Sales in Bulk Act, § 4, *held* liable to the extent of the entire stock to the satisfaction of a claim of the seller's creditor.—*Dwiggins Wire Fence Co. v. Patterson*, 179 S. W. 224.

FUNDAMENTAL ERROR.

See Appeal and Error, ⚡242.

GAME.

See Fish.

⚡9 (Tex.Cr.App.) In prosecution under Act March 13, 1911 (Acts 32d Leg. c. 60) § 5, for having in his possession for the purpose of sale and for offering to sell the hide of a wild deer, *held*, that the court's refusal to instruct an acquittal if there was reasonable doubt as to defendant's possession and offer for sale was reversible error.—*Cohen v. State*, 179 S. W. 1193.

GAMING.

See Indictment and Information, ⚡110.

⚡72 (Tex.Cr.App.) Pen. Code, 1911, art. 548, makes it an offense to play cards in the private room of a boarder at a hotel or boarding house, where no family occupied the room.—*Fondren v. State*, 179 S. W. 1170.

⚡72 (Tex.Cr.App.) A railroad box car set flat on the ground *held* not a "private residence" within the statute punishing gaming.—*Garcia v. State*, 179 S. W. 1172.

GARNISHMENT.

See Attachment; Fraudulent Conveyances, ⚡229.

XI. WRONGFUL GARNISHMENT.

⚡248 (Mo.App.) That return of writ by summoning garnishee was so defective as not to show a valid garnishment *held* not to conclude the attachment debtor on the question of damages from the attachment.—*State ex rel. Williams v. Stipp*, 179 S. W. 723.

GAS.

⚡16 (Ky.) Turnpike company licensing gas company to use its road for a main cannot, by contract, lessen the latter's obligation to maintain such main consistently with public safety.—*McWilliams v. Kentucky Heating Co.*, 179 S. W. 24.

⚡17 (Ky.) Gas company, contracting with turnpike company for laying of mains, *held* to undertake to exercise ordinary care to maintain mains so that the road would be kept in reasonably safe condition.—*McWilliams v. Kentucky Heating Co.*, 179 S. W. 24.

⚡18 (Ky.) Negligence of county officers, in ordering plaintiff operator of steam roller to pass over gas main *held* not to excuse gas company from liability for plaintiff's injuries in explosion.—*McWilliams v. Kentucky Heating Co.*, 179 S. W. 24.

Where a gas company occupies a highway or turnpike with its main, whether under contract or by obligation of law it must maintain the main in such condition that the road will be reasonably safe.—*Id.*

To render a gas company liable for an explosion of gas from a broken main, the injury must have been the natural and probable consequence of the negligent act, such that an ordinarily prudent man might have anticipated.—*Id.*

⚡20 (Ky.) In an action against a gas company for injuries to plaintiff operator of a steam roller in road repairing when the spikes of the machine's wheels pierced a main, resulting in an explosion, question of company's negligence *held* for the jury.—*McWilliams v. Kentucky Heating Co.*, 179 S. W. 24.

GIFTS.

See Fraudulent Conveyances, ⚡137.

GRADE CROSSINGS.

See Railroads, ⚡97.

GRAND JURY.

See Indictment and Information, ⚡137.

GRANTS.

See Municipal Corporations, ⚡680-684.

GUARANTY.

See Frauds, Statute of, ⚡23; Limitation of Actions, ⚡46.

III. DISCHARGE OF GUARANTOR.

⚡57 (Ky.) The extension of time for payment of a note which, when extended by the holder to the maker, will discharge a guarantor, must be based on a valid contract, founded on consideration, and for a definite time.—*Marshall v. Hollingsworth*, 179 S. W. 34.

⚡67 (Ky.) Negotiator of note indorsing and guarantying it unconditionally *held* not discharged, under Ky. St. § 3:20b, by holder's failure to notify him of maker's default.—*Marshall v. Hollingsworth*, 179 S. W. 34.

IV. REMEDIES OF CREDITORS.

§91 (Ky.) In an action against a guarantor of notes, evidence held insufficient to support defense that defendant's guaranty was written above his indorsement in blank without his knowledge or consent.—*Marshall v. Hollingsworth*, 179 S. W. 34.

In an action against the guarantor of a note, evidence held insufficient to sustain defendant's allegations that at maturity plaintiff agreed with the maker for an extension of one year.—*Id.*

GUARDIAN AND WARD.

IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

§77 (Mo.App.) Probate courts have no power to authorize the sale or incumbrance of property of minor wards, except for their education or support, or for investment; so that a deed of trust from guardian to secure attorney engaged in litigation, involving their property, was void.—*Eaker v. Harvey*, 179 S. W. 985.

§90 (Ky.) Errors in proceedings upon guardian's action for sale of land of his minor wards held not to render the judgment and sale voidable, so that until appeal under Civ. Code Prac. § 745, or vacation under sections 391, 518, it was binding on all parties.—*Harris v. Hopkins*, 179 S. W. 14.

§105 (Ky.) Under the express provision of Civ. Code Prac. § 391, the setting aside of a voidable sale of lands of infant wards does not affect the title of the guardian as purchaser, or of purchasers from him, if they were bona fide purchasers.—*Harris v. Hopkins*, 179 S. W. 14.

§107 (Ky.) It is only in cases where there is an entire want of jurisdiction that a judgment and sale of a minor ward's land can be collaterally attacked.—*Harris v. Hopkins*, 179 S. W. 14.

VI. ACCOUNTING AND SETTLEMENT.

§162 (Tex.Civ.App.) The commissions allowed the county judge by Rev. St. 1911, art. 3850, are payable on all cash receipts shown by any annual account of the guardian when such account is approved by the judge to whom it is presented, rather than of approval of the guardian's final account.—*Grice v. Cooley*, 179 S. W. 1008.

The word "exhibits," as used in Rev. St. 1911, art. 3850, providing that a commission shall be allowed the county judge on cash receipts of guardians on approval of exhibits, refers to annual accounts.—*Id.*

GUARDS.

See Prisons, §10.

HABEAS CORPUS.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§85 (Tex.Cr.App.) No evidence being offered to sustain the allegations of applicant for writ of habeas corpus, it must be presumed that the judgment committing him for contempt was correct.—*Ex parte Long*, 179 S. W. 567.

§113 (Tex.Cr.App.) On appeal from an order in habeas corpus denying admission to bail, the Court of Criminal Appeals will not discuss the evidence.—*Ex parte Sapp*, 179 S. W. 100.

Where, in habeas corpus, there was evidence warranting the conclusion of the court, in denying bail, that proof of guilt of a capital offense was strong, its order will be upheld on appeal.—*Id.*

§113 (Tex.Cr.App.) A transcript of the stenographer's notes attached to an application for writ of habeas corpus, not being agreed to by the attorneys nor approved by the judge as

a statement of facts, cannot be considered as such.—*Ex parte Long*, 179 S. W. 567.

§113 (Tex.Cr.App.) The Court of Criminal Appeals has no jurisdiction of an appeal from the judgment in a habeas corpus proceeding remanding the petitioner to custody, where he is admitted to bail pending the appeal.—*Ex parte Hengy*, 179 S. W. 718.

HARMLESS ERROR.

See Appeal and Error, §1027-1070, 1170; Criminal Law, §1163-1172; Homicide, §340, 341.

HEALTH.

See Food; Insurance, §291.

HEARSAY.

See Criminal Law, §374, 419, 420; Evidence, §314-323.

HIGHWAYS.

See Municipal Corporations, §269-567, 680-706; Officers, §19, 43, 54, 101; Private Roads; Railroads, §97.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(A) Establishment by Prescription, User, or Recognition.

§6 (Ky.) The peaceable, continuous, and open public use of a fenced way for 15 years will constitute the way a public highway.—*Rose v. Nolen*, 179 S. W. 229.

(B) Establishment by Statute or Statutory Proceedings.

§64 (Tex.Civ.App.) Injunction is the proper remedy where the commissioners' court is proceeding without authority to open a first-class 60-foot road; *Vernon's Sayles' Ann. Civ. St. 1914*, art. 6866, giving appeal only as to adequacy of damages.—*Currie v. Glasscock County*, 179 S. W. 1065.

If the commissioners' court in laying out a first-class 60-foot road is acting in substantial compliance with Rev. St. 1911, art. 6863, it cannot be enjoined, though the road would irreparably injure one's land.—*Id.*

The commissioners' court can be enjoined if in laying out a 60-foot road under Rev. St. 1911, art. 6863, it has transcended its authority or grossly abused its discretion.—*Id.*

Petition for injunction alleging the commissioners' court fraudulently laid out a first-class 60-foot road several miles to the side of the route required by Rev. St. 1911, art. 6863, so as to pass through plaintiff's lands, states ground for relief.—*Id.*

§68 (Mo.App.) In an action for encroachment upon a public highway, evidence held not sufficient to show that a sufficient amount of money and labor had been expended on the road so as to vest title thereto in the county under Rev. St. 1909, § 10446.—*Copeland v. Pyrtle*, 179 S. W. 992.

(C) Alteration, Vacation, or Abandonment.

§72 (Ky.) Under Ky. St. 1909, § 4303, where, on remonstrant's appeal to the circuit court in a proceeding to alter a highway, trial de novo is had and no error occurs, the objection that the court ignored remonstrant's exceptions to the commissioner's report is unavailing.—*Carriek v. Garth*, 179 S. W. 609.

It is not error for the court on appeal to correct a patent clerical error in the record of the proceedings before the board of commissioners from whom the case is appealed.—*Id.*

Where a judgment changing the location of a highway requires the erection of an obstruction across the old highway, the inclusion of such matter, though not essential to the decision, is not error.—*Id.*

II. HIGHWAY DISTRICTS AND OFFICERS.

⚡90 (Ark.) A special statute creating a road district for the improvement of a road running through an incorporated town *held* not void because it included property in such town without the consent of a majority in value of the property owners first obtained.—Nall v. Kelley, 179 S. W. 486.

A special statute creating a district to improve a road running through an incorporated town *held* not invalid as invading the jurisdiction of the town by authorizing the improvement of a highway constituting one of the streets thereof.—Id.

A special statute creating a road district *held* not invalid as not sufficiently describing the route of the road to be improved.—Id.

Proceedings under a statute creating a road improvement district *held* not invalid because one of the commissioners named was not a property owner within the district.—Id.

A special statute creating a highway improvement district *held* not invalid, under Const. art. 19, § 20, as failing to require the board of commissioners to take an oath of office.—Id.

⚡90 (Ark.) Acts 1915 *held* not to authorize the Miller county highway and bridge district to construct a system of highway improvements without also constructing the contemplated bridge over the Red river.—Conway v. Miller County Highway and Bridge Dist., 179 S. W. 1009.

⚡95 (Ark.) The Legislature has power to confer upon a board of a road improvement district plenary power in the matter of selecting the materials as well as forming the plans for the improvement.—Nall v. Kelley, 179 S. W. 486.

⚡95 (Ark.) Statute requiring road overseers to keep roads in good condition *held* not to authorize incurring of indebtedness exceeding revenues of district.—Weaver v. King, 179 S. W. 507.

Under Kirby's Dig. §§ 7314, 7318, under optional system of working roads, *held* that road overseer has no authority to incur an indebtedness for work on his roads in excess of his district's revenues.—Id.

III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

⚡99½ (Ky.) A way used by the public for 15 years *held* not a public highway under Ky. St. §§ 4287, 4295, which the county court was bound to order worked.—Rose v. Nolen, 179 S. W. 229.

HOLDING OVER.

See Master and Servant, ⚡9; Officers, ⚡54.

HOLOGRAPHIC WILLS.

See Wills, ⚡132.

HOMESTEAD.

II. TRANSFER OR INCUMBRANCE.

⚡117 (Tex.Civ.App.) Under Rev. St. 1911, art. 1115, title to lots, occupied by incorporator as a business homestead, agreed by him to be transferred to the company in return for stock, which was issued, neither the application for the charter nor the affidavit being executed by such incorporator's wife, did not pass.—McGough v. Finley, 179 S. W. 918.

⚡118 (Ark.) Defendant, who received purchase price for homestead, sold on executory contract without signature of his wife, cannot avoid repayment of purchase price, where property was destroyed before deed was made, though she joined in the deed after the fire.—Waters v. Hanley, 179 S. W. 817.

Under Kirby's Dig. § 3901, a deed purport-

ing to convey a homestead of a married man is void, where the wife fails to join; nor can he alone bind his wife by contract to convey the homestead.—Id.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

⚡162 (Ark.) Owner of homestead, who, after death of wife, rented it, reserving a room for his furniture, son, and himself, and thereafter, still reserving the room, went elsewhere to take work, intending ultimately to return and occupy the house, *held* not to have abandoned his homestead.—Hayley Beins & Co. v. Thweatt, 179 S. W. 995.

HOMICIDE.

See Criminal Law, ⚡198½, 368, 478, 510, 720, 762, 778, 782, 829, 854.

III. MANSLAUGHTER.

⚡47 (Tex.Cr.App.) Adultery of the deceased with the wife of appellant was "adequate cause" which might reduce the homicide to manslaughter.—Vollintine v. State, 179 S. W. 108.

⚡47 (Tex.Cr.App.) To reduce a killing to manslaughter, and upon defendant's belief of adultery between his wife and deceased, the killing must take place at the first meeting of the parties after he has become aware of the facts.—Mitchell v. State, 179 S. W. 116.

Adultery of defendant's wife and deceased in which she was equally at fault, if such as to be an outrage against defendant, would afford adequate cause reducing the killing to manslaughter.—Id.

Defendant, who had reason to believe that his wife had committed adultery with deceased, and that deceased was then endeavoring to have such relations renewed, and whose mind was rendered incapable of cool reflection, would be guilty only of manslaughter.—Id.

⚡49 (Tex.Cr.App.) That decedent called accused a bastardy son of a bitch was not an insult to his mother and did not raise the issue of manslaughter.—Ahearn v. State, 179 S. W. 1150.

⚡68 (Tenn.) One negligently operating an automobile in violation of Pub. Acts 1905, c. 173, who killed a child was guilty of felonious homicide.—Lauterbach v. State, 179 S. W. 130.

One killing another while negligently operating an automobile in violation of a statute is not excused by negligence of the person killed.—Id.

The doctrine of contributory negligence does not apply to criminal acts, and negligence of one killed by another, who is violating a law, does not relieve the violator.—Id.

IV. ASSAULT WITH INTENT TO KILL.

⚡89 (Tex.Cr.App.) Where defendant fired into a small room packed with people in reckless disregard of human life, with intent to kill some one, and did shoot some one, his conviction of assault to murder was proper.—Williams v. State, 179 S. W. 710.

⚡95 (Ark.) In prosecution for assault with intent to kill, an instruction that threatening acts, accompanied by opprobrious words, would be a provocation that might reduce the degree of assault *held* an incorrect statement of the law, in view of Kirby's Dig. § 1587.—Deshazo v. State, 179 S. W. 1012.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

⚡110 (Tex.Cr.App.) Defendant, charged with manslaughter, who was shot while down and being beaten by decedent and his friends, had the right of self-defense to shoot to protect him-

self from the attack of all.—*Welborn v. State*, 179 S. W. 1179.

⇒116 (Tex.Cr.App.) Defendant had right to shoot decedent attacking him if from his viewpoint he was in danger of death or serious injury, whether other parties, decedent's friends, had anything to do with the trouble, or whenever they came into it.—*Welborn v. State*, 179 S. W. 1179.

It is defendant's viewpoint, and not the jury's, as they subsequently see a homicide, from which the appearance of matters, as giving defendant reasonable cause to believe he was in danger of injury, is to be estimated.—*Id.*

⇒122 (Tex.Cr.App.) Where accused shot the deceased, who was attacking defendant's father, he was guilty of no offense if it reasonably appeared to him at the time he shot that the life of his father was in danger, or that he was in danger of suffering serious bodily injury.—*Brod v. State*, 179 S. W. 1189.

VI. INDICTMENT AND INFORMATION.

⇒142 (Ark.) An indictment charging one kind of first degree murder will not support an instruction and conviction on another kind, where the elements of the two are essentially different.—*Sheppard v. State*, 179 S. W. 168.

VII. EVIDENCE.

(A) Presumptions and Burden of Proof.

⇒144 (Ark.) Notwithstanding Kirby's Dig. § 1765, the burden on the whole case on a trial for homicide is on the state, and mitigating circumstances raising a reasonable doubt require an acquittal, by whichever party proved.—*Johnson v. State*, 179 S. W. 361.

(B) Admissibility in General.

⇒157 (Tex.Cr.App.) Evidence of defendant's difficulty with a person who had won his money and whom he probably intended to kill was admissible to show his state of mind.—*Williams v. State*, 179 S. W. 710.

⇒163 (Tex.Cr.App.) In a prosecution for uxoricide, defendant's evidence of his kindness to his children held inadmissible, since his kindness to them was not in issue.—*Rea v. State*, 179 S. W. 706.

⇒164 (Tex.Cr.App.) Where defendant contended that deceased might have committed suicide on account of ill health, testimony of an employer that he lost no time while working for him held admissible.—*Hand v. State*, 179 S. W. 1155.

⇒166 (Tex.Cr.App.) Evidence of defendant's difficulty with a person who had won his money and whom he probably intended to kill was admissible to show his motive.—*Williams v. State*, 179 S. W. 710.

⇒166 (Tex.Cr.App.) Evidence as to defendant's false statements before deceased's death that he was a millionaire, and after his death that he was a pauper, and that she had a large amount of money in a bank, held admissible.—*Hand v. State*, 179 S. W. 1155.

⇒170 (Ark.) In a prosecution for homicide, evidence that shoes of the same last as those sold to accused, but only a little shorter, fitted tracks at the place of the crime, except as to length, is admissible.—*Owens v. State*, 179 S. W. 1014.

⇒174 (Ky.) Letter by one defendant, written after commission of crime and threatening to kill the jailer, held not admissible upon joint trial.—*Wilson v. Commonwealth*, 179 S. W. 237.

⇒181 (Tex.Cr.App.) In a trial for murder, contents of letter of deceased in reply to defendant's wife held inadmissible, but that deceased received a letter from her and the registry receipt for it to which his answer was in reply was admissible.—*Vollintine v. State*, 179 S. W. 108.

(E) Weight and Sufficiency.

⇒228 (Ark.) Evidence as to circumstances under which deceased was called from his house and as to the subsequent finding of his dead body held to warrant a finding that there was an unlawful killing.—*Johnson v. State*, 179 S. W. 361.

⇒233 (Tex.Cr.App.) Proof of motive is not essential to support a conviction for murder.—*Rea v. State*, 179 S. W. 706.

⇒234 (Tex.Cr.App.) Circumstantial evidence in a prosecution for homicide held to support a verdict of guilty.—*Rea v. State*, 179 S. W. 706.

⇒236 (Tex.Cr.App.) In a prosecution for murder, evidence held to show that decedent, a three year old girl, received fatal injury when flung into an adjoining room by defendant.—*Galvan v. State*, 179 S. W. 875.

⇒250 (Tex.Cr.App.) In a prosecution for murder against a peace officer, evidence held to sustain conviction of manslaughter.—*Moser v. State*, 179 S. W. 104.

⇒253 (Ark.) Evidence held to warrant a conviction of murder in the first degree.—*Owens v. State*, 179 S. W. 1014.

⇒257 (Tex.Cr.App.) Evidence held to support a conviction for assault with intent to murder.—*Freeman v. State*, 179 S. W. 1157.

VIII. TRIAL.

(B) Questions for Jury.

⇒268 (Ark.) Under Kirby's Dig. § 1765, as to burden of showing mitigating circumstances, where unlawful killing was established, and defendant admitted "knifing" deceased, directed verdict held properly refused.—*Johnson v. State*, 179 S. W. 361.

⇒281 (Tex.Cr.App.) In a prosecution for homicide, evidence that accused was a principal held sufficient to go to the jury.—*Taylor v. State*, 179 S. W. 113.

(C) Instructions.

⇒290 (Tex.Cr.App.) Instructions in prosecution for wife murder by poison held to sufficiently require the state to prove that arsenic was the poison used.—*Rea v. State*, 179 S. W. 706.

⇒291 (Tex.Cr.App.) Evidence in a prosecution for wife murder by poison held not to require a charge on the issue of suicide.—*Rea v. State*, 179 S. W. 706.

⇒300 (Ark.) Instruction that defendant could not plead self-defense if he was the aggressor or voluntarily entered into the difficulty held to properly present state's theory, and not erroneous for failure to charge as to defendant's withdrawal from the difficulty.—*Yancey v. State*, 179 S. W. 352.

⇒300 (Ark.) Instruction on self-defense in language of Kirby's Dig. § 1798, and another instruction given at defendant's request held not in conflict, but to correctly declare the law.—*Johnson v. State*, 179 S. W. 361.

⇒300 (Ky.) Where the evidence shows that deceased was shot from behind, precluding the possibility of altercation or struggle, failure to instruct on self-defense and manslaughter held not error.—*Wilson v. Commonwealth*, 179 S. W. 237.

⇒300 (Tex.Cr.App.) Failure to instruct that two witnesses, when attacked by deceased, to whose aid defendant, a peace officer, came, were not bound to retreat, held not erroneous as not called for by evidence.—*Moser v. State*, 179 S. W. 104.

Failure to charge on law of retreat as applied to defendant peace officer and two brothers who were being attacked by deceased when the officer came up, the question being inapplicable to any theory of the case, held not erroneous.—*Id.*

⇒300 (Tex.Cr.App.) In a trial for murder, instruction that defendant in self-defense might use only such force as reasonably appeared to

him at the time and place to be necessary to protect himself against unlawful violence was erroneous.—*Vollintine v. State*, 179 S. W. 108.

Where the evidence in a trial for murder raised the issue of self-defense based on threats, the refusal to submit it was error.—*Id.*

⚡300 (Tex.Cr.App.) In a prosecution for homicide, *held*, that a charge on self-defense should have been given.—*Taylor v. State*, 179 S. W. 113.

One charged as principal of the party who actually fired the fatal shot *held* not guilty, where he or the actual perpetrator reasonably believed it was necessary in self-defense.—*Id.*

⚡300 (Tex.Cr.App.) In a prosecution for manslaughter, instruction *held* erroneous as improperly presenting issue of self-defense.—*Welborn v. State*, 179 S. W. 1179.

⚡305 (Tex.Cr.App.) In a prosecution for homicide, a charge on the question of principals *held* erroneous under the circumstances.—*Taylor v. State*, 179 S. W. 113.

⚡309 (Tex.Cr.App.) Instruction that adultery of defendant's wife with deceased would not reduce the killing to manslaughter *held* erroneous as not fairly presenting the issues made by the evidence.—*Mitchell v. State*, 179 S. W. 116.

An instruction that adultery with the wife may be adequate cause which may reduce a homicide to manslaughter should be given if there is evidence to support it.—*Id.*

X. APPEAL AND ERROR.

⚡340 (Tex.Cr.App.) Where jury assessed lowest punishment for manslaughter, charge on murder and manslaughter *held*, in view of the verdict not so general as to mislead jury.—*Lockett v. State*, 179 S. W. 716.

⚡341 (Tex.Cr.App.) In trial for murder, instruction on manslaughter that, if defendant believed that deceased had improper relations with his wife, it would be adequate cause, was sufficient, and failure to further instruct that his belief of such relations would be real to him whether such relations existed or not, was not reversible error.—*Vollintine v. State*, 179 S. W. 108.

HOSPITALS.

See Taxation, ⚡241.

HUMANITARIAN DOCTRINE.

See Negligence, ⚡83; Railroads, ⚡376, 390; Street Railroads, ⚡103.

HUSBAND AND WIFE.

See Bigamy; Curtesy; Death, ⚡31; Descent and Distribution, ⚡52; Disorderly House, ⚡9; Divorce; Evidence, ⚡248; Fraudulent Conveyances, ⚡299, 300; Homestead; Marriage; Witnesses, ⚡60.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

⚡6 (Ark.) Where one conveys his property to deprive an intended husband or wife of rights arising from marriage, equity will avoid such conveyance, or compel the grantee to hold the property in trust for the defrauded husband or wife.—*West v. West*, 179 S. W. 1017.

⚡11 (Ky.) Under the law in 1864, before the Married Women's Act of 1894, a husband, taking his wife's personal property and using it in the purchase of a farm, and taking title in her name with reversion to his heirs, thereby reduced it to possession.—*Neel's Ex'r v. Noland's Heirs*, 179 S. W. 430.

⚡14 (Tenn.) A conveyance to husband and wife creates an estate by the entireties, and not

in common.—*Bennett v. Hutchens*, 179 S. W. 629.

It is immaterial that a deed to a husband and wife does not show their relation, or the intention of their grantor, on its face, for their estate is required by the common law to be by the entireties.—*Id.*

Shannon's Code, § 3677, does not abolish estates by the entireties.—*Id.*

⚡19 (Tex.Civ.App.) A wife, who purchased goods which were necessities for her own use, was personally liable for their value.—*Trammell v. Neiman-Marcus Co.*, 179 S. W. 271.

⚡23½ (Tex.Civ.App.) In an action by an automobile dealer for the value of a car sold by one representing himself as agent, evidence *held* to warrant finding of agency in plaintiff's wife to employ salesman.—*Holmes v. Tyner*, 179 S. W. 887.

IV. DISABILITIES AND PRIVILEGES OF COVERTURE.

(C) Contracts.

⚡87 (Tex.Civ.App.) A married woman cannot, even with the consent of her husband, legally bind herself as surety on an appeal bond, and a bond on which she is a surety may be refused.—*Wilson v. Dearborn*, 179 S. W. 1102.

V. WIFE'S SEPARATE ESTATE.

(A) What Constitutes.

⚡113 (Tenn.) Laws 1913, c. 26, do not affect estates of married women *held* at the time of its passage.—*Bennett v. Hutchens*, 179 S. W. 629.

VI. ACTIONS.

⚡205 (Tenn.) Common-law rule that one spouse cannot sue the other for tort committed during the marriage *held* not abrogated by Shannon's Code, § 6470, or Pub. Acts 1913, c. 26.—*Lillienkamp v. Rippetoe*, 179 S. W. 628.

⚡209 (Tenn.) Notwithstanding the Married Women's Act, a husband may, as at common law, recover for loss of the services of his wife by reason of her personal injuries.—*City of Chattanooga v. Carter*, 179 S. W. 127.

⚡235 (Tex.Civ.App.) In action for alleged necessities, instruction to find the goods to be necessities as against the wife *held* calculated to impress the jury that they were necessities as against the husband.—*Trammell v. Neiman-Marcus Co.*, 179 S. W. 271.

Submission of issue whether goods were necessities, considering husband's financial circumstances and station in life at "and prior" to the time of the purchase, *held* erroneous.—*Id.*

In action for necessities, in which plaintiff pleaded estoppel, *held*, that question whether the husband knew the goods were being charged to him should have been submitted to the jury.—*Id.*

VII. COMMUNITY PROPERTY.

⚡257 (Tex.Civ.App.) Rev. St. 1911, art. 4621, as amended by Acts 35d Leg. c. 32, § 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4621), and Rev. St. 1911, art. 4622 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4622), do not change the rule that property acquired by the use of the wife's separate property becomes that of the community.—*First Nat. Bank of Plainview v. McWhorter*, 179 S. W. 1147.

IX. ABANDONMENT.

⚡302 (Tex.Cr.App.) It is not essential to the right to prosecute for abandonment after seduction and marriage that the marriage shall have taken place after indictment.—*Coleman v. State*, 179 S. W. 1172.

⚡313 (Tex.Cr.App.) In a prosecution for abandonment after seduction and marriage, *held* error to exclude testimony of a witness that he saw a woman, whom he believed to be

prosecutrix, and a third person in compromising acts, where there was evidence that her child resembled the third person rather than defendant.—*Coleman v. State*, 179 S. W. 1172.

Defendant's evidence that he married prosecutrix under duress, and almost immediately sued to annul the marriage for duress, was admissible to rebut the presumption arising from the marriage that he was guilty of seduction.—*Id.*

A decree divorcing defendant from prosecutrix, not being binding on the state, was not admissible in evidence.—*Id.*

HYPOTHETICAL QUESTIONS.

See Evidence, ¶553.

IDENTIFICATION.

See Evidence, ¶459.

IDENTITY.

See Homicide, ¶170; Names, ¶14.

ILLEGITIMATE CHILDREN.

See Bastards.

ILLUSORY APPOINTMENT DOCTRINE.

See Wills, ¶692.

IMPANELING JURY.

See Jury, ¶146.

IMPEACHMENT.

See Appeal and Error, ¶667; Witnesses, ¶311-396.

IMPLIED AGENCY.

See Principal and Agent, ¶14.

IMPLIED REPEAL.

See Statutes, ¶161.

IMPRISONMENT.

See False Imprisonment; Habeas Corpus.

IMPROVEMENT DISTRICTS.

See Municipal Corporations, ¶265, 747.

IMPROVEMENTS.

See Life Estates, ¶17; Mechanics' Liens; Municipal Corporations, ¶265-567; Tenancy in Common, ¶29.

IMPUTED NEGLIGENCE.

See Negligence, ¶93, 96.

INCEST.

¶10 (Ark.) An indictment stating in technical language that adultery was committed by defendant, a married man, with his niece, sufficiently alleged the offense of incest.—*Carmen v. State*, 179 S. W. 183.

An indictment for incest which failed to allege that defendant was a married man when he committed the adultery with his niece was insufficient to sustain a conviction.—*Id.*

¶13 (Ark.) On trial for incest, conduct and acts prior to period of limitation held admissible to show relations of parties.—*Carmen v. State*, 179 S. W. 183.

Bond and orders in bastardy proceeding in which defendant admitted that he was the father of the child held admissible.—*Id.*

¶14 (Ark.) On a trial for incest, evidence held sufficient to support a verdict of guilty.—*Carmen v. State*, 179 S. W. 183.

INCONSISTENT STATEMENTS.

See Witnesses, ¶379, 396.

INDEMNITY.

See Guaranty; Mechanics' Liens, ¶313.

¶6 (Tex.Civ.App.) Where indorsers of a note paid it, they were entitled to judgment upon an indemnity note given them by the maker and to a foreclosure of the trust deed securing it.—*Grubbs v. Eddleman*, 179 S. W. 91.

INDIANS.

¶35 (Mo.App.) Under Act Cong. March 1, 1907, giving Indian agents the authority conferred by Rev. St. U. S. § 2140 (U. S. Comp. St. 1913, § 4141), Indian agent held authorized to seize liquors in warehouse of defendant carrier in Kansas which he was informed were to be introduced into the Indian country.—*Danciger v. Atchison, T. & S. F. Ry. Co.*, 179 S. W. 800.

INDICTMENT AND INFORMATION.

See Arson, ¶25; Criminal Law, ¶170; Disorderly House, ¶12; False Pretenses, ¶38; Forgery, ¶28-34; Homicide, ¶142; Incest, ¶10; Infants, ¶12; Intoxicating Liquors, ¶223; Larceny, ¶40; Libel and Slander, ¶152; Records, ¶17.

II. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.

¶14 (Tex.Cr.App.) The fact that a substituted copy was not the indictment of a grand jury was no ground why accused could not be tried upon such copy.—*Bennett v. State*, 179 S. W. 713.

III. FORMAL REQUISITES OF INDICTMENT.

¶34 (Tex.Cr.App.) The indorsement of names of witnesses upon the back of an indictment for murder after its return into court was not an alteration invalidating it.—*Galvan v. State*, 179 S. W. 875.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

¶110 (Ark.) Indictment for keeping a gambling table, in the words of the statute, held to charge a public offense, under Kirby's Dig. § 1732.—*Riley v. State*, 179 S. W. 661.

¶110 (Tex.Cr.App.) An indictment for arson following Pen. Code 1911, art. 1200 et seq., held sufficient.—*Tinker v. State*, 179 S. W. 572.

¶110 (Tex.Cr.App.) In view of Rev. St. arts. 7435, 7416. Code Cr. Proc. arts. 453, 460, 464, and Pen. Code, art. 614, an information charging sale of intoxicants without a license, following article 611, held sufficient, while not averring the particular place in the county or that accused was licensed to sell elsewhere.—*Winterman v. State*, 179 S. W. 704.

¶121 (Ky.) An indictment being too general, and not sufficiently describing the thing converted, bill of particulars is the remedy.—*Commonwealth v. Holliday*, 179 S. W. 235.

¶122 (Tex.Cr.App.) A complaint charging an assault with "knucks, commonly known as brass knucks," and an information charging the assault with "knucks," do not show a fatal variance.—*Chisom v. State*, 179 S. W. 108.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

¶125 (Ky.) Considering the accusative and descriptive parts of an indictment, held, it was not duplicitous, but only charged the offense denounced by Ky. St. § 1358a, and not that denounced by section 1202.—*Commonwealth v. Holliday*, 179 S. W. 235.

⚡128 (Tex.Cr.App.) Indictment charging in two counts theft from two persons and theft from one of such persons *held* good, and not to charge a felony, though aggregate value of property, as stated in both counts, was \$55.—Whitfield v. States, 179 S. W. 558.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

⚡133 (Tex.Cr.App.) An indictment cannot be shown to be defective by evidence, but is tested as a pleading under the law applicable.—Tinker v. State, 179 S. W. 572.

⚡137 (Ark.) Disqualification of grand juror *held* not to affect indictment on motion to quash under the express provisions of Kirby's Dig. § 2245.—Calloway v. State, 179 S. W. 356.

⚡137 (Tex.Cr.App.) Where an indictment was in two counts, and one of them was good, there was no error in denying a motion to quash, where the conviction was general.—Hyroop v. State, 179 S. W. 878.

⚡137 (Tex.Cr.App.) That an indictment charges the same offense charged in another indictment under which accused had been convicted is not ground for quashing the indictment.—Park v. State, 179 S. W. 1152.

⚡137 (Tex.Cr.App.) That an indictment for knowingly permitting his house to be used for purposes of prostitution did not put defendant's name after the words "upon their oaths in said court present that, * * *" or that it did not allege particularly where the premises were located in the county, *held* not grounds for quashing.—Lawson v. State, 179 S. W. 1186.

⚡138 (Tex.Cr.App.) Overruling of motion containing exception to indictment on ground that it had been altered after return into court *held* proper.—Galvan v. State, 179 S. W. 875.

⚡147 (Ky.) An indictment being too general, and not sufficiently describing the thing converted, bill of particulars, and not demurrer, is the remedy.—Commonwealth v. Holliday, 179 S. W. 235.

XL. WAIVER OF DEFECTS AND OBJECTIONS, AND AID BY VERDICT.

⚡202 (Mo.) An information for embezzlement not assailed before the trial *held* good after verdict, under Rev. St. 1909, § 5115.—State v. Wilcox, 179 S. W. 479.

INDORSEMENT.

See Indictment and Information, ⚡84.

INFANTS.

See Death, ⚡44; Equity, ⚡39; Guardian and Ward; Judges, ⚡22; Jury, ⚡14; Municipal Corporations, ⚡762, 763; Negligence, ⚡96; Parent and Child.

II. CUSTODY AND PROTECTION.

⚡12 (Tenn.) Laws 1911, c. 58, declaring infants violating the criminal laws delinquent children who may be committed to the state reformatory, *held* not penal, but reformatory, and not contrary to Const. art. 1, § 14, prohibiting prosecution except by presentment, indictment, or impeachment.—Childress v. State, 179 S. W. 643.

⚡13 (Ark.) Father, owning pool tables, who employed his son, under 15 years, to operate the pool room under an agreement that the boy should have half the proceeds, *held* not guilty of a violation of Acts 1911, p. 63, § 1.—Halliday v. State, 179 S. W. 1004.

⚡18 (Ky.) Under Ky. St. § 381e, subsec. 5, *held*, that circuit court had no jurisdiction of juvenile delinquent of 16 who had not been brought before the county court, which want of jurisdiction might be raised on appeal, though

not raised in the circuit court.—Talbot v. Commonwealth, 179 S. W. 621.

IV. CONTRACTS.

⚡57 (Mo.App.) Sale of small value from stock of drugs, and retention of possession of store until trial of action for rescission of contract, whereby plaintiff, when an infant, had purchased the stock, *held* not a ratification of such contract.—Moser v. Renner, 179 S. W. 970.

⚡58 (Mo.App.) Action for decree, rescinding contract entered into during minority, and requiring defendants to surrender the consideration paid, commenced within proper time, *held* in itself a disaffirmance of such contract.—Moser v. Renner, 179 S. W. 970.

Action for rescission of contract of sale and cancellation of the several notes secured by chattel mortgage *held* maintainable for plaintiff's protection on ground of avoiding a multiplicity of suits on the notes.—Id.

Plaintiff, who while a minor purchased the capital stock of a drug company which was wholly owned by defendants individually, in action after majority to rescind sale, *held* not required to make tender of stock to himself, as representing the corporation.—Id.

INHERITANCE TAX.

See Taxation, ⚡890-895.

INJUNCTION.

See Courts, ⚡189; Easements, ⚡61; Execution, ⚡172; Highways, ⚡64; Municipal Corporations, ⚡697; Trial, ⚡11.

I. NATURE AND GROUNDS IN GENERAL.

(B) Grounds of Relief.

⚡9 (Tenn.) An injunction will not be granted to protect an alleged right, except upon a clear case.—Memphis St. Ry. Co. v. Rapid Transit Co., 179 S. W. 635.

II. SUBJECTS OF PROTECTION AND RELIEF.

(D) Corporate Franchises, Management, and Dealings.

⚡64 (Tenn.) The franchise of a street railway company is a property right, which enables it to maintain an action for injunction against competing carriers, who have not been granted similar rights by legislative sanction, and to that extent its franchise is exclusive.—Memphis St. Ry. Co. v. Rapid Transit Co., 179 S. W. 635.

⚡65 (Tenn.) Where the city council fails to act under a statute authorizing it to regulate jitney busses, the jitneys may be enjoined on the bill of the street railway company, since its rights may be materially invaded through failure of the council to act.—Memphis St. Ry. Co. v. Rapid Transit Co., 179 S. W. 635.

⚡67 (Ky.) Citizens of a municipality may compel a grantee of a franchise, where there are provisions therein for their benefit, to exercise the franchise.—City of Princeton v. Princeton Electric Light & Power Co., 179 S. W. 1074.

(E) Public Officers and Boards and Municipalities.

⚡80 (Ky.) Precinct election officers can be compelled to perform the omitted duty of returning statement with contested ballots showing whether and how counted.—Graham v. Treadway, 179 S. W. 1029.

Mandatory injunction is proper remedy to require performance of ministerial duties by precinct election officers.—Id.

The exercise of discretion by election officers will not be controlled by mandatory injunction.—Id.

(H) Criminal Acts, Conspiracies, and Prosecutions.

—105 (Tenn.) Equity cannot enjoin criminal proceedings under a statute, though it be charged that the act is invalid and that a multiplicity of actions will result in irreparable damage, when complainant's defense at law is adequate.—*Alexander v. Elkins*, 179 S. W. 310.

An equity court will enjoin the father of a girl and a justice of the peace from indulging in prosecutions of the girl's husband for non-support, under a statute declared unconstitutional by the Supreme Court, calculated to continue until such husband paid money for the support of his wife.—*Id.*

III. ACTIONS FOR INJUNCTIONS.

—109 (Tex.Civ.App.) In suit to enjoin trespasses, *held*, that defendant might assert ownership in himself and set up a claim for damages for being unlawfully dispossessed by plaintiff.—*Harper v. Stewart*, 179 S. W. 277.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.**(A) Grounds and Proceedings to Procure.**

—136 (Tex.Civ.App.) The court, in granting a temporary injunction should require a case of probable right and probable danger to the right without the injunction.—*Whitaker v. Hill*, 179 S. W. 539.

(B) Continuing, Modifying, Vacating, or Dissolving.

—163 (Tex.Civ.App.) The court, in refusing to dissolve a temporary injunction, should require a case of probable right and probable danger to the right without the injunction.—*Whitaker v. Hill*, 179 S. W. 539.

—164 (Mo.App.) A United States Circuit Court entering a temporary injunction order in force only "until the further order of the court" had inherent power at any time to vacate or set aside such order.—*Danciger v. American Express Co.*, 179 S. W. 797.

INSANE PERSONS.

See Criminal Law, —570.

INSOLVENCY.

See Corporations, —553-566.

INSPECTION.

See Insurance, —549; Master and Servant, —124.

INSTRUCTIONS.

To jury, see Criminal Law, —775-844; Trial, —191-296.

INSURANCE.

See Appeal and Error, —909; Constitutional Law, —208, 229, 283; Evidence, —128; Judgment, —559; Justices of the Peace, —98; Pleading, —236, 433; Principal and Agent, —143; Taxation, —113, 387; Trial, —191, 296.

II. INSURANCE COMPANIES.**(B) Mutual Companies.**

—55 (Ky.) Person *held* not to become member of co-operative insurance company by signing application, notwithstanding Ky. St. § 702, and hence agreement that insurance should be in force from the date of the application was invalid.—*Bracken County Ins. Co. v. Murray*, 179 S. W. 842.

—57 (Ky.) There could be no valid contract of insurance between a co-operative or assessment insurance company and a person not a member of the company.—*Bracken County Ins. Co. v. Murray*, 179 S. W. 842.

III. INSURANCE AGENTS AND BROKERS.**(A) Agency for Insurer.**

—74 (Mo.App.) A contract between an insurance company, its general agent and the general manager of its burglary and surety departments, *held* several and not joint.—*United States Fidelity & Guaranty Co. v. Ridge*, 179 S. W. 791.

Whether a contract between an insurance company and its agents creates a joint or several agency does not depend upon the number of agents contracted with nor on the form of the agreement.—*Id.*

—76 (Tex.Civ.App.) Insurance agent's testimony that his authority had not terminated when he issued a policy *held* to support finding for plaintiff, though circumstantial evidence tended to show that it had been terminated.—*International Fire Insurance Co. v. Black*, 179 S. W. 534.

—78 (Tex.Civ.App.) Person dealing with insurance agent without knowledge of limitation of authority *held* entitled to assume that he was authorized to issue particular policy and company was estopped to assert the contrary.—*International Fire Insurance Co. v. Black*, 179 S. W. 534.

Notwithstanding secretary's testimony as to custom, court *held* entitled to determine territorial extent of insurance agent's authority from correspondence, and it did not limit him to a particular county.—*Id.*

—79 (Mo.App.) A contract between an insurance company, its general agent and the general manager of its burglary and surety departments, *held* not terminated by the retirement of the general manager.—*United States Fidelity & Guaranty Co. v. Ridge*, 179 S. W. 791.

—83 (Ark.) Bond of local agent of insurance company *held* not to bind himself and sureties to reimburse the company for losses occurring on policies issued on prohibited risks by such local agent.—*Security Ins. Co. v. Jaggars*, 179 S. W. 1008.

—93 (Ark.) A fire policy, payable to mortgagee as interest might appear, *held* not void merely because, unknown to insurer, its agent was president of the mortgagee.—*Milwaukee Mechanics' Ins. Co. v. Fuquay*, 179 S. W. 497.

IV. INSURABLE INTEREST.

—114 (Ky.) Where deceased procured an accident policy and paid all the premiums, *held*, that the beneficiary named was entitled to the amount due under the policy, though she had no insurable interest in deceased's life.—*Allen's Adm'r v. Pacific Mut. Life Ins. Co.*, 179 S. W. 581.

V. THE CONTRACT IN GENERAL.**(A) Nature, Requisites, and Validity.**

—131 (Ky.) A valid and enforceable oral contract of insurance may be made between insured and the company, or between him and its authorized agent.—*Bracken County Ins. Co. v. Murray*, 179 S. W. 842.

—136 (Mo.App.) Insurance company *held* not liable to beneficiary on life policy undelivered to insured before his death, where the negotiations provided that there should be no contract until the policy had been delivered to insured in good health.—*Yount v. Prudential Life Ins. Co.*, 179 S. W. 749.

—141 (Mo.App.) Actual manual delivery of life policy made a condition precedent to liability by the terms of the insurance contract, as embodied in the application, may be waived by the insurer.—*Yount v. Prudential Life Ins. Co.*, 179 S. W. 749.

(B) Construction and Operation.

—146 (Mo.App.) All doubts appearing on the face of the contract should be resolved in favor

of the insured.—*Stout v. Missouri Fidelity & Casualty Co.*, 179 S. W. 993.

⚡146 (Tenn.) Insurance policy, though construed, when ambiguous, favorably to insured, *held* to be construed so as to give effect to the intention and express language of the parties.—*Seay v. Georgia Life Ins. Co.*, 179 S. W. 312.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(A) Grounds in General.

⚡256 (Tex.Civ.App.) To avoid a policy for misrepresentation the false statement must have been made willfully and with the intent to deceive, and relied upon by the insurer; and a misrepresentation made innocently and in the belief of its truth will not avoid the policy.—*American Nat. Ins. Co. v. Anderson*, 179 S. W. 66.

⚡265 (Tex.Civ.App.) Under a policy providing, as required by Rev. St. 1911, art. 4741, subd. 4, that statements in the application, in the absence of fraud, should be representations, and not warranties, a statement as to a material matter fraudulently made would be construed as a warranty.—*American Nat. Ins. Co. v. Anderson*, 179 S. W. 66.

A "warranty" enters into and forms a part of the contract itself, defining the limits of the obligation beyond which no liability arises; a "representation," made before or at the time of the contract, presents the elements on which the risk to be assumed is to be estimated.—*Id.*

(B) Matters Relating to Property or Interest Insured.

⚡278 (Ark.) A policy on a house insured as a dwelling house *held*, absent provision in the policy, not voided by insured keeping private boarders therein.—*Milwaukee Mechanics' Ins. Co. v. Fuquay*, 179 S. W. 497.

(C) Matters Relating to Person Insured.

⚡291 (Ky.) A representation of no constitutional disease, made by assured in an application for a policy, *held* not a misrepresentation of fact, because of affliction with hemorrhagic diathesis.—*Massachusetts Bonding & Insurance Co. v. Duncan*, 179 S. W. 472.

⚡291 (Tex.Civ.App.) That insured was not in sound health at time of delivery of a life insurance policy as required by its provisions *held* a good defense to suit thereon.—*American Nat. Ins. Co. v. Anderson*, 179 S. W. 66.

Misstatement as to insured's health made in his application *held* material to the risk.—*Id.*

Misstatement as to insured's health made in his application *held*, under Rev. St. 1911, art. 4751, subd. 4, and article 4947, not excused by his ignorance.—*Id.*

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(A) Grounds in General.

⚡310 (Mo.App.) Where the by-laws of the company were expressly made part of the contract by a life policy, they providing that a proceeding must be had to forfeit the policy for the making of false statements in the application, such policy was not forfeited for such false statements, in the absence of any proceeding to that end.—*Jennings v. National American*, 179 S. W. 789.

(B) Matters Relating to Property or Interest Insured.

⚡328 (Ky.) Transfer of insured property without the consent of the insurer and the subsequent retransfer to the original owner *held* not to avoid the policy, under provisions

for forfeiture in case of change of title not consented to.—*Germania Fire Ins. Co. v. Turley*, 179 S. W. 1059.

(E) Nonpayment of Premiums or Assessments.

⚡349 (Mo.App.) Under accident policy taken out June 4, providing for monthly payments on the 1st day of each month in advance, *held*, that premium paid August 1st covered insured's accidental death September 4th, though no payment was made September 1st.—*Stout v. Missouri Fidelity & Casualty Co.*, 179 S. W. 993.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

⚡368 (Mo.App.) Assurances by an insurance adjuster, that if the insured would obtain duplicate bills from the wholesale houses, the claim would be adjusted *held* to constitute a waiver of the iron-safe clause in the policy.—*Travis v. Continental Ins. Co.*, 179 S. W. 766.

⚡389 (Ky.) The issuance of a policy to its agent *held* waiver by the company of any disadvantage from the want of a local representative arising therefrom.—*Massachusetts Bonding & Insurance Co. v. Duncan*, 179 S. W. 472.

XII. RISKS AND CAUSES OF LOSS.

(C) Guaranty and Indemnity Insurance.

⚡430 (Tenn.) Policy insuring physician against liability for mistake of assistant "while acting under assured's instructions" *held* not to cover case treated by assistant without instructions other than previous general instructions.—*Seay v. Georgia Life Ins. Co.*, 179 S. W. 812.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(D) Life Insurance.

⚡515 (Ky.) That death was caused by strain *held* not to limit recovery of beneficiary to amount provided for as disability indemnity to assured in case of strain.—*Massachusetts Bonding & Insurance Co. v. Duncan*, 179 S. W. 472.

XIV. NOTICE AND PROOF OF LOSS.

⚡533 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4874, where property insured is totally destroyed by fire, the liability of the insurance company accrues immediately after the occurrence of the fire, regardless of stipulations as to notice and proof of loss.—*Fire Ass'n of Philadelphia v. Richards*, 179 S. W. 926.

⚡539 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5714, a stipulation in a fire insurance policy that proof of loss must be made within 90 days after fire was void.—*Fire Ass'n of Philadelphia v. Richards*, 179 S. W. 926.

⚡549 (Ky.) Failure to delay interment indefinitely upon request of insurance company *held* not to avoid policy for breach of provision entitling company to hold autopsy.—*Massachusetts Bonding & Insurance Co. v. Duncan*, 179 S. W. 472.

A refusal to grant a motion for exhumation and autopsy in an action on an accident policy *held* not error, where defendant failed to show that an autopsy would determine the cause of death.—*Id.*

Evidence in an action on insurance policy *held* insufficient to support motion for exhumation and autopsy on assured's body.—*Id.*

Indirect refusal by beneficiary of request for autopsy as provided in policy, with suggestion of proofs in lieu, *held* not to avoid policy for breach of autopsy provision.—*Id.*

⚡556 (Ark.) An insurance company's adjuster *held* authorized to waive proof of loss.—*Mil-*

waukee Mechanics' Ins. Co. v. Fuquay, 179 S. W. 497.

—558 (Ark.) Filing proof of loss held waived, where insured, at the adjuster's direction, procured and furnished estimates of cost of rebuilding.—Milwaukee Mechanics' Ins. Co. v. Fuquay, 179 S. W. 497.

XVIII. ACTIONS ON POLICIES.

—622 (Tex.Civ.App.) A provision in a fire insurance policy that suit thereon should be brought before the expiration of 2 years from the accrual of the cause of action held invalid, under Vernon's Sayles' Ann. Civ. St. 1914, art. 5713.—Fire Ass'n of Philadelphia v. Richards, 179 S. W. 926.

—645 (Mo.App.) In an action on a life policy, where the defense of forfeiture was not properly pleaded, the exclusion of evidence to substantiate it was proper.—Jennings v. National American, 179 S. W. 789.

In an action on a life policy providing the application should be taken as part of the contract, the plaintiff was not required to introduce the application in evidence with the policy.—Id.

Under Rev. St. 1909, § 7024, in absence of pleading and evidence that alleged misrepresentations in application for life insurance were material to the risk, evidence tending to show their falsity could not defeat the beneficiary's recovery.—Id.

—646 (Ky.) Categorical answers to questions in application are presumed to supply the insurer with all information necessary to acceptance or rejection of risk.—Massachusetts Bonding & Insurance Co. v. Duncan, 179 S. W. 472.

—658 (Tex.Civ.App.) Testimony as to the condition of the insured property more than 8½ months after the fire is inadmissible, in an action on a fire policy, without a showing that the condition was the same then as immediately after the fire.—Occident Fire Ins. Co. v. Linn, 179 S. W. 523.

Where a piano was insured against fire, evidence in an action on the policy as to the cost of repolishing the piano which was damaged and repairing its internal mechanism was improperly received, where there was no showing of that sort of damage.—Id.

—665 (Ky.) Evidence in an action by a beneficiary under an accident policy to recover for the death of assured held to sustain a finding that assured's answers to questions in the application were truthful.—Massachusetts Bonding & Insurance Co. v. Duncan, 179 S. W. 472.

—665 (Tex.Civ.App.) In an action on a fire policy, wherein it was contended that a settlement was obtained by duress, evidence held sufficient to sustain the plea thereof.—Fire Ass'n of Philadelphia v. Richards, 179 S. W. 926.

—668 (Ark.) Whether an insurance company's adjuster received estimates of cost of rebuilding, which insured testified he mailed to him properly addressed, held a question for the jury.—Milwaukee Mechanics' Ins. Co. v. Fuquay, 179 S. W. 497.

Whether the adjuster waived forfeiture because of oil being kept on the premises in greater quantity than permitted held a question for the jury on evidence that he, having a list of the articles kept in the house, directed insured to send estimates of cost of rebuilding.—Id.

—668 (Ky.) Whether answer that it was good, in application for insurance, to question as to mental and physical condition, was truthful, held for jury.—Massachusetts Bonding & Insurance Co. v. Duncan, 179 S. W. 472.

—669 (Tex.Civ.App.) A requested charge that, the market value after the fire of the piano insured not having been shown, no recovery could be had, held properly refused, under the evidence.—Occident Fire Ins. Co. v. Linn, 179 S. W. 523.

XX. MUTUAL BENEFIT INSURANCE.

(A) Corporations and Associations.

—687 (Mo.App.) Whether an insurance company did an old-line or fraternal insurance business was determined, not by what it called itself or its business, but by the character of the policy in suit and the manner in which the defendant conducted its business.—Jennings v. National American, 179 S. W. 789.

(C) Dues and Assessments.

—740 (Tex.Civ.App.) Deposit of total amount of assessments collected by officer of mutual benefit society without retention of commission held to be payment of assessments due on his own policies.—Knights of the Maccabees of the World v. Parsons, 179 S. W. 78.

(D) Forfeiture or Suspension.

—744 (Tex.Civ.App.) Collecting officer in arrears to local lodge of mutual benefit society held not to forfeit policy under his obligation to not knowingly wrong or defraud the lodge.—Knights of the Maccabees of the World v. Parsons, 179 S. W. 78.

(E) Beneficiaries and Benefits.

—788 (Ky.) Where assured was so insane as to render him not mentally responsible for his suicide, policy held not avoided by suicide forfeiture clause.—Sovereign Camp, Woodmen of the World v. Ethridge, 179 S. W. 1022.

(F) Actions for Benefits.

—819 (Tex.Civ.App.) Evidence, in an action on mutual benefit certificates, held to authorize a finding that assured was dead.—Knights of the Maccabees of the World v. Parsons, 179 S. W. 78.

It is not necessary that the evidence conclusively show the death of assured.—Id.

—825 (Ky.) In an action on a life policy defended for suicide, evidence held sufficient to go to the jury on the question of assured's irresponsible insanity.—Sovereign Camp, Woodmen of the World v. Ethridge, 179 S. W. 1022.

INSURRECTION.

See War.

INTENT.

See Bigamy, —1; Contracts, —147; Criminal Law, —371; Embezzlement, —39; False Imprisonment, —24; Fixtures, —4.

INTEREST.

See Corporations, —228; Damages, —69; Usury.

INTERPLEADER.

See Action, —57.

II. PROCEEDINGS AND RELIEF.

—23 (Tex.Civ.App.) That defendants pleaded on information and belief that money was due H. and not plaintiff held not to show such partiality as prevented them from interpleading H.—Pulkrabek v. Griffith & Griffith, 179 S. W. 282.

INTERSTATE COMMERCE.

See Carriers, —32; Commerce.

INTERVENTION.

See Parties, —40.

INTOXICATING LIQUORS.

See Carriers, —45, 90-92; Commerce, —8; Criminal Law, —27, 147, 507; Indiana, —85; Indictment and Information, —110.

I. POWER TO CONTROL TRAFFIC.

⚡6 (Mo.App.) The traffic in intoxicating liquors derives its authority only from statute, and a shipper's right to an express company's performance of its contract to deliver intoxicating liquors C. O. D. is always subject to the police power of the state.—*Dandiger v. American Express Co.*, 179 S. W. 797.

⚡10 (Ark.) Under Kirby's Dig. § 5438, a city may impose a license fee upon both wholesale and retail selling, although both are conducted by the same person in the same room, and though the state and county tax under sections 5109-5111 does not require a wholesale tax in such a case.—*Gunther v. City of Hot Springs*, 179 S. W. 505.

IV. LICENSES AND TAXES.

⚡46 (Ark.) Where the statute authorizing municipalities to license, tax, or suppress retailers and wholesalers of liquor fixes no maximum fee which may be charged, an ordinance fixing the license fee cannot be void because the amount is unreasonable.—*Gunther v. City of Hot Springs*, 179 S. W. 505.

V. REGULATIONS.

⚡112½ [New, vol. 20 Key-No. Series]
(Ky.) The Webb-Kenyon Act prohibits the shipment of intoxicating liquor into states in which its sale is unlawful, only when the liquor is intended for an unlawful use.—*Commonwealth v. White*, 179 S. W. 469.

VI. OFFENSES.

⚡139 (Ky.) In spite of Ky. St. 1915, § 2569 et seq., one may lawfully have in his possession liquor purchased where its sale is lawful.—*Commonwealth v. White*, 179 S. W. 469.

⚡141 (Tex.Cr.App.) That defendant may have been in some other business would not prevent him from pursuing the occupation of selling liquor to all who applied to him.—*Bagley v. State*, 179 S. W. 1167.

⚡150 (Tex.Cr.App.) Under Pen. Code, art. 611, the offense denounced is the sale of intoxicants without a license, and not engaging in the business of selling without a license.—*Winterman v. State*, 179 S. W. 704.

VIII. CRIMINAL PROSECUTIONS.

⚡223 (Tex.Cr.App.) On a trial for selling whisky in prohibition territory, the time and place where the prosecuting witness claimed to have bought the whisky from accused were directly in issue and properly shown.—*Engman v. State*, 179 S. W. 569.

⚡224 (Ky.) The commerce clause of the United States Constitution attaches to lawful shipments of liquor, and courts will not presume, in the absence of proof, that a record of interstate liquor shipments kept as required by Ky. St. 1915, § 2569b, subsec. 3, contains a record of unlawful shipments.—*Commonwealth v. White*, 179 S. W. 469.

⚡226 (Tex.Cr.App.) On trial for selling whisky, state held properly permitted to show location of building in which accused had a room, and the furniture in such room when a witness was in it.—*Engman v. State*, 179 S. W. 569.

⚡236 (Tex.Cr.App.) In a prosecution for violating the prohibition law, evidence held sufficient to sustain a conviction.—*Sloan v. State*, 179 S. W. 111.

⚡236 (Tex.Cr.App.) Evidence, on a prosecution for pursuing the business of selling intoxicating liquor in prohibition territory, held to support a conviction, especially when aided by plea of guilty.—*Luttrell v. State*, 179 S. W. 566.

⚡236 (Tex.Cr.App.) In a prosecution for selling intoxicating liquor without a license in a county where prohibition was not in force, evi-

dence held to warrant conviction.—*Winterman v. State*, 179 S. W. 704.

⚡236 (Tex.Cr.App.) To warrant a conviction of pursuing the business of selling intoxicating liquor in local option territory, the state must prove at least two sales.—*Brice v. State*, 179 S. W. 1178.

Evidence held insufficient to warrant a conviction.—Id.

⚡238 (Tex.Cr.App.) In a prosecution for unlawfully selling intoxicating liquor in a prohibition county, the positive testimony of the state's witness that defendant sold him intoxicating liquor as charged, denied by defendant, made the offense a question for the jury.—*Grisham v. State*, 179 S. W. 1186.

INTOXICATION.

See Carriers, ⚡284.

INVESTMENT.

See Remainders, ⚡16.

INVITEES.

See Negligence, ⚡32.

ISSUES.

See Appeal and Error, ⚡171-179.

JEOPARDY.

See Criminal Law, ⚡170-200.

JITNEYS.

See Carriers, ⚡2, 4; Constitutional Law, ⚡207, 208; Injunction, ⚡63; Licenses, ⚡7; Municipal Corporations, ⚡121, 697, 703.

JOHNSON GRASS.

See Agriculture, ⚡8.

JOINDER.

See Indictment and Information, ⚡128.

JOINT ADVENTURES.

⚡5 (Ky.) In an action on a contract for the purchase and sale of timber whereby plaintiff was to have half the profits less purchase money advanced by defendants, the charge to the jury held good.—*Daniel v. Daniel*, 179 S. W. 5.

JOINT CONTRACTS.

See Insurance, ⚡74.

JOINT TENANCY.

See Tenancy in Common.

JUDGES.

See Counties, ⚡190; Courts, ⚡184; Justices of the Peace.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

⚡22 (Ky.) One is disqualified by interest to vote as a member of a county's fiscal court on a motion to fix salaries, including his own as county judge.—*Hurt v. Morgan County*, 179 S. W. 255.

⚡22 (Tenn.) Judge of juvenile court appointed under Priv. Laws 1913, c. 277, which provided no salary, held entitled to salary created by Act of 1915, under Const. art. 6, § 7.—*State v. Brown*, 179 S. W. 321.

JUDGMENT.

See Appeal and Error, ¶493, 907; Courts, ¶184; Divorce, ¶152; Execution.

For judgments in particular actions or proceedings, see also the various specific topics. For review of judgments, see Appeal and Error.

I. NATURE AND ESSENTIALS IN GENERAL.

¶1 (Tex.Civ.App.) The "judgment" of a court is what the court pronounces; its "rendition" is the judicial act by which the court settles and declares the decision of the law upon the matters at issue; and its "entry" is the ministerial act by which the enduring evidence of the judicial act is afforded.—Moore v. Toyah Valley Irr. Co., 179 S. W. 550.

¶17 (Ky.) Under Civ. Code Prac. § 135, plaintiff, whose petition in an action to enforce a vendor's lien note alleged a cause of action on other notes not then due, was entitled to a judgment on the notes maturing after the petition was filed, without other process.—Stone v. Daniels, 179 S. W. 831.

IV. BY DEFAULT.

(B) Opening or Setting Aside Default.

¶138 (Ky.) In action to enforce vendor's lien notes, answer, tendered after judgment, filed with motion to set aside judgment, setting up deficiency and claim of set-off, without showing why the deficiency could not have been sooner discovered, held to show on its face lack of diligence.—Stone v. Daniels, 179 S. W. 831.

VI. ON TRIAL OF ISSUES.

(A) Rendition, Form, and Requisites in General.

¶199 (Tex.Civ.App.) The court had no power to render judgment in disregard of the jury's findings; its power being limited to setting aside the verdict and granting new trial.—Postal Telegraph Cable Co. of Texas v. De Krecko, 179 S. W. 525.

(B) Parties.

¶240 (Tex.Civ.App.) Where the verdict found a joint liability against defendants, there was no error in a judgment decreeing a joint and several liability.—San Antonio U. & G. Ry. Co. v. Yarbrough, 179 S. W. 523.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

¶256 (Tex.Civ.App.) Under Rev. St. arts. 1986, 1990, 1994, the court must conform the judgment to the special findings of the jury.—McLemore v. Bickerstaff, 179 S. W. 536.

¶256 (Tex.Civ.App.) The issues found by the jury should respond to the pleadings, and if they do not the issues so found should be regarded as immaterial, and not be considered in rendering the judgment.—Morris v. McSpadden, 179 S. W. 554.

In a suit for partnership accounting, finding as to funds not divided by agreement held immaterial, no division by agreement having been pleaded, and not to render judgment on the other findings erroneous.—Id.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

¶297 (Tex.Civ.App.) Court held to have authority to correct its minutes to make judgment dispose of the rights of all parties, as was done by the judgment as actually rendered.—Moore v. Toyah Valley Irr. Co., 179 S. W. 550.

¶299 (Tex.Civ.App.) Under Rev. St. 1911, arts. 2015, 2016, held that, where judgment as entered did not dispose of rights of certain parties, correction to conform to judgment render-

ed could not be made in vacation.—Moore v. Toyah Valley Irr. Co., 179 S. W. 550.

IX. OPENING OR VACATING.

¶391 (Ark.) In order to vacate a judgment for fraud practiced by the successful party, it is necessary that the defense of the action be sufficiently alleged and that such defense be adjudged a valid one.—Smith v. Minter, 179 S. W. 341.

X. EQUITABLE RELIEF.

(A) Nature of Remedy and Grounds.

¶416 (Ky.) That a note was not assigned in writing by the payee does not render void the default judgment obtained thereon by another, so as to authorize enjoining its collection.—Ross v. Ross, 179 S. W. 454.

(B) Jurisdiction and Proceedings.

¶461 (Ky.) Evidence in a suit to have a judgment for sale by way of partition set aside for fraud in procuring it held to show no fraud, but abandonment of an agreement for division through disinterested persons.—Jordan v. Cromwell, 179 S. W. 407.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) Judgments Operative as Bar.

¶540 (Mo.App.) Where two actions present the same parties or their privies, the same subject-matter, and the same claim or demand, a judgment in the first action, if rendered on the merits, constitutes an absolute bar to a second action.—Danciger v. American Express Co., 179 S. W. 806.

¶559 (Ky.) That plaintiff, in a suit on a fire policy, has been convicted of arson in setting fire to the insured building, is not a bar to his recovery.—Liverpool & London & Globe Ins. Co. v. Wright, 179 S. W. 49.

¶570 (Mo.App.) Where demurrer to the evidence was sustained and an involuntary nonsuit taken which the court refused to set aside, judgment held not to bar a new action under Rev. St. 1909, § 1900.—Woods v. Missouri Pac. Ry. Co., 179 S. W. 727.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

¶592 (Mo.App.) Where a demand arises out of separate and distinct causes of action, the rule against splitting causes of action obviously does not apply; and, where the respective demands grow out of independent acts, contracts, or transactions, they cannot be treated as parts of a single cause.—Danciger v. American Express Co., 179 S. W. 806.

¶597 (Mo.App.) Shipper's recovery against express company for conversion of number of shipments of intoxicating liquors held not a bar to a subsequent action for the conversion of other shipments made under separate contracts.—Danciger v. American Express Co., 179 S. W. 806.

KV. LIEN.

¶769 (Tex.Civ.App.) Indexing of an abstract of a judgment duly recorded is, under Vernon's Sayles' Ann. Civ. St. 1914, arts. 5614-5616, indispensable to the creation of a lien.—Whitaker v. Hill, 179 S. W. 539.

¶788 (Tex.Civ.App.) Judgment creditor may, notwithstanding unrecorded deed, acquire a lien by complying with Vernon's Sayles' Ann. Civ. St. 1914, arts. 5614-5616, or by levy of execution without notice under articles 6827, 6828, of a third person's ownership, and under article 6824, subject the land to his judgment.—Whitaker v. Hill, 179 S. W. 539.

XVII. FOREIGN JUDGMENTS.

¶822 (Ark.) Former judgment in another state, dismissing suit to set aside deed on

ground of grantor's incompetency and grantee's undue influence, *held* res judicata in a subsequent suit between the same parties involving the same issues.—*Fromholz v. McGahey*, 179 S. W. 300.

Pleadings and orders in suit in another state *held* sufficient to sustain a plea of res judicata.—*Id.*

—822 (Tex.Civ.App.) Under Const. U. S. art. 4, § 1, judgment of Wisconsin court having jurisdiction of subject-matter and parties *held* entitled to same force and effect in Texas as in Wisconsin.—*American Express Co. v. North Ft. Worth Undertaking Co.*, 179 S. W. 908.

XXI. ACTIONS ON JUDGMENTS.

(B) Foreign Judgments.

—944 (Tex.Civ.App.) Evidence *held* to show that Wisconsin judgment against plaintiffs, in action in which defendant was sued as garnishee, was valid, though plaintiffs were sued in their firm name.—*American Express Co. v. North Ft. Worth Undertaking Co.*, 179 S. W. 908.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

—951 (Tex.Civ.App.) In suit to foreclose a vendor's lien, where the only objection to the original judgment of partition, admitted in evidence to show that title to the purchase notes was vested in plaintiff's wards, was that such judgment affected title to land and had never been recorded, its admission was proper.—*Stewart v. Thomas*, 179 S. W. 886.

JUDICIAL ADMISSIONS.

See Evidence, —211.

JUDICIAL NOTICE.

See Evidence, —5, 32.

JUDICIAL POWER.

See Constitutional Law, —68.

JUDICIAL SALES.

See Appeal and Error, —708; Guardian and Ward, —77-107; Remainders.

—31 (Ky.) Though written exceptions to judicial sale were not traversed in writing, they are not admitted, and the exceptor is not entitled to have them sustained for that reason.—*Graves' Committee v. Lyons*, 179 S. W. 413.

—35 (Ky.) A judicial sale should not be set aside except for cause interfering with bringing the reasonable value of the property sold, the court taking into consideration the rights of all.—*Bethurum v. Baker*, 179 S. W. 436.

JURISDICTION.

See Courts; Justices of the Peace, —58.

JURY.

See Appeal and Error, —685, 922; Criminal Law, —185, 854, 866, 925, 928, 1148; Equity, —377-385; New Trial, —49; Trial, —370-374.

II. RIGHT TO TRIAL BY JURY.

—10 (Ky.) The constitutional right of jury trial exists only where by the common law a jury trial was customarily had, and the right to trial by jury means a trial according to the course of the common law.—*Stearns Coal & Lumber Co. v. Commonwealth*, 179 S. W. 1080.

—13 (Ky.) Where a distinct legal issue is made in an equitable action, either party may have such issue decided by a jury.—*Procter v. Tubb*, 179 S. W. 620.

—13 (Ky.) In owner's action against a contractor to remodel a house, to cancel a lien, such owner claiming damages by defective reconstruction, the contractor had the right to a jury trial as to whether there was anything due him.—*Scott v. Kirtley*, 179 S. W. 825.

—14 (Mo.App.) Petition, seeking a disaffirmance of contract entered into during minority and the return of the consideration paid, *held* to show a case of equitable jurisdiction, not interfered with by Rev. St. 1909, § 2786, relating to the ratification of minors' contracts.—*Moser v. Renner*, 179 S. W. 970.

—25 (Ky.) The right to a jury trial as to legal issues in an equitable action depends upon whether application is seasonably made.—*Procter v. Tubb*, 179 S. W. 620.

The application for the submission of legal issues to a jury in an equitable action must be made when the answer is filed, or within a reasonable time.—*Id.*

What is a reasonable time for a party to an equitable action to apply for a jury trial as to legal issues is a matter within the sound discretion of the trial court.—*Id.*

Where defendant in equity suit waited several months, after filing answer and until after the case had been referred on his motion, application for a jury trial as to the legal issues was too late.—*Id.*

IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

—75 (Ky.) Under Ky. St. § 2261, trial courts are without authority to discharge a second jury impaneled after the discharge of the regular first panel after a week's service, to impanel a third jury for the succeeding week, and to continue the practice for the term.—*Imperial Jellico Coal Co. v. Fox*, 179 S. W. 1032.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

—97 (Mo.App.) In suit for death of two year old girl, overruling defendant's challenge for cause to a juror who stated that if the evidence were evenly balanced his sympathies would probably influence him in favor of plaintiff, unless otherwise instructed, *held* proper.—*Albert v. St. Louis Electric Terminal Ry. Co.*, 179 S. W. 955.

—99 (Ark.) Opinion formed and expressed as to guilt of defendant *held* not to disqualify juror to sit in subsequent trial of defendant's sanity at the time of trial for the crime.—*Dewain v. State*, 179 S. W. 346.

—103 (Ark.) A juror is not disqualified because persons had detailed to him the facts as testified to in the justice court, and thought he had formed an opinion therefrom, where he says he can and will disregard all this and fairly try defendant on the evidence.—*Tisdale v. State*, 179 S. W. 650.

VI. IMPANELING FOR TRIAL AND OATH.

—146 (Tex.Cr.App.) Where veniremen failed to appear and answer as their names were called in impaneling the jury, but were later called and examined, and the defendant exhausted only 12 of his 15 peremptory challenges, there is no error in proceeding with the trial.—*Thompson v. State*, 179 S. W. 561.

JUSTICES OF THE PEACE.

See Constitutional Law, ¶102.

III. CIVIL JURISDICTION AND AUTHORITY.

¶58 (Mo.App.) The jurisdiction of a justice of the peace must appear affirmatively from the record.—Graves v. Metropolitan Life Ins. Co., 179 S. W. 947.

IV. PROCEDURE IN CIVIL CASES.

¶80 (Tenn.) In a suit against a railroad for personal injury on or near its tracks, begun before a justice of the peace, the warrant must sufficiently advise the defendant of the nature of the suit.—Whittaker v. Louisville & N. R. Co., 179 S. W. 140.

¶98 (Mo.App.) Under Rev. St. 1909, §§ 7413, 7414, in action before justice of the peace on insurance policy, where no affidavit as to its destruction was filed, *held*, that there could be no recovery.—Graves v. Metropolitan Life Ins. Co., 179 S. W. 947.

¶119 (Mo.App.) Judgments of a justice of the peace as entered speak for themselves and import verity.—State ex rel. Gardiner v. Wurdeman, 179 S. W. 964.

¶126 (Mo.App.) Under Const. art. 4, § 23, and Rev. St. 1909, §§ 3956, 7528, circuit court *held* not empowered to order a justice of the peace to make a correction or amendment of his predecessor's entries of judgment, not conforming to the judgment as rendered or to the so-called transcript thereof.—State ex rel. Gardiner v. Wurdeman, 179 S. W. 964.

To insert in the judgment of a justice of the peace an amount in dollars and cents in place of the blank left therein would be to amend or correct the judgment.—Id.

¶135 (Ark.) Return indorsed on execution issued by justice and subsequently found among his official papers *held* sufficiently to show that it was returned by the constable within the prescribed 30 days after issuance.—Peery v. Mauldin, 179 S. W. 652.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

¶141 (Mo.App.) Where a justice of the peace had no jurisdiction, the circuit court had no jurisdiction on appeal, as its jurisdiction is derivative.—Graves v. Metropolitan Life Ins. Co., 179 S. W. 947.

JUVENILE COURTS.

See Counties, ¶190; Judges, ¶22.

LANDLORD AND TENANT.

See Animals, ¶26; Life Estates, ¶25; Principal and Agent, ¶100, 166; Tenancy in Common, ¶49.

IV. TERMS FOR YEARS.

(B) Assignment, Subletting, and Mortgage.

¶80 (Tex.Civ.App.) Sublessee, occupying for more than a month, could not limit its occupancy to four months; the contract giving it an option to hold for a month or for one year.—Postal Telegraph Cable Co. of Texas v. De Krekko, 179 S. W. 525.

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(B) Possession, Enjoyment, and Use.

¶129 (Ky.) Ordinarily, where a lessor refuses to comply with the terms of a lease, the measure of damages is the difference between the agreed rent and the rental value of the premises.—Geary v. Taylor, 179 S. W. 426.

Where lease was subject to termination upon

sale of land, damages for failure to deliver possession *held* limited to difference between agreed rent and rental value up to time judicial sale was confirmed.—Id.

Lessee, suing for failure to deliver possession, *held* entitled to show value of land for pasturage purposes, but not to show probable profits.—Id.

VIII. RENT AND ADVANCES.

(B) Actions.

¶231 (Tex.Civ.App.) In action for rent, evidence *held* to show that defendant made a contract to subrent for a month, with option to extend the contract to cover term of plaintiff's lease.—Postal Telegraph Cable Co. of Texas v. De Krekko, 179 S. W. 525.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

¶291 (Mo.App.) In a suit in unlawful detainer, question whether the premises occupied by defendant were verbally rented to him by plaintiffs' predecessor, or by the latter's lessee, *held* for the jury under the evidence.—McCracken v. Schuster, 179 S. W. 757.

LANDS.

See Public Lands.

LAPSE.

See Wills, ¶775.

LARCENY.

See Criminal Law, ¶200, 508, 511, 722, 814, 829, 866, 1213; Embezzlement; False Pretenses; Indictment and Information, ¶128; Statutes, ¶118.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

¶27 (Tex.Cr.App.) A person not connected with the original taking of property is not guilty of theft, even though he received the stolen property knowing it to have been stolen.—Whitfield v. State, 179 S. W. 558.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

¶40 (Tex.Cr.App.) Under a complaint alleging defendant's theft of 500 asperine tablets, it was not incumbent on the state to prove that the bottle contained 500 tablets and no less.—Rice v. State, 179 S. W. 876.

(B) Evidence.

¶45 (Tex.Cr.App.) On a trial for larceny, testimony of a conversation with accused and a third person *held* properly admitted on issue of identity of property stolen.—Park v. State, 179 S. W. 1152.

¶55 (Tex.Cr.App.) Evidence *held* insufficient to show that defendants, who participated in the butchering of the animal and the carrying away of the meat, were guilty of stealing it.—Reyna v. State, 179 S. W. 568.

¶55 (Tex.Cr.App.) Evidence *held* to sustain a conviction of theft.—Park v. State, 179 S. W. 1152.

¶65 (Ark.) Evidence in a prosecution for grand larceny *held* sufficient to sustain a conviction.—Anderson v. State, 179 S. W. 158.

¶65 (Ark.) Unexplained possession of a portion of property recently stolen may be considered in corroboration of testimony of accomplices in a prosecution for grand larceny, although the value of the property so found does not exceed \$10.—White v. State, 179 S. W. 160.

(C) Trial and Review.

¶70 (Tex.Cr.App.) Instruction on cattle theft to acquit defendant if he received the cow in

trade or sale, or upon reasonable doubt thereof, *held* not objectionable for failure to define completed theft, and to charge that defendant must have participated in acts constituting offense.—*McAninch v. State*, 179 S. W. 719.

In prosecution for cattle theft, a charge to acquit unless defendant was connected with the original taking *held* not insufficient for failure to instruct that defendant must be acquitted if he was the receiver of stolen cow.—*Id.*

☞77 (Tex. Cr. App.) Instruction pertinently applying the law to the identical explanation of his possession of stolen property given by accused *held* the safest and best instruction.—*Whitfield v. State*, 179 S. W. 558.

LAST CLEAR CHANCE.

See Negligence, ☞83; Railroads, ☞376, 390; Street Railroads, ☞103.

LAW OF THE CASE.

See Appeal and Error, ☞1099, 1195.

LEASE.

See Landlord and Tenant; Principal and Agent, ☞100, 166.

LEGISLATIVE POWER.

See Constitutional Law, ☞80, 46, 60, 63.

LETTERS.

See Criminal Law, ☞398.

LEVEES.

See Statutes, ☞225½.

☞34 (Ark.) Under Acts 1909, p. 724, § 5, relating to issue of interest-bearing certificates in emergency, act of board of directors of levee district in declaring existence of an extraordinary emergency, not arbitrary, capricious, or fraudulent, cannot be challenged.—Board of Directors of St. Francis Levee Dist. v. Williford, 179 S. W. 665.

Under Acts 1909, p. 724, § 5, and Acts 1909, p. 717, the amount of interest-bearing certificates which the board of directors of the St. Francis levee district may issue in extraordinary emergencies is strictly limited to an aggregate of \$21,000.—*Id.*

LIBEL AND SLANDER.

See Trial, ☞2.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

☞7 (Ky.) Letters from gas company to its patrons who had paid their bills through plaintiff, stating that their bills were unpaid, *held* not libelous as charging plaintiff with embezzling the money so paid.—*Louisville Gas & Electric Co. v. Wulf*, 179 S. W. 232.

☞7 (Ky.) The word "rob" may be used to import a felony, or colloquially, and in the latter sense it is not actionable per se.—*Deitchman v. Bowles*, 179 S. W. 249.

III. JUSTIFICATION AND MITIGATION.

☞62 (Ky.) Belief that plaintiff was person accused of crime *held* not to rebut the presumption of malice raised by publication of matter libelous per se.—*Reid v. Nichols*, 179 S. W. 440.

☞63 (Ky.) In an action for slander, defendant is entitled to show, in mitigation, that the language was used in the heat of a political campaign and in retaliation for charges made by plaintiff.—*Deitchman v. Bowles*, 179 S. W. 249.

IV. ACTIONS.

(B) Parties, Preliminary Proceedings, and Pleading.

☞100 (Ky.) In an action for slander, plaintiff may show, in aggravation of damages, that he is of good character and reputation, though justification is not pleaded.—*Deitchman v. Bowles*, 179 S. W. 249.

(C) Evidence.

☞104 (Ky.) Ky. St. 1915, § 2438b, prescribing effect of retraction in libel cases, *held* to confer no right on plaintiff to prove failure to retract, but only on defendant to prove retraction for purpose of defeating punitive damages.—*Reid v. Nichols*, 179 S. W. 440.

(D) Damages.

☞120 (Ky.) Charge libelous per se *held* to raise presumption of malice, authorizing punitive damages, until rebutted by proof of contrary motive or truth of charge.—*Reid v. Nichols*, 179 S. W. 440.

(E) Trial, Judgment, and Review.

☞123 (Ky.) Where the language of letters is apparently innocent on its face, the question whether, under the facts disclosed by the inducement and colloquium, it is fairly susceptible of the defamatory meaning sought to be impressed by the innuendo is one of law.—*Louisville Gas & Electric Co. v. Wulf*, 179 S. W. 232.

☞123 (Ky.) It was a question for the jury, in an action for slander, whether the word "rob" was used in its colloquial or technical sense.—*Deitchman v. Bowles*, 179 S. W. 249.

Failure to define "robbery" after an instruction in an action for slander that, if the defendant meant the plaintiff had committed the crime of robbery, the verdict should be for plaintiff, was error.—*Id.*

VI. CRIMINAL RESPONSIBILITY.

(A) Offenses.

☞144 (Tex. Cr. App.) Repetition of slander by originator at request of party slandered with assertion of truth is slander.—*Robison v. State*, 179 S. W. 1157.

☞148 (Tex. Cr. App.) Slandorous statement made and sworn to before a justice at request of brother of the slandered girl, *held* not a privileged communication.—*Robison v. State*, 179 S. W. 1157.

Malice by person publishing slander *held* to destroy his privilege.—*Id.*

(B) Prosecution and Punishment.

☞152 (Tex. Cr. App.) An information for slander, stating what the accused said "in substance and effect" and using the third person, *held* not defective as not setting forth substantially the language used, in view of Pen. Code, art. 10, and Code Cr. Proc. arts. 452, 453, 460, and 25, relating to sufficiency of indictments generally.—*Martin v. State*, 179 S. W. 121.

☞156 (Tex. Cr. App.) In a prosecution for slander, evidence *held* to show that the slander was uttered maliciously.—*Robison v. State*, 179 S. W. 1157.

Malice by person publishing slander may be shown by style and tone of statement, or that it was made without careful and diligent inquiry as to truth.—*Id.*

LICENSES.

See Intoxicating Liquors, ☞46; Negligence, ☞32; Patents, ☞211.

I. FOR OCCUPATIONS AND PRIVILEGES.

☞1 (Tex. Civ. App.) Annual license fee for privilege of operating motor bus in streets of a

city held a charge based upon the cost of regulation, and not a tax.—Booth v. City of Dallas, 179 S. W. 301.

⚡5½ (Tex.Civ.App.) City of Dallas, under its charter, held to have the right to fix an annual license of \$75 for privilege of operating a motor bus over its streets.—Booth v. City of Dallas, 179 S. W. 301.

⚡7 (Tex.Cr.App.) An ordinance prescribing a license fee of \$50 for each jitney with a seating capacity of five or less held not objectionable as a tax for revenue for city purposes, instead of a police regulation.—Ex parte Bogle, 179 S. W. 1193.

⚡7 (Tex.Civ.App.) Ordinance imposing annual fee of \$75 for privilege of operating motor bus, in comparison with ordinance licensing and regulating rent cars, held not discriminatory, since they were engaged in different classes of street traffic.—Booth v. City of Dallas, 179 S. W. 301.

That an ordinance requiring procurement of a license as a condition to the right to operate a jitney gave the city authorities discretionary power to grant or refuse a license did not render it void.—Id.

⚡14 (Ark.) An ordinance requiring a license "for transportation within city limits" held not to apply to transportation from points within the city to points outside, and vice versa.—McDonald v. City of Paragould, 179 S. W. 335.

⚡15 (Tenn.) One who merely displays samples and takes orders, which he forwards to his employer for approval, collecting no money and delivering no goods, is a mere solicitor, and not liable for a merchant's license fee.—Lowenthal v. Underdown, 179 S. W. 129.

⚡29 (Tex.Civ.App.) A city, authorized to enact ordinance for licensing and regulating motor busses, held authorized to make an additional charge of \$1 for a new certificate, for a change of route, or for an increase in the seating capacity.—Booth v. City of Dallas, 179 S. W. 301.

⚡39 (Tex.Civ.App.) Damages sustained from defendant's failure to furnish electric current for theater building before plaintiff commenced business held recoverable, although he did not have license for such business.—City of Brownsville v. Tumlinson, 179 S. W. 1107.

II. IN RESPECT OF REAL PROPERTY.

⚡58 (Ky.) Where defendant granted plaintiff license to use a way over its land with the express condition that it might be revoked at pleasure, plaintiff's construction of a permanent way will not estop defendant from revoking the license.—Kentucky Distilleries & Warehouse Co. v. Warwick Co., 179 S. W. 611.

LIENS.

See Animals, ⚡26; Attorney and Client, ⚡172, 189; Judgment, ⚡759, 788; Mechanics' Liens; Sales, ⚡312; Vendor and Purchaser, ⚡253-296.

LIFE ESTATES.

See Deeds, ⚡129.

⚡17 (Ky.) A life tenant is not bound to make any permanent improvements on the estate, and if he makes them it will be presumed that they are for his own benefit, and he cannot recover anything therefor from the remaindermen or reversioners.—Neel's Ex'r v. Noland's Heirs, 179 S. W. 430.

⚡23 (Ky.) In absence of evidence, no presumption would be indulged that money from wife's sale of her separate realty, with the husband's consent, was received or spent by her, or was reinvested under the terms of her deed.—Neel's Ex'r v. Noland's Heirs, 179 S. W. 430.

Under the terms of her deed, wife's expenditure of the amount received from a sale of part

of the land, after her husband's death, in making permanent improvements on a farm, to that extent satisfied the requirement as to reinvestment.—Id.

⚡25 (Tenn.) Under Shannon's Code, § 4184, a life tenant cannot create a lease which will extend beyond his holding; the remainderman having the right to ratify or reject the lease.—Turner v. Turner, 179 S. W. 132.

Where, after the death of a life tenant, the remainderman sought to recover possession of the land and compensation from lessees for use, there was no ratification of the lease, within Shannon's Code, § 4184, authorizing an apportionment of rent.—Id.

Where a life tenant dies, and the remainderman does not affirm a lease contract, the life tenant's lessee may collect the emblements without payment of any compensation.—Id.

LIFE INSURANCE.

See Insurance, ⚡515.

LIMITATION OF ACTIONS.

See Adverse Possession; Criminal Law, ⚡147; Insurance, ⚡622; Reformation of Instruments, ⚡32; Taxation, ⚡805.

I. STATUTES OF LIMITATION.

(B) Limitations Applicable to Particular Actions.

⚡37 (Tex.Civ.App.) Action to recover money paid under mistake of fact held not barred by the two-year statute of limitations.—Lindsay v. Vogelsang, 179 S. W. 58.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

⚡46 (Mo.App.) The statute of limitations began to run on a guaranty of a bond secured by a corporate mortgage incorporating in the bond the provision of the mortgage that the debt should mature in case of default in interest at the option of the trustee when the trustee exercised such option irrespective of the due date of the bond.—Brinsmade v. Johnson, 179 S. W. 967.

The statute of limitations began to run on such guaranty by virtue of a provision in the mortgage that the debt should mature in case of sale by the trustee when such sale took place.—Id.

⚡55 (Tenn.) Where a railroad overflows lands through negligence in allowing ditch to fill up, the overflow depositing gravel and cinders, it constitutes recurrent or continuing damages under which a distinct right of action arises with each wrongful act.—Cincinnati, N. O. & T. P. Ry. Co. v. Roddy, 179 S. W. 143.

Damages recoverable for overflowing lands through filling up of railroad ditch held only such as accrued within the period of the statute of limitations, based on the condition of the land at the beginning of such period.—Id.

(H) Commencement of Action or Other Proceeding.

⚡121 (Ky.) Under Civ. Code Prac. § 134, a petition in an action against a corporation may be amended by inserting the correct name of the corporation, where the name as given was incorrect and service of summons on such petition will toll limitations.—Imperial Jellico Coal Co. v. Neff, 179 S. W. 829.

⚡124 (Ky.) Where a widow's action for the wrongful death of her husband, brought under Ky. St. § 4, had been begun within a year from his death, an application of his infant children to come into the case as parties plaintiff was not barred by the one-year statute of limitations, though not made until after one year.—Archer v. Bowling, 179 S. W. 16.

⚡130 (Tenn.) Under federal Employers' Liability Act, the limitation of two years is a limitation of the right to sue at all, so that Shannon's Code, § 4446, relating to commencement of new action, would not apply, and plaintiff could not maintain a suit brought within two years, within one year after his voluntary dismissal.—Vaught v. Virginia & S. W. R. R., 179 S. W. 314.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⚡177 (Ky.) In action for reformation of deed, complaint *held* not defective for failure to negative the running of the statute of limitation.—Kirk v. Kirk's Ex'r, 179 S. W. 1065.

LIMITATION OF LIABILITY.

See Carriers, ⚡159-163, 218; Telegraphs and Telephones, ⚡54.

LIQUIDATED DAMAGES.

See Damages, ⚡78.

LIQUOR SELLING.

See Intoxicating Liquors.

LIVE STOCK.

See Animals; Carriers, ⚡205-230.

LOAN ASSOCIATIONS.

See Building and Loan Associations.

LOGS AND LOGGING.

⚡2 (Ark.) Evidence *held* to show that defendant bought land with notice of plaintiff's prior purchase of the standing timber.—Cooksey v. Hartzell, 179 S. W. 506.

Subsequent conduct of the purchaser of land *held* corroboration of the vendor's testimony that he was informed before the purchase of prior sale of standing timber.—Id.

⚡3 (Ark.) Under a provision for removal of standing timber in a conveyance thereof, *held*, that the grantee must remove as expeditiously as possible.—Louis Werner Sawmill Co. v. Seesoms, 179 S. W. 185.

A logging company required by its deeds to remove timber as expeditiously as possible could *grant* to another company no greater rights than it possessed, and the limitation in its conveyances to another was measured by its own capacity, and not by the capacity of its grantee.—Id.

Evidence in a suit to reform timber conveyances as to the time of removal, with a cross-bill claiming forfeiture and a cancellation of the deeds, *held* to sustain a finding for the cross-complainants.—Id.

⚡3 (Ark.) The time limited to a purchaser of standing timber to remove it does not run during interference with his operations by the owner of the land.—Cooksey v. Hartzell, 179 S. W. 506.

⚡3 (Ky.) In an action for the balance advanced on a timber contract, alleged to have been paid by an order on cross-defendants, in which the measurement of logs sold by defendants to cross-defendants was the issuable fact, evidence *held* to sustain verdict for defendants against cross-defendants.—Ramey v. Ironton Lumber Co., 179 S. W. 207.

In an action to recover the balance of money advanced on a timber contract, with cross-actions by defendants against parties to whom they had sold the timber, instruction *held* to properly submit the only issue involved.—Id.

⚡3 (Ky.) A conveyance of land *held* to reserve to the grantors an estate in the timber

with a right to enter to remove.—Wilson v. Marsee, 179 S. W. 410.

LOST INSTRUMENTS.

See Records.

LUMBER.

See Logs and Logging.

MALICE.

See Libel and Slander, ⚡62; Torts, ⚡4.

MALICIOUS PROSECUTION.

II. WANT OF PROBABLE CAUSE.

⚡21 (Ky.) Advice of counsel, where there is a complete disclosure to the attorney, is a defense to an action of malicious prosecution.—Carrigan v. Graham, 179 S. W. 198.

V. ACTIONS.

⚡64 (Ky.) In an action for malicious prosecution, evidence *held* to show that defendant made full and complete disclosure to counsel and acted upon his advice.—Carrigan v. Graham, 179 S. W. 198.

⚡68 (Mo.App.) Punitive damages are allowable in a suit for the malicious prosecution of a civil action.—Rivers v. Norman, 179 S. W. 990.

MANDAMUS.

I. NATURE AND GROUNDS IN GENERAL.

⚡6 (Tex.Civ.App.) Where the trial court made final an order enjoining a sale of land on execution, mandamus to compel the sheriff to levy execution will not be issued until the order is set aside.—Wilson v. Dearborn, 179 S. W. 1102.

⚡10 (Tex.) Mandamus will not lie to compel action by the courts unless the duty to act is plain.—Coutress v. City of San Antonio, 179 S. W. 515.

II. SUBJECTS AND PURPOSES OF RELIEF.

(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

⚡34 (Ky.) Under Const. § 110, a writ of mandamus will not lie to compel the circuit judge to reverse his decision, quashing service of summons on the ground that defendant was not duly served.—Speckert v. Ray, 179 S. W. 592.

MANDATORY INJUNCTION.

See Injunction, ⚡80.

MANSLAUGHTER.

See Homicide.

MARKET VALUE.

See Evidence, ⚡323.

MARRIAGE.

See Bigamy; Breach of Marriage Promise; Death, ⚡31; Divorce; Husband and Wife; Slaves.

⚡13 (Tex.Cr.App.) A real common-law marriage, properly agreed to and consummated, is a legal marriage.—Nye v. State, 179 S. W. 100.

⚡40 (Ky.) Presumption of marriage from 50 years' cohabitation under claim of marriage *held* not overthrown by testimony of woman's child, an interested witness, that his mother and step-father began cohabiting without marriage when

witness was 5 years old.—*Rockcastle Mining, Lumber & Oil Co. v. Baker*, 179 S. W. 1070.

Presumption of marriage from cohabitation in apparent matrimony is less easily overthrown than other presumptions of fact.—*Id.*

—47 (Tex. Cr. App.) In determining whether there was a valid common-law marriage, the acts of the man in subsequently celebrating a ceremonial marriage with another, without divorce, are admissible.—*Nye v. State*, 179 S. W. 100.

MARRIED WOMEN.

See Husband and Wife.

MASONIC SOCIETIES.

See Beneficial Associations, —4.

MASSEURS.

See Physicians and Surgeons, —6.

MASTER AND SERVANT.

See Appeal and Error, —1064; Commerce, —8, 27; Death, —43; Evidence, —258, 352; False Imprisonment, —15; Limitation of Actions, —130; Negligence, —101; Pleading, —369, 403; Railroads, —281; Removal of Causes, —47; Telegraphs and Telephones, —48; Trial, —255, 296.

I. THE RELATION.

(A) Creation and Existence.

—9 (Mo. App.) Where an employé remains in employment after expiration of employment contract and without new agreement, the original contract is presumed to continue.—*Morris v. Z. T. Briggs Photographic Supply Co.*, 179 S. W. 783.

(C) Termination and Discharge.

—31 (Mo. App.) Plaintiff, employed as a music teacher under a contract for one year, held not entitled to recover as for a wrongful discharge.—*Lemaire v. Strassberger Conservatories of Music Co.*, 179 S. W. 959.

—40 (Ky.) In an action for damages for breach of a contract, to pay plaintiff to pump water from a mine, evidence held sufficient to support the verdict for plaintiff.—*Trosper Coal Co. v. Rader*, 179 S. W. 1023.

—41 (Mo. App.) In a sales' agent's action for breach of his contract of employment, measure of damages was salary earned, plus expenses, and a sum deposited by agent to cover the price of goods delivered to him.—*Watkins v. Donnell*, 179 S. W. 980.

II. SERVICES AND COMPENSATION.

(A) Performance of Services.

—48 (Mo. App.) Under contract of employment for year as music instructor, held, that defendant did not bind itself to assign plaintiff any particular number of pupils or hours of instruction, or to compensate plaintiff except for the actual number of hours devoted to the employment.—*Lemaire v. Strassberger Conservatories of Music Co.*, 179 S. W. 959.

(B) Wages and Other Remuneration.

—70 (Mo. App.) Separable express contract for employment and commissions held not abrogated as to commissions by increase of salary.—*Morris v. Z. T. Briggs Photographic Supply Co.*, 179 S. W. 783.

—79 (Mo. App.) Acceptance by a servant of check for "all salary to date" does not waive right to commissions under separable covenant.—*Morris v. Z. T. Briggs Photographic Supply Co.*, 179 S. W. 783.

—80 (Mo. App.) Instruction, in action for commissions under contract of employment by an employé against employer, held inapplica-

ble to the issues as developed by the evidence.—*Morris v. Z. T. Briggs Photographic Supply Co.*, 179 S. W. 783.

Complaint alleging express contract for servant's compensation is not supported by proof of implied contract.—*Id.*

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

—89 (Ky.) Plaintiff employed by defendant as a car repairer while walking upon its track under foreman's order to repair the house of a son of defendant's superintendent held not within scope of his employment, and a trespasser.—*Cumberland R. Co. v. Walton*, 179 S. W. 245.

—89 (Ky.) Employé held not a volunteer, but under protection of safe place doctrine while assisting another to prepare the place for plaintiff's work.—*Moses v. Proctor Coal Co.*, 179 S. W. 1043.

Servant going to and from work is within protection of safe place doctrine.—*Id.*

(B) Tools, Machinery, Appliances, and Places for Work.

—101, 102 (Ky.) A master operating a boiler is required to exercise ordinary care to prevent injury.—*Mason & Hurst Co. v. Feltner*, 179 S. W. 222.

—101, 102 (Ky.) That a master gives a servant an assurance of safety does not impose absolute liability, regardless of negligence, but only deprives the master of the advantage of the pleas of assumption of risk and contributory negligence, unless the defect was obvious.—*Thomas v. National Concrete Const. Co.*, 179 S. W. 439.

—103 (Ky.) Whatever was done in attempting to replace a log, whereby the sawyer was killed, being actually done by him, or supervised and directed by him, the men working with him obeying his signals or orders, the master was not liable.—*Lucas Land & Lumber Co. v. Cook's Adm'r*, 179 S. W. 582.

—103 (Ky.) The master's duty to provide reasonably safe tools and appliances for work and exercise ordinary care to keep them reasonably safe is one which he cannot escape by delegating to another.—*Phillips v. Corbin & Fannin*, 179 S. W. 586.

—107 (Ky.) Railway signal torpedoes, placed on tracks as signals, are not within the rule requiring explosives to be handled with greatest care.—*Gordon v. Chesapeake & O. Ry. Co.*, 179 S. W. 210.

—112 (Ky.) Railway company is not negligent in placing signal torpedo on track, and hence is not liable, when so doing, for failing to use ordinary care in providing reasonably safe place to work.—*Gordon v. Chesapeake & O. Ry. Co.*, 179 S. W. 210.

—113 (Ky.) For an engineer and conductor in charge of switching operations to leave a car on the siding so close that it endangered trainmen on passing trains is gross negligence.—*Chesapeake & O. Ry. Co. v. Shamblen*, 179 S. W. 837.

—115 (Ky.) There is no failure to furnish a sawyer a reasonably safe place to work, the mill being built in the way sawmills are usually and generally built, and containing no dangerous places beyond such as are necessarily found in all sawmills.—*Lucas Land & Lumber Co. v. Cook's Adm'r*, 179 S. W. 582.

—118 (Ky.) Ky. St. 1909, § 2739b, subsec. 7, relative to furnishing props to miners, held inapplicable where by custom or rule the duty of propping or timbering did not devolve upon the miner.—*Carter Coal Co. v. Hill*, 179 S. W. 2.

Duty of propping roof of room neck imposed by custom on coal company held not evaded by a contract requiring a contractor whom an in-

jured person was assisting to perform this work.—Id.

⇒118 (Ky.) The master operating a coal mine must not only inspect the roof of the mine in the exercise of ordinary care to provide a safe place for his servants to work, but also support the roof in a proper manner.—Carter Coal Co. v. Prichard's Adm'r, 179 S. W. 1088.

⇒118 (Tenn.) Laws 1903, c. 237, § 28, requiring structures inside mine shafts to protect employes, *held* to apply to a mine which had completed a shaft for conducting air used by employes in going to and returning from their work.—American Zinc Co. v. Graham, 179 S. W. 138.

A master's violation of the terms of a statute requiring structures to secure safety in mine shafts was negligence per se, and made him responsible for all injuries suffered as a direct consequence thereof.—Id.

⇒124 (Ky.) The master operating a coal mine must inspect the roof of the mine in the exercise of ordinary care, to provide a safe place for his servants to work.—Carter Coal Co. v. Prichard's Adm'r, 179 S. W. 1038.

A master bound to inspect cannot avoid liability for injuries to his servant, unless the servant is also under the duty of inspection or the danger is obvious, nor is a showing of inspection conclusive on the exercise of the required degree of care.—Id.

⇒125 (Ky.) A master is liable to a servant for injury from a defective appliance only when he knows of such defect, or should have known of it by the exercise of ordinary care.—Phillips v. Corbin & Fannin, 179 S. W. 586.

⇒129 (Ky.) The act of a servant while hauling logs into a sawmill in striking a log on the skidway, moving it out of place, was not the proximate cause of the sawyer's death while attempting to replace it.—Lucas Land & Lumber Co. v. Cook's Adm'r, 179 S. W. 582.

(C) Methods of Work, Rules, and Orders.

⇒137 (Ky.) Defendant railroad *held* under the circumstances, not within the rule requiring it to keep a lookout and give warning of the approach of trains for the protection of its employes on the track.—Cumberland R. Co. v. Walton, 179 S. W. 245.

As to railroad employé using its track in defendant's business, where their presence should have been reasonably anticipated, the railroad was required to keep a lookout and to give warning.—Id.

Where employé of defendant railroad, while a trespasser on its track, stepped in front of an approaching engine and was not discovered in time to prevent collision, defendant was not negligent.—Id.

⇒137 (Tex.) Engine crew not in possession of facts from which ordinarily prudent man would have foreseen that a car inspector on a "kicked" car might alight and be injured by the engine upon a parallel track *held* under no duty to ring bell or blow whistle.—International & G. N. R. Co. v. Walters, 179 S. W. 854.

(D) Warning and Instructing Servant.

⇒155 (Tenn.) Danger of employé slipping, where scrub-woman was mopping the floor, as she stepped back from the machine at which she was working, *held* so obvious that no warning was required.—Standard Knitting Mills v. Hickman, 179 S. W. 385.

⇒157 (Ky.) Employé in mine warned by cross-timberer of dangerous condition of roof *held* bound to heed such warning, and not entitled to recover for injuries if he disregarded it.—Carter Coal Co. v. Hill, 179 S. W. 2.

(E) Fellow Servants.

⇒177 (Mo.App.) Master *held* not liable for servant's acts, unless done in the course of the employment and in furtherance of the master's business.—Hellriegel v. Dunham, 179 S. W. 763.

⇒185 (Tenn.) Rule as to furnishing safe place to work *held* not to comprehend negligent acts of fellow servants, rendering the place dangerous temporarily.—Standard Knitting Mills v. Hickman, 179 S. W. 385.

⇒189 (Ky.) No recovery may be had from a master for an injury to a servant not causing death resulting from the ordinary negligence of a superior servant having immediate control of the injured servant.—Consolidated Coal Co. v. Baldrige, 179 S. W. 18.

⇒190 (Ky.) Assurance of safety given one assisting contractor in mine by agent selected by coal company to cross-timber the rooms *held*, in effect, an assurance by the coal company.—Carter Coal Co. v. Hill, 179 S. W. 2.

⇒190 (Ky.) Railway company *held* liable for gross negligence of its foreman, in failing to observe torpedo placed on track before running over it with a hand car.—Gordon v. Chesapeake & O. Ry. Co., 179 S. W. 210.

⇒190 (Tenn.) Foreman of crew digging a ditch *held* authorized to bind his employer by assurances as to the safety of the ditch.—City of Chattanooga v. Powell, 179 S. W. 808.

⇒198 (Ky.) The negligence of a conductor and engineer who left a car on the siding so close to the end that it endangered a fireman who took the engineer's place temporarily *held* that of the superior servants.—Chesapeake & O. Ry. Co. v. Shamblen, 179 S. W. 837.

⇒198 (Mo.App.) Under Rev. St. 1909, §§ 5434, 5439, that shop employes engaged in bending railway rails were fellow servants, *held* not to affect employer's liability for negligence; the rails being intended for a railroad already in operation.—Hellriegel v. Dunham, 179 S. W. 763.

⇒199 (Ky.) Brakeman on coal mine motor train and motorman *held* not fellow servants.—Consolidated Coal Co. v. Baldrige, 179 S. W. 18.

⇒202 (Ky.) For a fireman to recover for injuries caused by the negligence of the engineer and the conductor on the same train, who were his superiors, their negligence must be gross.—Chesapeake & O. Ry. Co. v. Shamblen, 179 S. W. 837.

⇒202 (Mo.App.) Employer *held* liable for employé's recklessness, injuring another employé, though he was actuated by malice against the foreman and intended to injure the foreman.—Hellriegel v. Dunham, 179 S. W. 763.

(F) Risks Assumed by Servant.

⇒203 (Tex.Civ.App.) Where a servant assumes a risk, it will defeat recovery for injuries caused thereby in any sum.—Pecos & N. T. Ry. Co. v. Winkler, 179 S. W. 691.

⇒204 (Ky.) A railroad company *held* not negligently using a defective appliance on a water tower, which would, under federal Employers' Liability Act, deprive it of advantage of defense of assumption of risk in an action by plaintiff, who slipped on the spout he knew was wet.—Davis v. Chesapeake & O. Ry. Co., 179 S. W. 422.

⇒204 (Tenn.) Miner, knowing that employer had failed to comply with Laws 1903, c. 237, § 28, requiring protection on inside shaft, *held* not to have assumed the risk of injury while ascending the shaft.—American Zinc Co. v. Graham, 179 S. W. 138.

⇒205 (Ky.) Where the master's electrician repaired its coal-punching machine and assured a servant that it was all right, the servant

might rely thereon and continue its use, unless the danger was so obvious that an ordinarily prudent person would refuse to work.—*Stearns Coal & Lumber Co. v. Calhoun*, 179 S. W. 590.

☞206 (Ky.) The dangers which a servant assumes when he undertakes his work are those inherent in the work and growing out of it.—*Phillips v. Corbin & Fannin*, 179 S. W. 586.

☞210 (Ky.) Employé of railway company assumes all risks ordinarily incident to his employment, including risk of injury by explosion of signal torpedoes placed on track.—*Gordon v. Chesapeake & O. Ry. Co.*, 179 S. W. 210.

☞213 (Ky.) A railroad employé held to assume the risk of injury in the mode of descent from a water tower adopted by him.—*Davis v. Chesapeake & O. Ry. Co.*, 179 S. W. 422.

☞216 (Ky.) A servant does not assume the risk arising from want of sufficient and skillful fellow servants, unless the incompetence was such that an ordinary man would not have continued work.—*Lack Singletree Co. v. Cherry*, 179 S. W. 1071.

While a servant assumes the risk of ordinary negligence of fellow servants, the master is bound to engage reasonably competent fellow servants.—*Id.*

☞217 (Ky.) A servant never assumes risks arising from the use of defective tools and appliances, unless he knows of the defect, or it is obvious and he continues without ordinary care to save himself from injury.—*Phillips v. Corbin & Fannin*, 179 S. W. 586.

☞217 (Ky.) To prevent a servant's recovery for injury on the ground of his assumption of risk from a defective machine, it must be shown that the danger therefrom was known or clearly observable and appreciated by him.—*Stearns Coal & Lumber Co. v. Calhoun*, 179 S. W. 590.

☞217 (Ky.) Plaintiff coal miner, engaged in "robbing" pillars, who knew that the roof was unsafe and was injured, could not recover, having assumed the risk.—*Imperial Jellico Coal Co. v. Fox*, 179 S. W. 1032.

☞219 (Ky.) A master will not be exonerated from liability for injuries sustained by a servant hurt when a bucket used to carry concrete broke, on the theory that it was a simple tool.—*Thomas v. National Concrete Const. Co.*, 179 S. W. 439.

☞220 (Ky.) Where a master assures a servant there is no danger from the incompetence of a fellow servant, and the servant is injured from that cause, the master is liable, unless the danger was so obvious that an ordinarily prudent person would not have continued in the work.—*Lack Singletree Co. v. Cherry*, 179 S. W. 1071.

☞222 (Ky.) A laborer directed by his foreman to remove a wooden horse from its position across a freshly cut ditch assumed the obvious risk of its caving in from his placing his weight too close to the edge.—*White v. Louisville Gas & Electric Co.*, 179 S. W. 418.

☞222 (Ky.) Plaintiff, who was bound to keep a railroad water tower in repair, held not to be acting under the direct orders of his superior, so as to render the employer liable for injuries occasioned by a slip on the wet spout.—*Davis v. Chesapeake & O. Ry. Co.*, 179 S. W. 422.

☞224 (Tex.Civ.App.) Where the servant is injured while at work, but in doing an unnecessary act of his own volition he assumes the risk, and the master is not liable.—*Pecos & N. T. Ry. Co. v. Winkler*, 179 S. W. 691.

(G) Contributory Negligence of Servant.

☞231 (Tenn.) A laborer digging a ditch held not negligent in accepting the assurances of the foreman that the ditch was not dangerous and continuing work there.—*City of Chattanooga v. Powell*, 179 S. W. 808.

☞240 (Mo.App.) A switchman held not negligent in kicking aside the coupler on an engine on which he was riding, whereby his foot was crushed, where the engineer failed to heed his signals to stop.—*Trowbridge v. Kansas City & W. B. Ry. Co.*, 179 S. W. 777.

(H) Actions.

☞252 (Tex.Civ.App.) Taking written statement of plaintiff's claim by agent of defendant employer waives a stipulation in the contract of employment barring the employé's action, unless written notice is given within 30 days.—*Pecos & N. T. Ry. Co. v. Winkler*, 179 S. W. 691.

Under Rev. St. 1911, art. 5714, a contract of employment of the plaintiff switchman for defendant railway requiring notice to be given in 30 days after injury is void, and will not defeat the plaintiff's action in spite of failure to give notice.—*Id.*

☞258 (Tenn.) Dismissal of action against master for death of plaintiff's intestate for failure to make declaration more specific, and to designate the names of the vice principals alleged to have been careless and the particular rule violated by defendant, held erroneous.—*Lowry v. Southern Ry. Co.*, 179 S. W. 125.

☞264 (Ky.) On pleadings in a servant's action for injury brought against a railroad and its contractor, held, that the issue raised by the pleadings was whether the work was done by an independent contractor.—*Mason & Hurst Co. v. Feltner*, 179 S. W. 222.

☞264 (Mo.App.) Act of employé, though actuated by malice towards the foreman, held negligent as to another employé injured thereby; and, the petition having alleged the character of the act in relation to the injured employé, there was no variance.—*Hellriegel v. Dunham*, 179 S. W. 763.

☞265 (Ky.) In a servant's action for injury, held, that the burden was on the defendant railroad to show that the work on its tunnel was done by an independent contractor.—*Mason & Hurst Co. v. Feltner*, 179 S. W. 222.

An explosion of a boiler does not give rise to a presumption of negligence.—*Id.*

☞265 (Ky.) In an action for injuries to a servant, negligence will not be presumed from the fact that the servant had been injured.—*Southern Mining Co. v. Lewis' Adm'r*, 179 S. W. 1067.

☞270 (Mo.App.) In a switchman's action for injuries under the federal Employers' Liability Act, evidence that the couplers, whereby plaintiff was injured, would not meet because they were broken held admissible, although the action was not based on the Safety Appliance Act.—*Trowbridge v. Kansas City & W. B. Ry. Co.*, 179 S. W. 777.

☞274 (Tex.Civ.App.) In the absence of a specific rule forbidding employés to make couplings by going between the cars, evidence of the custom of employés in that regard is admissible to rebut contributory negligence.—*Pecos & N. T. Ry. Co. v. Winkler*, 179 S. W. 691.

☞278 (Ky.) Evidence held to show that duty of propping roof of mine was on company, but that under contract this duty devolved upon a contractor whom plaintiff was assisting in the work of removing coal.—*Carter Coal Co. v. Hill*, 179 S. W. 2.

☞278 (Ky.) In action by an employé of a defendant railroad for injury upon its tracks while a trespasser, evidence held to show that defendant could not have prevented the injury by the exercise of ordinary care after discovering his peril.—*Cumberland R. Co. v. Walton*, 179 S. W. 245.

☞278 (Ky.) A prima facie case of negligence on the part of the master is not made out by proof of the breaking of a new bucket used to carry concrete, without showing the cause of the break or the master's knowledge of defects.—

Thomas v. National Concrete Const. Co., 179 S. W. 439.

⚡278 (Tenn.) Proof of conformity by employer to customary usage, though making a prima facie case of nonliability, *held* not conclusive, but rebuttable.—Sanford-Day Iron Works v. Moore, 179 S. W. 373.

⚡278 (Tex.Civ.App.) Evidence *held* sufficient to sustain finding that defendant negligently failed to provide a reasonably safe place for plaintiff to work.—Pecos & N. T. Ry. Co. v. Winkler, 179 S. W. 691.

⚡281 (Ky.) Evidence, in a car repairer's action against a railroad for injury on its track, *held* to show contributory negligence.—Cumberland R. Co. v. Walton, 179 S. W. 245.

⚡281 (Ky.) In an action by a fireman, hurt when his head came in contact with a car on a siding as he leaned from the engine, his testimony *held* not to show that he knew of the presence of the car.—Chesapeake & O. Ry. Co. v. Shamblen, 179 S. W. 837.

⚡281 (Tex.Civ.App.) Evidence *held* to sustain finding that plaintiff was not guilty of contributory negligence.—Pecos & N. T. Ry. Co. v. Winkler, 179 S. W. 691.

⚡285 (Ky.) On evidence in an action for personal injury while cutting coal with a punching machine, *held*, that whether the machine's defective condition was the proximate cause of the injury was for the jury.—Stearns Coal & Lumber Co. v. Calhoun, 179 S. W. 590.

⚡286 (Ark.) In action by employé injured as result of sham battle between other employés during the noon hour, employer's negligence *held* a question for the jury.—Barrentine v. Henry Wrape Co., 179 S. W. 328.

⚡286 (Ky.) In an action for the death of a miner struck by a wild empty mine car traveling downgrade outside the mine, the question of the mine company's negligence *held* for the jury.—Southern Mining Co. v. Lewis' Adm'r, 179 S. W. 1067.

⚡286 (Mo.App.) In an action by a switchman whose foot was crushed between the couplers of a car which he was attempting to couple, evidence *held* sufficient to submit to the jury the negligence of the engineer in failing to stop the engine on signal.—Trowbridge v. Kansas City & W. B. Ry. Co., 179 S. W. 777.

⚡286 (Tex.) Where an engine crew has information giving notice that a car inspector may leave the car on which he rides parallel with the engine's track and put himself in position to be struck by the engine, whether the crew should foresee he would do so was a question of fact for the jury.—International & G. N. R. Co. v. Walters, 179 S. W. 854.

In an action by car inspector for injuries received in leaving a "kicked" car and running across a parallel track, where he was struck by an engine, whether its crew had notice that he might do so *held* for the jury under the evidence.—Id.

⚡288 (Ky.) On evidence in a servant's action for injury while running a coal-punching machine, *held*, that whether he assumed the risk was for the jury.—Stearns Coal & Lumber Co. v. Calhoun, 179 S. W. 590.

⚡289 (Ky.) The question, whether the deceased employé of a mine killed by falling stone exercised ordinary care for his own safety, *held* on the evidence for the jury.—Carter Coal Co. v. Prichard's Adm'r, 179 S. W. 1038.

⚡289 (Tex.Civ.App.) Question whether a coupler could have been operated from the side of the car so as to make plaintiff switchman guilty of contributory negligence in going between the cars is for the jury.—Pecos & N. T. Ry. Co. v. Winkler, 179 S. W. 691.

⚡291 (Tex.Civ.App.) Instruction in switchman's action for injuries *held* erroneous for attempting to combine contributory negligence and

assumption of risk.—Pecos & N. T. Ry. Co. v. Winkler, 179 S. W. 691.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

⚡301 (Mo.App.) Where defendant's chauffeur let another person invited to ride with him, take the wheel, such other person's acts were the acts of the servant for which the defendant was liable.—Slothower v. Clark, 179 S. W. 55.

⚡302 (Mo.App.) The driver of defendant's automobile *held* within the scope of his employment when plaintiff was injured.—Slothower v. Clark, 179 S. W. 55.

⚡302 (Mo.App.) If a servant is doing the work for which he is employed, the master is liable to a third person for an injury caused by either the manner or the mode of performance.—Hellriegel v. Dunham, 179 S. W. 763.

A master is liable for the willful or malicious acts of his servant, where they are done in the course of the employment and within its scope.—Id.

⚡305 (Mo.App.) Mere orders *held* not to absolve the master from liability for servant's acts.—Slothower v. Clark, 179 S. W. 55.

⚡305 (Mo.App.) If the act of a servant is within the scope of his employment, the master will be liable, though the servant does not obey his orders as to the manner of its performance.—Hellriegel v. Dunham, 179 S. W. 763.

(C) Actions.

⚡333 (Ky.) In an action against the owner of an automobile for damages in collision, verdict for plaintiff against the owner, who was not in the car, exonerating the chauffeur who had driven the car, through whose negligence alone the owner was liable, could not be complained of by such owner.—Weil v. Hagan, 179 S. W. 835.

MATERIALITY.

See Evidence, ⚡143.

MEASURE OF DAMAGES.

See Damages, ⚡108, 113.

MECHANICS' LIENS.

See Jury, ⚡13.

II. RIGHT TO LIEN.

(D) Persons Entitled in General.

⚡93 (Tex.Civ.App.) Person contracting to install heating and plumbing in building and abandoning contract upon owner's refusal to pay an estimate *held* entitled to a lien under Rev. St. 1911, art. 5621.—King v. Collins, 179 S. W. 899.

VIII. INDEMNITY AGAINST LIENS.

⚡313 (Tex.Civ.App.) Stipulation in building contractor's bond for withholding of payment to contractor until claimants are paid *held* not to authorize owner to pay claims, whether there was any liability or not.—Texas Fidelity & Bonding Co. v. Brown, 179 S. W. 1125.

MENTAL CAPACITY.

See Criminal Law, ⚡452.

MENTAL SUFFERING.

See Telegraphs and Telephones, ⚡68.

MINES AND MINERALS.

See Master and Servant, ⚡118, 124, 157, 199, 204, 217.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

(B) Mining Partnerships and Companies.

§105 (Tex.Civ.App.) Rev. St. 1911, tit. 25, c. 2, art. 1121, subd. 16, as amended by Acts 34th Leg. c. 144, *held* not to authorize a producing oil company organized in a foreign state to own and operate a railroad.—Continental Trust Co. v. Brown, 179 S. W. 939.

MINORS.

See Infants.

MISDEMEANOR.

See Criminal Law, §27, 801.

MISREPRESENTATION.

See False Pretenses; Fraud.

MISTAKE.

See Evidence, §483; Limitation of Actions, §37; Reformation of Instruments, §18, 19.

MODIFICATION.

See Criminal Law, §834.

MONEY RECEIVED.

§9 (Ark.) Money which has been misappropriated or obtained by fraud and afterwards paid to an innocent party cannot be recovered.—Oklahoma State Bank v. Bank of Central Arkansas, 179 S. W. 509.

§18 (Ky.) In an action against an alleged joint borrower evidence *held* to show that defendant's only agreement was to turn over to plaintiff, in return for latter's loan to defendant's subcontractor, all money received by defendant for government work.—Citizens' Trust & Guaranty Co. v. Farmers' Bank of Estill County, 179 S. W. 29.

MONOPOLIES.

See Constitutional Law, §30, 240, 296; Statutes, §143.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

§10 (Ky.) Ky. St. §§ 3915-3921, prohibiting combines or pools to regulate or fix prices of any kind of commodity *held* valid.—Gay v. Brent, 179 S. W. 1051.

Ky. St. § 3941a, authorizing combinations to pool crops of wheat and tobacco *held* unconstitutional.—Id.

§17 (Tex.Civ.App.) A contract requiring defendant to buy of plaintiff all beers which he might need, *held* in violation of the monopoly statute (Vernon's Sayles' Ann. Civ. St. 1914, arts. 7798, 7799, and 7807), and an action thereon could not be maintained.—Carroll v. Evansville Brewing Ass'n, 179 S. W. 1099.

MORTGAGES.

See Chattel Mortgages; Corporations, §480½, 482; Receivers, §155; Usury, §34.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§12 (Ky.) Under Ky. St. § 2341, holder of option to purchase land *held* to have estate which could be mortgaged, and legal title subsequently acquired inured to the benefit of the mortgagee.—Yellow Chief Coal Co.'s Trustee v. Johnson, 179 S. W. 599; Same v. Preston, Id. 602.

§13 (Ky.) As a general rule, a mortgage of property to be acquired in futuro is void as against mortgagors, creditors, or purchasers for value.—Yellow Chief Coal Co.'s Trustee v. Johnson, 179 S. W. 599; Same v. Preston, Id. 602.

§34 (Tex.Civ.App.) Where a deed, absolute in form, was a mortgage at its inception, no subsequent parol agreement could change its character.—McLemore v. Bickerstaff, 179 S. W. 536.

§37 (Ky.) Parol evidence is admissible to show that a deed absolute on its face was intended as a mortgage.—Turner v. Newberry, 179 S. W. 23.

The true consideration of an absolute deed conveying property on an oral trust for the payment of debts, and providing for the accounting of proceeds, *held* provable by parol testimony, although fraud or mistake was not alleged.—Id.

(C) Execution and Delivery.

§73 (Ky.) Where a mortgagor agreed to take a new mortgage which should not be effective until the interest on the first mortgage had been paid or settled, a recordation by the mortgagee of the new mortgage without payment of interest constituted an acceptance thereof.—Gray v. Gilliam, 179 S. W. 22.

(D) Validity.

§86 (Ark.) In suit to cancel a deed of trust, evidence *held* insufficient to sustain allegations that plaintiff agreed to purchase the land for which notes and the deed were given only if his sister also signed the notes and executed the deed.—Davis v. Hall, 179 S. W. 323.

III. CONSTRUCTION AND OPERATION.

(C) Property Mortgaged, and Estates of Parties Therein.

§139 (Tex.Civ.App.) A mortgagee, in a mortgage evidenced by a deed absolute on its face, holds only a right to have recourse to the property for satisfaction of his debt in case of default.—McLemore v. Bickerstaff, 179 S. W. 536.

One obtaining a conveyance from a grantee in a deed, absolute in form, but in fact a mortgage, acquires no title unless he is a purchaser for value and without notice that the deed was a mortgage.—Id.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

§274 (Tex.Civ.App.) Purchasers of land under a deed of trust, who placed improvements in good faith upon the property with a belief in the sufficiency of the title, which they deranged through the mortgagor, cannot recover, as against a prior mortgage, the value of such improvements.—Memphis Cotton Oil Co. v. Gist, 179 S. W. 1090.

§283 (Ky.) A vendee of real estate who assumes payment of the mortgage debt thereon is liable as principal therefor.—Gray v. Gilliam, 179 S. W. 22.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§309 (Ky.) Where a mortgage given to release another mortgage on other property recited that the first mortgage would be released as soon as the second one was accepted and recorded, the act of recording the mortgage *ipso facto* released the lien of the previous mortgage.—Gray v. Gilliam, 179 S. W. 22.

§319 (Ark.) Finding that conveyance of mortgaged property other than certain machinery was not in full satisfaction of the mortgage debt *held* not against the preponderance

of the evidence.—*Eureka Stone Co. v. Roach*, 179 S. W. 499.

IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

—356 (Tex.Civ.App.) A trustee's sale cannot be set aside because the trustee did not select the public places where notice should be posted; it appearing that, though another selected them, notices were duly posted.—*Titterington v. Deutsch*, 179 S. W. 279.

X. FORECLOSURE BY ACTION.

(J) Sale.

—522 (Ky.) Notwithstanding resale for two-thirds of the appraised value precluded redemption under Ky. St. § 1684, *held* that a mortgagee could not complain that the commissioner resold the property after it was knocked down at the first sale to the mortgagee for one-fourth of its value.—*Bethurum v. Baker*, 179 S. W. 436.

(K) Deficiency and Personal Liability.

—559 (Ky.) In action to recover on notes to which wife was not a party and to foreclose mortgage executed by her, personal judgment against her *held* erroneous.—*Chappell v. Frick Co.*, 179 S. W. 203.

MOTIONS.

See Appeal and Error, —185-242, 282-301; Criminal Law, —922-957; Indictment and Information, —133-147; Pleading, —355-369.

MOTIVE.

See Homicide, —166, 233.

MOTOR VEHICLES.

See Constitutional Law, —88; Homicide, —68; Licenses, —1, 5½, 7, 29; Master and Servant, —301, 302; Municipal Corporations, —591.

MULTIPLICITY OF SUITS.

See Infants, —58.

MUNICIPAL CORPORATIONS.

See Counties; Electricity, —4; Evidence, —32; Highways; Intoxicating Liquors; Licenses, —5½; Negligence, —23; Schools and School Districts; Street Railroads; Trial, —194.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(B) Ordinances and By-Laws in General.

—121 (Tex.Cr.App.) A jitney owner who came only within the provisions of an ordinance prescribing a \$50 license fee *held* not entitled to complain of conditions prescribing \$75 and \$100 license fees.—*Ex parte Bogle*, 179 S. W. 1193.

Where a jitney owner had never applied for a license, he could not complain that the ordinance requiring licenses was invalid because it gave the city authorities arbitrary power to grant or refuse a license.—*Id.*

Where a jitney owner charged with violating an ordinance by operating a jitney without a license complains that requirements of the ordinance that he pay a license fee and give bond amount to a prohibition, the burden is on him to establish his contention.—*Id.*

VII. CONTRACTS IN GENERAL.

—226 (Ky.) One contracting with a municipality must at his peril know the rights and powers of the officers to make contracts.—*City of Princeton v. Princeton Electric Light & Power Co.*, 179 S. W. 1074.

—243 (Tex.Civ.App.) An oral contract by a city to furnish electricity *held* binding on it, Rev. St. 1911, arts. 769-771, not specifying how such a contract shall be made.—*City of Brownsville v. Tumlinson*, 179 S. W. 1107.

—247 (Ky.) A municipality is not bound by contracts of its officers which they have no power to make, and the law does not raise any promise by the city to pay for benefits received thereunder.—*City of Princeton v. Princeton Electric Light & Power Co.*, 179 S. W. 1074.

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Therefor.

—265 (Ark.) Improvement districts *held* to have only powers and liabilities conferred by statutes.—*Eickhoff v. City of Argenta*, 179 S. W. 367.

—269 (Ark.) "Street" defined as including all parts of the way, roadway, gutters, and sidewalks.—*Eickhoff v. City of Argenta*, 179 S. W. 367.

—282 (Ky.) Under Ky. St. §§ 3567, 3572, council of city of fourth class may, in its discretion, improve only part of the width of a street, which discretion, if abused, may be corrected.—*City of Maysville v. Davis*, 179 S. W. 463.

(B) Preliminary Proceedings and Ordinances or Resolutions.

—289 (Ky.) Assessment warrants against abutting property owners for cost of reconstructing curbing and guttering under single ordinance for reconstruction of carriageway, curbing, and guttering, were not invalid under Ky. St. §§ 3565, 3566.—*Weber v. Knepple*, 179 S. W. 19.

—302 (Ky.) Under Ky. St. §§ 3487, 3567, relating to cities of the fourth class, an ordinance for the original construction of a street is not valid without publication.—*City of Maysville v. Davis*, 179 S. W. 463.

(C) Contracts.

—352 (Ark.) Under contract, paving district *held* not required to give contractors quantity of work stated in proposal for bids, but bound to permit them to do all work required while the contract was in force.—*Burke v. Board of Improvement Paving Dist. No. 5*, 179 S. W. 654.

—354 (Ky.) Contract for a public improvement *held* to be subject to modification, either by council by valid ordinance, or by act of engineer and paving committee, if duly approved by the council.—*City of Maysville v. Davis*, 179 S. W. 463.

—362 (Ark.) Finding that paving district was not entitled to damages for delay in completing paving *held* warranted, where both parties had recognized that the work could not be completed within the specified time.—*Burke v. Board of Improvement Paving Dist. No. 5*, 179 S. W. 654.

—365 (Ky.) In the absence of fraud or collusion between the council and contractors, the acceptance of an improvement by the council after having been completed in accordance with the ordinance and contract is conclusive on property owners.—*City of Maysville v. Davis*, 179 S. W. 463.

—366 (Ark.) Paving district in paving streets *held* to have exercised option to do this at contractors' expense, and the contractors were entitled to the difference between the contract price and the cost to the district.—*Burke v. Board of Improvement Paving Dist. No. 5*, 179 S. W. 654.

—366 (Ky.) The provision of a town's charter that contracts involving expenditure of more than \$100 shall not be made by it except through competitive bidding does not prevent it itself

completing a street improvement, on failure of a contractor, without advertising for further bids.—*Bayes v. Town of Paintsville*, 179 S. W. 623.

(D) Damages.

—385 (Ark.) A city is liable for damages to abutting owner from change of grade of street.—*Eickhoff v. City of Argenta*, 179 S. W. 367.

—400 (Ark.) Kirby's Dig. § 5672, providing that street improvements shall be made with reference to grades as fixed by the city ordinances, held to impose liability for damages caused by change of established grade on city, and not on improvement district.—*Eickhoff v. City of Argenta*, 179 S. W. 367.

—404 (Ark.) Complaint against an improvement district held fatally defective for failure to allege that the district was created for the purpose of grading the street in front of plaintiff's buildings.—*Eickhoff v. City of Argenta*, 179 S. W. 367.

(E) Assessments for Benefits, and Special Taxes.

—406 (Ky.) Ky. St. § 3706, expressly empowers trustees of a town of the sixth class to construct sewers and streets, and assess abutting property, not exceeding 50 per cent. of the value of the land.—*Bayes v. Town of Paintsville*, 179 S. W. 623.

—407 (Ky.) Assessment of cost of curbing and guttering against abutting property held not double taxation, on theory that bonds issued for reconstruction of street was also intended to cover the curbing and guttering.—*Shuey v. Trapp*, 179 S. W. 578.

—407 (Ky.) A local assessment for the cost of a local improvement held not a "tax" within Const. §§ 157, 171, limiting tax rate and requiring uniformity of taxes.—*Vogt v. City of Oakdale*, 179 S. W. 1037.

Ky. St. § 3643, providing for local assessments for street improvements, held constitutional.—*Id.*

—413 (Ky.) Where its charter required a street railroad company to conform its tracks to the grade of the street and keep the portion occupied in good repair, the cost of improving that portion should be assessed against the railroad company, and not abutting owners.—*City of Maysville v. Davis*, 179 S. W. 463.

Under Ky. St. §§ 3567, 3573, 3576, abutting owners on street may be charged with an improvement, notwithstanding that portion occupied by car tracks was left unimproved, and the ordinance authorizing a change was invalid, the engineer having authorized the change, and the work having been accepted.—*Id.*

—414 (Ky.) Under Ky. St. §§ 3565, 3566, cost of curbing and guttering held properly assessed against abutting property, though done in connection with reconstruction of the carriage-way of the street.—*Shuey v. Trapp*, 179 S. W. 578.

—430 (Ky.) The owner of a lot by conveying the front eight feet, reserving right to use it for ingress and egress, with provision against construction thereon, cannot exempt the rest from assessment for street improvement, as not abutting on the street.—*Bayes v. Town of Paintsville*, 179 S. W. 623.

—446 (Ky.) Abutting owners held not entitled to object to a change in the method of improving a street, where the city could not secure removal of car tracks, the change not increasing the expense.—*City of Maysville v. Davis*, 179 S. W. 463.

—446 (Ky.) That by the plan of paving streets and constructing sewers, the sewer pipes are smaller in some streets than others does not invalidate the assessments in streets having the larger pipes, absent a showing of fraud in adopting the plan.—*Bayes v. Town of Paintsville*, 179 S. W. 623.

(F) Enforcement of Assessments and Special Taxes.

—562 (Ky.) An assessment for street improvement held not invalidated by changing plan and ordinance, and letting work under the new ordinance, after a contract for some of the work under the first ordinance has been completed.—*Bayes v. Town of Paintsville*, 179 S. W. 623.

The property owner cannot, in an action by a municipality to enforce a lien for payment of an apportionment warrant for a street improvement, assert a counterclaim or set-off against it.—*Id.*

—567 (Ky.) One must allege and prove a wrong basis of apportioning cost of a street improvement, and consequent damage, to have relief on that ground against his assessment.—*Bayes v. Town of Paintsville*, 179 S. W. 623.

X. POLICE POWER AND REGULATIONS.

(A) Delegation, Extent, and Exercise of Power.

—591 (Tex. Civ. App.) Provision of ordinance licensing and regulating motor busses, requiring an inspection and a new certificate weekly, held not objectionable, as a municipal delegation of police power intrusted to it by the state.—*Booth v. City of Dallas*, 179 S. W. 301.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

—680, 681 (Ky.) Ky. St. § 3636, regulating municipal franchise grants, must be strictly followed.—*Eastern Kentucky Home Telephone Co. v. Hatcher*, 179 S. W. 7.

—682 (Ky.) An exclusive franchise to electric light and power company held beyond the power of a city to grant.—*City of Princeton v. Princeton Electric Light & Power Co.*, 179 S. W. 1074.

A franchise for more than 20 years is beyond the power of the city to grant.—*Id.*

A grant by a city of a franchise to an electric light and power company for 10 years, to begin about 4½ years later, is invalid.—*Id.*

—683 (Ky.) Purpose of Const. § 164, is to prevent municipalities from granting franchises without sufficient consideration, by compelling them to receive bids after advertisement.—*City of Princeton v. Princeton Electric Light & Power Co.*, 179 S. W. 1074.

Under Const. § 164, a city, advertising for the sale of a franchise with the right to exercise it for 10 years, cannot grant a valid franchise for a greater number of years.—*Id.*

An ordinance of a city granting a franchise for 10 years, enacted without advertising and receiving bids as required by Const. § 164, is void.—*Id.*

—684 (Ky.) Any ambiguity in an ordinance granting a franchise as to the time in which it is to be enjoyed will be construed more strictly against the grantee.—*City of Princeton v. Princeton Electric Light & Power Co.*, 179 S. W. 1074.

—697 (Tenn.) Where a statute regulates jitneys and prohibits their operation, except upon conditions named, but they are operated in violation of law, with danger to persons and property, they may be enjoined at the suit of an individual showing special damage.—*Memphis St. Ry. Co. v. Rapid Transit Co.*, 179 S. W. 635.

Relief from an injunction against a nuisance, obstructing the highway, need not be sought by an abutting owner, but may be had by any individual who can show special damage to himself.—*Id.*

—703 (Tenn.) The Legislature, being endowed with police power to regulate the use of streets in public places, may prescribe the conditions with which jitneys must comply in or-

der to operate.—*City of Memphis v. State*, 179 S. W. 631.

—703 (Tenn.) Under Acts 1915, c. 60, a jitney company is altogether without right to do business on the streets of a city, which has passed no ordinance pursuant to the act, and the defendants have failed to procure any license or execute any bond under the act.—*Memphis St. Ry. Co. v. Rapid Transit Co.*, 179 S. W. 635.

—703 (Tex.Cr.App.) Under Austin city charter, *held*, that the city could enact all reasonable ordinances necessary to regulate the handling of automobiles, including jitneys, and the use of street by persons operating them in the carriage of passengers for hire.—*Ex parte Bogle*, 179 S. W. 1103.

A jitney ordinance requiring an indemnity bond or filing of insurance policy as prerequisite to a license *held* not objectionable as creating a liability against the licensee or his bondsmen in favor of strangers to the licensee and licensor.—*Id.*

—705 (Mo.App.) Ordinance limiting speed of automobiles to 12 miles an hour *held* not to authorize such speed under all circumstances and not conclusive that speed of 10 miles an hour was not negligence.—*Ginter v. O'Donoghue*, 179 S. W. 732.

Under Rev. St. 1909, § 8523, care required of automobile driver *held* to be determined according to attending and surrounding circumstances and the exigencies of the situation.—*Id.*

—705 (Mo.App.) Owner of automobile, driven by chauffeur negligent in failing to see boy approaching street crossing on roller skates at a negligent rate of speed in time to stop the car to avoid a collision, *held* liable for the boy's death.—*Hopfinger v. Young*, 179 S. W. 747.

—706 (Ky.) Under Civ. Proc. § 129, variance between petition and proof in action against automobile owner and his chauffeur for injuries sustained by plaintiff in collision with the car *held* immaterial.—*Weil v. Hagan*, 179 S. W. 835.

—706 (Mo.App.) Where an action for injuries to a person struck by an automobile is not submitted specifically upon the theory of the humanitarian or last chance doctrine, contributory negligence will defeat a recovery.—*Ginter v. O'Donoghue*, 179 S. W. 732.

Contributory negligence of person struck by conveyance not confined, like a street car, to tracks suggesting danger, *held* ordinarily a question for the jury.—*Id.*

Evidence *held* not to show conclusively that plaintiff failed to look for vehicles before crossing street or looked so carelessly as not to see what should have been seen.—*Id.*

Act of crossing street at a place other than a crossing at a street intersection, though to be considered, *held* not negligence as a matter of law.—*Id.*

Plaintiff in walking 15 or 20 steps, or about 33½ feet, after looking for automobiles before starting across street, *held* not negligent as a matter of law in failing to continually look behind her.—*Id.*

XII. TORTS.

(B) Acts or Omissions of Officers or Agents.

—747 (Ark.) Improvement district *held* not liable for damages occasioned by a change of street grade, caused by negligence of its agents in failing to conform to grade as fixed by city.—*Eickhoff v. City of Argenta*, 179 S. W. 367.

(C) Defects or Obstructions in Streets and Other Public Ways.

—762 (Ky.) City granting property owner permission to place obstruction or attractive nuisance in the street *held* liable as if it had

placed the obstruction in the street itself.—*Gnau v. Ackerman*, 179 S. W. 217.

Where an obstruction placed in a street by a property owner with the permission of the city made the street unsafe, the city and the property owner were jointly and severally liable for resulting injuries.—*Id.*

—782 (Ky.) Duty of city to keep streets and sidewalks reasonably safe extends to defects caused by acts of third persons.—*Eagan v. City of Covington*, 179 S. W. 1026.

—763 (Ky.) City *held* bound to exercise ordinary care to keep streets reasonably safe for use by children as well as adults.—*Gnau v. Ackerman*, 179 S. W. 217.

If higher degree of care is required to keep streets safe for children than for adults, city *held* bound to exercise such higher degree of care.—*Id.*

—767 (Mo.App.) A municipality need not keep its streets free from ruts, and the fact that a truck driver's wheel went into a rut, he being thrown out, did not render the city liable, unless the rut rendered the street not reasonably safe for travelers exercising ordinary care.—*Morrill v. Kansas City*, 179 S. W. 759.

—788 (Ky.) Where city authorized obstruction of street by building material, *held* actual notice was not necessary to make it liable for injuries.—*Gnau v. Ackerman*, 179 S. W. 217.

—788 (Ky.) City *held* not liable for injuries from defective sidewalk caused by act of third person, unless charged with knowledge of defect.—*Eagan v. City of Covington*, 179 S. W. 1026.

City *held* not liable for injuries from defective sidewalk caused by overflow in the absence of knowledge of defect.—*Id.*

—805 (Mo.App.) Where a walk is not glaringly dangerous, a pedestrian may use it exercising ordinary care, but, if so glaringly dangerous that an ordinary person would not use it, the mere use of the walk will preclude recovery against the city.—*Morgan v. City of Kirksville*, 179 S. W. 755.

—808 (Ky.) That property owner placing obstruction in the street obtained the right to do so from the city *held* not to relieve him from the duty of leaving the street in a safe condition.—*Gnau v. Ackerman*, 179 S. W. 217.

Where an obstruction placed in a street by a property owner with the permission of the city made the street unsafe, the city and the property owner were jointly and severally liable for resulting injuries.—*Id.*

Property owner authorized to place building material in the street *held* liable for negligence of contractors employed by him.—*Id.*

—812 (Mo.App.) Under Laws 1913, p. 545, plaintiff truck driver, injured by defendant city's defective street, could maintain his action; his petition being filed within 6 days of the accident, and the city's answer within 30 days.—*Morrill v. Kansas City*, 179 S. W. 759.

—818 (Mo.App.) Where there was nothing to show that the condition of a sidewalk had not changed, evidence of its condition at the time of a second trial was inadmissible.—*Morgan v. City of Kirksville*, 179 S. W. 755.

—821 (Ky.) Where but one inference can be drawn from evidence as to liability of city on constructive knowledge of street defect, question is for court.—*Eagan v. City of Covington*, 179 S. W. 1026.

—821 (Mo.App.) In an action against a city for injuries to plaintiff truck driver through the unsafe condition of a street, it was within the jury's province to determine whether the city had been negligent in the premises.—*Morrill v. Kansas City*, 179 S. W. 759.

—822 (Mo.App.) An instruction in an action by one injured in a fall on a walk *held* erroneous, as making a mere attempt to use a de-

fective walk negligence without regard to the manner of the use.—*Morgan v. City of Kirksville*, 179 S. W. 755.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(A) Power to Incur Indebtedness and Expenditures.

§871 (Tenn.) Priv. Acts 1913 (1st Ex. Sess.) c. 18, providing for improving the streets of Bristol and issuance of bonds held not in violation of Const. art. 2, § 29, as pledging the credit of the city for abutting owners who were specially assessed for part of the improvement.—*Imboden v. City of Bristol*, 179 S. W. 147.

(C) Bonds and Other Securities, and Sinking Funds.

§918 (Tenn.) Where the credit of a city or county is to be used for a proper city or corporation purpose, bonds may be issued, if due authority is given by the Legislature, without a submission of the matter to a vote of the people.—*Imboden v. City of Bristol*, 179 S. W. 147.

XV. ACTIONS.

§1027 (Ky.) Where a city brought suit to protect its rights as against a public service corporation operating under a void franchise, the petition of a citizen to be made a party plaintiff held properly rejected.—*City of Princeton v. Princeton Electric Light & Power Co.*, 179 S. W. 1074.

MUNICIPAL COURTS.

See Courts, §189; Criminal Law, §84.

MURDER.

See Homicide.

MUTUAL AID SOCIETIES.

See Beneficial Associations.

MUTUAL BENEFIT INSURANCE.

See Insurance, §687-825.

MUTUALITY.

See Contracts, §10.

MUTUAL WILLS.

See Death, §5.

NAMES.

See Beneficial Associations; Building and Loan Associations, §4.

§14 (Mo.App.) Identity of name, in the absence of proof to the contrary, is identity of person.—*Eaker v. Harvey*, 179 S. W. 985.

NATIONAL BANKS.

See Banks and Banking, §262.

NECESSARIES.

See Husband and Wife, §19.

NE EXEAT.

See Constitutional Law, §83.

§3 (Tenn.) The writ of ne exeat will not issue for demands uncertain or contingent, and either the demand or its enforcement must be of an equitable nature.—*Caughron v. Stinespring*, 179 S. W. 152.

§6 (Tenn.) A bill, praying the issuance of a writ of ne exeat, must, by positive allegations or by facts showing the intention, set forth defendants' intended departure from the state

and the probability of loss of rights.—*Caughron v. Stinespring*, 179 S. W. 152.

NEGLIGENCE.

See Bailment, §12; Carriers, §133, 136, 213-230, 280-382; Evidence, §5; Explosives, §8; Food, §25; Gas; Homicide, §68; Master and Servant, §89-333; Municipal Corporations, §705-822; Railroads, §281-484; Street Railroads.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(B) Dangerous Substances, Machinery, and Other Instrumentalities.

§23 (Ky.) City placing attractive nuisance dangerous to children of immature years in the streets held liable for injuries sustained by them.—*Gnau v. Ackerman*, 179 S. W. 217.

(C) Condition and Use of Land, Buildings, and Other Structures.

§29 (Mo.App.) Railroad company's failure to keep gate of stock pen reasonably safe held not actionable unless it owed to injured person the duty of keeping its stock pen and premises reasonably safe.—*Woods v. Missouri Pac. Ry. Co.*, 179 S. W. 727.

§32 (Mo.App.) Person selling live stock to shipper and entering railroad stockyards for purpose of delivering them held an invitee to whom the company owed the duty of ordinary care.—*Woods v. Missouri Pac. Ry. Co.*, 179 S. W. 727.

§32 (Tenn.) A policeman, injured while examining private premises without the owner's consent, is a mere licensee, as to whom the owner need not keep the premises safe, but must only refrain from willful injury.—*Burroughs Adding Mach. Co. v. Fryar*, 179 S. W. 127.

III. CONTRIBUTORY NEGLIGENCE.

(A) Persons Injured in General.

§68 (Tex.) It is a maxim that no one is bound to anticipate another's negligence.—*St. Louis Southwestern Ry. Co. of Texas v. Arey*, 179 S. W. 860.

§83 (Tex.Civ.App.) The doctrine of discovered peril has no application, in the absence of actual knowledge by the person inflicting the injury of the peril of the person injured in time to avoid the injury by use of the means at hand.—*St. Louis Southwestern Ry. Co. of Texas v. Aston*, 179 S. W. 1128.

(C) Imputed Negligence.

§93 (Mo.App.) The negligence of a driver of a wagon cannot be imputed to a person who is injured while riding therein, at the driver's invitation.—*Ingino v. Metropolitan St. Ry. Co.*, 179 S. W. 771.

§96 (Mo.App.) Father of two year old child, who permitted her, upon becoming engrossed in his newspaper, to run into the street, where she was struck by an electric car, held not negligent.—*Albert v. St. Louis Electric Terminal Ry. Co.*, 179 S. W. 955.

(D) Comparative Negligence.

§101 (Ky.) The contributory negligence of the injured servant will, under the federal Employers' Liability Act, only reduce the recovery.—*Cincinnati, N. O. & T. P. Ry. Co. v. Nolan*, 179 S. W. 1046.

§101 (Tex.Civ.App.) Contributory negligence on part of an employe merely diminishes the amount of his recovery.—*Pecos & N. T. Ry. Co. v. Winkler*, 179 S. W. 691.

To diminish recovery by servant on account of contributory negligence, the employer need not show that the servant knew of the danger, but it is sufficient to show that he did not exercise due care.—Id.

IV. ACTIONS.**(B) Evidence.**

⇒121 (Ky.) Negligence will not be presumed, but must be alleged and proven.—*Lucas Land & Lumber Co. v. Cook's Adm'r*, 179 S. W. 582.

⇒122 (Ky.) The burden is on the defendant to show contributory negligence.—*Southern Mining Co. v. Lewis' Adm'r*, 179 S. W. 1067.

⇒134 (Ky.) It is not necessary to establish negligence by eyewitnesses; circumstantial evidence is sufficient.—*Southern Mining Co. v. Lewis' Adm'r*, 179 S. W. 1067.

⇒134 (Tex. Civ. App.) Negligence cannot be established by mere conjecture without evidence of actual negligence or of facts from which it can be inferred.—*St. Louis Southwestern Ry. Co. of Texas v. Aston*, 179 S. W. 1128.

(C) Trial, Judgment, and Review.

⇒136 (Mo. App.) In determining whether plaintiff's negligence appears as a matter of law, plaintiff held entitled to all evidence favorable to her and all reasonable inferences from the facts in evidence.—*Ginter v. O'Donoghue*, 179 S. W. 732.

⇒136 (Tex.) Whether negligence of plaintiff contributed to injury held for the jury, unless such conclusion is irresistible.—*Wells Fargo & Co. v. Benjamin*, 179 S. W. 513.

Where evidence conflicts as to plaintiff's anticipation of danger, question of contributory negligence is for the jury.—*Id.*

⇒141 (Tex.) In an action for personal injuries defendant is entitled to charge grouping facts relied upon to establish contributory negligence.—*Wells Fargo & Co. v. Benjamin*, 179 S. W. 513.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

See Affidavits, ⇒5; Appeal and Error, ⇒282-301, 501, 933, 977, 1177; Criminal Law, ⇒922-957, 1064, 1124, 1156.

II. GROUNDS.**(B) Misconduct of Parties, Counsel, or Witnesses.**

⇒29 (Ky.) New trial will be granted when counsel misstated facts with the intention of influencing the jury improperly.—*Liverpool & London & Globe Ins. Co. v. Wright*, 179 S. W. 49.

(D) Disqualification or Misconduct of or Affecting Jury.

⇒49 (Ky.) New trial will be granted when the jury is "treated" by, and converses severally with the attorney of one party.—*Liverpool & London & Globe Ins. Co. v. Wright*, 179 S. W. 49.

(F) Verdict or Findings Contrary to Law or Evidence.

⇒75 (Ky.) Civ. Code Prac. § 341, prohibiting new trials of personal injury actions for inadequacy of damages, held not to prevent new trial for errors causing inadequacy or for other errors, though the damages are inadequate.—*Gnau v. Ackerman*, 179 S. W. 217.

⇒75 (Mo. App.) In action for damages for breach of contract concerning assets and management of a corporation, where the evidence tended to show damages in a substantial amount, the trial court was within its discretion in setting aside a verdict for plaintiff for \$1.—*Powell v. Batchelor*, 179 S. W. 751.

⇒76 (Ky.) Setting aside a verdict for \$12,000 held, under the evidence, not abuse of discretion

by lower court.—*Beall v. Louisville Home Telephone Co.*, 179 S. W. 251.

(G) Surprise, Accident, Inadvertence, or Mistake.

⇒97 (Ky.) A new trial for surprise will not be granted, where no objection was made to the evidence alleged to constitute surprise and no motion was made for postponement or continuance of the case.—*Hudson Engineering Co. v. Shaw*, 179 S. W. 1083.

(H) Newly Discovered Evidence.

⇒100 (Ky.) Where the defeated party neglected to call a witness solely because he said he would not testify because of his privilege against incriminating himself, his evidence is not newly discovered so as to warrant a new trial.—*Liverpool & London & Globe Ins. Co. v. Wright*, 179 S. W. 49.

⇒102 (Ky.) Where defendant could easily have discovered certain evidence at the trial of a case, which was pending for 3½ years, but he failed to produce it, he cannot have a new trial on the ground of newly discovered evidence.—*Hudson Engineering Co. v. Shaw*, 179 S. W. 1083.

⇒102 (Tex. Civ. App.) Defendant is not entitled to a new trial on the ground of newly discovered evidence, a deed of trust, of which the circumstances put him on inquiry.—*Ablon v. Wheeler & Motter Mercantile Co.*, 179 S. W. 527.

NOMINATION.

See Elections, ⇒146, 156.

NON OBSTANTE VEREDICTO.

See Judgment, ⇒199.

NOTES.

See Bills and Notes.

NOTICE.

See Appeal and Error, ⇒424; Bills and Notes, ⇒414, 421; Carriers, ⇒159, 218; Elections, ⇒280; Estoppel, ⇒54; Evidence, ⇒185; Execution, ⇒184; Guaranty, ⇒67; Insurance, ⇒533-558; Master and Servant, ⇒125, 217, 220, 252; Mortgages, ⇒356; Municipal Corporations, ⇒788, 812; Principal and Agent, ⇒166; Statutes, ⇒8½; Vendor and Purchaser, ⇒223, 232.

NOVATION.

See Bills and Notes, ⇒430.

⇒4 (Mo. App.) Where it is agreed that a substituted note shall be an absolute payment of the original debt or note, it will operate as an extinguishment of the original indebtedness by way of novation.—*Western Auction & Storage Co. v. Shore*, 179 S. W. 769.

NUISANCE.

See Negligence, ⇒23.

II. PUBLIC NUISANCES.**(A) Nature of Injury, and Liability Therefor.**

⇒65 (Tex. Civ. App.) Under Rev. St. 1911, art. 4689, plaintiff is not entitled to maintain his action to enjoin disorderly houses in the city of Houston, where bawdy houses are restricted by ordinance to a certain locality.—*Coman v. Baker*, 179 S. W. 937.

(B) Rights and Remedies of Private Persons.

⇒72 (Tex. Civ. App.) Under Rev. St. 1911, art. 4643, a property owner seeking an injunction against disorderly houses must show special

damage to entitle him to relief.—*Coman v. Baker*, 179 S. W. 937.

NUNC PRO TUNC.

See Courts, ¶116.

OBJECTIONS.

See Appeal and Error, ¶185-242; Trial, ¶273, 366.

OBSCENITY.

See Carriers, ¶284.

OFFICERS.

See Banks and Banking, ¶262; Constitutional Law, ¶102; Corporations, ¶425-432; Highways, ¶95; Injunction, ¶80; Judges; Justices of the Peace; Municipal Corporations, ¶747; Prisons; Receivers; Schools and School Districts, ¶53; Sheriffs and Constables.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(C) Eligibility and Qualification.

¶19 (Tenn.) Under the express provisions of Const. art. 2, § 25, and Shannon's Code, § 1069, the election of a defaulter in the payment of state revenue to the office of clerk of the county board of road commissioners was absolutely void.—*Hogan v. Hamilton County*, 179 S. W. 128.

¶35 (Ky.) Under Const. § 236, and Ky. St. §§ 779a, 3755, held, that lapse of one year after the appointment of a special railway policeman before qualifying, raised the presumption that he did not execute the bond and take the oath within the prescribed 30 days after notice of appointment, so that the office was vacant.—*Cincinnati, N. O. & T. P. Ry. Co. v. Cundiff*, 179 S. W. 615.

(D) De Facto Officers.

¶43 (Ky.) A special railway police officer whose office had become vacant for failure to take the oath and execute his bond within the time prescribed by the Constitution was not a "de facto officer."—*Cincinnati, N. O. & T. P. Ry. Co. v. Cundiff*, 179 S. W. 615.

¶43 (Tenn.) The fact that one whose election as clerk of a county board of road commissioners was absolutely void was permitted by the county court to take the oath and to give bond added nothing to his rights, and he merely became a de facto officer and could assert no rights.—*Hogan v. Hamilton County*, 179 S. W. 128.

(F) Term of Office, Vacancies, and Holding Over.

¶49 (Ky.) Under Const. § 93, and Ky. St. § 779a, it was intended to create the office of special railway policeman for the constitutional four-year term, and failure to fix the term as one not longer than four years did not render the statute invalid.—*Cincinnati, N. O. & T. P. Ry. Co. v. Cundiff*, 179 S. W. 615.

¶54 (Tenn.) The clerk of a county board of road commissioners entitled to hold over under the Constitution, after the void election of his intended successor, was the de jure officer entitled to serve and to receive the salary of the office.—*Hogan v. Hamilton County*, 179 S. W. 128.

¶55 (Ky.) Under Const. § 93, and Ky. St. § 779a, succession in office of special railway police officer was not contemplated, and, when the term of officer expired the office ceased, and another appointee was not a successor.—*Cincinnati, N. O. & T. P. Ry. Co. v. Cundiff*, 179 S. W. 615.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

¶100 (Ky.) While under Const. §§ 161, 235, compensation of an officer not previously fixed may be fixed after his election, it may not thereafter be changed.—*Hurt v. Morgan County*, 179 S. W. 255.

¶100 (Ky.) Salary of county clerk as clerk of fiscal court, fixed before election of clerk, cannot be reduced after his election, under Const. §§ 161, 235.—*Fiscal Court of Mercer County v. Gibbs*, 179 S. W. 409.

¶101 (Tenn.) In a suit against a county for salary due the clerk of the board of road commissioners, plaintiff might show that the person who had been nominally elected as his successor, and who had given bond and taken the oath of office, was a defaulter, and hence only a de facto officer.—*Hogan v. Hamilton County*, 179 S. W. 128.

OPEN AND CLOSE.

See Trial, ¶25.

OPINION EVIDENCE.

See Criminal Law, ¶448-473; Evidence, ¶471-568.

ORAL CONTRACTS.

See Municipal Corporations, ¶243.

ORDINANCES.

See Municipal Corporations, ¶121, 302.

PARENT AND CHILD.

See Adoption; Bastards; Death, ¶31, 99; Guardian and Ward; Infants; Negligence, ¶96; Slaves.

¶3 (Mo.App.) A father who leaves his home wrongfully is liable to his wife for necessities furnished by her to the minor children during his absence, even though he be divorced from her in a foreign state, and the decree does not award the custody of the children to either.—*Assman v. Assman*, 179 S. W. 957.

Where a wife, after leaving her husband, who was without fault, and going to a foreign state, returned, and, without the husband's knowledge or consent, induced her minor son to accompany her to such foreign state, her husband was not liable for such son's support by her thereafter.—*Id.*

That a father, after the mother had secretly carried off their son to another state, sent on the boy's clothes with a letter of good advice to him, did not show a consent to the removal.—*Id.*

¶17 (Tex.Cr.App.) Under Acts 33d Leg. c. 101, § 1, it was immaterial that the child charged to have been deserted was born after defendant had deserted his wife.—*Spicer v. State*, 179 S. W. 712.

PAROL EVIDENCE.

See Criminal Law, ¶447; Evidence, ¶397-462.

PARTIALITY.

See Interpleader, ¶23.

PARTIES.

For parties to particular proceedings or instruments, see the various specific topics.

III. NEW PARTIES AND CHANGE OF PARTIES.

¶40 (Tex.Civ.App.) Interveners, under their allegation that they were jointly interested with plaintiff in lands and waters in controversy, held proper parties.—*Moore v. Toyah Valley Irr. Co.*, 179 S. W. 550.

PARTNERSHIP.

See Evidence, [§442](#), [589](#); Joint Adventures; Judgment, [§256](#); Pleading, [§290](#); Trial, [§251](#), [255](#), [350](#).

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(D) Actions by or Against Firms or Partners.

[§199](#) (Mo.App.) Plaintiff, suing railroad for damage to live stock, part of which had been owned by a partnership of which he was a member, who showed no transfer by his partner to him of former's interest in the cattle or claim for damages, could not maintain his action for damage to the partnership stock.—Hardesty v. Atchison, T. & S. F. Ry. Co., 179 S. W. 725.

No formal assignment by a partner of his interest in firm property is necessary to enable another partner to sue alone for injury thereto. Any action showing an intent to transfer the interest to the suing partner is sufficient.—Id.

[§200](#) (Tex.Civ.App.) Subject to the power of the Legislature to otherwise provide, all members of a partnership must be made parties to authorize a judgment against the partnership and its property.—American Express Co. v. North Ft. Worth Undertaking Co., 179 S. W. 908.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

(B) Rights, Powers, and Liabilities after Dissolution.

[§296](#) (Tex. Civ. App.) In action by former member of partnership for share in commissions on a deal completed after the dissolution, evidence held to support findings in his favor.—Daniel v. Lane, 179 S. W. 906.

The court, in submitting issue as to whether a deal, on which commissions were claimed was pending when partnership was dissolved, held not to have erred in its definition of "pending."—Id.

That plaintiff participated in fee earned by firm prior to March 1st held not conclusive that jury's finding that he became a member of the firm on March 1st was not sustained by the evidence.—Id.

(D) Actions for Dissolution and Accounting.

[§336](#) (Tex.Civ.App.) On accounting between partners, where the books had been incorrectly kept, so that it was impossible to determine in what proportion partnership and personal funds had been commingled by defendant, it became incumbent upon him to show the amount of credit to which he was entitled.—Navarro v. Lamana, 179 S. W. 922.

[§336](#) (Tex.Civ.App.) Testimony of attorney who had acted for both parties and was familiar with their dealings with each other that he did not know or hear of plaintiff's ownership of the land in controversy held admissible in a partnership accounting.—Hall v. Ray, 179 S. W. 1135.

Where, in action for partnership accounting, defendant denied existence of the general partnership, and claimed that he and plaintiff had been interested in several land trade contracts, held, that defendant's testimony relative to such trades and division of profits was admissible.—Id.

In an action for an accounting in respect to a general partnership, wherein defendant denied the existence of such partnership, the burden of proof was on plaintiff.—Id.

[§346](#) (Tex.Civ.App.) Under Rev. St. 1911, arts. 2035, 2048, in action for accounting, the court properly exercised its discretion in tax-

ing all costs against defendant partner who fraudulently or negligently had kept books so that appointment of an auditor was necessary to determine amount of personal funds defendant had mingled with firm funds.—Navarro v. Lamana, 179 S. W. 922.

PART PERFORMANCE.

See Frauds, Statute of, [§129](#).

PASSENGERS.

See Carriers, [§247-382](#).

PASSWAYS.

See Private Roads, [§2](#).

PATENTS.

X. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Licenses and Contracts.

[§211](#) (Ky.) Where a contract transferred patents to defendants for their use, the use contemplated was the right to use, and not actual physical employment, so that retention of the patents constituted "use" within the contract.—Hudson Engineering Co. v. Shaw, 179 S. W. 1083.

PAYMENT.

See Appeal and Error, [§1180](#); Bills and Notes, [§430](#), [499](#), [511](#); Compromise and Settlement; Electricity, [§11](#); Insurance, [§740](#); Limitation of Actions, [§37](#); Master and Servant, [§79](#); Vendor and Purchaser, [§175](#), [334-341](#).

I. REQUISITES AND SUFFICIENCY.

[§7](#) (Tex.Civ.App.) A creditor, extending a past-due indebtedness, by accepting the 60 and 90 day notes of the debtor conclusively bound himself not to collect the debt until the maturity of the notes.—Bonner Oil Co. v. Gaines, 179 S. W. 686.

[§9](#) (Tex.Civ.App.) A creditor is not required to accept incumbered property in settlement of his account and to assume the incumbrance, but need accept nothing but a legal tender.—Scruggs v. E. L. Woodley Lumber Co., 179 S. W. 897.

PENAL STATUTES.

See Statutes, [§241](#).

PENALTIES.

See Carriers, [§20](#).

PERPETUITIES.

[§6](#) (Ky.) Reasonable restraint on alienation held valid, though deed or will passes fee-simple title.—Chappell v. Frick Co., 179 S. W. 203.

Condition of deed that grantee should not sell or convey to any one except grantor's heirs held void as an unreasonable restraint of alienation.—Id.

PERSONAL INJURIES.

See Carriers, [§280-382](#); Damages, [§32](#), [130-132](#); Explosives, [§8](#); Food, [§25](#); Gas; Husband and Wife, [§209](#); Master and Servant, [§89-333](#); Negligence.

PETITION.

See Pleading; Removal of Causes, [§86](#); Schools and School Districts, [§44](#).

PHOTOGRAPHS.

See Evidence, ¶359.

PHYSICIANS AND SURGEONS.

See Criminal Law, ¶476; Evidence, ¶128, 506; Insurance, ¶430; Witnesses, ¶208, 219.

¶2 (Tex. Cr. App.) The medical practice act is not unconstitutional.—Hyroop v. State, 179 S. W. 878.

¶6 (Tex. Cr. App.) Evidence of methods of treatment of disease by one claiming to be a masseur held admissible in a prosecution of such person for unlawfully practicing medicine.—Hyroop v. State, 179 S. W. 878.

Under Rev. St. 1911, art. 5745, one professing to be a masseur is yet a "physician," where he professes to cure diseases or disorders.—Id.

Under Rev. St. 1911, art. 5745, it is not necessary to complete the offense that the defendant shall have held himself out as practicing medicine.—Id.

PISTOLS.

See Weapons, ¶8.

PLEADING.

See Courts, ¶189; Indictment and Information.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal and Error.

I. FORM AND ALLEGATIONS IN GENERAL.

¶8 (Ky.) An allegation of a petition in ejectment that a prior sale of the land was by order in an action "seeking a sale and division of the proceeds" held a mere conclusion, and insufficient to rebut the presumption in favor of the judgment that the action was under Gen. St. c. 63, art. 6.—Johnson v. Whitcomb, 179 S. W. 821.

¶9 (Tenn.) Under Rev. St. Me. 1903, c. 47, § 50, a bill charging the issuance of stock to defendant to be without consideration sufficiently charges fraud, although the word "fraud" is not used.—Sullivan v. Farnsworth, 179 S. W. 317.

¶34 (Mo. App.) Every intendment will be indulged in favor of the sufficiency of the petition where defendant fails to object.—State ex rel. Williams v. Stipp, 179 S. W. 723.

In action on attachment bond, petition, when not objected to by demurrer or otherwise, held to sufficiently allege that plaintiff's property was attached.—Id.

¶34 (Tex. Civ. App.) In passing on a pleading as against demurrer, the court must consider everything as properly alleged which by any reasonable construction may be embraced within the allegations made.—Bolt v. State Savings Bank of Manchester, Iowa, 179 S. W. 1119.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

¶66 (Ky.) A complaint, in an action for breach of contract for failure to account to plaintiff for sales of timber which alleged that the purchasers' names were unknown to plaintiff, held not indefinite.—Daniel v. Daniel, 179 S. W. 5.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(C) Traverses or Denials and Admissions.

¶129 (Tex. Civ. App.) In broker's action for commissions, allegations of petition that the other party to the contract of exchange did not break it held admitted, where the answer failed

to deny such allegation.—Levy v. Dunken Realty Co., 179 S. W. 679.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

¶180 (Ky.) Under Civ. Code Prac. § 98, subsecs. 1, 2, 3, and 4, a reply should not set up a cause of action against an intervening defendant which was not contained in the original petition.—Hodge Tobacco Co. v. Sexton, 179 S. W. 88.

¶183 (Tex. Civ. App.) Where a supplemental petition consisted solely of exceptions and denials, and alleged no new matter, there was no place in the pleadings for a supplemental answer.—City of Brownsville v. Tumlinson, 179 S. W. 1107.

V. DEMURRER OR EXCEPTION.

¶193 (Ky.) Where a petition states a cause of action, a general demurrer will not lie because of indefiniteness in the statement of facts; the remedy being by motion to make the petition more specific under Civ. Code Prac. § 134.—Daniel v. Daniel, 179 S. W. 5.

¶196 (Ky.) Where a cause of action is attempted to be set up by reply instead of amended petition, the defect can be reached by motion to strike and not demurrer.—Hodge Tobacco Co. v. Sexton, 179 S. W. 88.

¶199 (Tex. Civ. App.) If a general demurrer is well taken, it should be sustained at any stage of the proceedings.—City of Brownsville v. Tumlinson, 179 S. W. 1107.

¶205 (Tex. Civ. App.) Exception, though directed specially to a particular paragraph of the answer, held a general demurrer, as it set up no specific reason why the answer failed to set up a defense.—Bolt v. State Savings Bank of Manchester, Iowa, 179 S. W. 1119.

As against general demurrer, answer pleading alteration of note held good, though not alleging that alteration was without defendant's consent and by a party to the note.—Id.

¶207 (Ky.) An affirmative defense may not be asserted by special demurrer.—Pete Sheeran, Bro. & Co. v. Tucker, 179 S. W. 426.

¶214 (Tenn.) On demurrer the allegations of a bill must be taken as true.—Alexander v. Elkins, 179 S. W. 310.

¶216 (Ark.) Under Kirby's Dig. § 6128, bond of local agent of insurance company securing performance of his duties, filed as an exhibit to the company's complaint in suit thereon, could be considered on demurrer to the complaint.—Security Ins. Co. v. Jagers, 179 S. W. 1008.

¶228 (Tex. Civ. App.) A special exception which asserted that defendant was not bound by the contract sued on, because it was an oral one, and that plaintiff therefore stated no cause of action, was general.—City of Brownsville v. Tumlinson, 179 S. W. 1107.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

¶236 (Ky.) Permission to file an amended pleading is a matter in the sound discretion of the court, which it may exercise in furtherance of justice, upon proper terms.—Hodge Tobacco Co. v. Whaley, 179 S. W. 840.

¶236 (Mo. App.) In suit on a life policy, court's refusal to grant insurer leave to amend the answer to set up one of its by-laws to reduce recovery after both sides had rested and the instructions been passed upon was not an abuse of discretion.—Jennings v. National American, 179 S. W. 789.

¶245 (Tex. Civ. App.) In proceedings for the appointment of a receiver, it was not error to permit the plaintiffs to file a trial amendment after the evidence was closed and argument had begun, and to consider such amendment as

a basis for the appointment.—*Hart-Parr Co. v. Alvin-Japanese Nursery Co.*, 179 S. W. 697.

⚡245 (Tex.Civ.App.) Where in foreclosure a misdescription of the note sued on as to date and amount is corrected by trial amendment, an assignment or error will not lie thereto, where defendants were not misled or surprised, the record showing that they were only expected to defend against one note and mortgage.—*Memphis Cotton Oil Co. v. Gist*, 179 S. W. 1080.

⚡258 (Tex.Civ.App.) Defendant was not entitled to amend his answer during the trial to set up a deed of trust, with a defense based thereon, where the circumstances put him on inquiry.—*Ablon v. Wheeler & Motter Mercantile Co.*, 179 S. W. 527.

⚡261 (Ark.) Amendment of pleading introducing new defense after the case is called for trial *held* within the discretion of court.—*Kansas City Southern Ry. Co. v. Bull*, 179 S. W. 172.

Failure to plead a defense in the original answer is no waiver of the right to subsequently insist upon it by amending the answer.—*Id.*

VII. SIGNATURE AND VERIFICATION.

⚡290 (Tex.Civ.App.) Where defendants did not deny under oath, as required by statute, plaintiff's allegation that they were partners, evidence to disprove such allegation *held* properly excluded.—*Levy v. Dunken Realty Co.*, 179 S. W. 679.

XI. MOTIONS.

⚡355 (Ky.) Where a cause of action is attempted to be set up by reply instead of amended petition, the defect can be reached by motion to strike and not demurrer.—*Hodge Tobacco Co. v. Sexton*, 179 S. W. 36.

⚡367 (Ky.) Where a petition states a cause of action, a general demurrer will not lie because of indefiniteness in the statement of facts; the remedy being by motion to make the petition more specific under Civ. Code Prac. § 134.—*Daniel v. Daniel*, 179 S. W. 5.

⚡369 (Ky.) In an action for damages by fire from sparks from a locomotive, plaintiff *held* properly not required to elect as to whether to prosecute the company owning the roadbed or the company operating the trains.—*Louisville & N. R. Co. v. Feeney*, 179 S. W. 826.

⚡369 (Tex.Civ.App.) In an action by the widow of a railroad employé for his death, pleadings intended to meet proof of his engagement either in intrastate or interstate commerce at death *held* not improper as an attempt to recover under federal and state statutes at once, so as to require an election.—*International & G. N. Ry. Co. v. Reek*, 179 S. W. 699.

XII. ISSUES, PROOF, AND VARIANCE.

⚡376 (Mo.App.) In an action for injuries to the occupant of a wagon struck by a street car at a street crossing, evidence as to the ownership of the car was not necessary, where both sides assumed that defendant's servants were in charge thereof.—*Ingino v. Metropolitan St. Ry. Co.*, 179 S. W. 771.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

⚡403 (Ky.) Whether or not the petition in a servant's action for injury was defective in not negating his contributory negligence, it was cured by answers affirmatively alleging that plaintiff was guilty of contributory negligence.—*Mason & Hurst Co. v. Feltner*, 179 S. W. 222.

⚡403 (Tenn.) Failure of plaintiff to plead and prove the statutes of another state is cured by defendant's pleading them and agreeing that they shall govern.—*Sullivan v. Farnsworth*, 179 S. W. 317.

⚡406 (Tex.Civ.App.) Where, though allegation charging defendants with fault in connection with contract negotiated by brokers was general, it was not excepted to for that reason, *held* that it had standing as a plea fixing responsibility on defendants.—*Levy v. Dunken Realty Co.*, 179 S. W. 679.

⚡408 (Mo.App.) Though insufficiency of petition to state cause of action may be raised at any time, every intendment will be indulged in favor of its sufficiency where defendant fails to object.—*State ex rel. Williams v. Stipp*, 179 S. W. 723.

⚡433 (Ky.) An averment that the policy sued on was alive and in force since its execution and delivery must be held sufficient after verdict for plaintiff, though not specifically averring payment of premiums.—*Pacific Mut. Life Ins. Co. v. Taylor*, 179 S. W. 199.

⚡433 (Mo.App.) Petition, in action for malicious prosecution of a civil suit, *held* not open to attack after verdict as failing to aver that plaintiff was the owner of certain realty when defendant instituted the alleged malicious suit questioning his title.—*Rivers v. Norman*, 179 S. W. 990.

Where a petition utterly fails to state facts either directly or inferentially sufficient to constitute a cause of action, it is open to attack after answer or verdict.—*Id.*

POLICE.

See False Imprisonment, ⚡15; Officers, ⚡35, 43, 49, 55; Railroads, ⚡281.

POLICE COURTS.

See Courts, ⚡189.

POLICE POWER.

See Municipal Corporations, ⚡591.

POLICY.

See Insurance.

POLITICAL RIGHTS.

See Elections.

POOLING.

See Constitutional Law, ⚡240, 296.

POOLROOMS.

See Infants, ⚡13.

POPULARITY CONTEST.

See Contracts, ⚡108.

POSSESSION.

See Embezzlement, ⚡9; Fraudulent Conveyances, ⚡132, 133.

POWERS.

See Wills, ⚡692.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PREFERRED STOCK.

See Corporations, ⚡156.

PREMATURE APPEAL.

See Criminal Law, ⚡1069.

PREMIUM TAX.

See Constitutional Law, ¶229, 283; Taxation, ¶387.

PRESCRIPTION.

See Adverse Possession.

PRESENTMENT.

See Bills and Notes, ¶400.

PRESUMPTIONS.

See Appeal and Error, ¶907-936; Evidence, ¶67.

PRIMARY ELECTIONS.

See Elections, ¶146, 280.

PRINCIPAL AND ACCESSORY.

See Criminal Law, ¶59, 792; Homicide, ¶281, 306.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Corporations, ¶425-432; Evidence, ¶248, 253; Husband and Wife, ¶23½; Insurance, ¶74-93; Municipal Corporations, ¶747.

I. THE RELATION.**(A) Creation and Existence.**

¶3 (Mo.App.) Contract between manufacturing company and resident of South Carolina, placing a "sales agency" in the latter's charge, *held* to create the relation of principal and agent, and not to effectuate a sale of goods.—Watkins v. Donnell, 179 S. W. 980.

¶14 (Tex.Civ.App.) Relation of principal and agent may arise by implication from words and acts of parties and the circumstances of the particular transactions.—Holmes v. Tyner, 179 S. W. 887.

¶22 (Tex.Civ.App.) The statements of an agent as to the existence of the relation of principal and agent are inadmissible to bind his principal.—McConnon & Co. v. McCormick, 179 S. W. 275.

¶23 (Ky.) Where sureties who were compelled to pay the debt of an agent sought to hold the agent's undisclosed principal, evidence *held* insufficient to show the agent's authority to borrow, or in fact his agency at the time of negotiating the loan.—Hodge Tobacco Co. v. Sexton, 179 S. W. 36.

¶23 (Mo.App.) Evidence *held* to justify a finding that a third person acted as agent for payee in procuring usurious notes.—Riepe v. Vette, 179 S. W. 952.

¶23 (Tex.Civ.App.) Evidence, in an action for the value of an automobile sold by one representing himself as agent for plaintiff, *held* sufficient to support finding of agency.—Holmes v. Tyner, 179 S. W. 887.

¶25 (Ky.) An undisclosed principal *held* not liable on ground of estoppel to his agent's sureties who did not know of his existence.—Hodge Tobacco Co. v. Sexton, 179 S. W. 36.

(B) Termination.

¶34 (Tex.Civ.App.) Powers are irrevocable by the principal when they form part of an act deemed valuable in law, or which forms part of the contract and is a security for money or for the performance of any act deemed valuable.—Quannah, A. & P. Ry. Co. v. Dickey, 179 S. W. 60.

¶40 (Tex.Civ.App.) In an action by an automobile dealer to recover the value of a car procured by defendant through barter with plaintiff's sales agent, evidence *held* insufficient to show revocation of the agent's authority

prior to such sale.—Holmes v. Tyner, 179 S. W. 887.

¶42 (Mo.App.) Subsequent insanity of codefendant, who had authorized defendant to enter into a contract concerning the assets and management of a corporation, *held* not to terminate defendant's authority, or to release him from liability for defendant's acts as his agent.—Powell v. Batchelor, 179 S. W. 751.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.**(A) Powers of Agent.**

¶100 (Ky.) Contract between owners of land and H., giving him supervision over a large tract of land, *held* not to authorize him to lease it, except to squatters then on the land.—Geary v. Taylor, 179 S. W. 426.

¶100 (Tex.Civ.App.) Scope of general manager's authority *held* coextensive with the business intrusted to him to do what is usual and customary in such business.—Holmes v. Tyner, 179 S. W. 887.

Agent having apparent general authority in a given business has implied authority to do usual, ordinary, and reasonably necessary acts.—Id.

¶103 (Tex.Civ.App.) Implied intention of automobile dealer to authorize demonstrator to sell cars *held* as a business necessity to create an implied authority to sell.—Holmes v. Tyner, 179 S. W. 887.

Sale of car made by salesman employed by wife with implied authority so to employ *held* binding on automobile dealer.—Id.

In general, the power of an agent to sell does not include the power to barter.—Id.

¶123 (Tex.Civ.App.) In an action by an automobile dealer to recover the value of a car bartered by a demonstrator, evidence *held* insufficient to show authority to barter.—Holmes v. Tyner, 179 S. W. 887.

¶137 (Tex.Civ.App.) Liability of principal for act of servant based upon estoppel arises when a third person relies in good faith on words or conduct of the principal indicating authority in the agent to do such act.—Holmes v. Tyner, 179 S. W. 887.

(B) Undisclosed Agency

¶140 (Ark.) That a commission company, which had the exclusive sale of butter shipped by a creamery company, sold all the butter at cost to its employé, did not make him an undisclosed principal, as to the creamery company, which had no knowledge of the transaction.—Beatrice Creamery Co. v. Garner, 179 S. W. 160.

¶143 (Ark.) Insurance company, not disclosed as principal obligee in the bond of its local agent for performance of his duties, the bond being executed to the general agent of the company, could bring suit thereon.—Security Ins. Co. v. Jagers, 179 S. W. 1008.

¶145 (Ark.) Where an agent makes a contract for an undisclosed principal, both the principal and the agent may be held liable at the election of the party who dealt with the agent.—Beatrice Creamery Co. v. Garner, 179 S. W. 100.

¶145 (Ky.) Persons giving credit to the agent of an undisclosed principal may recover from the principal moneys furnished the agent for the business of his agency.—Hodge Tobacco Co. v. Sexton, 179 S. W. 36.

¶145 (Ky.) A principal may be charged upon his agent's contract within his authority, though the principal's name does not appear in the instrument and was not disclosed.—Geary v. Taylor, 179 S. W. 426.

¶145 (Tex.Civ.App.) One dealing with agent under either express or implied authority *held* not bound to show knowledge of such authority or a dependence on the faith thereof in order to

bind principal.—*Holmes v. Tyner*, 179 S. W. 887.

(C) Unauthorized and Wrongful Acts.

⚡152 (Tex.Civ.App.) One who barbers for an automobile with a reputed sales agent, in the absence of express or implied authority in agent to barter, *held* to act at his peril.—*Holmes v. Tyner*, 179 S. W. 887.

(D) Ratification.

⚡166 (Ky.) Owners of land *held* not to have ratified the unauthorized act of an agent in leasing it; it not appearing that they knew thereof, or received the rent for one month, which was paid.—*Geary v. Taylor*, 179 S. W. 426.

⚡171 (Tex.Civ.App.) Principal *held* not entitled to retain advantage secured by agent's fraud and accept benefits without adopting the means employed by him, though unknown to the principal.—*Lockney State Bank v. Damron*, 179 S. W. 552.

PRINCIPAL AND SURETY.

See Attachment, ⚡337-343; Bail; Evidence, ⚡471, 472; Guaranty; Husband and Wife, ⚡87; Mortgages, ⚡283; Principal and Agent, ⚡143; Subrogation, ⚡1; United States, ⚡74.

I. CREATION AND EXISTENCE OF RELATION.

(A) Between Individuals.

⚡23 (Ky.) A surety who signs a note upon condition that other sureties also sign *held* liable, though the others do not sign, in absence of notice of such condition to obligee.—*Peal v. Cairo Nat. Bank*, 179 S. W. 10.

⚡27 (Tex.Civ.App.) Two signers of a note as principals had the right to sign and deposit it with the payee on condition that it should not become valid until other principals had signed it.—*First State Bank of Amarillo v. Cooper*, 179 S. W. 295.

⚡35 (Tex.Civ.App.) A creditor's extension of the payment of a past-due indebtedness from a corporation upon receiving its 60 and 90 day notes would support a contract of suretyship evidenced by the indorsement of its president.—*Bonner Oil Co. v. Gaines*, 179 S. W. 686.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

⚡82 (Ark.) A surety on a building contract, which completed the work on the contractor's failure, *held* entitled to recover from the owner of the building payments made by him to the contractor in violation of the contract.—*Fidelity & Deposit Co. v. Merchants' & Farmers' Bank*, 179 S. W. 1019.

⚡86 (Ark.) Completion of building contract by surety, after knowledge that the owner of the building had made payments to the contractors in violation of the contract, *held* not a waiver of such breach.—*Fidelity & Deposit Co. v. Merchants' & Farmers' Bank*, 179 S. W. 1019.

III. DISCHARGE OF SURETY.

⚡104 (Ark.) Surety on note containing stipulation that parties consented to extension of time of payment *held* not discharged by such an extension.—*Ward v. Nutt*, 179 S. W. 667.

⚡106 (Ark.) An agreement, upon valid consideration, by a creditor, without the consent of the surety, not to sue the principal debtor for a stated time, discharges the surety.—*Ward v. Nutt*, 179 S. W. 667.

⚡108 (Ark.) Agreement extending time for payment of note, made when maker paid inter-

est due, did not discharge his surety.—*Ward v. Nutt*, 179 S. W. 667.

⚡115 (Ky.) A surety on a note was discharged, where the holder without the surety's consent surrendered collateral security, regardless of the value of the collateral.—*Elsley v. People's Bank of Bardwell*, 179 S. W. 392.

That surety and maker were directors, and brothers of the director and president, of a bank, *held* not to revive surety's liability on note after his release by the bank's surrender of collateral.—*Id.*

Bank's surrender of collateral security to maker of note *held* to discharge surety, though the collateral was its own stock, contrary to Ky. St. § 581.—*Id.*

IV. REMEDIES OF CREDITORS.

⚡156 (Tex.Civ.App.) In action against surety on note, answer relating to agreement as to collateral *held* not a defense to the note.—*First State Bank of Amarillo v. Cooper*, 179 S. W. 295.

In action against surety on note, answer *held* not too indefinite and uncertain, as failing to particularize the collateral alleged to have been misapplied.—*Id.*

⚡163 (Tex.Civ.App.) In action against corporation on its notes and against its president as surety thereon, where the surety's pleadings sought no such relief, it was not necessary that a judgment against him be framed to subject the corporation's property to satisfaction before proceeding against him.—*Bonner Oil Co. v. Gaines*, 179 S. W. 686.

PRIORITIES.

See Corporations, ⚡566; Judgment, ⚡788; Vendor and Purchaser, ⚡260.

PRISONS.

⚡10 (Tenn.) Superintendent of county workhouse, whose office was created under Priv. Acts 1913, c. 204, *held* acting in an official capacity in employing a guard, and where he was not present when the guard against his orders shot and wounded a prisoner, was not liable in damages.—*Lunsford v. Johnson*, 179 S. W. 151.

PRIVATE ROADS.

See Easements; Statutes, ⚡123.

⚡2 (Ky.) Under Ky. St. 1909, § 4348, subsecs. 2-4, and section 4351, *held*, that no appeal lies in proceeding to establish passways until final judgment in the county court.—*Exall v. Holland*, 179 S. W. 241.

In proceeding to establish private passway, *held*, that necessity of passway cannot be determined on the application for the appointment of commissioners, but on exceptions to the commissioners' report.—*Id.*

In proceeding to establish passway, *held*, that court may have jury's advice on question of necessity, but is not conclusively bound by its verdict.—*Id.*

PRIVILEGED COMMUNICATIONS.

See Libel and Slander, ⚡148; Witnesses, ⚡198-219.

PROBABLE CAUSE.

See Malicious Prosecution, ⚡21.

PROBATE.

See Wills, ⚡230.

PROCESS.

See Appeal and Error, ⚡424; Attachment; Execution; Garnishment; Justices of the Peace, ⚡80; Mandamus, ⚡34.

I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.

⚡6 (Tenn.) Under Shannon's Code, §§ 4495, 4589, process to bring in defendant after an amendment substituting plaintiff as administrator, instead of plaintiff in his own name, was not required, and a notification by the court's order was sufficient.—*Studer v. Roberts*, 179 S. W. 181.

PROFITS.

See Damages, ⚡40, 176.

PROHIBITION.

See Courts, ⚡207.

I. NATURE AND GROUNDS.

⚡3 (Ky.) The writ of prohibition may be issued by a circuit court against an inferior court, or by an appellate court against a circuit court, where the writ is the only adequate remedy to which the party applying therefor can resort.—*Speckert v. Ray*, 179 S. W. 592.

⚡10 (Ky.) The writ of prohibition may be issued by a circuit court against an inferior court, or by an appellate court against a circuit court, where the inferior or circuit court is attempting to act out of jurisdiction.—*Speckert v. Ray*, 179 S. W. 592.

⚡12 (Tex.Civ.App.) Prohibition to prevent one district court from enjoining a judgment of another, affirmed by the Court of Civil Appeals, will not, in view of Rev. St. 1911, arts. 4643, 4653, be denied, because the court hearing the injunction should properly administer the law on the facts.—*Cattlemens Trust Co. of Ft. Worth v. Willis*, 179 S. W. 1115.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

⚡18 (Mo.App.) Act of circuit court, on motion for order against justice of the peace commanding correction of entries of judgment, held an assertion of jurisdiction, so that, if it was without jurisdiction, a preliminary rule in prohibition was not prematurely issued.—*State ex rel. Gardiner v. Wurdeman*, 179 S. W. 964.

PROMISE OF MARRIAGE.

See Breach of Marriage Promise.

PROMISSORY NOTES.

See Bills and Notes.

PROPERTY.

See Appeal and Error, ⚡493; Fixtures.

PROSTITUTION.

⚡1 (Tex.Cr.App.) Under Pen. Code 1911, art. 498, providing that it shall be unlawful to invite, solicit, or procure any female to have unlawful sexual intercourse, mere solicitation completes the offense.—*Denman v. State*, 179 S. W. 120.

⚡4 (Tex.Cr.App.) In a prosecution for soliciting a female to illicit sexual intercourse, an offense denounced by Pen. Code 1911, art. 498, evidence held sufficient to support a conviction.—*Denman v. State*, 179 S. W. 120.

⚡4 (Tex.Cr.App.) In a prosecution against defendant for unlawfully giving the name of his wife to another for the purpose of enabling the latter to have sexual intercourse with her, evidence held sufficient to sustain a conviction.—*Fletcher v. State*, 179 S. W. 879.

PROTEST.

See Bills and Notes, ⚡410.

PROVINCE OF COURT AND JURY.

See Criminal Law, ⚡737-764; Trial, ⚡191-199.

PROXIMATE CAUSE.

See Railroads, ⚡389, 425.

PUBLICATION.

See Municipal Corporations, ⚡302, 683; Willa, ⚡119.

PUBLIC DEBT.

See Counties, ⚡165; Municipal Corporations, ⚡871.

PUBLIC DOCUMENTS.

See Evidence, ⚡366, 383.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, ⚡265-567.

PUBLIC LANDS.**III. DISPOSAL OF LANDS OF THE STATES.**

⚡173 (Tex.) Under Rev. St. 1911, art. 5423, held, it is insufficient for forfeiture of public school lands sold, for default in interest, to indorse, "Land forfeited," on the purchaser's obligation, without an entry on his account.—*Chambers v. Robison*, 179 S. W. 123.

⚡178 (Tex.Civ.App.) Public land awarded to a purchaser in accordance with the statute is the subject of sale.—*Hollis v. Myers*, 179 S. W. 57.

Failure to file conveyance by purchaser of public land in General Land Office held not to affect grantee's title, and if original purchaser obtains a patent, the legal title inures to the benefit of his grantee.—*Id.*

Grantee of original settler on public land, who purchased with knowledge of former conveyance, held to acquire no greater right by obtaining a patent than the settler would have obtained.—*Id.*

PUBLIC NUISANCE.

See Nuisance, ⚡65, 72.

PUBLIC POLICY.

See Contracts, ⚡108.

PUBLIC SCHOOLS.

See Schools and School Districts.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Electricity; Gas; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC USE.

See Eminent Domain.

QUALIFICATIONS.

See Officers, ⚡19, 85.

QUIETING TITLE.**II. PROCEEDINGS AND RELIEF.**

⚡44 (Ark.) In action to quiet title, the defendant, claiming under a decree of divorce from plaintiff's grantor and asserting that plaintiff's deed had been made in fraud of her marital rights, had the burden of proving it, since fraud is never presumed.—*West v. West*, 179 S. W. 1017.

In action to quiet title as against the claim of defendant under a decree of divorce from plaintiff's grantor, and asserting that plaintiff's deed was in fraud of her marital rights, evidence

held insufficient to sustain a decree for the defendant.—Id.

QUOTIENT VERDICT.

See Criminal Law, ¶866.

RAILROAD COMMISSION.

See Carriers, ¶13.

RAILROADS.

See Agriculture, ¶8; Appeal and Error, ¶1070; Carriers; Commerce, ¶27; Constitutional Law, ¶241; Estoppel, ¶93; False Imprisonment, ¶15; Master and Servant, ¶112, 113, 198; Mines and Minerals, ¶105; Pleading, ¶369; Receivers, ¶69; Statutes, ¶47; Street Railroads; Subscriptions, ¶10, 12, 18; Trial, ¶250, 251.

I. CONTROL AND REGULATION IN GENERAL.

¶9 (Ark.) Order of the Railroad Commission, based on petition signed by 17 corporations, held invalid, as not in compliance with Acts 1907, p. 357, § 1, providing that the petition must be signed by 15 citizens.—St. Louis & S. F. R. Co. v. State, 179 S. W. 342.

Corporations held not to be citizens, within Acts 1907, p. 357, § 1, in the absence of any provision fixing the method of corporate assent.—Id.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

¶97 (Ky.) A railroad company is a necessary party to a proceeding to change the location of a highway so as to abolish a grade crossing over its right of way and relocate the crossing at another spot as an overhead crossing.—Carrick v. Garth, 179 S. W. 609.

¶113 (Ky.) Where a railroad company builds its line on the right of way purchased from a landowner, it is liable to the landowner for damages to his remaining land only when guilty of negligence in construction.—Roberts v. Sandy Valley & Elkhorn Ry. Co., 179 S. W. 228.

¶114 (Ky.) In an action for damages to plaintiffs' lands by the improper construction of defendant's roadbed, which caused a creek to cut the lands, evidence held to warrant a finding that the damage was only temporary.—Roberts v. Sandy Valley & Elkhorn Ry. Co., 179 S. W. 228.

K. OPERATION.

(D) Injuries to Licensees or Trespassers in General.

¶281 (Ky.) A railroad responsible for the appointment of a special police officer could not regard him as a de facto officer after his office was vacated by failure to take the oath, etc., since it was bound to know that he was an officer de jure before he was given employment on its trains.—Cincinnati, N. O. & T. P. Ry. Co. v. Cundiff, 179 S. W. 615.

In view of Ky. St. § 3755, railroad held responsible for acts of special railway police officer whose office had been vacated for failure to take oath, etc.—Id.

(F) Accidents at Crossings.

¶312 (Tenn.) Under Shannon's Code, § 1574, subsecs. 1, 2, engineer held not required to sound whistle or bell on approaching railroad crossing not designated by a lookout sign.—Whittaker v. Louisville & N. R. Co., 179 S. W. 140.

¶320 (Tenn.) Count in action for injury at railroad crossing, brought under Shannon's Code, § 1574, subsec. 4, not alleging that the train struck the plaintiff, being under the com-

mon law, the absolute liability imposed by sections 1575 and 1576 did not apply.—Whittaker v. Louisville & N. R. Co., 179 S. W. 140.

¶344 (Tenn.) Count in action for injury at railroad crossing, brought under Shannon's Code, § 1574, subsec. 4, not alleging that the train struck the plaintiff, was under the common law, and the absolute liability imposed by sections 1575 and 1576 did not apply.—Whittaker v. Louisville & N. R. Co., 179 S. W. 140.

¶350 (Tenn.) In an action for personal injury at a crossing brought under Shannon's Code, § 1574, subsec. 4, held on the evidence that it was for the jury to say whether plaintiff was negligent in jumping from the wagon instead of trusting her safety to the speed of the horses.—Whittaker v. Louisville & N. R. Co., 179 S. W. 140.

¶351 (Tenn.) In action for personal injury at railroad crossing, brought under Shannon's Code, § 1574, subsec. 4, instruction as to common-law duty of railroad to avoid accident held proper.—Whittaker v. Louisville & N. R. Co., 179 S. W. 140.

(G) Injuries to Persons on or near Tracks.

¶367 (Tenn.) Under Shannon's Code, § 1574, railroad enginemen held not required to withdraw lookout from the track immediately ahead to look across to the further end of a curve.—Cincinnati, N. O. & T. P. Ry. Co. v. Wright, 179 S. W. 641.

¶372 (Tenn.) Railroad employees held not required to slacken speed of train when approaching a curve though the curve be wholly or partly in a cut or hidden from view by another train.—Cincinnati, N. O. & T. P. Ry. Co. v. Wright, 179 S. W. 641.

¶375 (Ky.) A pedestrian held a trespasser on railroad track entitled to demand that those in charge of trains use all reasonable means to avoid injuring him after discovering his peril.—Cincinnati, N. O. & T. P. Ry. Co. v. Jones' Adm'r, 179 S. W. 851.

Where a railroad engineer discovers a trespasser on the track in a position of peril, and the distance is too short to stop the train, it is negligence for him to fail to give the alarm signal.—Id.

¶384 (Ky.) It was negligence for deceased to go on track ahead of train in attempt to reach station ahead of it, where the train was only twice as far from station as he was.—Louisville & N. R. Co. v. Fentress' Adm'r, 179 S. W. 419.

¶389 (Ky.) Negligence of plaintiff's intestate is proximate cause of his death by being struck by train which he knew to be approaching, although he thought he was on another track than that on which he was running to station.—Louisville & N. R. Co. v. Fentress' Adm'r, 179 S. W. 419.

¶390 (Ky.) Though a trespasser on a railroad track was guilty of contributory negligence, recovery for his death may be had where those in charge of a train did not use reasonable care after discovering his position of peril.—Cincinnati, N. O. & T. P. Ry. Co. v. Jones' Adm'r, 179 S. W. 851.

¶390 (Tex.Civ.App.) Where defendant's engine crew was negligent after discovery of one on the track, it was immaterial that such person was negligent in entering thereon.—Chicago, R. I. & G. Ry. Co. v. Loftis, 179 S. W. 930.

¶390 (Tex.Civ.App.) Where, after a pedestrian's left leg had been cut off, the engineer, acting on the supposition that he had not been struck, released the emergency brakes, in consequence of which the train moved forward, and caused loss of the right leg, held, that the railroad company was liable, under the doctrine of discovered peril, for loss of the right leg.—

St. Louis Southwestern Ry. Co. of Texas v. Aston, 179 S. W. 1128.

Facts held sufficient to charge engineer with negligence under the doctrine of discovered peril, where it showed that he knew of plaintiff's perilous position, though it did not show that he knew certainly that he would be injured unless the train was stopped.—Id.

—398 (Ky.) In an action against a railroad for a death near the track, evidence held insufficient to support verdict for plaintiff.—Cincinnati, N. O. & T. P. Ry. Co. v. Frogg's Adm'r, 179 S. W. 1062.

—398 (Tex.Civ.App.) Evidence held to authorize finding that defendant's engine crew discovered the child on the track, unaware of the approaching train in time to have avoided the death.—Chicago, R. I. & G. Ry. Co. v. Loftis, 179 S. W. 930.

—400 (Ky.) Testimony by persons in position to hear it that a railroad whistle was not heard, though of a negative character, presents an issue of fact as to whether an alarm signal was given.—Cincinnati, N. O. & T. P. Ry. Co. v. Jones' Adm'r, 179 S. W. 851.

—400 (Tex.Civ.App.) In an action against a railroad for death of plaintiffs' minor son, while walking on the tracks, whether defendant negligently operated its engine at a high rate of speed held for the jury.—Chicago, R. I. & G. Ry. Co. v. Loftis, 179 S. W. 930.

—401 (Tenn.) Instruction as to duty of employees operating engine if they could have seen a person on the track before another train cut off their view held confusing.—Cincinnati, N. O. & T. P. Ry. Co. v. Wright, 179 S. W. 641.

(H) Injuries to Animals on or near Tracks.

—411 (Tex.Civ.App.) The fencing law, Vernon's Sayles' Ann. Civ. St. 1914, art. 6603, has no application to switchyards and station grounds of a railroad company, where a fence would endanger employees.—Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co., 179 S. W. 1104.

—415 (Tex.Civ.App.) Where a municipal ordinance prohibiting the running at large of domestic animals is enforced, a railroad is under no obligation to keep a lookout for trespassing animals in its switchyard.—Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co., 179 S. W. 1104.

—425 (Tex.Civ.App.) The attempt of a horse to recross a trestle, in doing which it fell and was injured, held the proximate cause of the injury, and not any negligence in the construction or maintenance of the trestle or the right of way fences.—Missouri, K. & T. Ry. Co. of Texas v. Lovell, 179 S. W. 1111.

—442 (Tex.Civ.App.) In an action for the killing of cattle on railroad tracks, evidence as to where they were struck, based on the evidences found on the ground, is admissible.—Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co., 179 S. W. 1104.

—443 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 6603, there is no prima facie case against a railway for the death of a horse, which was not struck by its trains, but which fell through a trestle on the defendant company's right of way.—Missouri, K. & T. Ry. Co. of Texas v. Lovell, 179 S. W. 1111.

—447 (Tex.Civ.App.) In an action against a railroad for the killing of cattle, a charge, authorizing verdict for plaintiff, held erroneous under Vernon's Sayles' Ann. Civ. St. 1914, art. 6603, as authorizing verdict against the company though the cattle were killed at places where it was not bound to fence.—Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co., 179 S. W. 1104.

A charge held erroneous in placing too great a burden on the operatives of the railroad company.—Id.

(I) Fires.

—460 (Tex.) Owner of barn destroyed by fire caused by a spark from railroad locomotive held debarred from recovery by his own contributory negligence in leaving open a window facing the road; the interior being littered with straw.—St. Louis Southwestern Ry. Co. of Texas v. Arey, 179 S. W. 860.

—479 (Ky.) In an action for setting fire by sparks from defendant's locomotive, alleged to be due to the negligent operation of the train, evidence showing a defective spark arrester was not inadmissible because it was not pleaded.—Louisville & N. R. Co. v. Feeney, 179 S. W. 826.

—481 (Tex.Civ.App.) In an action for the destruction of plaintiff's house by fire from defendant's locomotive evidence that said locomotive had set fire on the right of way the day before held properly excluded.—Moose v. Missouri, K. & T. Ry. Co. of Texas, 179 S. W. 75.

—484 (Ky.) In an action for the burning of a barn by sparks from defendant's locomotive, evidence that such sparks caused the fire held sufficient to authorize the submission of defendant's negligence to the jury.—Louisville & N. R. Co. v. Feeney, 179 S. W. 826.

—484 (Tex.Civ.App.) In an action against a railway company for the destruction of plaintiff's house by fire from the spark of a locomotive, evidence held to justify direction of verdict for defendant.—Moose v. Missouri, K. & T. Ry. Co. of Texas, 179 S. W. 75.

RAPE.

See Criminal Law, —814, 945.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

—40 (Tenn.) In a prosecution for rape, evidence of previous acts of intercourse between the prosecutrix and other men held admissible on the probability of consent.—Lee v. State, 179 S. W. 145.

—44 (Tenn.) In a prosecution for rape, evidence of prior intercourse between prosecutrix and accused is admissible to raise an implication of consent.—Lee v. State, 179 S. W. 145.

—51 (Tex.Cr.App.) Evidence held sufficient to sustain a finding that the defendant was the person that committed the crime.—Jernigan v. State, 179 S. W. 1187.

RATIFICATION.

See Infants, —57; Principal and Agent, —166, 171.

REAL ACTIONS.

See Ejectment; Quieting Title; Trespass to Try Title.

REASONABLE DOUBT.

See Criminal Law, —561.

REBATES.

See Carriers, —32.

REBUTTAL.

See Criminal Law, —683; Witnesses, —376.

RECEIVERS.

See Appeal and Error, —101, 1062; Corporations, —553-566; Pleading, —245.

I. NATURE AND GROUNDS OF RECEIVERSHIP.

(A) Nature and Subjects of Remedy.

—3 (Tex.Civ.App.) A bill which has for its sole object the appointment of a receiver will not be entertained.—Continental Trust Co. v. Brown, 179 S. W. 939.

(B) Grounds of Appointment of Receiver.

⚡24 (Mo.App.) On facts alleged in petition for rescission of contract entered into during minority and for cancellation of notes, chattel mortgage, etc., *held* that plaintiff had a right to apply for the appointment of a receiver.—*Moser v. Renner*, 179 S. W. 970.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

⚡32 (Tex.Civ.App.) A bill for the appointment of a receiver praying for time in which to pay indebtedness *held* not to state ground for appointment.—*Continental Trust Co. v. Brown*, 179 S. W. 939.

III. TITLE TO AND POSSESSION OF PROPERTY.

⚡69 (Tex.Civ.App.) Receiver for purchaser of railroad stock under executory contract *held* not entitled to obtain the stock without first paying the purchase price.—*Continental Trust Co. v. Brown*, 179 S. W. 939.

Receiver for corporation *held* to have no right to compel the vendor, under an executory contract with the corporation for the purchase of land, to deliver possession without payment of the purchase price.—*Id.*

V. ALLOWANCE AND PAYMENT OF CLAIMS.

⚡155 (Tex.) Where the court takes charge of quasi public corporations, operating them through a receiver, it may make the necessary debts of operation a prior lien upon the income or the property itself.—*Craver v. Greer*, 179 S. W. 962.

Without some element of estoppel, vested liens on property of a private corporation or individual cannot be postponed to the receiver's operating expenses, and that one is a party to the receivership suit is insufficient to produce that result.—*Id.*

Plaintiff, in a suit to foreclose a mortgage, in which a receiver was appointed to continue the business on application of intervening creditors, *held* entitled to priority for his mortgage over the receiver's operating expenses.—*Id.*

Presence of mortgage creditors at a creditors' meeting at which a receivership to continue the business was decided on, *held* not to estop them to assert the priority of their liens over the receiver's operating expenses.—*Id.*

Bank which was instrumental in procuring the appointment of a receiver to continue the business of a lumber concern *held* not entitled to object to the postponement of its mortgage to the receiver's operating expenses.—*Id.*

VI. ACTIONS.

⚡168 (Ky.) A receiver cannot be sued individually upon a contract made by him as a receiver.—*Avey v. Burnley*, 179 S. W. 1050.

RECEIVING STOLEN GOODS.

See Criminal Law, ⚡507.

RECOGNIZANCES.

See Bail.

RECORDS.

See Appeal and Error, ⚡493-708; Courts, ⚡116; Criminal Law, ⚡1090-1128; Evidence, ⚡318, 352, 383; Vendor and Purchaser, ⚡261.

⚡17 (Tex.Cr.App.) Where copies of the indictment, etc., certified on a change of venue from F. county to M. county were lost, the jurisdiction of the M. county district court attached, and it might take proceedings to sub-

stitute the lost papers.—*Bennett v. State*, 179 S. W. 713.

In view of Code Cr. Proc. art. 482, lost papers can be substituted without notice served upon the accused, and, in any event, his appearance and answer to a motion to substitute without such service amounted to a waiver of notice.—*Id.*

REDIRECT EXAMINATION.

See Witnesses, ⚡286.

REFORMATION OF INSTRUMENTS.

See Limitation of Actions, ⚡177.

I. RIGHT OF ACTION AND DEFENSES.

⚡18 (Ark.) Equity does not reform contracts or deeds for a pure mistake of law.—*Louis Werner Sawmill Co. v. Sessoms*, 179 S. W. 185.

⚡19 (Ark.) To justify a decree for reformation of a deed on the ground of mistake, the mistake must have been mutual.—*Louis Werner Sawmill Co. v. Sessoms*, 179 S. W. 185.

⚡19 (Tex.Civ.App.) It was not error to refuse to correct a deed of trust running to defendants as to a misdescription, where it did not appear that a mutual mistake as to such description had been made.—*Memphis Cotton Oil Co. v. Gist*, 179 S. W. 1090.

II. PROCEEDINGS AND RELIEF.

⚡32 (Ark.) Lumber company's suit to reform deeds to timber on ground of mistake as to time for removal, not brought within six years, *held* barred by laches.—*Louis Werner Sawmill Co. v. Sessoms*, 179 S. W. 185.

⚡33 (Tex.Civ.App.) If reformation of transfer of interest in business to include claim sued on was desired, *held* that the transferor should have been made a party.—*City of Brownsville v. Tumlinson*, 179 S. W. 1107.

⚡36 (Tex.Civ.App.) If reformation of transfer of interest in business to include claim sued on was desired, *held* that proper allegations should have been made.—*City of Brownsville v. Tumlinson*, 179 S. W. 1107.

⚡45 (Ark.) Reformation of bond given to secure return of mortgaged property with respect to the time for its return *held* properly denied; the evidence not being sufficiently clear, unequivocal, and decisive.—*Eureka Stone Co. v. Roach*, 179 S. W. 499.

To justify or authorize the reformation of a written instrument for fraud or mistake, the evidence of such fraud or mistake must be clear, unequivocal, and decisive.—*Id.*

REFRESHING MEMORY.

See Witnesses, ⚡255.

REHEARING.

See Appeal and Error, ⚡883, 885; Criminal Law, ⚡1133.

REJOINDER.

See Pleading, ⚡183.

RELEASE.

See Chattel Mortgages, ⚡241; Compromise and Settlement; Mortgages, ⚡809; Payment; Principal and Surety, ⚡115; Vendor and Purchaser, ⚡267.

REMAINDERS.

See Execution, ⚡33; Life Estates; Wills, ⚡634.

⚡16 (Ky.) Gen. St. Ky. c. 63, art. 6, § 1, authorizes the sale and reinvestment of estates of

persons taking vested remainders after a life estate created by a will.—*Johnson v. Whitcomb*, 179 S. W. 821.

Children of remaindermen held barred from attacking sale under Gen. St. c. 63, art. 6, although not made parties thereto.—*Id.*

A sale of property on petition of life tenant under Gen. St. c. 63, art. 6, is binding against contingent heirs who might take the property should all remaindermen die before the life tenant.—*Id.*

Where sale is made under Gen. St. c. 63, art. 6, the sale and reinvestment cut off all rights of contingent takers, who must then look to the fund derived from the sale for their share.—*Id.*

REMISSION.

See Appeal and Error, ¶1140.

REMOVAL.

See Fixtures, ¶33.

REMOVAL OF CAUSES.

III. CITIZENSHIP OR ALIENAGE OF PARTIES.

(A) Diverse Citizenship or Alienage in General.

¶36 (Ky.) A nonresident defendant cannot remove a cause to the federal courts for diversity of citizenship, in the absence of a showing of fraud in joining defendants, where the petition on its face states a good cause of action against both defendants.—*Carter Coal Co. v. Prichard's Adm'r*, 179 S. W. 1038.

¶39 (Ky.) Where verdict was erroneously directed for the resident defendant, the case will be treated thereafter as though the ruling were not made, and the nonresident defendant cannot remove to the federal court for diversity of citizenship.—*Carter Coal Co. v. Prichard's Adm'r*, 179 S. W. 1038.

Where verdict was properly directed for the resident defendant, he is still in the case until the appeal taken is decided, so that until then the case cannot be removed to the federal court for diversity of citizenship between the remaining defendant and the plaintiff.—*Id.*

¶47 (Ky.) Petition, in an action for servant's wrongful death, held to state a good cause of action against both defendants so that neither was entitled to a transfer to the federal court for diversity of citizenship to avoid which the plaintiff made the alleged fraudulent joinder of parties.—*Carter Coal Co. v. Prichard's Adm'r*, 179 S. W. 1038.

VI. PROCEEDINGS TO PROCURE AND EFFECT OF REMOVAL.

¶86 (Ky.) Where the defendant moves to remove to the federal court for diversity of citizenship, alleging fraud in the joinder of parties, he must set out the facts showing the fraud.—*Carter Coal Co. v. Prichard's Adm'r*, 179 S. W. 1038.

RENT.

See Landlord and Tenant, ¶231.

REOPENING CASE.

See Equity, ¶385.

REPLEVIN.

See Chattel Mortgages, ¶172.

IV. PLEADING AND EVIDENCE.

¶69 (Ark.) In replevin for mules, where it appeared that they were sold by plaintiff to one who gave his note for the purchase money and that on his own failure to pay the buyer procured defendant to indorse a note, the question of defendant's liability as indorser of the note

could not be determined.—*Couch v. Starks*, 179 S. W. 995.

¶72 (Ark.) Evidence in replevin for mules held to sustain a verdict for defendant.—*Couch v. Starks*, 179 S. W. 995.

REPLY.

See Pleading, ¶180.

REPORTS.

See Evidence, ¶366.

RESCISSION.

See Cancellation of Instruments; Sales, ¶124.

RESERVATIONS.

See Deeds, ¶143.

RES GESTÆ.

See Criminal Law, ¶863; Divorce, ¶62; Evidence, ¶128.

RESIDENCE.

See Gaming.

RES IPSA LOQUITUR.

See Master and Servant, ¶265; Telegraphs and Telephones, ¶20.

RES JUDICATA.

See Judgment, ¶540-597, 822.

RESTITUTION.

See Ejectment, ¶122.

RESTRAINT OF TRADE.

See Contracts, ¶116; Monopolies.

RESULTING TRUSTS.

See Trusts, ¶63, 89.

RETROSPECTIVE LAWS.

See Taxation, ¶861.

REVENUE.

See Taxation.

REVIEW.

See Appeal and Error; Criminal Law, ¶1134-1172; Justices of the Peace, ¶141.

REVISION.

See Statutes, ¶231.

REVOCATION.

See Licenses, ¶58; Principal and Agent, ¶34-42; Subscriptions, ¶18.

RIGHT OF WAY.

See Easements.

ROADS.

See Highways; Private Roads.

ROBBERY.

See Criminal Law, ¶369.

¶24 (Tex. Cr. App.) In a prosecution for robbery by putting complaining witness in fear of life and bodily harm, proof that he was terrorized with a razor and despoiled held to warrant conviction, where death penalty was not assessed though the razor be not a deadly weapon.—*Acosta v. State*, 179 S. W. 870.

RULES OF COURT.

See Courts, ¶78.

SAFE PLACE TO WORK.

See Master and Servant, ¶101-129, 210.

SALES.

See Brokers; Commerce, ¶40; Contracts, ¶10, 116; Evidence, ¶231, 318, 354, 400, 434, 441, 442; Executors and Administrators, ¶164, 167; Guardian and Ward, ¶77-107; Intoxicating Liquors, ¶150; Judicial Sales; Life Estates, ¶23; Logs and Logging, ¶2, 3; Monopolies, ¶17; Mortgages, ¶356-522; Municipal Corporations, ¶562, 567; Principal and Agent, ¶103; Remainders; Trial, ¶251; Usury, ¶32; Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

¶38 (Tex.Civ.App.) Extraneous fraud in the procurement of a note for the purchase price of a horse held to destroy the binding effect of a warranty of the horse constituting a part of the contract.—Bolt v. State Savings Bank of Manchester, Iowa, 179 S. W. 1119.

¶52 (Ky.) Where the issue was whether a sale was effected or whether there was merely an agreement to effect a subsequent sale by written contract, the burden was on the plaintiffs.—Pete Sheeran, Bro. & Co. v. Tucker, 179 S. W. 428.

¶52 (Ky.) In an action for the price of a car load of cotton seed, defended on the ground that defendant had never bought or agreed to pay for it, evidence held to sustain a verdict for plaintiff.—Cotton Seed Products Co. v. Bonduant, 179 S. W. 603.

¶53 (Tex.Civ.App.) Whether a representation was intended by the seller, and understood by the buyer, as an affirmation of a fact, or as a mere expression of opinion, in the latter case no ground for rescission, is a question of fact.—Fowler v. Carlisle, 179 S. W. 528.

¶53 (Tex.Civ.App.) In an action for the balance due on a bill of lumber furnished for a house which defendant had agreed to convey, evidence held to make defendant's agreement to pay therefor a question for the jury.—Scruggs v. E. E. Woodley Lumber Co., 179 S. W. 897.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(C) Rescission by Buyer.

¶124 (Tex.Civ.App.) Persons induced to purchase horse by fraudulent misrepresentations held entitled to sue for a rescission, but bound to return the horse or show good cause for their failure to do so.—Bolt v. State Savings Bank of Manchester, Iowa, 179 S. W. 1119.

While ordinarily, where a purchaser elects to rescind, he must return the property purchased, yet he need not do so if it be worthless.—Id.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

¶168½ (Ky.) One who bought soot blowers, agreeing to pay therefor if satisfactory on six months' test, held bound to determine satisfaction for himself, and not entitled to rely on tests by others.—Louisville Trust Co. v. Bayer Steam Soot Blower Co., 179 S. W. 1034.

¶181 (Tex.Civ.App.) In action to recover for cars of wood sold f. o. b. at A., exclusion of original freight bills of railroad to show numbers of cords of wood received in each car by defendant at H. held proper.—McLaughlin v. Terrell Bros., 179 S. W. 932.

In an action to recover for a shipment of wood sold f. o. b. A. and delivered at H., de-

fendant claiming the shipment contained 132 cords only, plaintiffs claiming it contained 185, evidence on the point held sufficient to support verdict for plaintiff.—Id.

VI. WARRANTIES.

¶251 (Tex.Civ.App.) In absence of written warranty, material misrepresentations by seller held admissible as warranties, whether made fraudulently or not.—Bolt v. State Savings Bank of Manchester, Iowa, 179 S. W. 1119.

¶287 (Tex.Civ.App.) Where the seller of a concrete mixer induced the buyers to forego their right to reject for breach of warranty within ten days, as stipulated, such seller was bound to permit rejection on failure to give satisfaction after the stipulated period.—Braden-Zander Const. Co. v. Seng, 179 S. W. 1103.

¶288 (Tex. Civ. App.) Failure of buyers of cement mixer to reject for breach of warranty of capacity within the ten-day period stipulated in the chattel mortgage securing the price held to waive their right to reject later for such reason.—Braden-Zander Const. Co. v. Seng, 179 S. W. 1103.

VII. REMEDIES OF SELLER.

(B) Lien.

¶312 (Ark.) Under Kirby's Dig. § 4967, the seller of personal property cannot have the constable seize property sold wherever it may be found, but his remedy under this section is applicable only where the property is found in the possession of his vendee.—Holman v. Nutt, 179 S. W. 811.

(B) Actions for Price or Value.

¶347 (Ky.) Accrued right of plaintiff to purchase price of soot blowers sold under contract to defendant held not affected by subsequent agreement altering original contract.—Louisville Trust Co. v. Bayer Steam Soot Blower Co., 179 S. W. 1034.

¶355 (Tex.Civ.App.) In an action for the price of wood, evidence that plaintiffs had contracted with defendant to ship him 450 cords held not at variance with the contract pleaded.—McLaughlin v. Terrell Bros., 179 S. W. 932.

¶355 (Tex.Civ.App.) Purchaser sued for purchase price, in support of plea of failure of consideration, held entitled to rely upon material misrepresentations.—Bolt v. State Savings Bank of Manchester, Iowa, 179 S. W. 1119.

VIII. REMEDIES OF BUYER.

(D) Actions and Counterclaims for Breach of Warranty.

¶428 (Tex.Civ.App.) Purchaser sued on note for purchase price held entitled to rely upon misrepresentations as a defense, not on the theory of fraud and deceit, but because they were warranties.—Bolt v. State Savings Bank of Manchester, Iowa, 179 S. W. 1119.

SATISFACTION.

See Compromise and Settlement.

SCHOOLS AND SCHOOL DISTRICTS.

See Public Lands, ¶173; Taxation, ¶242.

II. PUBLIC SCHOOLS.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

¶44 (Ark.) Under Act Feb. 4, 1869 (Laws 1865-69, pp. 27, 28) §§ 16, 17 (Kirby's Dig. § 7695), and Act April 1, 1895, p. 82, § 1, county court held authorized to dissolve a special school district.—Hughes v. Robuck, 179 S. W. 163.

Under Act April 1, 1895, p. 82, § 1, petition to dissolve school district need not designate

school districts to which petitioners desire the territory attached.—Id.

Act April 1, 1895, p. 82, § 1, merely confers upon the county court discretionary authority to dissolve school districts, and does not require it to dissolve a district upon the filing of a proper petition.—Id.

Under Act April 1, 1895, p. 82, § 1, the county court has no authority to dissolve a school district except on the filing of a petition conforming to the requirements of the statute.—Id.

Under Act April 1, 1895, p. 82, §§ 1, 3, discretion of court in assignment of territory of dissolved school district held limited only by duty of adjudging such territory its pro rata part of the district's indebtedness.—Id.

(C) Government, Officers, and District Meetings.

§53 (Ky.) One held not to have title to the office of trustee of graded schools, so as to entitle him to maintain action to enjoin another from asserting title thereto; a certificate of election not having been issued to him by the board of trustees, as required by Ky. St. § 4485.—Chapman v. Freeman, 179 S. W. 450.

(E) District Debt, Securities, and Taxation.

§106 (Tex.Civ.App.) Under Const. art. 7, § 3, independent school district annexed to existing common school district under Acts 29th Leg. c. 124, § 148, might collect 20-cent tax applicable to land in common school district before the annexation.—Davis v. Payne, 179 S. W. 60.

In a suit by owner of land in common school district, after its annexation to independent school district, to enjoin the new district's collection of school tax, the independent school district was a necessary party.—Id.

SECONDARY EVIDENCE.

See Evidence, §158, 185.

SEDUCTION.

See Criminal Law, §595, 598, 608, 938; Husband and Wife, §302, §13.

SELF-DEFENSE.

See Homicide, §110-116, 300.

SEPARATE ESTATE.

See Husband and Wife, §113.

SEQUESTRATION.

§13 (Tex.Civ.App.) Where claimant in a sequestration suit in T. county secures possession of the property in D. county pursuant to Vernon's Sayles' Ann. Civ. St. 1914, art. 7769 et seq., and fails to see that his affidavit and claim bond are returned to the court of D. county as required by articles 7770, 7777, held, that he cannot object that judgment was rendered against him and the sureties on his bond in T. county.—Josey v. Masters, 179 S. W. 1134.

§20 (Tex.Civ.App.) Claimant and his sureties held chargeable with knowledge that affidavit and claim bond were returned to the justice court from which writ of sequestration was issued, instead of to a court in the county in which they contended they should have been returned.—Josey v. Masters, 179 S. W. 1134.

SERVANTS.

See Master and Servant.

SET-OFF AND COUNTERCLAIM.

See Sales, §428.

SEWERS.

See Drains.

SHERIFFS AND CONSTABLES.

See Attachment, §365; Counties, §139.

III. POWERS, DUTIES, AND LIABILITIES.

§108 (Ark.) To recover against a constable for failure to levy an execution, plaintiff must prove that during the life of the writ the judgment debtor possessed property liable to seizure and that the constable neglected to seize it.—Peery v. Mauldin, 179 S. W. 652.

SIGNALS.

See Master and Servant, §107, 190.

SIGNATURES.

See Appeal and Error, §569; Libel and Slander.

SLAVES.

§25 (Ark.) Act Feb. 6, 1867 (Laws 1866-67, p. 99) § 3, legalizing the cohabitation of negroes as husband and wife and legitimizing their recognized children is still in force.—Black v. Youmans, 179 S. W. 335.

SPECIAL INTERROGATORIES.

See Trial, §349-366.

SPECIAL POLICE.

See False Imprisonment, §15; Officers, §35, 43, 49, 55; Railroads, §281.

SPECIFICATION OF ERRORS.

See Appeal and Error, §758.

SPEED.

See Municipal Corporations, §705.

SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

SPLITTING CAUSES OF ACTION.

See Judgment, §592, 597.

STATEMENT.

See Appeal and Error, §564-578, 644.

STATES.

See Courts, §223-247; Intoxicating Liquors, §6; Judgment, §822; Statutes, §20.

VI. ACTIONS.

§191 (Tex.Civ.App.) Under Rev. St. 1911, arts. 7737, 7738, a plaintiff may maintain trespass to try title against agents for the state in possession, where he has title and right of possession, although the state has not consented to the suit.—Imperial Sugar Co. v. Cabell, 179 S. W. 83.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§8½ (Ark.) The constitutional provision requiring notice of a special bill is a mere direc-

tion to the Legislature itself.—*State v. Woodruff*, 179 S. W. 813.

Laws 1915, p. 340, establishing municipal courts, though applying to only two cities, *held* not a special act within the constitutional provision as to notice of special bills.—*Id.*

—20 (Ky.) Compensation provided for agricultural experiment station in making analysis under Laws 1908, c. 4 (Ky. St. 1915, § 1906a), *held* to be an appropriation and not a system of fees.—*Bosworth v. State University*, 179 S. W. 403.

—32 (Ark.) Where after adjournment of the Legislature an appropriation bill containing distinct items is presented to the Governor, he must, under Const. art. 6, §§ 15, 17, if desirous of vetoing particular items, file his objections to them with the bill and give notice by public proclamation.—*Dickinson v. Page*, 179 S. W. 1004.

A notation, "Disapproved," written across items of an appropriation bill *held* a sufficient compliance with Const. art. 6, § 15, requiring the bill to be filed with notations of objections.—*Id.*

—33 (Ark.) Under Const. art. 6, §§ 15, 17, the filing with the secretary of state of an appropriation bill signed by the Governor but disapproved as to some items is a sufficient public proclamation of the disapproval.—*Dickinson v. Page*, 179 S. W. 1004.

—47 (Tex.) An act levying penalties upon any person failing to erect a shed wherein railroad repair work may be done must be plain enough for those operating the industry affected to know whether by engaging in an act of repair without erecting the shed they would breach its terms.—*State v. International & G. N. Ry. Co.*, 179 S. W. 867.

Where an act of the Legislature requiring persons engaged in the repair of railroad equipment to erect a shed therefor, except in case of light repairs, was as definite in meaning as the nature of the subject allowed, the rule that a penal act must be certain in its provisions was complied with.—*Id.*

Rev. St. 1911, arts. 6581, 6582, requiring persons engaged in repairing railroad equipment to erect sheds, *held* not void for uncertainty as exempting "light repairs."—*Id.*

—64 (Ark.) Laws 1915, p. 340, if invalid in part as giving municipal courts civil jurisdiction coextensive with the limits of the county, *held* not thereby rendered invalid as to other provisions.—*State v. Woodruff*, 179 S. W. 813.

—64 (Ky.) Unconstitutional section in otherwise valid statute will, where practicable, be excluded, and the remainder allowed to stand.—*Bosworth v. State University*, 179 S. W. 403.

—64 (Tex.Civ.App.) The courts cannot hold one provision of a law valid and another invalid, where it is uncertain whether either would have been passed without the other.—*Coman v. Baker*, 179 S. W. 937.

III. SUBJECTS AND TITLES OF ACTS.

—105 (Ky.) Const. § 51, providing that all acts of the Legislature shall have but one subject, expressed in the title, will be strictly construed.—*Bosworth v. State University*, 179 S. W. 403.

—110½ (Ky.) Section 11, c. 4, Laws 1908 (subsection 11, § 1905a, Ky. St. 1915), relating to sale of adulterated and misbranded food and drugs, and making certain appropriations, *held* a violation of Const. § 51, providing that subject of act must be single and expressed in title.—*Bosworth v. State University*, 179 S. W. 403.

—118 (Ky.) Act March 17, 1904 (Laws 1904, c. 29; Ky. St. § 1201c), leveled at the offense of poultry stealing, *held* not in violation of Const. § 51, requiring the subject of an act to appear in the title.—*Fry v. Commonwealth*, 179 S. W. 604.

—123 (Ky.) Section 89 of Acts 1914, c. 80, relating to public roads, so far as it attempts to repeal Ky. St. 1909, §§ 4348-4356, relative to private passeways, *held* to violate Const. § 51.—*Exall v. Holland*, 179 S. W. 241.

IV. AMENDMENT, REVISION, AND CODIFICATION.

—141 (Ark.) Const. art. 5, § 23, prohibiting amendment of statutes by reference to their title, does not invalidate Kirby's Dig. § 5433, assimilating the holding of city elections to state and county elections, which is complete in itself and is not amendatory of other laws, though reference to other acts may be necessary to ascertain its meaning.—*State v. McKinley*, 179 S. W. 181.

—143 (Ky.) The amendment of Ky. St. §§ 3915-3921, prohibiting combinations to regulate trade, by the unconstitutional enactment of Acts 1906, c. 117, does not affect the validity of the act amended.—*Gay v. Brent*, 179 S. W. 1051.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

—161 (Ky.) Statutes may be repealed expressly or by implication, but repeal by implication can only occur where two statutes are repugnant and irreconcilable, or where the latter statute covers the whole subject and is manifestly a substitute for the first.—*Exall v. Holland*, 179 S. W. 241.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

—181 (Tex.Civ.App.) The argument of inconvenience results where the language of the law is not clear, either express or implied, and extends to constitutions and statutes.—*Davis v. Payne*, 179 S. W. 60.

—184 (Ark.) In construing a statute the object to be attained thereby and the purpose of the Legislature are to be considered, and that construction given which is in harmony with the legislative intent.—*McDaniel v. Herru*, 179 S. W. 337.

—205 (Ark.) A statute should be considered as a whole.—*Conway v. Miller County Highway and Bridge Dist.*, 179 S. W. 1009.

—212 (Tex.Civ.App.) The presumption against absurd consequences of legislation is no more than the presumption that the legislators were gifted with ordinary common sense, and applies only where there is room for construction by reason of the obscurity or ambiguity of a law.—*Davis v. Payne*, 179 S. W. 60.

—225¼ (Ark.) Where the Legislature passed two acts at the same session dealing with the powers of a levee board, and the language of one was ambiguous, to determine the intention of the Legislature, the court should consider the other act with it.—*Board of Directors of St. Francis Levee Dist. v. Williford*, 179 S. W. 665.

—226 (Ark.) A statute borrowed from another state will receive construction placed upon it by courts thereof, in absence of conflict with settled policy of borrowing state.—*St. Louis, I. M. & S. Ry. Co. v. Freeman*, 179 S. W. 648.

—231 (Tenn.) Shannon's Code, § 3935, *held* to be construed with the sections giving a right of action for wrongful death as if they had all originated with the Code of 1858, though, in substance, section 3935 was a prior enactment.—*Sharp v. Cincinnati, N. O. & T. P. Ry. Co.*, 179 S. W. 375.

(B) Particular Classes of Statutes.

—239 (Tenn.) A statute intended to alter the common law will not be construed to alter it

further than it expressly declares or is necessarily implied from the fact of it covering the whole subject-matter.—Baker v. Dew, 179 S. W. 645.

§ 241 (Tex.) An act of the Legislature penal in its nature should be strictly construed.—State v. International & G. N. Ry. Co., 179 S. W. 867.

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UNITED STATES.

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See Evidence, 506, 588; Injunction, 64, 65; Municipal Corporations, 413; Pleading, 376.

II. REGULATION AND OPERATION.

78 (Mo.App.) Where a street railroad is operated by receivers they alone, and not the company itself, are responsible for personal injuries due to the negligence of the company's servants.—*Ingino v. Metropolitan St. Ry. Co.*, 179 S. W. 771.

99 (Mo.App.) Driver approaching street car tracks held bound to look for cars and stop in place of safety if one was approaching, making it dangerous to cross.—*Guffey v. Harvey*, 179 S. W. 729.

⚡103 (Mo.App.) In an action for personal injury in collision with a street car, plaintiff's error of judgment prompted by fear of imminent injury did not absolve the motorman, under the humanitarian rule, from exercising reasonable care to avoid injury.—*Michaels v. Harvey*, 179 S. W. 735.

⚡103 (Mo.App.) The knowledge of an occupant of a wagon of the approach of defendant's street car held not to bar recovery under the last clear chance doctrine, where the motorman could have avoided injury if he had exercised proper care.—*Ingino v. Metropolitan St. Ry. Co.*, 179 S. W. 771.

⚡110 (Mo.App.) In action for injuries to person struck by street car, petition held not to charge negligence under the last chance rule, and hence contributory negligence was a complete defense.—*Guffey v. Harvey*, 179 S. W. 729.

⚡114 (Mo.App.) Evidence held to show that plaintiff either failed to look before turning to drive across street car tracks or took a dangerous and unnecessary chance and drove into a zone of apparent danger.—*Guffey v. Harvey*, 179 S. W. 729.

⚡117 (Mo.App.) In an action for personal injury sustained in a collision between plaintiff's wagon and defendant's street car, evidence held to make defendant's negligence under the last clear chance rule a question for the jury.—*Michaels v. Harvey*, 179 S. W. 735.

⚡117 (Mo.App.) In an action against a street car company for injuries to a person riding in a wagon at the invitation of the driver thereof, by collision with a car, evidence as to the negligence of defendant under the last clear chance doctrine held for the jury.—*Ingino v. Metropolitan St. Ry. Co.*, 179 S. W. 771.

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See Appeal and Error, ⚡767.

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SUBROGATION.

⚡1 (Ky.) Where a principal was indebted to an agent, sureties of the agent who had been compelled to pay his debt cannot be substituted to the agent's rights against the principal; there being no privity.—*Hodge Tobacco Co. v. Sexton*, 179 S. W. 36.

SUBSCRIPTIONS.

See Corporations, ⚡228.

⚡10 (Tex.Civ.App.) A subscriber to a list for a fund in aid of railway construction will not be permitted to deny a contract authorizing trustees to contract with the railway company, where the subscription list recites that such contract was attached.—*Quannah, A. & P. Ry. Co. v. Dickey*, 179 S. W. 69.

⚡12 (Tex.Civ.App.) A subscription contract in aid of railway construction, providing for a bond to pay damages to abutting owners if relinquishments were not obtained, held an indemnity contract upon which the subscriber is jointly and severally liable primarily for the amount of his subscription, enforceable although not reduced to judgment.—*Quannah, A. & P. Ry. Co. v. Dickey*, 179 S. W. 69.

⚡18 (Tex.Civ.App.) Withdrawal by a subscriber to raise a bonus for railway construction of the amount subscribed held not a revo-

cation of other powers given trustees by virtue of the subscription contract.—*Quannah, A. & P. Ry. Co. v. Dickey*, 179 S. W. 69.

A subscription contract signed by numerous property holders, giving trustees power to contract with a railway to procure permission from the city for the construction of its lines and for relinquishment of damages, when accepted by the railroad, is not a naked power revocable at the subscriber's pleasure.—*Id.*

SUBSTITUTION.

See Novation, ⚡4.

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See Action.

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III. LIABILITY OF PERSONS AND PROPERTY.

(B) Corporations and Corporate Stock and Property.

⚡113 (Ky.) Ky. St. §§ 4226, 4230a, imposing a tax on premiums collected by life companies and authorizing the collection of the tax after such a company has voluntarily ceased to do business in the state, are not unconstitutional.—*Washington Life Ins. Co. v. Commonwealth*, 179 S. W. 591.

⚡169 (Ky.) Where foreign corporations acquired lots of insignificant value not related to their corporate business, defendant, a resident shareholder, could not escape taxation on stock owned by her, under Ky. St. § 4085.—*Slater v. Commonwealth*, 179 S. W. 201.

(D) Exemptions.

⚡241 (Ky.) A home for destitute old women held exempt from taxes as an institution of purely public charity, under Const. § 170.—*Commonwealth v. Parr's Ex'r*, 179 S. W. 1048.

That the trustee and executor withheld a fund bequeathed for the purpose of erecting a charitable institution from the board of managers thereof, pending contest of will, held not to remove it from the protection of Const. § 170, exempting public charities from taxation.—*Id.*

⚡241 (Ky.) Under Const. § 170, hospital incorporated as charitable corporation, held an "institution of purely public charity," whose invested fund, used solely for hospital expenses,

was exempt from taxation.—*Mason County v. Hayswood Hospital of Maysville*, 179 S. W. 1050.

—242 (Ky.) An office building owned by a church conference, the rentals of which are devoted exclusively to the partial support of a college maintained by the church, *held* exempt from taxation under Const. § 170.—*Commonwealth v. Board of Education of Methodist Episcopal Church*, 179 S. W. 596.

That a college maintained by a church gives preference to students who are candidates for the ministry does not deprive it of its exemption from taxation under Const. § 170.—*Id.*

V. LEVY AND ASSESSMENT.

(C) Mode of Assessment in General.

—362¼ (Ky.) Proceeding under Ky. St. c. 108, art. 17, for assessment of omitted property, is special, and the judge of the county court acts in a ministerial capacity.—*Stearns Coal & Lumber Co. v. Commonwealth*, 179 S. W. 1080.

Under Ky. St. § 4260, a party in proceeding to assess omitted property may object to a jury, and the court must then try the case without a jury.—*Id.*

(D) Mode of Assessment of Corporate Stock, Property, or Receipts.

—387 (Ky.) Plaintiff foreign assessment insurance company *held* liable to tax of \$2 on every \$100 of premium receipts under Ky. St. § 4226, embracing all foreign life insurance companies other than fraternal assessment companies.—*Clay v. Hartford Life Ins. Co.*, 179 S. W. 1024.

XI. TAX TITLES.

(C) Actions to Confirm or Try Title.

—885 (Ark.) Where purchaser of wild lands under tax deed paid taxes thereon for 14 years after tax sale, the former owner's action to quiet title is barred by the seven-year statute of limitations.—*McGill v. Adams*, 179 S. W. 489.

While plaintiffs, seeking to quiet title to unimproved land, are not barred by the statute of limitations, being under coverture, their action for equitable relief is barred by their laches in failing to pay taxes for 45 years, 14 of which followed defendant's purchase from the state.—*Id.*

XIII. LEGACY, INHERITANCE, AND TRANSFER TAXES.

—860 (Ark.) The Inheritance Tax Act is not a tax on property but on the privilege of succession, and, being a special tax, must be construed strictly against the government.—*McDaniel v. Byrnett*, 179 S. W. 491.

—861 (Ky.) Ky. St. § 4281a, subsec. 1, which went into effect in 1906, imposing a succession tax, *held* not to have a retroactive effect so as to apply to a conveyance made in 1895 whereby land was granted reserving a life estate which did not end until after 1906.—*Commonwealth v. McCauley's Ex'r*, 179 S. W. 411.

—866 (Ark.) The widow's dower does not come to her as the heir of her husband or by virtue of the intestate laws, and hence is not taxable under the Inheritance Tax Law.—*McDaniel v. Byrnett*, 179 S. W. 491.

—889 (Ark.) Provisions of the Inheritance Tax Act for payment of taxes by widow of deceased thereunder apply only to such property as she acquires in a manner to make it taxable, and not to her dower.—*McDaniel v. Byrnett*, 179 S. W. 491.

—895 (Ark.) Under Acts 1909, Act 303, p. 906, § 3, the exemption from inheritance tax of \$5,000 is to be deducted after distribution of the property, and the tax imposed upon the remainder.—*McDaniel v. Herrin*, 179 S. W. 337.

TELEGRAPHS AND TELEPHONES.

See Commerce, —8.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

—7 (Ky.) A municipal ordinance granting a franchise to a telephone company *held* invalid under Const. § 164, and Ky. St. § 3636, because not passed in the prescribed manner.—*Eastern Kentucky Home Telephone Co. v. Hatcher*, 179 S. W. 7.

—20 (Ky.) Manner in which plaintiff was injured *held* to raise presumption of negligence of defendant telephone company in construction of the line under doctrine of *res ipsa loquitur*.—*Beall v. Louisville Home Telephone Co.*, 179 S. W. 251.

Evidence in an action for personal injuries against a telephone company *held* not to constitute variance with complaint.—*Id.*

Limitation on method of fastening its wire by owner of land *held* not to excuse telephone company for injury caused by defective fastening of wire.—*Id.*

II. REGULATION AND OPERATION.

—48 (Tex. Civ. App.) Where a telegraph agent converted money paid by the cousin of one accused of crime in order to stop proceedings, *held*, that creditors who instituted the proceedings had no right of action against the telegraph company; title not having passed, and the agreement being illegal.—*Western Union Telegraph Co. v. Smith*, 179 S. W. 548.

—54 (Ark.) Where the contract between a telegraph company and the sender of a message limits liability to \$50, the sender suing for negligent failure to deliver can recover nothing over \$50.—*Western Union Telegraph Co. v. Brooks*, 179 S. W. 649.

—68 (Ark.) Mental anguish alone will not support a recovery for negligence in failing to deliver an interstate message.—*Western Union Telegraph Co. v. Culpepper*, 179 S. W. 494.

TENANCY IN COMMON.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

—29 (Tex.) Tenant in common having property improved *held* not entitled to contribution, where he had not paid the cost of improving the property, and limitations had run against it.—*Stephenson v. Luttrell*, 179 S. W. 260.

—38 (Tex.) Tenant in common suing for contribution *held*, under his petition, not entitled to recover defendant's share of the cost of improving a street adjacent to the property.—*Stephenson v. Luttrell*, 179 S. W. 260.

III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

—49 (Ky.) A lease by one or more of several tenants in common is not valid as to those not joining therein, but merely makes the lessee a tenant in common with the owners.—*Geary v. Taylor*, 179 S. W. 426.

For breach of lease by agent of tenants in common, G., the only tenant in common who authorized the lease, *held* liable only for his proportionate share of the difference between the agreed rent and the rental value.—*Id.*

THEATERS AND SHOWS.

See Licenses, —39.

THEFT.

See Embezzlement; Larceny.

TIMBER.

See Logs and Logging.

TIME.

See Appeal and Error, ¶272, 300, 564, 627, 770, 773; Bills and Notes, ¶129; Criminal Law, ¶577, 801, 1069, 1092, 1099; Elections, ¶156; Executors and Administrators, ¶164; Highways, ¶6; Insurance, ¶539; Limitation of Actions, ¶46, 55; Payment, ¶7; Pleading, ¶199, 245, 258; Prohibition, ¶18; Trial, ¶76; Vendor and Purchaser, ¶78.

TITLE.

See Adverse Possession; Mortgages, ¶274; Receivers, ¶69; Schools and School Districts, ¶53; Vendor and Purchaser, ¶112, 130, 176, 239.

TOOLS.

See Master and Servant, ¶101-129.

TORPEDOES.

See Master and Servant, ¶107, 112, 190, 210.

TORTS.

See Damages, ¶60; False Imprisonment; Fraud; Husband and Wife, ¶209; Insurance, ¶98; Judgment, ¶597; Libel and Slander, ¶7-123; Limitation of Actions, ¶55; Malicious Prosecution; Municipal Corporations, ¶747-822; Negligence; Nuisance; Trover and Conversion; Venue, ¶8.

¶4 (Tenn.) A malicious act is one injurious to another, intentional and without legal justification, but an act, otherwise lawful if it is reasonably of benefit to the doer, is not within the rule, because there was malice in the doing.—Hutton v. Watters, 179 S. W. 134.

¶10 (Tenn.) Whether a cause of action for wrongful destruction of a business is shown must be determined in each case on its own facts, as no rule can be stated to govern its determination.—Hutton v. Watters, 179 S. W. 134.

¶26 (Tenn.) Petition in an action for wrongful destruction of a business held to present a cause of action, and demurrer thereto should have been overruled.—Hutton v. Watters, 179 S. W. 134.

TOWAGE.

See Appeal and Error, ¶837.

TOWNS.

See Municipal Corporations.

TRANSCRIPTS.

See Appeal and Error, ¶553.

TRANSFER OF CAUSES.

See Appeal and Error, ¶353, 424; Courts, ¶487; Criminal Law, ¶1069; Trial, ¶11.

TREES.

See Logs and Logging.

TRESPASS TO TRY TITLE.

See Appeal and Error, ¶1068; Vendor and Purchaser, ¶296.

II. PROCEEDINGS.

¶27 (Tex.Civ.App.) A judgment in trespass to try title to defendant's homestead held void, where defendant's wife was not a party, though she had subsequently died childless.—Harper v. Stewart, 179 S. W. 277.

¶39 (Tex.Civ.App.) Admission of testimony of witness in trespass to try title that, to the best of his recollection, the vendor's lien notes on which title depended had been transferred by the former owners of the property before it made an assignment for the benefit of creditors, held not error, in view of the lapse of time and other circumstances.—Etheridge v. Campbell, 179 S. W. 1144.

¶41 (Tex.Civ.App.) Evidence in an action of trespass to try title, wherein the question of title depended on whether the former owners of the property had transferred, prior to making an assignment for the benefit of creditors, vendor's lien notes retained by them held to show that the notes had been transferred.—Etheridge v. Campbell, 179 S. W. 1144.

TRIAL.

See Continuance; Costs; Jury; New Trial; Venue.

For trial of particular actions or proceedings, see also the various specific topics.

For review of rulings at trial, see Appeal and Error.

I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

¶2 (Ky.) Trial together of action for libel against newspaper and action against reporter thereon involving same issues held within discretion of court.—Reid v. Nichols, 179 S. W. 440.

II. DOCKETS, LISTS, AND CALENDARS.

¶11 (Ky.) Action for injunction against threatened trespass held improperly transferred to common-law docket, with instructions for a general verdict, under Civ. Code Prac. §§ 6, 12.—Consolidation Coal Co. v. Vanover, 179 S. W. 43.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

¶25 (Tex.Civ.App.) Under rule 31 for district and county courts (142 S. W. xx), including the provision of Rev. St. art. 1953, held, on the pleadings in an action on a note, that the granting to defendants of the right to open and close was error.—First State Bank of Amarillo v. Cooper, 179 S. W. 295.

¶25 (Tex.Civ.App.) Under Rev. St. 1911, art. 1953, and rule 31 for district and county courts (142 S. W. xx), court held to have erred in permitting defendant to open and close the argument.—J. W. Carter Music Co. v. Bailey, 179 S. W. 547.

IV. RECEPTION OF EVIDENCE.

(C) Objections, Motions to Strike Out, and Exceptions.

¶76 (Ky.) Objection to bank cashier testifying from memorandum concerning deposit held too late when made after his testimony was completed.—Shelby v. Grabble, 179 S. W. 1.

¶76 (Tex.) In tenant in common's action for contribution, objection to testimony concerning improvement of adjacent street not alleged in the petition held interposed in time, and not waived.—Stephenson v. Luttrell, 179 S. W. 260.

¶85 (Tex.Civ.App.) There was no error in overruling an objection to the whole of testimony, part of which was admissible.—First State Bank of Amarillo v. Cooper, 179 S. W. 295.

¶85 (Tex.Civ.App.) Assignments complaining of objections going to the entire answers of a witness will be overruled, where a part of the answers was admissible.—Bolt v. State Savings Bank of Manchester, Iowa, 179 S. W. 1119.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

- ⚡112 (Ky.) Where a personal injury case consumed one day with the examination of 16 witnesses, and 8 instructions, *held* error to limit argument to 20 minutes on each side.—*Moses v. Proctor Coal Co.*, 179 S. W. 1043.
- ⚡125 (Ky.) Reference by counsel in action for personal injuries to defendant's "hoarded thousands and millions," the accidents in its mine, and the fact that it was a corporation *held* to require a reversal.—*Carter Coal Co. v. Hill*, 179 S. W. 2.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

- ⚡139 (Ark.) In action against railroad company for overcharge in freight, *held* error to direct a verdict against the company, where there was some evidence of the correctness of the amount charged.—*Kansas City Southern Ry. Co. v. Bull*, 179 S. W. 172.
- ⚡139 (Ark.) Where there is any evidence tending to establish an issue in favor of a party, it is error to take the case from the jury and direct a verdict against such party.—*Barrentine v. Henry Wrape Co.*, 179 S. W. 328.
- ⚡139 (Ky.) It is not error to refuse a peremptory instruction for defendant if there is any evidence to support the plaintiff's cause of action.—*Daniel v. Daniel*, 179 S. W. 5.
- ⚡139 (Ky.) The refusal of a peremptory instruction where the evidence preponderates upon the other side is not error, and will not be disturbed on appeal.—*Carrick v. Garth*, 179 S. W. 609.
- ⚡139 (Ky.) Where there is any evidence tending to sustain the cause of action, the case must be submitted to the jury.—*Eagan v. City of Covington*, 179 S. W. 1026.
- ⚡139 (Tex.) Unless all reasonable minds would agree that the evidence is insufficient to establish a cause of action, the court is not warranted in taking the case from the jury.—*International & G. N. R. Co. v. Walters*, 179 S. W. 854.
- ⚡139 (Tex.Civ.App.) The weight of testimony is for the jury.—*Houston Belt & Terminal Ry. Co. v. Vogel*, 179 S. W. 268.
- ⚡140 (Tex.Civ.App.) The credibility of witnesses is for the jury.—*Houston Belt & Terminal Ry. Co. v. Vogel*, 179 S. W. 268.
- ⚡140 (Tex.Civ.App.) A case wholly dependent upon the uncorroborated testimony of a party interested in the litigation, though not contradicted, is for the jury.—*First Nat. Bank of Plainview v. McWhorter*, 179 S. W. 1147.
- ⚡143 (Ark.) Where there is a material conflict in the evidence, a peremptory instruction is error.—*Holman v. Nutt*, 179 S. W. 811.
- ⚡143 (Ky.) It is the province of the jury to determine the facts, where the evidence is conflicting.—*Hodge Tobacco Co. v. Whaley*, 179 S. W. 840.

(D) Direction of Verdict.

- ⚡168 (Ky.) An affirmative defense may not be asserted by a motion for a directed verdict.—*Pete Sheeran, Bro. & Co. v. Tucker*, 179 S. W. 426.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

- ⚡191 (Mo.App.) In an action on a fire insurance policy, instructions as to waiver of the iron-safe clause *held* not erroneous as assuming facts in dispute.—*Travis v. Continental Ins. Co.*, 179 S. W. 766.

⚡191 (Tex.Civ.App.) In action on note, instruction *held* not objectionable, as assuming that court thought that part of defendants were sureties.—*First State Bank of Amarillo v. Cooper*, 179 S. W. 295.

⚡192 (Mo.App.) Where defendant, in an action for breach of marriage promise, admitted his unwarranted refusal, it was not error for instructions to assume those facts.—*Chapman v. Brown*, 179 S. W. 774.

⚡194 (Mo.App.) In an action against a city for personal injuries to plaintiff truck driver through a defect in a street, instruction *held* improper as invading the jury's province to weigh the evidence.—*Morrill v. Kansas City*, 179 S. W. 759.

⚡194 (Tex.Civ.App.) In action on a note, a requested instruction *held* properly refused, being on the weight of the evidence.—*First State Bank of Amarillo v. Cooper*, 179 S. W. 295.

⚡199 (Mo.App.) In suit on a note, instruction submitting to jury whether plaintiff's claimed agreement to release defendant from liability was based on valuable consideration, a question of law, *held* erroneous.—*Lumpkin v. Strange*, 179 S. W. 742.

(B) Necessity and Subject-Matter.

⚡208 (Tex.Civ.App.) Where the court erroneously denied a motion to strike incompetent evidence, the refusal of a charge to disregard such evidence was error.—*Occident Fire Ins. Co. v. Lann*, 179 S. W. 523.

(C) Form, Requisites, and Sufficiency.

⚡232 (Tex.Civ.App.) Where a cause was submitted on special issues, a charge correctly embodying the law but calling for a general verdict should not be given.—*International & G. N. Ry. Co. v. Reek*, 179 S. W. 699.

There was no error in informing the jury which party had requested that the cause be submitted on special issues.—*Id.*

(D) Applicability to Pleadings and Evidence.

⚡250 (Tex.Civ.App.) An instruction presenting an issue unauthorized by any pleading or evidence is properly refused.—*Ablon v. Wheeler & Motter Mercantile Co.*, 179 S. W. 527.

⚡250 (Tex.Civ.App.) Where error is assigned for refusal to instruct upon an issue not raised by the pleadings or evidence, it will be overruled.—*Pecos & N. T. Ry. Co. v. Winkler*, 179 S. W. 691.

⚡250 (Tex.Civ.App.) A charge on the duty of a railroad company to give the crossing signals prescribed by *Vernon's Sayles' Ann. Civ. St. 1914, art. 6564*, is not appropriate in an action for the killing of cattle, unless they were killed on a crossing.—*Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.*, 179 S. W. 1104.

⚡251 (Mo.App.) In an action on a note, where the amended answer admitted there was a partial consideration, giving of an instruction submitting the hypothesis that there was no consideration was error.—*Lumpkin v. Strange*, 179 S. W. 742.

⚡251 (Tex.Civ.App.) The question of estoppel not being raised by the pleadings, an instruction thereon is properly refused.—*Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lampkin*, 179 S. W. 541.

⚡251 (Tex.Civ.App.) In broker's action for commissions, objection to instruction on ground that the pleadings raised no issue as to failure to consummate deal being due to defendants' fault *held* unfounded.—*Levy v. Dunkin Realty Co.*, 179 S. W. 679.

⚡251 (Tex.Civ.App.) In action for balance of a bill for lumber, furnished to build a house, *held* that, upon the pleadings, instructions as

to defendant's waiver or estoppel in respect to the size of the house actually built should not have been given.—*Scruggs v. E. L. Woodley Lumber Co.*, 179 S. W. 897.

⇨251 (Tex.Civ.App.) In action by former partner for share of commissions on deal completed after dissolution on an issue as to whether deal was pending at time of dissolution definition of "pending" held sustained by the petition.—*Daniel v. Lane*, 179 S. W. 906.

⇨251 (Tex.Civ.App.) A requested charge that there was no evidence showing the train was being run at excessive speed is properly refused in an action for killing cattle, where excessive speed was not made a basis of recovery.—*Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.*, 179 S. W. 1104.

⇨252 (Ky.) Instructions which there was no proof to sustain should not have been given.—*Elsey v. People's Bank of Bardwell*, 179 S. W. 392.

⇨252 (Tex.Civ.App.) In an action on a note, where there was no evidence to support the issue as to whether plaintiff had failed to account for collateral, it should not have been submitted.—*First State Bank of Amarillo v. Cooper*, 179 S. W. 295.

⇨252 (Tex.Civ.App.) An instruction, unauthorized by any evidence in the case, is properly refused.—*Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin*, 179 S. W. 541.

⇨253 (Tex.Civ.App.) In an action for killing cattle, an instruction held improper as tending to exclude the defense that the cattle were killed on a public road, where the tracks were not required to be fenced.—*Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.*, 179 S. W. 1104.

(E) Requests or Prayers.

⇨255 (Ky.) While an instruction, in a servant's action for injury, limiting the competency of life tables to showing expectancy of life, should be given on request, a failure to so instruct was not error, where no request was made.—*Stearns Coal & Lumber Co. v. Calhoun*, 179 S. W. 590.

⇨255 (Tex.Civ.App.) In trespass to try title, held, that party desiring issue submitted, or desiring its theory of the case presented, should have requested proper charges.—*Wichita Valley Ry. Co. v. Somerville*, 179 S. W. 671.

⇨255 (Tex.Civ.App.) In an action for partnership accounting, wherein defendant denied the existence of the partnership and set up special partnerships in respect to which he asked an accounting, held, that failure to instruct that the burden was on defendant to establish matters in respect to which he asked affirmative relief was not error, in the absence of a request.—*Hall v. Ray*, 179 S. W. 1135.

⇨256 (Mo.App.) In action for wrongful death of plaintiff's minor daughter under Rev. St. 1906, § 5425, general charge that jury might find for plaintiff not less than \$2,000 and not more than \$10,000 held not erroneous in absence of request for more definite instruction.—*Albert v. St. Louis Electric Terminal Ry. Co.*, 179 S. W. 955.

⇨260 (Ark.) The court properly refused requested instructions if the matters contained therein were embraced in other instructions given.—*Western Union Telegraph Co. v. Brooks*, 179 S. W. 649.

⇨260 (Ky.) Where instructions in a cause fully and fairly present to the jury every material issue of fact necessary to a correct decision of the case, no error is presented by the court's refusal to give requested instructions.—*Carrick v. Garth*, 179 S. W. 609.

⇨260 (Mo.App.) Where the essential elements of a requested instruction were fully embodied in the party's given instructions, the refusal of the request was proper.—*Hopfinger v. Young*, 179 S. W. 747.

⇨260 (Mo.App.) It is not error for the court to refuse a request covered and stated by other instructions given for the party.—*Morrill v. Kansas City*, 179 S. W. 759.

⇨260 (Tex.Civ.App.) Requested instructions covered by others given need not be given.—*Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin*, 179 S. W. 541.

⇨260 (Tex.Civ.App.) It is not error to refuse a requested instruction substantially covered by the charge of the court.—*Pecos & N. T. Ry. Co. v. Winkler*, 179 S. W. 691.

⇨260 (Tex.Civ.App.) In an action for injuries from being run over by train at a depot, held, that it was not error to refuse an instruction on discovered peril where it was substantially covered by one given.—*St. Louis Southwestern Ry. Co. of Texas v. Aston*, 179 S. W. 1128.

⇨263 (Tex.Civ.App.) Where a party requests two special instructions on the same issue, and the court selects and gives one, the party cannot complain of the refusal of the other.—*St. Louis Southwestern Ry. Co. of Texas v. Aston*, 179 S. W. 1128.

(F) Objections and Exceptions.

⇨273 (Tex.Civ.App.) Under Rev. St. 1911, art. 1971, as amended by Act 33d Leg. c. 59, an objection to a paragraph of the charge, not made and presented to the court before the charge was read to the jury, was waived.—*McLaughlin v. Terrell Bros.*, 179 S. W. 932.

(G) Construction and Operation.

⇨296 (Ky.) In a servant's action for injury while operating a machine, instruction on contributory negligence, read with the other instructions, held not misleading.—*Phillips v. Corbin & Fannin*, 179 S. W. 586.

⇨296 (Tex.Civ.App.) In an action on a fire insurance policy, an instruction ignoring the defense of settlement held erroneous, notwithstanding other instructions.—*Fire Ass'n of Philadelphia v. Richards*, 179 S. W. 926.

⇨296 (Tex.Civ.App.) Where an instruction, purporting to generally define the rights of the parties, omits defenses, the fact that other instructions present those defenses will not cure the error.—*Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.*, 179 S. W. 1104.

IX. VERDICT.

(A) General Verdict.

⇨329 (Tex.Civ.App.) In broker's action for commissions, verdict for plaintiffs held to dispose of defendants' cross-action, and judgment was properly rendered against defendants on their cross-action.—*Levy v. Dunken Realty Co.*, 179 S. W. 679.

⇨331 (Tex.Civ.App.) In action for conversion, verdict for plaintiff, construed in light of charge, held to remove objections of uncertainty and that it did not dispose of cross-action setting up indebtedness to defendant.—*San Antonio, U. & G. Ry. Co. v. Yarbrough*, 179 S. W. 523.

⇨339 (Tex.Civ.App.) Action of court in directing that jury return to jury room and correct their verdict so as to include an item which they had overlooked and which the undisputed evidence showed defendant to be entitled to hold not error.—*Hall v. Ray*, 179 S. W. 1135.

⇨343 (Mo.App.) A verdict resolves all conflicts in the evidence in favor of the successful party.—*Chapman v. Brown*, 179 S. W. 774.

⇨343 (Tex.Civ.App.) Verdict for plaintiff held to decide against defendant issue, submitted to the jury, on which the testimony was conflicting.—*Levy v. Dunken Realty Co.*, 179 S. W. 679.

(B) Special Interrogatories and Findings.

⇨349 (Tex.Civ.App.) Where the court would have been justified in peremptorily instructing

to find for the plaintiff, there was no error in refusing defendant's request to submit the case on special issues.—*Banks v. Mixon*, 179 S. W. 690.

§350 (Tex.Civ.App.) In action by former partner for share of commissions on deal completed after dissolution, issue as to whether deal was pending at time of dissolution and definition of "pending" held sustained by the petition.—*Daniel v. Lane*, 179 S. W. 906.

Special issues which were not put in controversy by the evidence, or were included in and controlled by issues which were submitted, were properly refused.—Id.

§352 (Tex.Civ.App.) Where the court had informed the jury that the issues in a passenger's action for injuries in alighting were to be submitted as raised by the pleadings, the form of the question submitting defendant's negligence to the jury held not objectionable.—*Aransas Harbor Terminal Ry. v. Sims*, 179 S. W. 895.

§365 (Tex.Civ.App.) A finding upon a special issue submitted to the jury becomes immaterial when other facts have the legal effect to eliminate the issue embodied in such finding.—*International & G. N. Ry. Co. v. Berthea*, 179 S. W. 1087.

§366 (Tex.Civ.App.) Assignment complaining of refusal of special issues requested, with others substantially given, held not to be considered, where exception was taken to the refusal of all the requested issues.—*Morris v. McSpadden*, 179 S. W. 554.

A general exception to the refusal to give special charges en masse will be overruled, where part of them were embraced in the main charge as given.—Id.

X. TRIAL BY COURT.

(A) Hearing and Determination of Cause.

§367 (Ky.) Submission of suit to annul marriage on the ground that defendant had fraudulently represented that she had been divorced from a former husband held not premature, where the wife admitted that she had not been divorced from a previous husband, though the case had not been set for trial.—*Robinson v. Robinson*, 179 S. W. 438.

§370 (Ky.) The court, over objection, may not submit issues in a special proceeding created by statute not providing for jury trial.—*Stearns Coal & Lumber Co. v. Commonwealth*, 179 S. W. 1080.

§374 (Ky.) Where a distinct legal issue is in an equitable action, decided by a jury, the verdict cannot be set aside unless flagrantly against the evidence.—*Procter v. Tubb*, 179 S. W. 620.

Findings as to legal issues of jury erroneously impaneled in equitable action on defendant's application for jury trial, made after the commissioner's report, could be disregarded by the chancellor in determining the disputed questions of fact.—Id.

(B) Findings of Fact and Conclusions of Law.

§403 (Tex.Civ.App.) Where the trial court failed to file findings of fact within the 10 days after expiration of the term allowed by *Vernon's Sayles' Ann. Civ. St. 1914*, art. 2075, his subsequently filed findings were a nullity, and could not be considered.—*International & G. N. Ry. Co. v. Mudd*, 179 S. W. 686.

TRIAL DE NOVO.

See Appeal and Error, §895.

TROVER AND CONVERSION.

See Embezzlement, §11; Evidence, §817.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

§9 (Ky.) Failure of custodian bank to deliver stock certificate within 10 days of demand held not conversion because of the then refusal of purchaser from owner to accept the stock.—*Ohio Valley Banking & Trust Co. v. Wathen's Ex'rs*, 179 S. W. 230.

II. ACTIONS.

§40 (Ark.) Evidence, in an action against a partnership for the conversion of goods delivered by a railroad without payment of plaintiff, the consignor's draft, held to sustain a verdict for plaintiff on the issue of plaintiff's consent to the delivery.—*Vehicle Supply Co. v. McInturf*, 179 S. W. 999.

TRUST DEEDS.

See Mortgages.

TRUSTS.

See Monopolies.

I. CREATION, EXISTENCE, AND VALIDITY.

(B) Resulting Trusts.

§63 (Ky.) Ky. St. § 2353, abolishes the old doctrine of resulting trusts, except in two cases expressly saved.—*Neel's Ex'r v. Noland's Heirs*, 179 S. W. 430.

§89 (Ky.) To establish a resulting trust by parol evidence as against the holder of the legal title to property, the proof of all the essential facts and circumstances must be clear, convincing, and satisfactory.—*Neel's Ex'r v. Noland's Heirs*, 179 S. W. 430.

Parol evidence in an action to establish a resulting trust in a farm, held not of that clear, convincing, and satisfactory character requisite to the establishment of such a trust.—Id.

(C) Constructive Trusts.

§110 (Ky.) In an action to recover land, on the ground that defendant agreed to buy it for plaintiff's ancestor and had fraudulently taken title in his own name, evidence held insufficient to establish a constructive trust.—*Holtzclaw v. Wells*, 179 S. W. 193.

To establish a parol constructive trust, the proof must be such as to leave no rational doubt as to the truth of the necessary facts; and, to establish such trust against documents showing the legal title to be in some one else, the evidence must be strong and convincing.—Id.

UNDISCLOSED AGENCY.

See Principal and Agent, §140-145.

UNITED STATES.

See Citizens; Indians; Patents.

II. PROPERTY, CONTRACTS, AND LIABILITIES.

§74 (Ky.) That the surety for a defaulted government contractor assumed the contract and sublet it to meet the original contractor's defaulted pay rolls did not render it liable for funds borrowed by the subcontractor to meet the pay rolls.—*Citizens' Trust & Guaranty Co. v. Farmers' Bank of Estill County*, 179 S. W. 29.

USAGES.

See Customs and Usages.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

Ⓒ32 (Ky.) Giving a note in consideration of a conveyance of land is not a transaction for the loan or forbearance of money, as regards the rate of interest being usurious.—*Nantz v. Hurst*, 179 S. W. 400.

Ⓒ34 (Mo.App.) Under Rev. St. 1909, § 4571, 15 notes for \$35 each with 8 per cent. interest, secured by mortgage on household furniture for loan of \$350, held usurious.—*Riepe v. Vette*, 179 S. W. 952.

VACANCY.

See Officers, Ⓒ55.

VACATION.

See Judgment, Ⓒ391; Judicial Sales, Ⓒ85.

VAGRANCY.

Ⓒ3 (Tex.Cr.App.) Evidence held to support conviction of vagrancy.—*Looper v. State*, 179 S. W. 110.

VALUE.

See Courts, Ⓒ231; Evidence, Ⓒ317, 323, 474.

VARIANCE.

See Indictment and Information, Ⓒ122.

VENDOR AND PURCHASER.

See Contracts, Ⓒ10; Fixtures, Ⓒ21; Frauds, Statute of, Ⓒ69, 143; Fraudulent Conveyances, Ⓒ318; Homestead, Ⓒ117, 118; Logs and Logging, Ⓒ2; Public Lands, Ⓒ178; Remainders; Sales; Taxation, Ⓒ805.

I. REQUISITE AND VALIDITY OF CONTRACT.

Ⓒ3 (Ark.) Contract of one party to sell land at a stipulated price, the other in return to pay the price, is for the sale of land, and does not create an agency for sale, although sales by the purchaser are contemplated in it.—*Federal Realty Co. v. Evins*, 179 S. W. 344.

Ⓒ33 (Tex.Civ.App.) A purchaser of land held not entitled to rescind on the ground that the deed of dedication prepared by his grantors showed that they were to build a viaduct, which they did not.—*Barnes & Mitchell v. Campbell*, 179 S. W. 444.

Where a vendor subsequently agreed with a city for the construction of a viaduct on the property sold, a statement at the time of the sale that there then existed a contract for the construction of the viaduct is no ground for rescission.—*Id.*

In a suit where it was sought to rescind a purchase of land on the ground of misrepresentations as to future actions, held, that such misrepresentations were not fraudulently made so as to warrant rescission.—*Id.*

II. CONSTRUCTION AND OPERATION OF CONTRACT.

Ⓒ78 (Ark.) Under changed agreement concerning payment of purchase price and furnishing of abstract of title, time held not of the essence as to performance by the vendor.—*Mays v. Blair*, 179 S. W. 331.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(C) Rescission by Purchaser.

Ⓒ110 (Tex.Civ.App.) Where the agent of a landowner represented to purchasers that a viaduct would be subsequently constructed, breach of that agreement does not warrant rescission

unless made with intent to deceive and defraud.—*Barnes & Mitchell v. Campbell*, 179 S. W. 444.

Ⓒ112 (Ark.) Where lots to which a vendor's title was unmarketable formed a substantial part of the purchase, the purchaser could refuse to pay any more on the price and demand the return of the amount already paid.—*Mays v. Blair*, 179 S. W. 331.

IV. PERFORMANCE OF CONTRACT.

(A) Title and Estate of Vendor.

Ⓒ130 (Ark.) A purchaser of land, before he is required to pay the purchase price, is entitled, unless stipulated to the contrary, to receive not only a good title, but one which is marketable.—*Mays v. Blair*, 179 S. W. 331.

A marketable title must be a clear record title, and not one by adverse possession.—*Id.*

(D) Payment of Purchase Money.

Ⓒ175 (Ark.) Purchaser under unexecuted contract held ordinarily entitled to detain purchase money if vendor's title is not such as he is entitled to require.—*Mays v. Blair*, 179 S. W. 331.

Ⓒ175 (Ky.) Unless there is immediate danger of loss without legal remedy, a grantee will not be relieved from payment of the price for alleged defect in title and insolvency of grantor, where he is in possession under an executed contract of sale.—*Todd v. Finley*, 179 S. W. 455.

V. RIGHTS AND LIABILITIES OF PARTIES.

(C) Bona Fide Purchasers.

Ⓒ228 (Tex.Civ.App.) One obtaining a conveyance from a grantee in a deed, absolute in form, but in fact a mortgage, acquires no title unless he is a purchaser for value and without notice that the deed was a mortgage.—*McLemore v. Bickerstaff*, 179 S. W. 586.

Ⓒ232 (Tex.Civ.App.) A conveyance by a mortgagee out of possession passes no title.—*McLemore v. Bickerstaff*, 179 S. W. 586.

Ⓒ239 (Tex.Civ.App.) Where the question was solely one of boundary, and plaintiff was not in possession of the land which it claimed, the bona fides of plaintiff's purchase or want of notice does not give him additional rights.—*Lockwood Inv. Co. v. Geiselman*, 179 S. W. 549.

VI. REMEDIES OF VENDOR.

(A) Lien and Recovery of Land.

Ⓒ253 (Tex.Civ.App.) Decree of foreclosure of vendor's lien held erroneous, the description in the deed being defective, while the only description in the purchase notes was by reference thereto, there being no proof as to the intent or that there was a mutual mistake.—*Stewart v. Thomas*, 179 S. W. 886.

Ⓒ260 (Tex.Civ.App.) Execution and record of indemnity note and trust deed by original purchaser of land held to create a lien in favor of the holders of the note subject to the lien of the holder of vendor's lien notes previously acquired by a subsequent purchaser of the property.—*Grubbs v. Eddleman*, 179 S. W. 91.

A holder of vendor's lien notes held not to have a lien for improvements superior to the lien of the holders of a note to indemnify indorsers upon a note given for the price.—*Id.*

Ⓒ261 (Tex.Civ.App.) Purchasers for value and without actual notice of previous transfers of vendor's lien notes are, as against unrecorded transfers of such notes, bound only by their actual knowledge or notice appearing from the records.—*Lubbock State Bank v. H. O. Wooten Grocery Co.*, 179 S. W. 1141.

Where a purchaser, who had given vendor's lien notes in payment, retransferred the land on condition that she should be discharged from payment of such notes, and the vendor retained

the notes, the notes are on reissue thereafter valid as against the vendor.—Id.

A holder of a subsequent series of vendor's lien notes held to have a lien superior to those of the holder of unrecorded earlier notes, there being nothing in the record to give notice or to cast suspicion on the statements of the seller.—Id.

As the purchase of a vendor's lien note carries with it as an incident the lien, and the latter is within the registration statutes, one desirous of protecting his lien should secure a written assignment and record it.—Id.

⚡261 (Tex.Civ.App.) Where a deed reserved a vendor's lien securing the purchase money notes, and a trust deed authorizing appointment of trustee was executed as additional security, the action of the grantor's successor in appointing a trustee and the sale of the property under the trust deed after the notes had been transferred to a third person was unauthorized and conveyed no title.—Etheridge v. Campbell, 179 S. W. 1144.

⚡263 (Tex.Civ.App.) Where vendee executed a note secured by deed of trust to indemnify indorsers upon a purchase-money note for the property, such lien was not destroyed by a sale subsequently made by him in consideration of the vendee's assumption of the original vendor's lien notes.—Grubbs v. Eddleman, 179 S. W. 91.

⚡266 (Tex.Civ.App.) Where a contract for the sale of land and the cultivation of cane was secured by a vendor's lien, failure to assert the lien upon a partial breach held not waiver for future performance.—Imperial Sugar Co. v. Cabell, 179 S. W. 83.

⚡267 (Tex.Civ.App.) A release of a vendor's lien held to release it as to a money consideration only, and not as to performance of a contract for the cultivation and sale of sugar cane.—Imperial Sugar Co. v. Cabell, 179 S. W. 83.

⚡274 (Ky.) In action on vendor's lien note, answer, alleging a vendor's misrepresentations as to the acreage of the tract relied on by the purchaser, and that part of it was in the adverse possession of other parties, if tendered in time, would set up a good defense.—Stone v. Daniels, 179 S. W. 831.

⚡281 (Ky.) In an action on notes executed by defendant's grantor and to charge the land with a lien, evidence held to warrant a finding that the notes were not a lien on the land and that the defendant purchased without knowledge of the debt and never assumed its payment.—Gambill v. Grigsby, 179 S. W. 822.

⚡285 (Ky.) Where only two of the defendant's purchase-money notes had matured and the other five were not then due, a decree for the sale of the land to satisfy all the notes was invalid.—Mottley v. Roemer, 179 S. W. 581.

⚡296 (Tex.Civ.App.) A vendor, who has reserved an express vendor's lien to secure the consideration for a conveyance, may, on default by the vendee, rescind the contract and recover the land in trespass to try title.—Imperial Sugar Co. v. Cabell, 179 S. W. 83.

VII. REMEDIES OF PURCHASER.

(A) Recovery of Purchase Money Paid.

⚡334 (Ark.) Purchaser under unexecuted contract held ordinarily entitled to recover back purchase money if vendor's title is not such as he is entitled to require.—Mays v. Blair, 179 S. W. 331.

Under contract of sale, cash payment held a payment on the purchase price, and not merely a payment for an option, and hence recoverable if the vendor failed to furnish a marketable title.—Id.

⚡334 (Mo.App.) Where an agreement for the sale of land contained no provision as to retention of payments on default, and the vendor,

who rescinded, was able to sell the land at the original price, the purchaser, who defaulted, is entitled to recover his payments.—Chamberlain v. Ft. Smith Lumber Co., 179 S. W. 740.

⚡334 (Tenn.) A vendor of land cannot escape liability for a deficiency on the ground that the purchaser looked over the tract, which was very large.—Caughron v. Stinespring, 179 S. W. 152.

Where a sale is in gross, no recovery can be had save for fraud, but if by the acre, the purchaser may recover for the deficiency at the agreed price.—Id.

To recover for deficiency in land on misrepresentation as to the quantity conveyed, it is not necessary that the acreage be stated in a deed; but this may be shown by extrinsic evidence.—Id.

⚡334 (Tex.Civ.App.) Interest paid on the excess of purchase-money notes, due to a mistake in acreage, was recoverable.—Lindsay v. Vogel-sang, 179 S. W. 58.

⚡339 (Ark.) Purchaser who arbitrarily broke off negotiations instead of demanding that defects in vendor's title be cured held not entitled to recover purchase price.—Mays v. Blair, 179 S. W. 331.

⚡341 (Tenn.) In a suit to recover for a deficiency in a parcel of land, parol evidence, showing the terms of the contract as to the price and number of acres, must be clear and certain; those matters not being stated in the deed.—Caughron v. Stinespring, 179 S. W. 152.

(B) Actions for Breach of Contract.

⚡350 (Tenn.) Evidence held to show that complainants purchased a farm by the acre and not in gross, and so could recover for deficiency in acreage.—Caughron v. Stinespring, 179 S. W. 152.

VENUE.

See Criminal Law, ⚡119-137, 1051.

I. NATURE OR SUBJECT OF ACTION.

⚡8 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1830, § 7, wife's action charging husband's fraud upon her in B. county, that some of the property was there situated, and seeking to establish a resulting trust, held properly brought in B. county.—Fox v. Fox, 179 S. W. 883.

II. DOMICILE OR RESIDENCE OF PARTIES.

⚡22 (Tex.Civ.App.) Under Rev. St. 1911, art. 1840, action against husband and divorced wife for necessaries purchased during the marriage held properly brought in the county of the wife's residence.—Trammell v. Neiman-Marcus Co., 179 S. W. 271.

VERDICT.

See Appeal and Error, ⚡930, 1070; Trial, ⚡329-366, 374.

VERIFICATION.

See Pleading, ⚡290.

VESTED RIGHTS.

See Constitutional Law, ⚡102.

VETO.

See Statutes, ⚡32, 33.

VICE PRINCIPALS.

See Master and Servant, ⚡189, 190.

VOLUNTEERS.

See Master and Servant, ⚡89.

VOTERS.

See Elections.

WAGES.

See Master and Servant, ¶70-80.

WAIVER.

See Appeal and Error, ¶644; Criminal Law, ¶577; Estoppel: Fixtures, ¶33; Insurance, ¶141, 388, 556, 558; Pleading, ¶406, 408; Sales, ¶288; Vendor and Purchaser, ¶266; Witnesses, ¶219.

WAR.

¶21 (Ky.) Under international law and Captured Property Act, Act Cong. March 3, 1863, title to property not used in actual hostilities could not be devoted in the insurgent states, and one whose property was captured or abandoned might obtain its restoration.—*Neal's Ex'r v. Noland's Heirs*, 179 S. W. 430.

WARDS.

See Guardian and Ward.

WAREHOUSEMEN.

See Carriers, ¶140.

WARRANTIES.

See Insurance, ¶265.

WARRANTY.

See Sales, ¶251-288.

WATERS AND WATER COURSES.

See Damages, ¶108; Drains; Levees; Limitation of Actions, ¶55.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

¶171 (Ky.) One constructing bridge over stream held not liable as for obstructing the stream, where overflows are due to extraordinary rains or floods, which could not be anticipated by persons of ordinary experience and prudence.—*Louisville & N. R. Co. v. Conn*, 179 S. W. 165.

¶179 (Ky.) In action against railroad company, claimed to have obstructed stream by bridge, evidence held to show that rains and floods, at time of flooding of plaintiff's premises, were extraordinary and of unusual occurrence.—*Louisville & N. R. Co. v. Conn*, 179 S. W. 195.

WAYS.

See Easements; Highways; Private Roads.

WEAPONS.

See Death, ¶31, 44, 91, 95.

¶8 (Tex.Cr.App.) It is not an offense to carry a pistol either so defectively manufactured or in such bad repair that it cannot be fired at all.—*Miles v. State*, 179 S. W. 567.

¶8 (Tex.Cr.App.) In a prosecution for carrying pistol, refusal to charge that accused was entitled to acquittal if the pistol would not shoot or was unloaded at the time named, etc., held not error.—*Davis v. State*, 179 S. W. 702.

¶11 (Tex.Cr.App.) Though accused came to a city as a traveler, that fact does not warrant him in carrying a pistol about the streets for several days while searching for work.—*Smith v. State*, 179 S. W. 711.

The right of a traveler to carry a pistol will not defeat a prosecution for unlawfully carrying a weapon, where the journey was temporarily abandoned while he burglarized a house.—*Id.*

¶17 (Tex.Cr.App.) Whether a pistol which defendant was accused of carrying could be fired held a question for the jury.—*Miles v. State*, 179 S. W. 567.

¶17 (Tex.Cr.App.) Evidence in a prosecution for unlawfully carrying a pistol held to sustain conviction.—*Davis v. State*, 179 S. W. 702.

¶17 (Tex.Cr.App.) On trial for unlawfully carrying a pistol, evidence on the whole case and on the issue as to whether defendant was a traveler held sufficient to sustain a conviction.—*Taylor v. State*, 179 S. W. 1161.

Instruction attempting to define "traveler" held incorrect and properly refused.—*Id.*

WEBB-KENYON ACT.

See Intoxicating Liquors, ¶112½.

WEEDS.

See Agriculture.

WILLS.

See Death, ¶5; Descent and Distribution; Executors and Administrators; Taxation, ¶860-895; Trial, ¶140.

IV. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Testamentary Dispositions.

¶70 (Ky.) The validity, of a will, as to personal property, is determined by the law of the testator's domicile at the time of his death, and, as to real property, by the law of the jurisdiction wherein it is situated.—*Rutledge v. Wiggington*, 179 S. W. 389.

(C) Execution.

¶115 (Ky.) Under Ky. St. 1909, § 4828, a will written by some other than testatrix and attested by only one witness is not valid.—*Rutledge v. Wiggington*, 179 S. W. 389.

¶119 (Tenn.) Unless publication of the contents of a will to the subscribing witnesses is required by statute, they need not be informed of the character of the document when they subscribe.—*Long v. Mickler*, 179 S. W. 477.

¶123 (Tenn.) Under Shannon's Code, § 3895, it is not necessary that a witness to a will subscribe, either knowing that it is a will or in the presence of the other witness to it.—*Long v. Mickler*, 179 S. W. 477.

(D) Holographic Wills.

¶132 (Ky.) Under Ky. St. 1909, § 4828, a will wholly in the handwriting of the testatrix is valid.—*Rutledge v. Wiggington*, 179 S. W. 389.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(B) Actions to Establish or Determine Validity in General.

¶230 (Tex.Civ.App.) Agreement whereby widow, children, and legatees of testator agreed to withhold the will from probate and to take certain shares therein held not to estop the parties from claiming under the will after its probate by purchasers from the estate.—*Masterson v. Harria*, 179 S. W. 284.

VI. CONSTRUCTION.

(A) General Rules.

¶439 (Ky.) The only purpose of rules of construction is to give effect to the intent of the testator.—*Whitaker v. Whitaker's Adm'r*, 179 S. W. 584.

(C) Survivorship, Representation, and Substitution.

¶545 (Ky.) Where an estate is devised for life, with remainder, and if the remainderman die without lawful heir, then to a third person, the words "dying without lawful heirs" are re-

stricted to the death of the remainderman before the termination of the life estate.—Jewell v. White, 179 S. W. 212.

⚡545 (Ky.) Will giving life estates to testator's three sons with remainder to survivor on death of other two without heirs of their body, *held* to vest fee simple in survivor on death of the other devisees without issue.—Kirk v. Kirk's Ex'r, 179 S. W. 1065.

(F) Vested or Contingent Estates and Interests.

⚡634 (Ky.) Where a will creates a life estate in trust, with remainder over at death of life tenant, the devisees take a vested fee in the remainder, subject to be defeated by their death prior to that of the life tenant.—Johnson v. Whitcomb, 179 S. W. 821.

⚡634 (Tex.) A remainder is vested where there is a person in being who would have an immediate right to the possession upon the termination of the intermediate estate.—Caples v. Ward, 179 S. W. 856.

Will bequeathing residuary estate to testator's wife for life, with remainder over to the five children, *held* to give one of such children a vested remainder.—Id.

The law will not construe a remainder as contingent, where it can reasonably be taken as vested.—Id.

Where testator bequeathed his residuary estate for life, with remainder over to his five children, the life tenant being granted power of disposition with the consent of the children, the remainder of a child was nevertheless vested.—Id.

Where testator bequeathed his residuary estate for life, with remainder over to his children, directing that the descendants of any remainderman dying before the life tenant should succeed to the remainderman's share, such direction will be construed to prevent lapsing of the remaindermen's legacies, and not affecting the vested character of the remainders.—Id.

The contingency that the death of a remainderman before the life tenant may prevent such remainderman from coming into possession of his interest does not render the remainder contingent.—Id.

(H) Estates in Trust and Powers.

⚡692 (Ky.) Powers of appointment are "exclusive" when there is granted to the donee the right to exclude members of the designated class, and "nonexclusive" when no such right of selection or exclusion is granted.—Barret's Ex'r v. Barret, 179 S. W. 396.

When a power of appointment to a class is nonexclusive, the exclusion of any member of the designated class in making the appointment invalidates the attempted exercise of the power.—Id.

Failure of donee of nonexclusive power of appointment to a class to give each member a substantial share fairly proportioned to the amount for distribution *held* to invalidate the attempted execution of the power.—Id.

Under will creating trust for son during his life, and providing that property should pass as he might direct by last will to his wife and heirs at law, power *held* nonexclusive.—Id.

Execution of power of appointment to widow and heirs at law by giving each brother and sister \$1,000, and the widow \$147,000, *held* invalid under the illusory appointment doctrine.—Id.

The illusory appointment doctrine under which the donee of a nonexclusive power of appointment must give each member of the class a substantial share of the fund is the law of this state.—Id.

Where donee of nonexclusive power of appointment gave each of his heirs \$1,000 and his widow \$147,000, acceptance of these amounts *held* not to estop heirs from questioning validity of execution of the power.—Id.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) Nature of Title and Rights in General.

⚡714 (Ky.) A devise of land by a husband to his wife in fee *held*, in view of the surrounding circumstances and the devise of a life estate in all of his other property, to be a satisfaction of her claim against the lands devised, which were acquired with her money.—Whitaker v. Whitaker's Adm'r, 179 S. W. 584.

(C) Advancements, Ademption, Satisfaction, and Lapse.

⚡775 (Tex.Civ.App.) Wills of husband and wife killed in a common catastrophe made each the primary beneficiary of the other, and their foster son the secondary beneficiary. There being no evidence as to which died first, *held*, that the son would take as primary beneficiary to give effect to the wills.—Fitzgerald v. Ayres, 179 S. W. 289.

(D) Election.

⚡792 (Tex.Civ.App.) Whether widow given rent of community property for life and furniture in hotel had elected to take under the will, where she and devisee continued to live on the property, *held* for the jury.—Wichita Valley Ry. Co. v. Somerville, 179 S. W. 671.

An election by a widow to take under her husband's will in lieu of her community and homestead rights must be unequivocal and with the intention to make an election.—Id.

WITHDRAWAL.

See Elections, ⚡146.

WITNESSES.

See Continuance, ⚡26; Criminal Law, ⚡452-478, 676; Estoppel, ⚡21; Evidence; Trial, ⚡76; Wills, ⚡115-123.

II. COMPETENCY.

(A) Capacity and Qualifications in General.

⚡37 (Tex.Cr.App.) In prosecution for selling intoxicating liquors in prohibition territory, a question to fix the time of sale within the period of limitations *held* not objectionable as seeking to make the witness testify as to facts of which he had no recollection.—Alvarez v. State, 179 S. W. 714.

⚡60 (Ky.) Competency of husband and wife to testify against each other in action for divorce, as permitted by Civ. Code Prac. § 606, as amended by Act March 15, 1912 (Acts 1912, c. 104), extends only to issue of probable danger or bodily injury to the wife as specified therein.—Hester v. Hester, 179 S. W. 451.

⚡78 (Tex.Cr.App.) Evidence *held* to show a witness was not defendant's wife, and competent to testify.—Galvan v. State, 179 S. W. 875.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

⚡138 (Mo.App.) In an action against a decedent's estate to recover compensation for services, plaintiff's sister *held* not excluded by Rev. St. 1909, § 6354, as a witness to decedent's agreement to compensate.—Biggerstaff v. Riley, 179 S. W. 744.

⚡159 (Mo.App.) In action for damages from breach of contract, evidence, tending to show a codefendant's connection with the contract or cause of action in issue and on trial, *held* not to come within Rev. St. 1909, § 6354, forbidding party to testify in his own favor as against opposite party, shown to be insane.—Powell v. Batchelor, 179 S. W. 751.

§178 (Mo.App.) Defendant in unlawful detainer held not rendered competent to testify to conversation wherein plaintiffs' deceased predecessor had verbally rented the premises either to him or to such predecessor's lessee, because decedent's attorney, still living and testifying for plaintiff, was present at the conference.—*McCracken v. Schuster*, 179 S. W. 757.

Defendant could testify where the plaintiffs' deceased predecessor's evidence in another suit as to the conversation as to which defendant testified was preserved and introduced at the trial, though defendant himself introduced the preserved evidence.—*Id.*

(D) Confidential Relations and Privileged Communications.

§198 (Ky.) While an attorney cannot testify concerning communications between himself and his client, an attorney who is a mining expert is competent, in an action involving breach of a mining contract, to testify as to the number of tons of coal in an acre.—*Trosper Coal Co. v. Rader*, 179 S. W. 1023.

§208 (Mo.App.) In action against street railroad for personal injury, refusal to allow defendant's regular physician, who examined plaintiff's injury while attempting to settle her claim, to disclose his knowledge of such injury, held proper.—*Michaels v. Harvey*, 179 S. W. 735.

§219 (Mo.App.) Plaintiff, who offered her own physician to testify to the results of an examination, and who afterwards permitted examination by another physician, held to have waived her right to exclude testimony of latter physician, as privileged under Rev. St. 1909, § 6362.—*Michaels v. Harvey*, 179 S. W. 735.

III. EXAMINATION.

(A) Taking Testimony in General.

§255 (Tex.Cr.App.) The memory of a witness may be refreshed by propounding questions to her and exhibiting to her her testimony given at the coroner's inquest.—*Taylor v. State*, 179 S. W. 113.

(B) Cross-Examination and Re-examination.

§269 (Tex.Cr.App.) Where defendant's wife admitted adultery with deceased, which had been set up as provocation, the state could prove her contradictory statements to the county attorney after the homicide, but could not prove a material fact on a different branch of the case as to which she did not testify in chief.—*Mitchell v. State*, 179 S. W. 116.

§278 (Ark.) Admission of question on cross-examination of one jointly indicted with accused as to whether his brother had not been charged with killing and burning a woman held error.—*Counts v. State*, 179 S. W. 662.

§280 (Ky.) In an action for slander, a question on cross-examination calling for the relations between plaintiff and the witness held inadmissible as framed.—*Deitchman v. Bowles*, 179 S. W. 249.

§286 (Tex.Cr.App.) Question on redirect examination of witness, who claimed that he, and not accused, assaulted the prosecuting witness, as to whether he had ever testified on oath about this, held immaterial, in view of his cross-examination.—*Vinson v. State*, 179 S. W. 574.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(A) In General.

§311 (Ark.) A credible person is one having capacity to testify on given subject and worthy of belief, and lack of knowledge on the subject of particular inquiry renders witness not credible in reference thereto.—*Dewain v. State*, 179 S. W. 346.

§321 (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 815, the state cannot impeach its witness who failed to remember and testify to facts stated at the coroner's inquest as to which it was sought to refresh the witness' memory.—*Taylor v. State*, 179 S. W. 113.

§330 (Tex.Cr.App.) In prosecution for slander for asserting sexual relations, held proper to exclude a question to prosecuting witness on cross-examination whether she would submit to medical examination.—*Robison v. State*, 179 S. W. 1157.

(B) Character and Conduct of Witness.

§337 (Tex.Cr.App.) In prosecution for swindling, previous similar charges held admissible in evidence to impeach the credibility of accused as a witness.—*Arnold v. State*, 179 S. W. 1183.

§345 (Ky.) Impeachment of witness by showing his mere arrest on a warrant charging false swearing held improper, under Civ. Code Prac. § 597.—*Consolidation Coal Co. v. Vanover*, 179 S. W. 43.

§345 (Ky.) Conviction of burning insured property is admissible to impeach the credibility of a plaintiff suing on an insurance policy.—*Liverpool & London & Globe Ins. Co. v. Wright*, 179 S. W. 49.

(C) Interest and Bias of Witness.

§369 (Tex.Cr.App.) To impeach a witness for defendant in seduction, the state may show witness prescribed for prosecutrix to produce an abortion.—*McDonald v. State*, 179 S. W. 880.

§376 (Tex.Cr.App.) Where accused sought to show that a state's witness was taking an active interest in the prosecution, the court could permit the state to show the reason of the witness' interest.—*Word v. State*, 179 S. W. 1175.

(D) Inconsistent Statements by Witness.

§379 (Ky.) A witness may properly be impeached by proof of his statements out of court inconsistent with his testimony.—*Liverpool & London & Globe Ins. Co. v. Wright*, 179 S. W. 49.

§396 (Tex.Civ.App.) Evidence of plaintiff as to circumstances surrounding the giving of a statement and as to its falsity was admissible to rebut the statement given to contradict plaintiff's testimony.—*Pecos & N. T. Ry. Co. v. Winkler*, 179 S. W. 691.

(E) Contradiction and Corroboration of Witness.

§405 (Ky.) Where, in action on note for borrowed money, defendant denied ever borrowing money from plaintiff, check claimed to represent a different loan held competent to impeach defendant.—*Shelby v. Grabbie*, 179 S. W. 1.

§414 (Tex.Civ.App.) Report of defendant railway's investigator on condition of a car coupling in operating which plaintiff was injured is not admissible to corroborate the testimony of the investigator, unless made before motive for concealing defects arose.—*Pecos & N. T. Ry. Co. v. Winkler*, 179 S. W. 691.

WORDS AND PHRASES.

"Accomplice."—*Richardson v. Commonwealth* (Ky.) 179 S. W. 458; *Dorman v. State* (Tex. Cr. App.) 179 S. W. 120; *Bagley v. Same*, *Id.* 1167.

"Adequate cause."—*Vollintine v. State* (Tex. Cr. App.) 179 S. W. 108.

"Adverse possession."—*Wichita Valley Ry. Co. v. Somerville* (Tex. Civ. App.) 179 S. W. 671.

"Agistment."—*Patchen-Wilkes Stock Farm Co. v. Walton* (Ky.) 179 S. W. 823.

"Appurtenance."—*Kentucky Distilleries & Warehouse Co. v. Warwick Co.* (Ky.) 179 S. W. 611.

- "Assets."—*Sharp v. Cincinnati, N. O. & T. P. Ry. Co. (Tenn.)* 179 S. W. 375.
- "Chattel."—*Sharp v. Cincinnati, N. O. & T. P. Ry. Co. (Tenn.)* 179 S. W. 375.
- "Chose in action."—*Sharp v. Cincinnati, N. O. & T. P. Ry. Co. (Tenn.)* 179 S. W. 375.
- "Citizen."—*St. Louis & S. F. R. Co. v. State (Ark.)* 179 S. W. 342.
- "C. O. D."—*Danciger v. American Express Co. (Mo. App.)* 179 S. W. 797.
- "Common carrier."—*City of Memphis v. State (Tenn.)* 179 S. W. 631.
- "Congregate."—*Halliday v. State (Ark.)* 179 S. W. 1004.
- "Conversion."—*State v. Wilcox (Mo.)* 179 S. W. 479.
- "Creation of new corporation."—*Avery Bldg. Ass'n v. Commonwealth (Ky.)* 179 S. W. 39.
- "Credible."—*Dewein v. State (Ark.)* 179 S. W. 346.
- "Debt."—*Francis v. Francis (Mo. App.)* 179 S. W. 975.
- "De facto officer."—*Cincinnati, N. O. & T. P. Ry. Co. v. Cundiff (Ky.)* 179 S. W. 615.
- "De jure officer."—*Hogan v. Hamilton County (Tenn.)* 179 S. W. 128.
- "Delinquent child."—*Talbot v. Commonwealth (Ky.)* 179 S. W. 621.
- "Dividends."—*Smith v. Southern Foundry Co. (Ky.)* 179 S. W. 205.
- "Dying without lawful heirs."—*Jewell v. White (Ky.)* 179 S. W. 212.
- "Emblems."—*Turner v. Turner (Tenn.)* 179 S. W. 132.
- "Employment."—*Clark v. Dunham (Mo. App.)* 179 S. W. 795.
- "Entry of judgment."—*Moore v. Toyah Valley Irr. Co. (Tex. Civ. App.)* 179 S. W. 550.
- "Estate."—*McDaniel v. Herrn (Ark.)* 179 S. W. 337; *Sharp v. Cincinnati, N. O. & T. P. Ry. Co. (Tenn.)* Id. 375.
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